

Supreme Court No. 200,744-9

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE DISCIPLINARY PROCEEDING AGAINST

JOHN R. SCANNELL,

Lawyer (Bar No. 31035).

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ANSWERING BRIEF OF THE
WASHINGTON STATE BAR ASSOCIATION

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I. COUNTERSTATEMENT OF THE ISSUES

1. Without any assignments of error, and few citations to the record, Respondent presents an alternative version of the facts and an alternative reality in which, among other things, an order is not an order and his motives are pure. Should this Court retry the facts, or should it uphold the hearing officer's findings of facts, which are supported by substantial evidence?

2. In the course of an investigation into his alleged and apparent misconduct, Respondent filed a pretextual lawsuit against the Washington State Bar Association, the Disciplinary Board, the disciplinary counsel assigned to the case, and others. Can a respondent lawyer contrive a disqualifying conflict of interest by suing everyone responsible for carrying out the functions set forth in the ELC?

3. Respondent moved for a discovery order that would have required the Association to make a detailed review of thousands of confidential grievance files spanning almost 12 years. The motion was supported only by the bare assertion that such discovery was "reasonable and necessary for the development of [Respondent's] case." Did the hearing officer abuse his discretion under ELC 10.11(d) by limiting discovery?

4. The findings of fact and conclusions of law establish that Respondent repeatedly obstructed a disciplinary investigation by refusing to appear for depositions, refusing to produce documents, filing frivolous motions, disobeying orders denying his frivolous motions, and otherwise. The findings and conclusions further establish that Respondent did so intentionally, for the purpose of delaying and frustrating the Association's investigation. A unanimous Disciplinary Board recommended disbarment. Should this Court affirm the recommendation of the unanimous Board?

II. COUNTERSTATEMENT OF THE CASE

A. SUBSTANTIVE FACTS

1. Facts Pertaining to Count 1

On October 3, 2003, Paul Matthews was charged with two counts of first degree theft and one count of first degree trafficking in stolen property. FFCL ¶ 1.1.2;¹ EX 104.² His wife, Stacey Matthews (also known as Stacey Lee Turner) was charged in the same information with one count of first degree trafficking in stolen property. FFCL ¶ 1.1.2; EX 104. The charges related to some computers that Paul Matthews allegedly stole from his employer, the Washington State Department of

¹ "FFCL" refers to the Findings of Fact, Conclusions of Law, and Recommended Sanction, BF 121, attached hereto as Appendix A.

² Unless otherwise indicated, the exhibits cited are the Association's exhibits, numbered A-100, A-101, etc. Respondent's exhibits are cited as R-1 and R-2.

Transportation (WSDOT), and from another WSDOT employee. FFCL ¶ 1.1.2; EX 101, 104; TR2³ 123. Respondent represented both Paul and Stacey Matthews in their criminal case. FFCL ¶ 1.1.3; TR2 94-95; EX 105-07, 109, 114-15, 120-21.

Before and during his representation of Paul and Stacey Matthews in their criminal case, Respondent also represented Paul Matthews in two civil cases. FFCL ¶ 1.1.3; TR2 84-86. At the same time, Paul Matthews worked in Respondent's office on the understanding that the work he did there would offset his legal fees. TR2 84-85, 99. The terms of this transaction, including the rate at which Paul Matthews' work for Respondent would offset his legal fees, were never reduced to writing. TR2 85, 99.

One of the two civil cases concerned claims by Paul Matthews against WSDOT for wrongful discharge and unpaid wages. FFCL ¶ 1.1.3; TR2 83-84. Respondent represented Paul Matthews in that case on a contingent fee basis, and he believed that the case could result in the largest fee of his career. FFCL ¶ 1.1.3; TR2 85; TR3 27-28. Respondent undertook the joint representation of Paul and Stacey Matthews in their criminal case in order to prevent that case from having any adverse effect

³ The disciplinary hearing took place on December 1-4, 2008. "TR1" refers to the transcript of December 1, 2008; "TR2" to the transcript of December 2, 2008; etc.

on the civil case against WSDOT. FFCL ¶ 1.1.3; TR2 98.

Respondent's strategy for preserving Paul Matthews' case against WSDOT, and his own contingent fee, was to have both his clients enter Alford⁴ pleas in the criminal case. FFCL ¶ 1.1.3; EX 114-15; TR2 90-91. Accordingly, Respondent reached an agreement with the prosecution whereby Stacey Matthews would plead guilty to the original charge of first degree trafficking, a level IV offense under the Sentencing Reform Act (SRA), while Paul Matthews would plead guilty to reduced charges of second degree theft and second degree trafficking, both level III offenses under the SRA. FFCL ¶ 1.1.3; TR2 125-33; EX 107-10. The other first degree theft charge against Paul Matthews would be dismissed. TR2 131-32; EX 109, 113.

On February 24, 2004, Paul and Stacey Matthews entered Alford pleas under the agreement negotiated by Respondent, and on March 26, 2004, they were sentenced. EX 114-15, 120-21. Although they had identical offender scores of 2, Paul Matthews had a lower standard sentence range because he pleaded guilty to level III offenses, while Stacey Matthews pleaded guilty to a level IV offense. EX 107-09; TR2 132-33. Consequently, Paul Matthews was sentenced to five months in work release, while Stacey Matthews was sentenced to 12 months in

⁴ North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

prison. EX 108, 110, 120-21. Stacey Matthews' sentence was to run concurrently with a sentence previously imposed in another matter that was then on appeal. EX 121; TR2 136.

Later, Stacey Matthews consulted lawyer Douglas Stratemeyer about the representation she had received from Respondent. TR2 153. After discussing the case with his client and reviewing the court file, Stratemeyer filed a Motion to Withdraw Guilty Plea on behalf of Stacey Matthews based on "a prejudicial conflict of interest on the part of defense counsel due to representation of multiple defendants." TR2 154-59; EX 122. For reasons unknown, however, Stacey Matthews apparently abandoned the attempt to withdraw her guilty plea, and the motion was never ruled upon. TR2 159-60.

Respondent knew that his representation of Paul Matthews might be materially limited by his responsibilities to Stacey Matthews or his own interests. FFCL ¶ 1.1.4; TR3 28; BF 3 ¶ 9; BF 9 ¶ 9. Likewise, Respondent knew that his representation of Stacey Matthews might be materially limited by his responsibilities to Paul Matthews or his own interests. FFCL ¶ 1.1.4; TR3 28; BF 3 ¶ 10; BF 9 ¶ 10. Paul Matthews testified that Respondent had "mentioned a conflict of interest," but did not discuss or explain it in any detail. TR2 88-93. It is undisputed that neither Paul Matthews nor Stacey Matthews ever consented in writing to

the common representation. FFCL ¶ 1.1.5; TR3 28; BF 3 ¶¶ 11-12; BF 9 ¶¶ 11-12.

2. Facts Pertaining to Count 2

On February 24, 2005, the Association opened a grievance against Respondent based on a letter from King County Superior Court Judge Helen L. Halpert. FFCL ¶ 1.2.2; EX R-1, R-2. On May 9, 2005, Disciplinary Counsel sent Respondent a request for documents and information under ELC 5.3(e). FFCL ¶ 1.2.2; EX 402. Disciplinary Counsel requested (1) copies of any documents by which Paul Matthews and/or and Stacey Matthews consented to common representation⁵ and (2) (a) a description of the terms of any business transaction Respondent entered into with Paul Matthews together with (b) copies of any documents by which those terms were transmitted in writing to Paul Matthews.⁶ EX 402.

Instead of promptly responding to this request, Respondent requested a deferral of the investigation and indicated that he would not respond until “the appeals on this request have been exhausted.” FFCL ¶ 1.2.3; EX 403; TR3 95. As the basis for deferral, Respondent cited two cases, King v. Matthews and Matthews v. WSDOT, which he said were

⁵ See former RPC 1.7(b).

⁶ See RPC 1.8(a).

“still active.” FFCL ¶ 1.2.3; EX 403. King v. Matthews was a lawsuit by Respondent’s mentor, lawyer Paul H. King, against Paul Matthews concerning some posters that Paul Matthews allegedly took from King. TR3 80-81; EX 400. Matthews v. WSDOT was the lawsuit for wrongful discharge and unpaid wages described above. TR3 81; EX 401. Try as he might, Respondent could not articulate any meaningful connection between these two cases, on the one hand, and the information requested under ELC 5.3(e), on the other. TR3 81-87.

Respondent’s deferral request was in keeping with his earlier testimony that, in his opinion, “the best way to deal with the Bar Association is to slow them down.” TR3 73-76; EX 404. Respondent also testified that one of the strategies he routinely used to “slow the Bar down” was to request a deferral “whenever [he] would get a bar complaint.” TR3 73-76; EX 404. Whether or not the request had any merit, Respondent expected that he could “stall the investigation” until a Review Committee determined that the request was properly denied.⁷ TR3 75-76. Respondent provided no reasonable basis for his deferral request, which was intended to delay, and did delay, the Association’s investigation. FFCL ¶ 1.2.3; EX 404.

⁷ See ELC 5.3(c)(2). In this case, a Review Committee made that determination on August 30, 2005. EX 412.

Further correspondence with Respondent produced no information concerning either (a) the terms under which Paul Matthews worked in Respondent's office in exchange for legal services or (b) which implications of the common representations, if any, Respondent supposedly explained to Paul and Stacey Matthews. EX 404, 406-07, 409. Respondent merely asserted that he had provided his clients "a full explanation of the conflict," an assertion that was at odds with (a) information provided by one of Respondent's clients and (b) the Motion to Withdraw Guilty Plea previously filed. TR4 95-96; EX 122, 406.⁸

On October 18, 2005, Respondent was served with a subpoena duces tecum under ELC 5.5 directing him to appear at a deposition on October 26, 2005. FFCL ¶ 1.2.4; EX 413. To accommodate Respondent's schedule, the deposition was continued to November 1, 2005. FFCL ¶ 1.2.4; EX 414-15. Respondent made no objection to the subpoena duces tecum before the date of his deposition. TR3 96; EX 414; EX 416 at 8-10. But on the date of the deposition, Respondent refused to produce any documents or answer any questions, asserting that, in his opinion, the deposition was "oppressive." FFCL ¶ 1.2.4; EX 416 at 7.

⁸ Respondent's assertion is also at odds with the position he has belatedly taken before this Court, which appears to be that there was no potential conflict for him to explain or for his clients to waive. And Respondent's current position is inconsistent with the admissions he made both in his Answer to the Formal Complaint (BF 9) and in his sworn testimony at the disciplinary hearing. See TR3 28; BF 3 ¶¶ 9-10; BF 9 ¶¶ 9-10.

Two days later, Respondent filed a motion to terminate the deposition, arguing that it was “oppressive” because, in his opinion, the facts were “straightforward and . . . not in dispute.”⁹ FFCL ¶ 1.2.5; EX 417 at 4. Respondent’s objections were frivolous and were made for the purpose of delaying and frustrating the Association’s investigation, in keeping with Respondent’s stated view that “the best way to deal with the Bar Association is to slow them down.” FFCL ¶ 1.2.5; TR3 74-76; EX 418. Respondent’s conduct resulted in harm to the lawyer discipline system in the form of increased cost and delay. FFCL ¶ 1.2.6.

Respondent’s motion was denied. EX 421. Respondent was served with another subpoena duces tecum under ELC 5.5 directing him to appear at a deposition on May 4, 2006. EX 423. On the afternoon of May 3, 2006, Respondent informed Disciplinary Counsel that he would be “unable to attend” due to a scheduling conflict. EX 424. Once again, the deposition was continued to accommodate Respondent’s schedule. EX 425. Eventually, Respondent was deposed concerning the Matthews matter. TR3 101-02. At his disciplinary hearing, Respondent was unable to identify anything about the deposition that was “oppressive,” discourteous, or even impolite; but he nevertheless asserted that

⁹ Respondent also attempted to “slow the bar down” by making yet another deferral request. EX 419, 422.

Disciplinary Counsel had acted like a “fascist” just by conducting it. TR1 56; TR3 102-03.

3. Facts Pertaining to Counts 3 and 4

For about nine years before he established his own law practice, Respondent worked for lawyer Paul H. King as a paralegal, a law clerk, a legal intern under APR 9, and a lawyer. TR3 29-30; TR4 10-12. As Respondent’s tutor in the law clerk program, King was instrumental in helping Respondent obtain his law license. TR3 29-30; TR4 10-12; see also APR 6.

On April 25, 2002, the first of King’s three disciplinary suspensions took effect. EX 200-01. On April 24, 2002, knowing that the suspension would take effect the next day, Respondent bought all of King’s active cases. TR3 30-31. A law firm known as “Action Employment Law” or “Actionlaw.net” was established so that Respondent could keep King’s law practice going while he was suspended. TR3 31. Respondent, who was the only lawyer in the firm, maintained an office next door to King’s and consulted with him regularly about the cases King had sold to him. TR3 32.

In the spring of 2004, Kurt Rahrig contacted Actionlaw.net about a claim for breach of contract against his former employer, Alcatel USA. TR1 60-61. On September 3, 2004, after he was reinstated following his

first two disciplinary suspensions, King signed a contingent fee agreement with Rahrig. TR1 79; EX 207. The fee agreement states that Rahrig “hereby retains John Scannell, Actionlaw.net and Paul H. King” to represent him in his dispute with Alcatel USA. EX 207. Respondent did not sign the fee agreement, and he claims to have been unaware of it. EX 207; TR4 53. Although Rahrig met Respondent on visits to King’s office, he never consulted with Respondent, and Respondent was never his lawyer. TR1 79-80, 82; EX 411.

Meanwhile, on August 15, 2002, the United States District Court for the Western District of Washington entered an order suspending King from practice in that court for three years. EX 202, 245. On October 21, 2004, this Court ordered King to show cause under ELC 9.2(c) why the same discipline should not be imposed in the State of Washington. EX 210. On March 9, 2005, this Court entered an order reciprocating discipline in part and suspending King from the practice of law in the State of Washington until August 13, 2005.¹⁰ EX 242. Respondent knew of the March 9, 2005 suspension order because he represented his former tutor in the reciprocal discipline proceeding. TR3 37; EX 246.

¹⁰ Later, the court entered a corrective order stating that King’s suspension would expire on June 7, 2005. EX 326.

On the evening of March 9, 2005, just after the order of suspension was entered, an email message was sent to King's opposing counsel in Rahrig v. Alcatel from actionlaw@w-link.net, the email address that appears on Respondent's website.¹¹ TR1 177-83; TR2 10-11, 14; EX 243, 324. The message stated:

Please have pleadings addressed to Actionlaw.net John Scannell Attorney from now on. Mr. King is taking a leave. Same address as before.

EX 243. After that date, opposing counsel served all their motion papers and discovery documents on Respondent. TR2 15-27; EX 252, 269-73, 278-80, 303, 306, 316-17. Respondent's name appeared on the certificates of service as one of the "Attorneys for Plaintiff Kurt Rahrig." EX 271-73, 279-80.

Meanwhile, instead of "taking a leave," King continued to act as Rahrig's lawyer without notifying Rahrig of his March 9, 2005 suspension. TR 1 85-117. In the extensive correspondence relating to his representation of Rahrig both before and after his March 9, 2005 suspension, King used the email address that appears on Respondent's website. TR1 63-78, 89-91, 101-114; EX 243, 249-51, 253, 257, 265,

¹¹ Respondent appears to dispute that the website is or was his. The website does, however, contain Respondent's photograph, mailing address, and fax number, as well as the statement that "ActionLaw.net and Action Employment Law are the names for a law firm headed by 'Zamboni John' Scannell." EX 324. There is no mention anywhere of King. Id.

274-76, 281-88, 290, 308. On at least one occasion when Respondent knew that King was suspended, Respondent saw Rahrig in King's office when he was there to consult with King. TR1 116-17.

On or about May 31, 2005, Rahrig discovered that King was suspended and informed him by email that he was terminating their attorney-client relationship. TR1 118-19; EX 318. The email message was forwarded to Roger Knight, Respondent's paralegal, who also worked for King. TR1 119-20; TR3 55; EX 320. Knight replied to Rahrig by pointing out that "John Scannell is on the fee agreement and he is still active in his membership in the Bar and can still practice law." EX 320. Knight also stated that King had "transferred the case to Mr. Scannek [*sic*] on March 9, 2005." TR1 120-21, 126; EX 321.

A few days later, Rahrig filed a grievance against Respondent. EX 405. After a calculated delay,¹² Respondent provided a written response in which he stated that he had never been Rahrig's lawyer, that he had never consulted with Rahrig, and that he had never acquainted himself with Rahrig v. Alcatel. EX 411. He admitted however, that he had received

¹² FFCL ¶ 1.3.2. On June 6, 2005, Disciplinary Counsel requested that Respondent provide a response by June 20, 2005. EX 405. At 5:23 p.m. on June 20, 2005, Respondent faxed a letter to Disciplinary Counsel asking that he be allotted "the full 30 days" for his response. EX 408. On July 12, 2005, Disciplinary Counsel sent Respondent a "ten-day" letter under ELC 5.3(f) directing him to respond by July 25, 2005. EX 410. Finally, Respondent prepared a two-page response dated July 22, 2005 that he faxed to Disciplinary Counsel at 4:57 p.m. on July 25, 2005. EX 411.

the documents that were served on him by King's opposing counsel, and that he had spoken with King about them. EX 411. Those documents identified Respondent as one of the "Attorneys for Plaintiff Kurt Rahrig" in Rahrig v. Alcatel. EX 252, 269-73, 278-80, 303, 306, 316-17. Respondent nevertheless claimed to be wholly ignorant of the fact that his name and trade name were being used by King, a suspended lawyer, for the unauthorized practice of law. TR3 54; EX 411.

On October 18, 2005, Respondent was served with a subpoena duces tecum under ELC 5.5 directing him to appear at a deposition on October 26, 2005. FFCL ¶ 1.3.2; EX 413. To accommodate Respondent's schedule, the deposition was continued to November 1, 2005. FFCL ¶ 1.3.2; EX 414-15. Respondent made no objection to the subpoena duces tecum before the date of his deposition. TR3 96; EX 414; EX 416 at 8-10. On the date of the deposition, however, Respondent refused to produce any documents or answer any questions, asserting that the deposition was "oppressive." FFCL ¶ 1.3.2; EX 416 at 7.

On November 3, 2005, Respondent filed his first motion to terminate the deposition. FFCL ¶ 1.3.3; EX 417. Respondent argued that he could not be deposed because, in his opinion, "it is unclear what Scannell is being accused of in the Rahrig matter." EX 417 at 8. Respondent also asserted, without any supporting authority, that "the

proper forum” for Rahrig’s grievance against him was Virginia, even though Respondent is admitted to practice law in Washington, not in Virginia. TR3 104-07; EX 417 at 7-8. Respondent’s objections were frivolous and were made for the purpose of delaying and frustrating the Association’s investigation, in keeping with Respondent’s stated view that “the best way to deal with the Bar Association is to slow them down.” FFCL ¶ 1.3.3; TR3 74-76; EX 418.

Respondent’s motion was denied. EX 421. On May 11, 2006, Respondent was served with a second subpoena duces tecum directing him to appear and produce documents at a deposition on May 19, 2006 at 2:00 p.m. FFCL ¶1.3.4; EX 427. About an hour and a half before the deposition was to begin, Respondent came to the Association’s office to personally deliver a letter stating that he would not come to the deposition because “travel fees” had not been tendered. FFCL ¶ 1.3.4; EX 428-30. As the basis for his refusal to attend the deposition, Respondent cited RCW 2.40.020, a statute applicable by its plain language only to “civil cases,” not to investigations under the ELC. FFCL ¶ 1.3.4; EX 428. Respondent’s refusal to appear and produce documents was motivated by an intent to delay and frustrate the Association’s investigation, not by a good faith procedural objection. FFCL ¶ 1.3.4.

On June 13, 2006, Respondent was served with a third subpoena duces tecum directing him to appear and produce documents at a deposition on June 23, 2006. FFCL ¶ 1.3.5; EX 431. Rather than waste time litigating with Respondent over the expense of the 1.3 mile journey from Respondent's office to the Association's office, the Association tendered a \$12 check to cover Respondent's "travel fees." FFCL ¶ 1.3.5; EX 432. On June 23, 2006, Respondent appeared briefly but refused to be sworn, refused to answer questions, refused to produce any of the documents identified in the subpoena duces tecum, and left abruptly before the deposition was adjourned. FFCL ¶ 1.3.5; EX 433.

Almost two weeks later, on July 6, 2006, Respondent filed a second motion to terminate the deposition that had not begun due to Respondent's refusal to comply with any of the three subpoenas duces tecum that had been served on him. FFCL ¶ 1.3.5; EX 434. For the most part, Respondent's second motion to terminate was just a reprise of his first motion to terminate. Compare EX 417 with EX 434. To the arguments that had previously been rejected, Respondent added a claim that his deposition could not be taken unless notice was served on King, an objection that Respondent could have raised in his first motion to terminate, but did not. EX 417, 434. Respondent asserted that King was a "party to the action" even though (1) no action had been commenced and

(2) the matter in which Respondent had been commanded to testify was the investigation of a grievance against Respondent himself. EX 434-35. Respondent's refusal to testify and produce documents at the June 23, 2006 deposition lacked a factual basis and was motivated by an intent to delay and frustrate the Association's investigation. FFCL ¶ 1.3.5; EX 435.

On August 17, 2006, Respondent's second motion to terminate was denied. FFCL ¶ 1.3.6; EX 439. Respondent was ordered to appear for a deposition and produce documents in accordance with the three subpoenas duces tecum previously served on him. FFCL ¶ 1.3.6; EX 439. Respondent was informed that his deposition would resume on September 1, 2006. EX 440.

On August 25, 2006, Respondent filed a motion to set aside the order denying his second motion to terminate the deposition. FFCL ¶ 1.3.7; EX 441. In the alternative, Respondent moved for a stay pending an appeal to this Court, an appeal that he never filed. EX 441. Respondent asserted that the order should be vacated because "it appears that the person who should be ruling on this motion would be the chief hearing officer," even though (1) the Chief Hearing Officer has no authority to make any rulings in a matter that has not been ordered to hearing, (2) Respondent never raised this objection to the order denying his first motion to terminate, and (3) Respondent had specifically addressed his

second motion to terminate to Bernard H. Friedman, then Chair of the Disciplinary Board. FFCL ¶ 1.3.7; TR3 107-11; EX 436, 438, 441-42. Respondent's motion to set aside or stay was motivated by an intent to delay and frustrate the Association's investigation, not by a good faith objection. FFCL ¶ 1.3.7.

Respondent's motion to set aside or stay was denied. FFCL ¶ 1.3.7; EX 446. Respondent's deposition was continued to September 25, 2006 to accommodate Respondent's schedule. FFCL ¶ 1.3.8; EX 443, 444. On September 6, 2006, Respondent informed Disciplinary Counsel of some potential scheduling problems, but stated that the September 25, 2006 deposition date "appears to work." EX 445. On September 25, 2006, however, shortly before the deposition was to begin, Respondent sent a fax to the Association stating that he would not attend. FFCL ¶ 1.3.8; EX 447-48. Respondent's refusal to testify and produce documents at the September 25, 2006 deposition was motivated by an intent to delay and frustrate the Association's investigation, not by a well-grounded procedural objection. FFCL ¶ 1.3.9.

Respondent never allowed his deposition to be taken, and he never produced any of the documents called for by the three subpoenas duces tecum served on him in the Rahrig matter until the next-to-last day of the December 2008 disciplinary hearing. FFCL ¶ 1.3.10; BF 72, 81, 85, 96;

TR2 187-90; TR3 6-11. Respondent admitted that there might be other documents within the scope of the subpoenas that he still had not produced. TR3 6-11; FFCL ¶ 1.3.10.

B. PROCEDURAL FACTS

The Formal Complaint, filed May 30, 2007, alleged four counts of misconduct, as follows:¹³

By representing multiple clients in a single matter without their written consent to the common representation after consultation and a full disclosure of the material facts, including an explanation of the implications of the common representation and the advantages and risks involved, Respondent violated RPC 1.7(b). (Count 1)

By failing to promptly respond to disciplinary counsel's requests for information [concerning the Matthews matter], by refusing to produce documents and answer questions at his deposition, by asserting frivolous objections to disciplinary counsel's requests for information, by making a frivolous deferral request, and/or by filing a frivolous motion to terminate his deposition, all of which were intended to obstruct and delay the Association's investigation, Respondent violated RPC 3.1, RPC 3.4(a), RPC 3.4(c), RPC 3.4(d), RPC 8.4(d), and/or RPC 8.4(l) (through violation of duties imposed by ELC 5.3 and 5.5). (Count 2)

By permitting Mr. King, a suspended lawyer, to use Respondent's name and/or his trade name for the practice of law, and/or by knowingly assisting Mr. King in violating and/or attempting to violate RPC 5.5(e), RPC 8.4(b) (through violation of RCW 2.48.180), RPC 8.4(l) (through violation of a duty imposed by ELC 14.2), and/or RPC

¹³ All references to the RPC are to the Rules in effect at the time of the alleged misconduct. BF 3 at n.1; FFCL at 1-2. The text of the relevant Rules in effect at the time of the alleged misconduct can be found at Appendix C.

8.4(j), Respondent violated RPC 5.5(d)(3) and/or RPC 8.4(a). (Count 3)

By failing to promptly respond to disciplinary counsel's requests for information [concerning the Rahrig matter], by refusing to allow his deposition to be taken, by failing to produce any of the documents called for by the subpoenas duces tecum, by filing frivolous motions intended to obstruct and delay an investigation, and/or by disobeying orders denying those motions, Respondent violated RPC 3.1, RPC 3.4(a), RPC 3.4(c), RPC 3.4(d), RPC 8.4(d), RPC 8.4(j), and/or RPC 8.4(l) (through violation of duties imposed by ELC 5.3 and 5.5). (Count 4)

BF 3 ¶¶ 20, 37, 55, 82.

After the Formal Complaint was filed, Respondent began a concerted effort to delay and frustrate the disciplinary proceeding, consistent with his efforts to delay and frustrate the investigations that preceded it. Respondent coordinated those efforts with King, his mentor, whom Respondent considered an authority on legal ethics. TR3 135-38. Respondent moved repeatedly "to have the Washington State Bar Association convene to pass a rule" to have his case adjudicated by a special tribunal in a different state.¹⁴ BF 18, 49; TR3 131-38. He made repeated efforts to disqualify everyone who could adjudicate the

¹⁴ Respondent could not begin to explain either (1) how such a convention would take place or (2) under what authority the Association could "pass a rule" governing proceedings that are governed by rules adopted by this Court. TR3 131-38. Respondent admitted that he had not bothered to consult those rules, since he was "relying upon Paul King." TR3 136-37.

allegations against him.¹⁵ See, e.g., BF 7, 14, 16, 18-24, 28, 30, 33, 49, 53, 92, 95 at 2; TR1 5-14. Respondent opposed the setting of any hearing until after December 2009, and he repeatedly sought to postpone the hearing after it was set. BF 38, 40, 42, 44-45, 45.10, 75, 81, 85, 86, 92, 100-01. Respondent sought to require the Association to make a detailed review of all of its grievance files dating back to 1997. BF 50, 55, 64. And Respondent failed to comply with the Association's ELC 10.13(c) Demand for Documents, which referenced the same documents the Association had sought from Respondent via subpoena duces tecum for over three years. FFCL ¶ 1.3.10; EX 413, 427, 431; BF 72, 81, 85, 96, 100-01; TR2 187-90; TR3 6-11.

The disciplinary hearing finally took place on December 1-4, 2008. FFCL at 1. The hearing officer dismissed Count 3 at the close of the hearing. TR4 121. On February 3, 2009, the hearing officer entered his Findings of Fact, Conclusions of Law, and Recommended Sanction. The hearing officer concluded (1) that Respondent violated RPC 1.7(b) as charged in Count 1, (2) that Respondent violated RPC 3.1 and 8.4(I) as

¹⁵ The targets of these efforts included "Gail McDonald" *sic*, the "Hearing Examiner" *sic*, the "Chief Hearing Examiner" *sic*, the "Chairman of the Disciplinary Committee" *sic*, and the "Disciplinary Committee [*sic*] as a whole." BF 28.

charged in Count 2, and (3) that Respondent violated RPC 8.4(I) as charged in Count 4. FFCL ¶¶ 2.1-2.3.

With respect to Counts 2 and 4, the hearing officer repeatedly found that Respondent acted with the objective or purpose of delaying and frustrating the Association's investigation.¹⁶ In other words, Respondent's repeated violations of RPC 3.1 and 8.4(I) were intentional.¹⁷ In spite of those findings, however, the hearing officer incorrectly concluded that the presumptive sanction for Respondent's "knowing" violations of RPC 3.1 and 8.4(I) was suspension.¹⁸ FFCL ¶¶ 2.6-7. The hearing officer recommended that Respondent be suspended for two years, and that the suspension continue until Respondent provided satisfactory proof that all the documents within the scope of the Association's subpoenas duces

¹⁶ See, e.g., FFCL ¶ 1.2.3 (request for deferral motivated by intent to delay Association's investigation), FFCL ¶ 1.2.5 (objections interposed for the purpose of delaying and frustrating Association's investigation), FFCL ¶ 1.3.3 (objections interposed for purpose of delaying and frustrating Association's investigation), FFCL ¶ 1.3.4 (failure to appear and refusal to produce documents motivated by intent to delay and frustrate Association's investigation), FFCL ¶ 1.3.5 (failure to produce documents and refusal to testify motivated by intent to delay and frustrate Association's investigation), FFCL ¶ 1.3.7 (motion to set aside or stay motivated by intent to delay and frustrate Association's investigation), FFCL ¶ 1.3.9 (failure to appear and give testimony and failure to produce documents motivated by intention to delay and frustrate Association's investigation).

¹⁷ See In re Disciplinary Proceeding Against Miller, 149 Wn.2d 262, 281, 66 P.3d 1069 (2003); ABA Standards for Imposing Lawyer Sanctions (1991 ed. & Feb. 1992 Supp.) at 17.

¹⁸ The hearing officer also concluded that the presumptive sanction for Respondent's violation of RPC 1.7 was a reprimand under ABA Standards std. 4.33. FFCL ¶ 2.5.

tecum had been produced. FFCL ¶ 3.1.

The matter came before the Disciplinary Board for review under ELC 11.2(b)(1). Both parties submitted briefs under ELC 11.8. Respondent refused to concede that either the hearing officer or the Board had authority to act, and he demanded that all the Board members resign en masse. BF 126 at 1, 133 at 1, 135 at 1, 137 at 1. They did not. On September 1, 2009, the Board issued an order amending the hearing officer's conclusions of law. BF 142.¹⁹ Based on the hearing officer's findings that Respondent's misconduct was intentional, the Board unanimously concluded that the presumptive sanction for Respondent's violations of RPC 3.1 and 8.4(*I*) was disbarment under ABA Standards std. 7.1. BF 142, 151. The Board unanimously recommended that Respondent be disbarred. BF 142, 151.

On September 16, 2009, Respondent filed yet another motion to disqualify the Board.²⁰ BF 144. This time, Respondent asserted that the Board members should all be disbarred for, among other transgressions, "a

¹⁹ The Disciplinary Board Order, BF 142, erroneously stated that the decision was entered after "[h]aving heard oral argument." The Corrected Disciplinary Board Order, BF 151, deleted that statement. Both orders are attached hereto as Appendix B.

²⁰ Like many of Respondent's motions, it is unclear to whom this motion was directed. For although the caption states that it is "Before the Disciplinary Board of the Washington State Bar Association," Respondent refused to concede that the Board could rule on it. BF 144 at 1.

remarkable lack of competency [*sic*] and diligence under RPC 1.1 and RPC 1.3.” BF 144 at 5. Respondent’s motion was denied. BF 152.

Respondent brings this appeal from the September 1, 2009 Disciplinary Board Order, BF 142, and the September 25, 2009 Corrected Disciplinary Board Order, BF 151. He refuses to concede that this Court has jurisdiction to hear the appeal. BF 145, 153.

III. ARGUMENT

A. STANDARD OF REVIEW

The ultimate responsibility for lawyer discipline rests with this Court. In re Disciplinary Proceeding Against Marshall (Marshall II), 167 Wn.2d 51, 66, ¶ 27, 217 P.3d 291 (2009). Nevertheless, the Court gives great weight to the hearing officer's findings of fact and his evaluation of the credibility of witnesses. Id. at 66-67, ¶ 27. Unchallenged findings of fact are treated as verities on appeal. Id. at 66, ¶ 27; RAP 10.3(g). Assignments of error must be supported by argument, legal authority, and references to the record. In re Disciplinary Proceeding Against Behrman, 165 Wn.2d 414, 422, ¶ 13, 197 P.3d 1177 (2008). Challenged findings of fact will be upheld if they are supported by substantial evidence. Marshall II, 167 Wn.2d at 66-67, ¶ 27. Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of a declared

premise. In re Disciplinary Proceeding Against Marshall (Marshall I), 160 Wn.2d 317, 330, ¶ 16, 157 P.3d 859 (2007).

A lawyer who challenges findings of fact must do more than argue his version of the facts while ignoring adverse evidence. Marshall II, 167 Wn.2d at 67, ¶ 28. He must present argument as to why specific findings are unsupported, and he must cite to the record to support his argument. Id.; RAP 10.3(a)(6). Findings of Fact will not be overturned based simply on an alternative explanation of the facts or on a version of the facts previously rejected by the hearing officer and the Disciplinary Board. Marshall II, 167 Wn.2d at 67, ¶ 28.

Conclusions of law are reviewed de novo and will not be disturbed if they are supported by the findings of fact. In re Disciplinary Proceeding Against Hicks, 166 Wn.2d 774, 781, ¶ 15, 214 P.3d 897 (2009). The Board's unanimous sanction recommendation should be affirmed unless the Court can articulate clear and specific reasons for rejecting it. In re Disciplinary Proceeding Against Guarnero, 152 Wn.2d 51, 59, 93 P.3d 166 (2004).

B. THE EVIDENCE AND THE FINDINGS OF FACT SUPPORT THE DISCIPLINARY BOARD'S CONCLUSIONS OF LAW

1. The Evidence and the Findings of Fact Support the Conclusion That Respondent Violated Former RPC 1.7(b) as Charged in Count 1

Former RPC 1.7(b)²¹ 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.

Under RPC 1.7(b), common representation will necessarily require consultation and consent in writing, since the rule imposes these requirements anytime there is *potential* conflict. Marshall I, 160 Wn.2d at 336, ¶ 33.²²

“The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should

²¹ In his Petitioner's [*sic*] Opening Brief, Respondent cites and discusses the current version on RPC 1.7, which was not in effect until September 1, 2006.

²² In Marshall I, 160 Wn.2d at 336, ¶ 33, the Court applied the same version of RPC 1.7(b) that applies to this case.

decline to represent more than one codefendant.” Model Rules of Prof’l Conduct R. 1.7 cmt. 23 (2003). Where such representation is nonetheless undertaken, RPC 1.7(b) requires that each client consent in writing after consultation and a full disclosure²³ of the material facts, including an explanation of the implications of the common representation and the risks involved. See Marshall I, 160 Wn.2d at 336, ¶ 33. The requirement of written consent is intended “to impress upon clients the seriousness of the decision the client is being asked to make.” Model Rules of Prof’l Conduct R. 1.7 cmt. 20 (2003). Failure to obtain consent in writing is not a mere “technical” violation. In re Disciplinary Proceeding Against Halverson, 140 Wn.2d 475, 486-87, 998 P.2d 833 (2000); see also In re Disciplinary Proceeding Against Egger, 152 Wn.2d 393, 411, 98 P.3d 477 (2004) (respondent lawyer “ignores the requirement of RPC 1.7(b) that a lawyer must obtain informed consent *in writing* to the actual or potential conflict”) (emphasis in original).

The hearing officer and the Board concluded that Respondent

²³ A full disclosure is more than a mere “perfunctory ceremony.” C. Wolfram, Modern Legal Ethics § 7.2.4 at 343–44 (1986). The consultation must include sufficient detail and analysis so that each client can understand the ways in which his or her interests may be in conflict with those of another client, as well as those of the lawyer. Id. at 345. While it is doubtful that Respondent’s mere mention of a conflict was sufficient, the Court need not resolve this issue since Respondent admits that his clients did not consent in writing to the common representation. See In re Disciplinary Proceeding Against Egger, 152 Wn.2d 393, 411, 98 P.3d 477 (2004).

violated RPC 1.7(b) by failing to obtain consent in writing to the common representation from either Paul Matthews or Stacey Matthews. FFCL ¶ 2.1; BF 151. That conclusion is supported by the findings of fact, FFCL ¶¶ 1.1.2-1.1.6, and those findings of fact are in turn supported by the evidence. For example:

- Respondent admitted (1) that he knew his representation of Paul Matthews might be materially limited by his responsibilities to Stacey Matthews or by his own interests, and (2) that he knew his representation of Stacey Matthews might be materially limited by his responsibilities to Paul Matthews or by his own interests. TR3 28; BF 3 ¶¶ 9-10; BF9 ¶¶ 9-10. Respondent further admitted (3) that neither Paul Matthews nor Stacey Matthews ever consented in writing to the common representation. TR3 28; BF3 ¶¶ 11-12; BF 9 ¶¶ 11-12. Respondent's admissions alone provide substantial, and even conclusive, evidence in support of the findings of fact.
- Given the nature of the closely related criminal charges against Respondent's two clients, TR2 123; EX 101, 104, as well as Respondent's interest in a large contingent fee from the civil case against WSDOT, it is absurd to suggest that there was no *potential* conflict of interest. See Marshall I, 160 Wn.2d at 336, ¶ 33; see also Model Rules of Prof'l Conduct R. 1.7 cmt. 23. Potential competition for the favor of the prosecutor is present in every criminal case in which there are multiple defendants. Wolfram, supra note 23, § 8.2.2 at 412 (1986). Here, moreover, the prosecutor testified that the settlement negotiated by Respondent was *not* the only possible settlement. TR2 136-37. There were potentially other settlements that were more or less favorable to each of Respondent's multiple clients. See id.
- The fact that Stacey Matthews moved to withdraw her guilty plea based on "a prejudicial conflict of interest on the part of defense counsel due to representation of multiple defendants," EX 122, is substantial evidence that there was at least a

potential conflict requiring consultation and consent in writing under former RPC 1.7(b).

The conclusion that Respondent violated RPC 1.7(b) is supported by the findings of fact and the evidence, and should not be disturbed on appeal. See Marshall II, 167 Wn.2d at 66-67, ¶ 27; Hicks, 166 Wn.2d at 781, ¶ 15.

2. The Evidence and the Findings of Fact Support the Conclusion that Respondent Violated RPC 3.1 and 8.4(I) as Charged in Count 2

The Supreme Court has authorized the Association to investigate any alleged or apparent misconduct by a lawyer. In re Disciplinary Proceeding Against Poole (Poole II), 164 Wn.2d 710, 728, ¶ 33, 193 P.3d 1064 (2008); ELC 5.3(a). An investigation may include, among other things, requests for records and information under ELC 5.3(e) and depositions under ELC 5.5. Under ELC 5.3(e), every lawyer has a duty to promptly respond to any inquiry or request for information relevant to matters under investigation. Under ELC 5.5(c), every lawyer must promptly respond to discovery requests from Disciplinary Counsel. Compliance with these rules is “vital” to the legal profession. In re Disciplinary Proceeding Against Clark, 99 Wn.2d 702, 707-08, 663 P.2d 1339 (1983). As this Court said in Clark, 99 Wn.2d at 707-08:

The Bar Association's investigation of a complaint is an integral part of the machinery for handling charges regarding the ethics and conduct of the attorneys admitted to practice before this court. Public confidence in the legal profession, and the deterrence of misconduct, require

prompt, complete investigations. The process of investigating complaints depends to a great extent upon an individual attorney's cooperation. Without that cooperation, the Bar Association is deprived of information necessary to determine whether the lawyer should continue to be certified to the public as fit. Obviously, unless attorneys cooperate in the process, the system fails and public confidence in the legal profession is undermined. If the members of our profession do not take the process of internal discipline seriously, we cannot expect the public to do so and the very basis of our professionalism erodes. Accordingly, an attorney who disregards his professional duty to cooperate with the Bar Association must be subject to severe sanctions. Moreover, unless noncooperation brings such sanctions, attorneys who are guilty of unprofessional conduct might be tempted to stonewall to prevent serious violations coming to light.

RPC 8.4(l) provides that it is professional misconduct for a lawyer to violate a duty imposed by the ELC in connection with a disciplinary matter, including the duties imposed by ELC 5.3 and 5.5. See, e.g., Behrman, 165 Wn.2d at 420, ¶ 8 (violation of RPC 8.4(l) where lawyer failed to provide prompt and complete responses to requests for information); Poole II, 164 Wn.2d at 729-30, ¶¶ 37-38 (violation of RPC 8.4(l) and RPC 8.4(d) where lawyer did not promptly respond to request for information and resisted efforts to inspect records). RPC 3.1 provides that a lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous. Concerning the Matthews matter, the hearing officer and the Board concluded that Respondent violated RPC 8.4(l) and RPC 3.1 by

failing to comply with the Association's subpoena duces tecum, by failing to cooperate in the Association's investigation, and by doing so with the intent to delay and frustrate the Association's investigation. FFCL ¶ 2.2; BF 151. That conclusion is supported by the findings of fact, FFCL ¶ 1.2.2-1.2.6, and those findings of fact are in turn supported by the evidence. For example:

- The hearing officer's findings of fact concerning Respondent's intent to delay and frustrate the Association's investigation, FFCL ¶¶ 1.2.3, 1.2.5, are supported by Respondent's own testimony. Respondent testified that he had counseled his mentor, King, not to comply with the Association's subpoena because "they're just going to use it to get information." TR4 19-20. In a prior disciplinary hearing, Respondent testified that, in his opinion, "the best way to deal with the Bar Association is to slow them down."²⁴ TR3 74-76; EX 404.
- According to Respondent's own testimony, one of the "strategies" he used to "slow the bar down" was to "always ask for a deferral." TR3 74-76; EX 404. Here, Respondent's deferral request cited two cases that had nothing whatever to do with the information requested in Disciplinary Counsel's May 9, 2005 letter. EX 402-04. The hearing officer was not required to credit Respondent's unintelligible explanation of the supposed basis for his deferral request.²⁵

²⁴ Although Respondent attempted to disavow that view, TR3 76, the hearing officer was not required to credit his disavowal. See, e.g., In re Disciplinary Proceeding Against Whitt, 149 Wn.2d 707, 722, 72 P.3d 173 (2003) (hearing officer not bound by respondent's explanations if he or she is not persuaded by them). Moreover, Respondent's conduct has been consistent with the intent to delay and frustrate the Association's investigation that Respondent so clearly expressed at his prior disciplinary hearing.

²⁵ TR3 81-87; See Whitt, 149 Wn.2d at 722.

- Respondent's subsequent correspondence with Disciplinary Counsel was entirely consistent with an intent to stonewall, rather than cooperate. EX 404, 406-07, 409.
- At the November 1, 2005 deposition, Respondent offered no justification for his refusal to cooperate other than the bare assertion that the deposition was "oppressive," but he was unable to articulate anything "oppressive" about the deposition that finally belatedly took place. EX 416 at 7; TR3 102.
- Respondent's motion to terminate the deposition is based on the ridiculous premise that Respondent need not comply with a subpoena under ELC 5.5 if in his opinion there is nothing in need of investigation. EX 417 at 4.

The conclusion that Respondent violated RPC 3.1 and 8.4(*l*) as charged in Count 2 is supported by the findings of fact and the evidence, and should not be disturbed on appeal. See Marshall II, 167 Wn.2d at 66-67, ¶ 27; Hicks, 166 Wn.2d at 781, ¶ 15.

3. The Evidence and the Findings of Fact Support the Conclusion that Respondent Violated RPC 8.4(*l*) as Charged in Count 4

Concerning the Rahrig matter, the hearing officer and the Board concluded that Respondent violated RPC 8.4(*l*) by failing to comply with the Association's subpoenas duces tecum, by failing to cooperate in the Association's investigation, and by doing so with the intent to delay and frustrate the Association's investigation. FFCL ¶ 2.3; BF 151. That conclusion is supported by the findings of fact concerning Respondent's repeated refusals to comply with his duties under the ELC and the lack of any valid justification for such refusals, FFCL ¶¶ 1.3.3-1.3.5, 1.3.7, 1.3.9,

and by the findings of fact concerning Respondent's intent to delay and frustrate the Association's investigation, FFCL ¶¶ 1.3.3-1.3.5, 1.3.7, 1.3.9. All those findings of fact are in turn supported by the evidence. For example:

- Respondent made no objection to the first subpoena duces tecum until the date of the deposition itself. On the date of the deposition, Respondent provided no justification for his refusal to produce documents or answer questions aside from the bare assertion that the deposition was "oppressive." TR3 96; EX 414; EX 416 at 7-10.
- In his first motion to terminate the deposition, Respondent asserted that the Association had no jurisdiction to investigate Mr. Rahrig's grievance against him, and that "the proper forum" for Mr. Rahrig's grievance was in Virginia. EX 417 at 7-8. Respondent never cited any authority for his denial of jurisdiction (because there is none), and he simply ignored clear authority to the contrary. See former RPC 8.5(a) (lawyer licensed or admitted in this jurisdiction subject to the disciplinary authority of this jurisdiction); ELC 1.2 (any lawyer admitted or permitted to practice in this state is subject to the ELC); TR3 104-07.
- Respondent also asserted that he could not be deposed because the Rahrig grievance was "unclear" to him. EX 417. But Respondent cannot explain how his supposed inability to comprehend a grievance against him justifies his refusal to cooperate in an investigation.
- Respondent refused to comply with the second subpoena duces tecum on the grounds that "travel fees" had not been tendered. TR3 112-114; EX 428-30. As justification for his refusal to cooperate, Respondent cited a statute, RCW 2.40.020, that plainly applies only to civil cases in courts of record, not to

investigations under the ELC.²⁶

- In his second motion to terminate the deposition, Respondent asserted that his deposition could not be taken unless notice was served on King, an objection that Respondent could have raised in his first motion to terminate, but did not. EX 417, 434. Respondent also asserted that King was a “party to the action” even though (1) no action had been commenced and (2) the matter in which Respondent had been commanded to testify was the investigation of a grievance against Respondent himself. See ELC 10.3(b); CR 30; EX 435 at 6-7.
- After his second motion to terminate was denied, Respondent asserted that the Chief Hearing Officer, instead of the Disciplinary Board Chair, should have ruled on his motion. EX 441. Respondent made this assertion even though (1) he had never objected to the Chair’s ruling on his first motion to terminate, (2) he had specifically addressed his second motion to terminate to the Chair, and (3) the Chief Hearing Officer has no authority to make any rulings in a matter that has not been ordered to hearing.²⁷ TR3 107-11; TR4 108-09; EX 436, 438, 441-42, 446.
- As discussed above, the multiple findings of fact concerning Respondent’s intent to delay and frustrate the Association’s investigation, FFCL ¶¶ 1.3.3-1.3.5, 1.3.7, 1.3.9, are supported by Respondent’s own testimony, TR3 74-76; TR4 19-20; EX 404, together with his obstructionist tactics throughout the investigation and the formal proceeding that followed.

The conclusion that Respondent violated RPC 8.4(I) as charged in Count 4 is supported by the findings of fact and the evidence, and should not be

²⁶ RCW 2.40.020 provides: “Witnesses *in civil cases* shall be entitled to receive, upon demand, their fees for one day's attendance, together with mileage going to the place where they are required to attend, if such demand is made to the officer or person serving the subpoena at the time of service.” Title 2 RCW applies to *courts of record*, not to grievance investigations under Title 5 ELC. See also ELC 10.14(a) (disciplinary hearings neither civil nor criminal).

²⁷ The Board, on the other hand, has authority to perform all the functions “necessary and proper to carry out its duties.”

disturbed on appeal. See Marshall II, 167 Wn.2d at 66-67, ¶ 27; Hicks, 166 Wn.2d at 781, ¶ 15.

C. RESPONDENT'S COMPLAINTS ABOUT THE FAIRNESS OF THE PROCEEDING ARE MERITLESS

Respondent makes a number of complaints about the fairness of the disciplinary proceeding against him. These complaints are based on (1) the lawsuit that Respondent filed to delay and frustrate the Association's investigation and the subsequent proceeding, and (2) Respondent's assertion that Disciplinary Counsel is a "fascist" who is out to get him because he made a complaint against the Attorney General of Washington a decade ago.

1. An Investigation or a Disciplinary Proceeding Cannot Be Thwarted by Suing Everyone Charged with Carrying out the Functions Set Forth in the ELC

In an effort to delay and frustrate the investigation and the subsequent disciplinary proceeding, Respondent, with the help of his mentor, King, filed what he called a "Petition for Writ of Prohibition, Mandamus, Injunction, Complaint for Declaratory Judgment" in the King County Superior Court.²⁸ BF 12. The named respondents (sometime referred to as "defendants") were the State of Washington, the Washington State Bar Association, the "Disciplinary Committee" *sic*, former

²⁸ Scannell, et al. v. State of Washington, et al., King County Superior Court No. 06-2-33100-1.

Disciplinary Board Chair Gail McMonagle (sometimes referred to as “McManogle” or “McDonald”), and Disciplinary Counsel Scott Busby.²⁹ Under former ELC 2.12(a),³⁰ the Association’s General Counsel appeared and obtained a dismissal of the lawsuit based on lack of subject matter jurisdiction. The Court of Appeals affirmed the dismissal,³¹ and this Court denied Respondent’s petition for review.³²

As soon as he filed his “Petition for Writ,” Respondent began using it for its intended purpose: to delay and frustrate the disciplinary process. Respondent filed a series of repetitive motions demanding that everyone charged with carrying out the functions set forth in the ELC under this Court’s authority³³ be disqualified because every such person had a “conflict of interest” as a “defendant in a related lawsuit” and/or a “material witness.” See, e.g., BF 7, 18-19, 27-28, 43, 49. According to Respondent, no one could rule on his motions, so he demanded that “the Washington State Bar Association convene to pass a rule” to have his motions adjudicated by a special tribunal, “preferably out of state.” See,

²⁹ A later iteration of the Petition added David M. Schoeggl as a respondent. Mr. Schoeggl was the hearing officer in In re Disciplinary Proceeding Against Paul H. King, Supreme Court No. 200,681-7.

³⁰ Former ELC 2.12(a) provides in pertinent part: The Association must defend any action against an officer or agent of the Association for actions taken in good faith under these rules” See Appendix C.

³¹ Scannell, et al. v. State of Washington, et al., Court of Appeals No, 60623-9-I.

³² Scannell v. State, 166 Wn.2d 1039, 217 P.3d 783 (2009).

³³ See ELC 2.1.

e.g., BF 7 at 1; BF 18 at 1-2; BF 49 at 1. On appeal, Respondent contends that the disciplinary proceeding was unfair because the pretextual lawsuit he filed created a disqualifying conflict of interest. His position is neither original nor legally supportable.

Due process of law, the appearance of fairness doctrine, and ELC 2.6(e)(4) require a judicial officer to disqualify himself only if he is biased or if his impartiality may reasonably be questioned. See Wolfkill Feed & Fertilizer Corp. v. Martin, 103 Wn. App. 836, 841, 14 P.3d 877 (2000); State v. Dominguez, 81 Wn. App. 325, 328, 914 P.2d 141 (1996); see also Hill v. Department of Labor & Industries, 90 Wn.2d 276, 279, 580 P.2d 636 (1978) (common-law rules governing disqualification for conflict of interest apply to administrative tribunals); Nationscapital Mortgage Corp. v. State Dep't. of Fin. Inst., 133 Wn. App. 723, 765, 137 P.3d 78 (2006) (principles governing disqualification of judges apply to administrative proceedings). But a judicial officer is presumed to be impartial, and a party who alleges actual or potential bias must affirmatively establish his claim based on facts in the record, not mere speculation or innuendo. See Nationscapital, 133 Wn. App. at 766; Wolfkill, 103 Wn. App. at 841; Dominguez, 81 Wn. App. at 328-29.

It is well established that judicial officers are not disqualified merely because a litigant sues or threatens to sue them. See, e.g., United

States v. Studley, 783 F.2d 934, 940 (9th Cir. 1986); Ronwin v. State Bar of Arizona, 686 F.2d 692, 701 (9th Cir. 1981), rev'd on other grounds sub nom. Hoover v. Ronwin, 466 U.S. 558, 104 S. Ct. 1989, 80 L. Ed. 2d 590 (1984); United States v. Grismore, 564 F.2d 929, 933 (10th Cir. 1977), cert. denied, 435 U.S. 954, 98 S. Ct. 1586, 55 L. Ed. 2d 806 (1978). “It cannot be that an automatic recusal can be obtained by the simple act of suing the judge.” United States v. Pryor, 960 F.2d 1, 3 (1st Cir. 1992). “Such an easy method for obtaining disqualification should not be encouraged or allowed,” for to do so “would be to put the weapon of disqualification in the hands of the most unscrupulous.” Ronwin, 686 F.2d at 701; In re Ronwin, 139 Ariz. 576, 586, 680 P.2d 107 (1983).

Not content with “the simple act of suing the judge,” Respondent has surpassed even “the most unscrupulous” by suing, in a court with no jurisdiction, virtually everyone charged with carrying out the functions set forth in the ELC under this Court’s authority. Nowhere in all his voluminous and repetitive filings has Respondent ever adduced any actual evidence of bias. Contrary to Respondent’s repeated assertions, made without any supporting evidence, there have been no “ex parte contacts,” and no “comingling of prosecutorial and adjudicative functions.” Petitioner’s [*sic*] Opening Brief at 57. Disciplinary Counsel, the hearing officer, the Board, and the Association’s General Counsel have all carried

out their designated functions under the ELC. See ELC 2.3, 2.5, 2.8; former ELC 2.12(a).

In support of the position that he can thwart a disciplinary investigation or proceeding simply by filing a lawsuit, Respondent relies on Washington Medical Disciplinary Board v. Johnston, 29 Wn. App. 613, 626, 630 P.2d 1354 (1981), in which the Court of Appeals held that an appearance of unfairness was created by the same tribunal combining investigative and adjudicative functions. But even if that decision had not been reversed by this Court in Wash. Med. Disciplinary Bd. v. Johnston, 99 Wn.2d 466, 478-81, 483, 663 P.2d 457 (1983), it would have no bearing on this case, since there is no evidence that the hearing officer and the Board functioned as anything but adjudicators in this case. On the facts of this case, a “reasonably prudent and disinterested observer” would conclude not that Respondent was denied a “fair, impartial, and neutral hearing,” but that he went out of his way to thwart such a hearing. Id. at 481.

2. The Hearing Officer Properly Exercised His Discretion in Limiting Discovery

Respondent also complains that he was denied unlimited discovery into a supposed connection between this matter and a complaint that he filed a decade ago against then Attorney General Christine Gregoire.

Petitioner's *[sic]* Opening Brief at 10, 20, 22, 34. Shortly before the disciplinary hearing, Respondent filed a "Motion to Allow Discovery Pursuant to ELC 10.11" in which he asked the hearing officer to require the Office of Disciplinary Counsel (ODC) to make a detailed review of *all* of its grievance files dating back to 1997. BF 50, 55. Respondent articulated the basis for his request as follows:

The plaintiff *[sic]* wishes to conduct discovery. The attached discovery is reasonable and necessary for the development of his case.

BF 50.

The Association opposed Respondent's request on the grounds that (1) Respondent had already been provided ample discovery, (2) Respondent had made no showing that the discovery sought was necessary, (3) a review and examination of 12 years of disciplinary grievance files would be impossibly burdensome, (4) there was no possibility of unfair surprise, and (5) the request was contrary to the confidentiality provisions of the ELC, the attorney-client privilege, and the work-product doctrine. BF 55. The hearing officer entered an order allowing some of Respondent's discovery requests and disallowing others.

BF 64.

Under ELC 10.11(d), the hearing officer has broad discretion to limit discovery:

Limitations on Discovery. The hearing officer may exercise discretion in imposing terms or limitations on the exercise of discovery to assure an expeditious, economical, and fair proceeding, considering all relevant factors including necessity and unavailability by other means, the nature and complexity of the case, seriousness of charges, the formal and informal discovery that has already occurred, the burdens on the party from whom discovery is sought, and the possibility of unfair surprise.

A hearing officer abuses his discretion only when his order is manifestly unreasonable or based on untenable grounds. See Holbrook v. Weyerhaeuser Co., 118 Wn.2d 306, 315, 822 P.2d 271 (1992).

Respondent's discovery requests were not calculated to facilitate or assure an "expeditious, economical, and fair" proceeding; they were calculated to obstruct, delay, and thwart such a proceeding. Respondent made no showing that the discovery he sought was necessary or even marginally relevant to the matters at issue in this proceeding. He merely asserted, with no substantiation, that a detailed review of thousands of confidential grievance files dating back to 1997 was "reasonable and necessary for the development of his case." The mere suggestion of some bizarre conspiracy theory is not enough to require the discovery that Respondent sought. See State v. Terrovonia, 64 Wn. App. 417, 419-21, 423-24, 824 P.2d 537 (1992) (denial of discovery to develop selective prosecution claim not an abuse of discretion). Respondent cannot show that the hearing officer abused his discretion under ELC 10.11(d).

D. DISBARMENT IS THE ONLY APPROPRIATE SANCTION

The ABA Standards for Imposing Lawyer Sanctions (1991 ed. & Feb. 1992 Supp.) (ABA Standards) govern sanctions in lawyer discipline cases. Marshall I, 160 Wn.2d at 342, ¶ 48. First, the Court considers whether the Board determined the correct presumptive sanction, considering the ethical duty violated, the lawyer's mental state, and the actual or potential injury caused by the lawyer's misconduct. Id. Next, the Court considers the aggravating or mitigating factors. Id.

1. The Presumptive Sanction

a. Count 1

ABA Standards std. 4.3 applies to violations of RPC 1.7. See, e.g., Egger, 152 Wn.2d at 415-18. The Board determined that Respondent's violation of RPC 1.7 was negligent and that the presumptive sanction was reprimand under ABA Standards std. 4.33. FFCL ¶ 2.5; BF 151. Although the evidence and the findings of fact would support a presumptive sanction of suspension under ABA Standards std. 4.32,³⁴ the application of ABA Standards std. 4.33 is amply supported by the

³⁴ Respondent knew that his representation of each client might be materially limited by his responsibilities to the other client or by his own interests, and he knew that he had not obtained his clients' informed consent in writing. See, e.g., FFCL ¶ 1.1.4; TR3 28; BF 3 ¶¶ 9-10; BF 9 ¶¶ 9-10. Respondent professed ignorance of RPC 1.7, which he described as a "new" rule and a mere "Bar Association" rule. TR1 44; EX 406. But Respondent's professed ignorance of the RPC does not negate his knowledge of the nature and attendant circumstances of his conduct. See Egger, 152 Wn.2d at 415-16.

evidence, as described above.

b. Counts 2 and 4

ABA Standards std. 7.0 applies to Respondent's violations of his duty to cooperate with the Association in connection with a disciplinary matter. See, e.g., Poole II, 164 Wn.2d at 732, ¶ 43. ABA Standards std. 6.2 applies to violations of RPC 3.1. See ABA Standards, Appendix 1. Based on the hearing officer's findings of fact, the Board determined that Respondent's violations of RPC 3.1 and 8.4(I) were intentional, and that the presumptive sanction was disbarment under ABA Standards std. 7.1. BF 151. The application of ABA Standards std. 7.1 is amply supported by the law, the hearing officer's findings of fact, and the evidence.

A lawyer's conduct is intentional when he has "the conscious objective or purpose to accomplish a particular result." In re Disciplinary Proceeding Against Miller, 149 Wn.2d 262, 281, 66 P.3d 1069 (2003) (quoting ABA Standards at 17). According to the hearing officer's findings of fact, Respondent acted with the objective or purpose of delaying and frustrating the Association's investigation. See, e.g., FFCL ¶ 1.2.3 (request for deferral motivated by intent to delay Association's investigation), FFCL ¶ 1.2.5 (objections interposed for the purpose of delaying and frustrating Association's investigation), FFCL ¶ 1.3.3 (objections interposed for purpose of delaying and frustrating

Association's investigation), FFCL ¶ 1.3.4 (failure to appear and refusal to produce documents motivated by intent to delay and frustrate Association's investigation), FFCL ¶ 1.3.5 (failure to produce documents and refusal to testify motivated by intent to delay and frustrate Association's investigation), FFCL ¶ 1.3.7 (motion to set aside or stay motivated by intent to delay and frustrate Association's investigation), FFCL ¶ 1.3.9 (failure to appear and give testimony and failure to produce documents motivated by intention to delay and frustrate Association's investigation). These are factual determinations, and the hearing officer's findings of fact are given great weight. In re Disciplinary Proceeding Against Longacre, 155 Wn.2d 723, 744, ¶ 49, 122 P.3d 710 (2005). Those findings of fact are supported by the evidence, as described above. Consequently, according to the evidence and the hearing officer's findings of fact, Respondent's misconduct was intentional. See Miller, 149 Wn.2d at 281; ABA Standards at 17.

In this case, Respondent's unrelenting campaign of obstruction and delay began way back in May 2005. Respondent has, unfortunately, succeeded to a large extent in "slow[ing] the Bar down." In addition, every single one of Respondent's intentional efforts to "delay and frustrate" the disciplinary system has required the expenditure of time, effort, and resources by the Office of Disciplinary Counsel, the hearing

officer, and/or the Disciplinary Board. The ridiculous number of pleadings and orders on file, and the still more ridiculous content of Respondent's voluminous and repetitive dilatory efforts,³⁵ are a testament to the enormous waste of time, expense, and scarce resources caused by Respondent's intentional obstruction of the disciplinary process. The record shows that Respondent's refusal to cooperate has resulted in serious harm both to the Office of Disciplinary Counsel and to the disciplinary system as a whole, which depends upon lawyers' cooperation to function. See Poole II, 164 Wn.2d at 731-32, ¶¶ 40-42.

Based on Respondent's mental state and on the actual and potential harm caused by his extreme intransigence and his frivolous and vexatious filings, the Board correctly determined that the presumptive sanction for Respondent's violations of his duty to cooperate is disbarment under ABA Standards std. 7.1.

2. Aggravating and Mitigating Factors

The hearing officer and the Board found the following aggravating factors, which are supported by evidence in the record:

- Prior disciplinary offenses (ABA Standards std. 9.22(a)). FFCL ¶ 2.8.1. Respondent has previously been admonished for failing to supervise his nonlawyer assistant, Roger Knight, in violation of former RPC 5.3(a) and 5.3(b). EX 500; TR3 56-

³⁵ See, e.g., EX 417, 434, 441; BF 7, 10-13, 18-20, 28, 40, 44, 49-50, 65, 74-75, 81-83, 94, 136-38, 144.

58; TR4 78.³⁶

- Selfish motive (ABA Standards std. 9.22(b)). FFCL ¶ 2.8.2. According to Respondent's own testimony, the lesson he learned from an earlier investigation of his mentor, King, was that it is better to stonewall than to cooperate, because cooperation might allow the Association to "get information" which could lead to disciplinary action. TR4 19-20.
- Multiple offenses (ABA Standards std. 9.22(d)). FFCL ¶ 2.8.3.
- Refusal to acknowledge the wrongful nature of conduct (ABA Standards std. 9.22(g)). FFCL ¶ 2.8.4. This aggravating factor is appropriate in cases such as this where the lawyer admits committing the acts but denies that they were wrongful. See In re Disciplinary Proceeding Against Holcomb, 162 Wn.2d 563, 588, ¶¶ 57-58, 173 P.3d 898 (2007); Marshall I, 160 Wn.2d at 347 ¶ 59; In re Disciplinary Proceeding Against Poole (Poole I), 156 Wn.2d 196, 224, ¶ 48, 125 P.3d 954 (2006); In re Disciplinary Proceeding Against Dynan, 152 Wn.2d 601, 621, 98 P.3d 444 (2004).

In addition, the record supports a finding of at least two additional aggravating factors:

- A pattern of misconduct (ABA Standards std. 9.22(c)); and
- Bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency (ABA Standards std. 9.22(e)). The record reflects that Respondent's frivolous and vexatious filings and his attempts to obstruct and delay the disciplinary proceeding continued unabated even after the acts of misconduct that are charged in the Formal Complaint. See supra part II.B.

³⁶ In addition, Respondent's frivolous litigation has previously resulted in a published decision awarding sanctions against his client. Andrus v. Dept. of Transp., 128 Wn. App. 895, 900, ¶ 12, 117 P.3d 1152 (2005).

3. Unanimity and Proportionality

After determining the presumptive sanction and considering the aggravating and mitigating factors, the Court considers whether the sanction is appropriate in light of the two remaining Noble³⁷ factors: (1) the Board's degree of unanimity and (2) the proportionality of the recommended sanction to the misconduct. In re Disciplinary Proceeding Against Trejo, 163 Wn.2d 701, 734, ¶ 65, 185 P.3d 1160 (2008).

a. Unanimity

The Court generally gives more weight to the Board's sanction recommendation than to that of the hearing officer. In re Disciplinary Proceeding Against Vanderveen, 166 Wn.2d 594, 615, ¶ 41, 211 P.3d 1008 (2009). Where the Board's recommendation is unanimous, it is entitled to great deference, and should be affirmed unless this Court can articulate a specific reason for rejecting it. In re Disciplinary Proceeding Against Day, 162 Wn.2d 527, 538, ¶ 23, 542, ¶ 37, 173 P.3d 915 (2007); Guarnero, 152 Wn.2d at 59. The Board's decision in this case was unanimous, and therefore entitled to great deference.

b. Proportionality

In proportionality review, the Board considers whether the recommended sanction is appropriate by comparing the case at hand with

³⁷ In re Disciplinary Proceeding Against Noble, 100 Wn.2d 88, 667 P.2d 608 (1983).

other similar cases in which the same sanction was either approved or disapproved. In re Disciplinary Proceeding Against Cohen, 150 Wn.2d 744, 763, 82 P.3d 224 (2004). Respondent asserts that disbarment is too “extreme” because his misconduct does not fit neatly into one of the four categories of misconduct described in In re Disciplinary Proceeding Against Eugster, 166 Wn.2d 293, 324-25 ¶ 53, 209 P.3d 435 (2009), “for which disbarment is *usually* imposed for a first offense” (emphasis added). But nothing in Eugster suggests that cases like the ones cited therein are the *only* ones where disbarment is appropriate. And Respondent can cite no case that is even remotely similar to this one where the sanction of disbarment was disapproved. If there are not yet, as of this writing, any reported cases in which a lawyer was disbarred for misconduct similar to Respondent’s, it is only because, with one exception, no lawyer other than Respondent has ever engaged in such an extreme and outrageous form of intentional noncooperation.³⁸

4. The Appropriate Sanction

Where there are multiple violations, the “ultimate sanction imposed should at least be consistent with the sanction for the most

³⁸ The one exception is Respondent’s mentor, Paul H. King, with whom Respondent coordinated his efforts to delay and frustrate the Association’s investigation. TR3 135-38. As of this writing, King’s appeal to this Court is pending. In re Disciplinary Proceeding Against King, Supreme Court No. 200,681-7.

serious instance of misconduct.” In re Disciplinary Proceeding Against Petersen, 120 Wn.2d 833, 854, 846 P.2d 1330 (1993) (quoting ABA Standards at 6). Taking into account the presumptive sanctions for the multiple violations established here, along with the aggravating factors and the lack of any mitigating factors, the only appropriate sanction is disbarment.

IV. CONCLUSION

Respondent’s conduct in this matter has been an appalling abuse of the system this Court has put in place for the regulation of the legal profession. Respondent has made it painfully clear that he will never accept the legitimacy of the lawyer discipline system as it applies to him. He asserts the right to disregard any subpoena, court rule, or order if he deems it “illegitimate” or “oppressive.” BF 126 at 9, 15, 17. In Respondent’s mind, a simple attempt to take his deposition under ELC 5.5 is part of a nefarious plot by “fascists” to establish “a police state in its purest form.” See TR1 28-29, 56; BF 126 at 1, 14-15; Petitioner’s [*sic*] Opening Brief at 2. In Respondent’s mind, anyone who investigates his alleged or apparent misconduct is a ruthless totalitarian of one hue or another. See TR1 28-29. In Respondent’s mind, anyone who might adjudicate any allegation of misconduct against him must be a biased co-conspirator. See, e.g., BF 7, 14, 16, 18-24, 28, 30, 33, 49, 53, 92, BF 95 at

2, BF 126 at 14, 16; TR1 5-14. And, in Respondent's mind, any proceeding in which such an allegation may be adjudicated is necessarily a "sham." BF 126 at 15.

"[A]n attorney who disregards his professional duty to cooperate with the Bar Association must be subject to severe sanctions." Clark, 99 Wn.2d at 708. Otherwise, lawyers such as Respondent will be tempted to "stonewall" to prevent serious violations coming to light. Id. Respondent not only disregards his professional duty to cooperate, he effectively denies that it exists. The legal profession cannot tolerate a lawyer such as Respondent who, for whatever reason, sets himself above the laws that govern the profession.

For the foregoing reasons, the Association respectfully requests that this Court affirm the unanimous recommendation of the Disciplinary Board.

RESPECTFULLY SUBMITTED this 1st day of February, 2010.

WASHINGTON STATE BAR ASSOCIATION



Scott G. Busby, Bar No. 17522
Disciplinary Counsel

APPENDIX A

FILED

FEB 03 2009

SCANNELL BOARD

BEFORE THE DISCIPLINARY BOARD
OF THE
WASHINGTON STATE BAR ASSOCIATION

In re

JOHN R. SCANNELL,

Lawyer

(WSBA No. 31035)

NO. 05#00113

FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND RECOMMENDED
SANCTION

Pursuant to Rule 10.13 of the Rules for Enforcement of Lawyer Conduct ("ELC"), a hearing was held before the undersigned Hearing Officer December 1, 2, 3 and 4, 2008. Respondent Scannell appeared pro se. Disciplinary Counsel Scott Busby and Linda Eide appeared for the Association. Upon the Association resting its case, Respondent moved to dismiss Counts I and III. The motion to dismiss Count I was denied. The motion to dismiss Count III was granted on the grounds that the Association's evidence could not be found to establish the elements of Count III by a clear preponderance of the evidence.

I. FINDINGS OF FACT

The Respondent was charged by Formal Complaint dated May 30, 2007, with four counts of violation of the Rules of Professional Conduct in effect at the time of the alleged

FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND RECOMMENDED
SANCTION - 1

1 misconduct. Findings of Fact, Conclusions of Law and the Recommendation with regard to
2 Counts I, II and IV are as follows:

3 1.1 Count I

4 1.1.1 Respondent is charged in Count I of the Association's Formal
5 Complaint with failing to provide his clients Paul Matthews and Stacey Matthews with a full
6 disclosure of material facts relating to his representation of both in a criminal matter and
7 failing to obtain written consent to joint representation from the clients, thereby violating
8 RCP 1.7(b).

9 1.1.2 On October 3, 2003, Paul Matthews and Stacey Matthews were
10 charged with felonies arising from common facts and circumstances. The criminal
11 Information alleged that Paul Matthews stole computer hardware from his employer, the
12 Washington State Department of Transportation, and that Stacey Matthews was complicit in
13 selling the stolen property. [Ex. A-104]

14 1.1.3 Respondent appeared for and represented both Paul Matthews and
15 Stacey Matthews. Respondent also undertook to represent Paul Matthews in a wrongful
16 termination of employment claim against the Department of Transportation. The civil case
17 representation was provided in accordance with a percentage contingent fee agreement.
18 Respondent was hopeful of obtaining the largest contingent fee of his career from the case.
19 Respondent believed that findings of guilty or pleas of guilty by either Paul or Stacey
20 Matthews would prejudice Mr. Matthews' wrongful termination claim. Respondent
21 negotiated *Alford* pleas for both to avoid prejudicing the civil case. Respondent received no

FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND RECOMMENDED
SANCTION - 2

1 fee for the criminal representation, felt he was entitled to a fee from the civil case and did not
2 want another attorney involved in the criminal case for fear it would upset his strategy for
3 maximizing the potential for recovery in the civil case.

4 1.1.4 Respondent's legal representation of Paul Matthews might have been
5 materially limited by Respondent's representation of Stacey Matthews. Respondent's
6 representation of Stacey Matthews might have been materially limited by his representation
7 of Paul Matthews. Respondent knew that joint representation may materially limit an
8 attorney's representation of one client, the other or both.

9 1.1.5 The Matthews and Respondent had some discussion about his joint
10 representation but no witness was able to recall the details of Respondent's disclosure of
11 material facts to the Matthews regarding joint representation or their pleas of guilty. Neither
12 Paul Matthews nor Stacey Matthews consented in writing to joint representation.

13 1.1.6 By his conduct, Respondent negligently exposed both his clients and
14 the administration of justice to potential harm.

15 1.2 Count II

16 1.2.1 Respondent is charged in Count II of the Association's Formal
17 Complaint with obstructing and delaying the Association's investigation of Respondent's
18 joint representation of Paul and Stacey Matthews and thereby violating RPC 3.1, 3.4(a),
19 3.4(c), 3.4(d), 8.4(d), and 8.4(l). The undersigned Hearing Officer makes the following
20 Findings of Fact with respect to Count II.

21

FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND RECOMMENDED
SANCTION - 3

1 1.2.2 By letter to Respondent dated February 16, 2005, King County
2 Superior Court Judge Helen L. Halpert questioned whether Respondent had a conflict of
3 interest due to his involvement in certain lawsuits. Judge Halpert provided a copy to the
4 Association. [Ex. R-1]. The Association proceeded with an investigation into Respondent's
5 role in those and other cases. In furtherance of that investigation, the Association, by letter
6 dated May 9, 2005, requested that Respondent provide (1) copies of any documents by which
7 Paul Matthews and/or Stacey Matthews consented to common representation and (2) copies
8 of any documents transmitted by Respondent to Paul Matthews relating to a suspected
9 business transaction between Respondent and Paul Matthews. [Ex. A-402]

10 1.2.3 Respondent requested deferral of the Association's investigation
11 pending conclusion of two civil cases – *Matthews v. Washington State Department of*
12 *Transportation* and *Paul King v. Matthews*. [Ex. A-403] The latter was one of the cases
13 identified by Judge Halpert as contributing to an apparent ongoing conflict of interest.
14 Respondent provided no reasonable basis for deferral of the Association's investigation.
15 Respondent's request for deferral was motivated by an intent to delay the Association's
16 investigation. The deferral request delayed the Association's investigation. [Ex. A-422]

17 1.2.4 On October 18, 2005, the Association served Respondent with two
18 subpoenas duces tecum for document production and an investigatory deposition. [Ex. A-
19 413] The deposition was rescheduled at Respondent's request for November 1, 2005.
20 Respondent appeared on that date but failed to produce the subpoenaed documents.

21

FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND RECOMMENDED
SANCTION – 4

1 Respondent provided no substantive testimony, instead asserting he was terminating the
2 deposition because it was "oppressive." [Ex. A-416].

3 1.2.5 On November 3, 2005 Respondent filed a Motion and Declaration to
4 Terminate and/or Limit Scope of Deposition. [Ex. A-417]. The bases for objection to the
5 deposition, insofar as it related to the Matthews investigation, included Respondent's
6 challenge to the term "business transaction" in RPC 1.8(a) and the scope of the Association's
7 authority to investigate whether Respondent had a business transaction with his client, and
8 that disciplinary counsel was engaged in a "fishing expedition." These objections were
9 frivolous and were interposed for the purpose of delaying and frustrating the Association's
10 investigation.

11 1.2.6 Respondent's conduct resulted in harm to the WSBA lawyer
12 disciplinary system in the form of increased cost and delay.

13 1.3 Count IV

14 1.3.1 Respondent is charged in Count IV of the Formal Complaint with
15 obstructing and delaying the investigation of a grievance by Kurt R. Rahrig and thereby
16 violating RPC 3.1, 3.4(a), 3.4(c), 3.4(d), 8.4(d), 8.4(j), and 8.4(l). The undersigned Hearing
17 Officer makes the following Findings of Fact with respect to Count IV.

18 1.3.2 On June 6, 2005, the Association requested that Respondent
19 reply to a grievance filed by Kurt Rahrig. After some delay, Respondent provided a written
20 response. On October 18, 2005, the Association served Respondent with a subpoena duces
21 tecum requiring his appearance at a deposition scheduled for October 26, 2005. The

FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND RECOMMENDED
SANCTION - 5

1 subpoena duces tecum was independent of that relating to the Matthews investigation. The
2 deposition was rescheduled at Respondent's request for November 1, 2005. Respondent
3 appeared on that date but failed to produce the subpoenaed documents. Respondent provided
4 no substantive testimony, instead asserting he was terminating the deposition because it was
5 "oppressive." [Ex. A-416]. See Finding of Fact 1.2.4.

6 1.3.3 Respondent objected to the Rahrig investigation subpoena duces tecum
7 and moved to terminate on the grounds that the Washington State Bar Association lacked
8 jurisdiction to investigate whether Respondent assisted another Washington attorney in
9 practicing during a period of suspension and that the Bar Association was attempting to
10 "force an attorney to testify against a client." These objections lacked a factual and legal
11 basis and were interposed for the purpose of delaying and frustrating the Association's
12 investigation of the Rahrig complaint. The jurisdictional argument was frivolous.
13 Respondent's motion was denied.

14 1.3.4 On May 11, 2006, the Association served Respondent with another
15 subpoena duces tecum requiring him to appear and produce documents at a deposition
16 scheduled for May 19, 2006, at the Association's office. On that date, approximately one and
17 one-half hours before the deposition was to begin, Respondent personally delivered to the
18 Association's office a letter stating that he refused to attend the deposition because he had not
19 been tendered "travel fees" pursuant to RCW 2.40.020. Respondent failed to appear in
20 response to the subpoena duces tecum. Respondent's failure to appear and refusal to produce
21

FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND RECOMMENDED
SANCTION - 6

1 documents was motivated not by a good faith objection to procedure but instead was
2 motivated by intent to delay and frustrate the Association's investigation.

3 1.3.5 On June 13, 2006, Respondent was served with a third subpoena duces
4 tecum requiring his appearance for a deposition and production of documents regarding the
5 Rahrig grievance. [Ex. A-431] The Association removed Respondent's previous objection
6 by tendering a check to Respondent in the amount of \$12 compensating him for the 1.3 mile
7 journey from Respondent's office to the Association's office – the location of the deposition.
8 Respondent personally appeared in response to the subpoena but refused to be sworn, refused
9 to answer questions and produced no documents. [Ex. A-433] On July 6, 2006, Respondent
10 filed a Motion and Declaration to Terminate Deposition of John Scannell, Motion to Quash
11 Subpoena. [Ex. A-434] The bases offered in support of the motion included Respondent's
12 stated assumptions that the deposition questioning would seek testimony regarding its
13 investigation of another attorney and that the Association would inquire into matters
14 protected by attorney-client privilege. Respondent further objected on the grounds that the
15 Association had not given notice of the deposition to the attorney in the other bar
16 investigation. [Ex. A-434] Respondent's failure to produce documents and refusal to testify
17 in response to the subpoena duces tecum lacked a factual basis and were motivated by intent
18 to delay and frustrate the Association's investigation.

19 1.3.6 Respondent's Motion to Terminate was denied and Respondent was
20 ordered to produce documents and appear for a deposition. [Ex. A-439]

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FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND RECOMMENDED
SANCTION – 7

1 1.3.7 Respondent thereafter filed a Motion contending that the Disciplinary
2 Board, to whom he had directed his Motion to Terminate and who had issued the Order
3 denying the Motion and compelling his cooperation, did not have jurisdiction to rule on the
4 Motion. The Motion was denied. [Ex. A-446] Respondent's Motion to Set Aside or Stay
5 Order was not motivated by a good faith objection but was motivated by intent to delay and
6 frustrate the Association's investigation. [Ex. A-441]

7 1.3.8 Respondent's deposition was scheduled and then re-scheduled for
8 September 25, 2006 to accommodate Respondent's schedule. [Ex. A-444] On September 25,
9 2006 Respondent did not appear but provided a letter to the Association stating in part:

10 I will not be attending the deposition this morning ... I would
11 like to comply but unfortunately the way this deposition is
12 being conducted raises very serious issues regarding lack of
due process as well as how the constitutionality of the rules and
how they are interpreted. [sic]

13 My intent is to raise these issues before the court system. It is
14 clear to me that attending the deposition would render any
court action moot. [Ex. A-448]

15 1.3.9 Respondent's failure to appear and give testimony and failure to
16 produce documents was motivated not by well-grounded objection to procedure but instead
17 was motivated by an intention to delay and frustrate the Association's investigation.

18 1.3.10 Not until the third day of the instant hearing did Respondent produce
19 documents, at which time Respondent advised that he did not know if additional documents
20 within the scope of the Association's subpoenas duces tecum and ELC 5.5(b) request existed
21 because he had not fully searched his computer. Whether additional documents within the

FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND RECOMMENDED
SANCTION - 8

1 scope of the subpoenas duces tecum and the ELC 5.5(b) request existed when they were
2 served remains unknown to the Association and the Hearing Officer.

3 1.4 Respondent's conduct resulted in harm to the WSBA lawyer disciplinary
4 system in the form of increased cost and delay. Respondent's failure to make full disclosure
5 of documents impaired the Association's ability to complete its investigation.

6 II. CONCLUSIONS OF LAW

7 With respect to Counts I, II and IV of the Formal Complaint, the undersigned Hearing
8 Officer makes the following Conclusions of Law.

9 Count I

10 2.1 In failing to obtain the Matthews' written consent to common representation,
11 Respondent negligently violated RPC 1.7(b).

12 Count II

13 2.2 In failing to comply with the Association's subpoenas duces tecum and in
14 failing to cooperate in the Association's investigation of Respondent's joint representation of
15 Paul Matthews and Stacey Matthews and in being motivated by intention to delay and
16 frustrate the Association's investigation, Respondent knowingly violated RPC 3.1 and
17 RPC 8.4(l).

18 Count IV

19 2.3 In failing to comply with the Association's subpoenas duces tecum and the
20 Association's investigation of Mr. Rahrig's grievance and in being motivated by intention to
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FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND RECOMMENDED
SANCTION - 9

1 delay and frustrate the Association's investigation, Respondent knowingly violated RPC
2 8.4(l).

3 **Affirmative Defenses**

4 2.4 Respondent's contentions that the WSBA investigations and the Formal
5 Complaint are in retaliation for his grievance filed against former Attorney General Christine
6 Gregoire, that he is the victim of selective enforcement by the Association, that disciplinary
7 counsel pursued the investigations and filed the Formal Complaint out of personal animus,
8 and that the Association's investigation furthers a "creeping police state" are unsupported.

9 **Presumptive Sanction**

10 2.5 Count I. The presumptive sanction for Respondent's negligent violation of
11 RPC 1.7 is reprimand. *See* ABA Standard § 4.33.

12 2.6 Count II. The presumptive sanction for Respondent's knowing violation of
13 RPC 3.1 and RPC 8.4(l) is suspension.

14 2.7 Count IV. The presumptive sanction for Respondent's knowing violation of
15 RPC 8.4(l) is suspension.

16 **Aggravating Factors**

17 2.8 In accordance with the ABA Standard § 9.22, the following aggravating
18 factors are found applicable to this case:

19 2.8.1 Respondent previously was admonished (failing to supervise a non-
20 legal assistant in violation of RPC 5.3(a) and 5.3(b)). [Ex. A-500]

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**FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND RECOMMENDED
SANCTION - 10**

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2.8.2 In acting to frustrate and delay the Association's investigation, Respondent demonstrated a selfish motive.

2.8.3 Respondent is found to have committed multiple offenses.

2.8.4 Respondent, while acknowledging his acts, has refused to acknowledge the wrongful nature of his conduct.

2.8.5 Paul Matthews and Stacey Matthews were vulnerable victims.

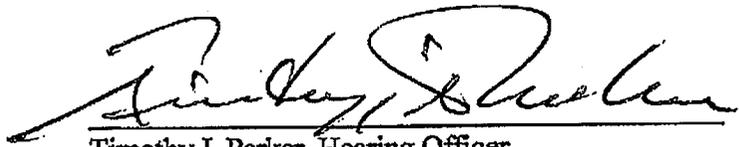
Mitigating Factors

2.9 None.

III. RECOMMENDATION

3.1 The Hearing Officer recommends that Respondent be suspended for a period of two years. The Hearing Officer further recommends that the suspension continue until Respondent provides satisfactory proof that all documents within the scope of the subpoenas duces tecum and the Association's ELC 5.5(b) request have been identified by competent and thorough search and provided to the Association.

DATED this 31 day of JANUARY 2009.



Timothy J. Parker, Hearing Officer

Carney Badley Spellman, P.S.
701 Fifth Avenue, Suite 3600
Seattle, WA 98104
Phone: 206-622-8020
Fax: 206-467-8215

CERTIFICATE OF SERVICE

I certify that I caused a copy of the FF. Conf Ho's Recommendation to be delivered to the Office of Disciplinary Counsel and to be mailed to John Scannell Respondent/Respondent's Counsel at POB 32521, Seattle, WA 98114, by Certified/first class mail, postage prepaid on the 3 day of February 2009.

Becky Clo
Clerk/Counsel to the Disciplinary Board

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDED SANCTION - 11

APPENDIX B

FILED

SEP 01 2009

DISCIPLINARY BOARD

BEFORE THE
DISCIPLINARY BOARD
OF THE
WASHINGTON STATE BAR ASSOCIATION

In re

JOHN R. SCANNELL,
Lawyer (WSBA No. 31035)

Proceeding No. 05#00113

DISCIPLINARY BOARD ORDER

This matter came before the Disciplinary Board at its July 24, 2009 meeting, on automatic review of Hearing Officer Timothy J. Parker's decision recommending a two-year suspension following a hearing.

Having heard oral argument and reviewed the materials submitted by the parties, and the applicable case law and rules,

IT IS HEREBY ORDERED THAT the Hearing Officer's Findings of Fact, Conclusions of Law and Recommendation are amended as follows¹:

2.2 In failing to comply with the Association's subpoena *duces tecum* and in failing to cooperate in the Association's investigation of Respondent's joint representation of Paul Matthews and Stacey Mathews and in being motivated by intention to delay and frustrate the

¹ The vote was unanimous. Those voting were: Anderson, Bahn, Barnes, Cena, Coppinger-Carter, Greenwich, Handmacher, Meehan, Stiles and Ureña.

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1 Association's investigation, Respondent intentionally violated RPC 3.1 and RPC 8.4(l).²

2 2.3 In failing to comply with the Association's subpoena *duces tecum* and the
3 Association's investigation of Mr. Rahrig's grievance and in being motivated by intention to
4 delay and frustrate the Association's investigation, Respondent intentionally violated RPC
5 8.4(l).³

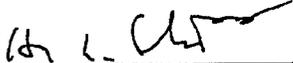
6 2.6 Count II. The presumptive sanction for Respondent's intentional violation of RPCs
7 3.1 and 8.4(l) is disbarment pursuant to ABA Standard 7.1.⁴

8 2.7 Count IV. The presumptive sanction for Respondent's intentional violation of RPC
9 8.4(l) is disbarment pursuant to ABA Standard 7.1

10 2.8.5 This aggravator is deleted. The Matthews do not fit the legal definition of
11 vulnerable victims.

12 3.1 The Board recommends that the Court disbar Mr. Scannell.

13 Dated this 1st day of September, 2009.

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H.E. Stiles, II, Acting Chair
Disciplinary Board

² Original 2.2 stated as follows: "In failing to comply with the Association's subpoena *duces tecum* and in failing to cooperate in the Association's investigation of Respondent's joint representation of Paul Matthews and Stacey Matthews and in being motivated by intention to delay and frustrate the Association's investigation, Respondent knowingly violated RPC 3.1 and RPC 8.4(l).

³ Original 2.3 stated as follows: " In failing to comply with the Association's subpoena *duces tecum* and the Association's investigation of Mr. Rahrig's grievance and in being motivated by intention to delay and frustrate the Association's investigation, Respondent knowingly violated RPC 8.4(l).

⁴ Disbarment is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system.

CERTIFICATE OF SERVICE

I certify that I caused a copy of the Disciplinary Board Order
to be delivered to the Office of Disciplinary Counsel and to be mailed
to Spencer Scamner, Respondent/Respondent's Counsel
PO BOX 2284 Seattle, WA 98101, for certified first class mail
postage prepaid on the September day of 2009

[Signature]
Clerk/Counsel to the Disciplinary Board

FILED

SEP 25 2009

DISCIPLINARY BOARD

BEFORE THE
DISCIPLINARY BOARD
OF THE
WASHINGTON STATE BAR ASSOCIATION

In re

JOHN R. SCANNELL,
Lawyer (WSBA No. 31035)

Proceeding No. 05#00113

**CORRECTED DISCIPLINARY BOARD
ORDER**

This matter came before the Disciplinary Board at its July 24, 2009 meeting, on automatic review of Hearing Officer Timothy J. Parker's decision recommending a two-year suspension following a hearing.

Having reviewed the materials submitted by the parties, and the applicable case law and rules,¹

IT IS HEREBY ORDERED THAT the Hearing Officer's Findings of Fact, Conclusions of Law and Recommendation are amended as follows²:

2.2 In failing to comply with the Association's subpoena *duces tecum* and in failing to cooperate in the Association's investigation of Respondent's joint representation of Paul Mathews and Stacey Mathews and in being motivated by intention to delay and frustrate the Association's investigation, Respondent intentionally violated RPC 3.1 and RPC 8.4(1).³

¹ This correction deletes the erroneous statement that the Board heard oral argument on this matter. The Board did not hear oral argument on this matter. The statement in the original order regarding oral argument was a clerical error.

² The vote was unanimous. Those voting were: Anderson, Bahn, Barnes, Cena, Coppinger-Carter, Greenwich, Handmacher, Meehan, Stiles and Ureña.

³ Original 2.2 stated as follows: "In failing to comply with the Association's subpoena *duces tecum* and in failing to cooperate in the Association's investigation of Respondent's joint representation of Paul Mathews and Stacey

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1 2.3 In failing to comply with the Association's subpoena *duces tecum* and the
2 Association's investigation of Mr. Rahrig's grievance and in being motivated by intention to
3 delay and frustrate the Association's investigation, Respondent intentionally violated RPC
4 8.4(l).⁴

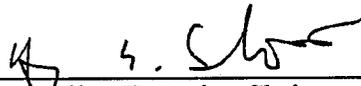
5 2.6 Count II. The presumptive sanction for Respondent's intentional violation of RPCs
6 3.1 and 8.4(l) is disbarment pursuant to ABA Standard 7.1.⁵

7 2.7 Count IV. The presumptive sanction for Respondent's intentional violation of RPC
8 8.4(l) is disbarment pursuant to ABA Standard 7.1

9 2.8.5 This aggravator is deleted. The Matthews do not fit the legal definition of
10 vulnerable victims.

11 3.1 The Board recommends that the Court disbar Mr. Scannell.

12 Dated this 25th day of September, 2009.

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H.E. Stiles, II, Acting Chair
Disciplinary Board

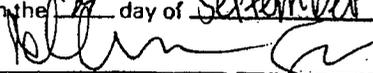
18 Matthews and in being motivated by intention to delay and frustrate the Association's investigation, Respondent
19 knowingly violated RPC 3.1 and RPC 8.4(l).

20 ⁴ Original 2.3 stated as follows: " In failing to comply with the Association's subpoena *duces tecum* and the
21 Association's investigation of Mr. Rahrig's grievance and in being motivated by intention to delay and frustrate
22 the Association's investigation, Respondent knowingly violated RPC 8.4(l).

23 ⁵ Disbarment is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty
24 owed as a professional with the intent to obtain a benefit for the lawyer or another, and causes serious or
25 potentially serious injury to a client, the public, or the legal system.

CERTIFICATE OF SERVICE

I certify that I caused a copy of the Corrected Disciplinary Board Order
to be delivered to the Office of Disciplinary Counsel and to be mailed
to John Scamler Respondent/Respondent's Counsel
at PO Box 254 Lehigh, WA 98024 by Certified/First Class mail
postage prepaid on the 29 day of September 2004


Clerk/Counsel to the Disciplinary Board

APPENDIX C

APPENDIX C

**RULES OF PROFESSIONAL CONDUCT (RPC)
AND
RULES FOR ENFORCEMENT OF LAWYER CONDUCT (ELC)**

**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 3.1 MERITORIOUS CLAIMS
AND CONTENTIONS**

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

RPC 3.4 FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not:

- (a) Unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;
- (b) Falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;
- (c) Knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;
- (d) In pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;
- (e) In trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, or assert personal knowledge of facts in issue except when testifying as a witness; or
- (f) In trial, state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused, but the lawyer may argue, on his or her analysis of the evidence, for any position or conclusion with respect to the matters stated herein.

RPC 5.5 UNAUTHORIZED PRACTICE OF LAW

A lawyer shall not:

- (a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction;
- (b) assist a person who is not a member of the Bar in the performance of activity that constitutes the unauthorized practice of law;
- (c) permit his or her name to be used as a lawyer by another person who is not a lawyer authorized to practice law in the state of Washington;
- (d) engage in any of the following with an individual who is a disbarred or suspended lawyer or who has resigned in lieu of disbarment:
 - (1) practice law with or in cooperation with such an individual;

- (2) maintain an office for the practice of law in a room or office occupied or used in whole or in part by such an individual;
- (3) permit such an individual to use the lawyer's name for the practice of law;
- (4) practice law for or on behalf of such an individual;
- (5) practice law under any arrangement or understanding for division of fees or compensation of any kind with such an individual; or
- (e) engage in the practice of law while on inactive status, or while suspended from the practice of law for any cause.

RPC 8.4 MISCONDUCT

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the rules of professional conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official;
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law;
- (g) Commit a discriminatory act prohibited by state law on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual orientation, or marital status, where the act of discrimination is committed in connection with the lawyer's professional activities. In addition, it is professional misconduct to commit a discriminatory act on the basis of sexual orientation if such an act would violate this rule when committed on the basis of sex, race, age, creed, religion, color, national origin, disability or marital status. This rule shall not limit the ability of a lawyer to accept, decline, or withdraw from the representation of a client in accordance with RPC 1.15;
- (h) In representing a client, engage in conduct that is prejudicial to the administration of justice toward judges, other parties and/or their counsel, witnesses and/or their counsel, jurors, or court personnel or officers, that a reasonable person would interpret as manifesting prejudice or bias on the basis of sex, race, age, creed, religion, color, national

origin, disability, sexual orientation, or marital status. This rule does not restrict a lawyer from representing a client by advancing material factual or legal issues or arguments;

(i) Commit any act involving moral turpitude, or corruption, or any unjustified act of assault or other act which reflects disregard for the rule of law, whether the same be committed in the course of his or her conduct as a lawyer, or otherwise, and whether the same constitutes a felony or misdemeanor or not; and if the act constitutes a felony or misdemeanor, conviction thereof in a criminal proceeding shall not be a condition precedent to disciplinary action, nor shall acquittal or dismissal thereof preclude the commencement of a disciplinary proceeding;

(j) Willfully disobey or violate a court order directing him or her to do or cease doing an act which he or she ought in good faith to do or forbear;

(k) Violate his or her oath as an attorney;

(l) Violate a duty or sanction imposed by or under the Rules for Enforcement of Lawyer Conduct in connection with a disciplinary matter; including, but not limited to, the duties catalogued at ELC 1.5;

(m) Violate the Code of Judicial Conduct; or

(n) Engage in conduct demonstrating unfitness to practice law.

ELC 2.12 EXONERATION FROM LIABILITY

(a) Association and Its Agents. No cause of action accrues in favor of a respondent lawyer or any other person, arising from an investigation or proceeding under these rules, against the Association, or its officers or agents (including but not limited to its staff, members of the Board of Governors, the Disciplinary Board, review committees, and hearing panels; hearing officers; disciplinary counsel; adjunct investigative counsel; adjunct review committee members; lawyers appointed under rule 7.7, 8.2(c)(2), or 8.3(d)(3); probation officers appointed under rule 13.8; or any other individual acting under authority of these rules) provided only that the Association or individual acted in good faith. The burden of proving bad faith in this context is on the person asserting it. The Association must defend any action against an officer or agent of the Association for actions taken in good faith under these rules, bear the costs of that defense, and indemnify the officer or agent against any such judgment.

(b) Grievants and Witnesses. Communications to the Association, Board of Governors, Disciplinary Board, review committee, hearing officer or panel, disciplinary counsel, adjunct investigative counsel, Association staff, or any other individual acting under authority of these rules, are absolutely privileged, and no lawsuit predicated thereon may be instituted against any grievant, witness, or other person providing information.

ELC 5.3 INVESTIGATION OF GRIEVANCE

(a) Review and Investigation. Disciplinary counsel must review and may investigate any alleged or apparent misconduct by a lawyer and any alleged or apparent incapacity of a lawyer to practice law, whether disciplinary counsel learns of the misconduct by grievance or otherwise. If there is no grievant, the Association may open a grievance in the Association's name.

(b) Adjunct Investigative Counsel. Disciplinary counsel may assign a case to adjunct investigative counsel for investigation. Disciplinary counsel assists in those investigations and monitors the performance of adjunct investigative counsel. On receiving a report of an investigation by an adjunct investigative counsel, disciplinary counsel may, as appears appropriate, request or conduct additional investigation or take any action under these rules.

(c) Deferral by Disciplinary Counsel.

(1) Disciplinary counsel may defer an investigation into alleged acts of misconduct by a lawyer:

(A) if it appears that the allegations are related to pending civil or criminal litigation;

(B) if it appears that the respondent lawyer is physically or mentally unable to respond to the investigation; or

(C) for other good cause, if it appears that the deferral will not endanger the public.

(2) Disciplinary counsel must inform the grievant and respondent of a decision to defer or a denial of a request to defer and of the procedure for requesting review. A grievant or respondent may request review of a decision on deferral. If review is requested, disciplinary counsel refers the matter to a review committee for reconsideration of the decision on deferral. To request review, the grievant or respondent must deliver or deposit in the mail a request for review to the Association no later than 45 days after the Association mails the notice regarding deferral.

(d) Dismissal of Grievance Not Required. None of the following alone requires dismissal of a grievance: the unwillingness of a grievant to continue the grievance, the withdrawal of the grievance, a compromise between the grievant and the respondent, or restitution by the respondent.

(e) Duty To Furnish Prompt Response. Any lawyer must promptly respond to any inquiry or request made under these rules for information relevant to grievances or matters under investigation. Upon inquiry or request, any lawyer must:

- (1) furnish in writing, or orally if requested, a full and complete response to inquiries and questions;
- (2) permit inspection and copying of the lawyer's business records, files, and accounts;
- (3) furnish copies of requested records, files, and accounts;
- (4) furnish written releases or authorizations if needed to obtain documents or information from third parties; and
- (5) comply with discovery conducted under rule 5.5.

(f) Failure To Cooperate.

(1) *Noncooperation Deposition.* If a lawyer has not complied with any request made under section (e) or rule 2.13(d) for more than 30 days, disciplinary counsel may notify the lawyer that failure to comply within ten days may result in the lawyer's deposition or subject the lawyer to interim suspension under rule 7.2. Ten days after this notice, disciplinary counsel may serve the lawyer with a subpoena for a deposition. Any deposition conducted after the ten-day period and necessitated by the lawyer's continued failure to cooperate may be conducted at any place in Washington State.

(2) *Costs and Expenses.*

(A) Regardless of the underlying grievance's ultimate disposition, a lawyer who has been served with a subpoena under this rule is liable for the actual costs of the deposition, including but not limited to service fees, court reporter fees, travel expenses, and the cost of transcribing the deposition, if ordered by disciplinary counsel. In addition, a lawyer who has been served with a subpoena for a deposition under this rule is liable for a reasonable attorney fee of \$500.

(B) The procedure for assessing costs and expenses is as follows:

- (i) Disciplinary counsel applies to a review committee by itemizing the cost and expenses and stating the reasons for the deposition.
- (ii) The lawyer has ten days to respond to disciplinary counsel's application.
- (iii) The review committee by order assesses appropriate costs and expenses.
- (iv) Rule 13.9(e) governs Board review of the review committee order.

(3) *Grounds for Discipline.* A lawyer's failure to cooperate fully and promptly with an investigation as required by section (e) or rule 2.13(d) is also grounds for discipline.

ELC 5.5 DISCOVERY BEFORE FORMAL COMPLAINT

(a) Procedure. Before filing a formal complaint, disciplinary counsel may depose either a respondent lawyer or a witness, or issue requests for admission to the respondent. To the extent possible, CR 30 or 31 applies to depositions under this rule. CR 36 governs requests for admission.

(b) Subpoenas for Depositions. Disciplinary counsel may issue subpoenas to compel the respondent's or a witness's attendance, or the production of books, documents, or other evidence, at a deposition. Subpoenas must be served as in civil cases in the superior court and may be enforced under rule 4.7.

(c) Cooperation. Every lawyer must promptly respond to discovery requests from disciplinary counsel.

ELC 14.2 LAWYER TO DISCONTINUE PRACTICE

A disbarred or suspended lawyer, or a lawyer transferred to disability inactive status, must not practice law after the effective date of the disbarment, suspension, or transfer to disability inactive status, and also must take whatever steps necessary to avoid any reasonable likelihood that anyone will rely on him or her as a lawyer authorized to practice law. This rule does not preclude a disbarred or suspended lawyer, or a lawyer transferred to disability inactive status, from disbursing assets held by the lawyer to clients or other persons or from providing information on the facts and the lawyer's theory of a case and its status to a succeeding lawyer, provided that the suspended or disbarred lawyer not be involved in any discussion regarding matters occurring after the date of the suspension or disbarment. The lawyer must provide this information on request and without charge.

APPENDIX D

APPENDIX D

AMERICAN BAR ASSOCIATION STANDARDS FOR IMPOSING LAWYER SANCTIONS

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.

6.2 Abuse of the Legal Process

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 failure to expedite litigation or bring a meritorious claim, or failure to obey any obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists:

- 6.21 Disbarment is generally appropriate when a lawyer knowingly violates a court order or rule with the intent to obtain a benefit for the lawyer or another, and causes serious injury or potentially serious injury to a party or causes serious or potentially serious interference with a legal proceeding.
- 6.22 Suspension is generally appropriate when a lawyer knows that he or she is violating a court order or rule, and causes injury or potential injury to a client or a party, or causes interference or potential interference with a legal proceeding.
- 6.23 Reprimand is generally appropriate when a lawyer negligently fails to comply with a court order or rule, and causes injury or potential injury to a client or other party, or causes interference or potential interference with a legal proceeding.
- 6.24 Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence in complying with a court order or rule, and causes little or no actual or potential injury to a party, or causes little or no actual or potential interference with a legal proceeding.

7.0 Violations of Duties Owed as a Professional

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 false or misleading communication about the lawyer or the lawyer's services, improper communication of fields of practice, improper solicitation of professional employment from a prospective client, unreasonable or improper fees, unauthorized practice of law, improper withdrawal from representation, or failure to report professional misconduct.

- 7.1 Disbarment is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system.
- 7.2 Suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.
- 7.3 Reprimand is generally appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.
- 7.4 Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence that is a violation of a duty owed as a professional, and causes little or no actual or potential injury to a client, the public, or the legal system.