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64-10: At the direction of the assignment justice, the motion to allow submission of supplemental authority is passed to the merits for consideration by the court.
Susan Carlson
Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In Re:

JOHN R. SCANNELL,

Lawyer

Bar No. 31035

Supreme Court No. 200,744

STATEMENT OF SUPPLEMENTAL
AUTHORITY

MOTION TO ALLOW SUBMISSION
OF SUPPLEMENTAL AUTHORITY

2007449

The undersigned attorney moves the court to allow a statement of supplemental authority submitted to the record. The reason is that during oral argument Disciplinary Counsel raised new arguments. This occurred after the accused lawyer had argued that a party abandons an issue on appeal by failing to brief it citing State v. Wood, 89 Wn.2d 97, 99, 569 P.2d 1148 (1977); Talps v. Arreola, 83 Wn.2d 655, 657, 521 P.2d 206 (1974). see also In re Disciplinary Proceeding of Kennedy, 80 Wn.2d 222, 236, 492 P.2d 1364 (1972) ("Points not argued and discussed in the opening brief are deemed abandoned and are not open to consideration on their merits."). If the court is not going to rule that Disciplinary Counsel has now abandoned these issues, then the attorney respectfully requests this court to allow him to address these new arguments that were not raised in briefs.

MOTION TO ALLOW SUBMISSION OF
SUPPLEMENTAL AUTHORITY - PAGE 1

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1. ACCUSED ATTORNEY'S DISCIPLINE IS HIGHLY DISPROPORTIONATE TO ANY DISCIPLINE METED OUT IN EARLIER CASE IN RE CLARK.

In response to a question at 18:50, Disciplinary Counsel cited In re Clark, 99 Wn.2d 702, 663 P.2d 1339 (1983) as the only other case he knew of where an accused attorney was acquitted of the underlying charged but was nevertheless disciplined for obstruction. He is quoted as saying that cooperation was nothing like this case. He is correct, but for different reasons.

In re Clark, 99 Wn.2d 702, 663 P.2d 1339 (1983) the attorney had received a previous admonition for not cooperating. In the present case, the accused attorney was not previously admonished for non-cooperation. In Clark, the attorney did not provide any answers to letters sent by disciplinary counsel. That is unlike the case here, where the accused attorney fully answered all letters requesting information. As a result of not responding in Clark, Disciplinary Counsel had to schedule a non-cooperation deposition which he clearly had a right to under rules that existed at that time. Here, Disciplinary Counsel simply schedules a deposition where he claims that he does not have to establish anything, apparently contending that he has an unlimited right to engage in any fishing expedition his curiosity requires for any purpose which could include harassing and annoying.

In re Clark, the attorney did not honor the subpoena and took no legal action such as filing for a protective order to stay the subpoena. Here, the accused attorney had followed procedures and properly stayed the deposition by filing a motion to terminate the deposition under CR 30 which was the only method of doing so.

In Clark, the Bar Association then gave him a second chance to obey the subpoena by serving another one. Again, he filed for no protective order and sent his wife to the deposition instead of himself.

Here, after the a preliminary ruling that should have had no effect, the undersigned attorney volunteered to be deposed in the Matthews case. Only in the Rahrig case did he

continue to press for a valid ruling, because he was faced with the Hobson's choice of either producing attorney client privileged information or being held in contempt.

Disciplinary Counsel claims that Clark didn't precipitate a year long legal process which delayed the investigation. However, Mr. Clark never contended, nor was there any question as to the unconstitutional nature of the process as there was here, with the issue of attorney client privilege at stake. Furthermore, if Disciplinary Counsel was truly concerned about delay, he simply could have gone into Superior Court and obtained a court order under ELC 4.4. This would have been a very simple, inexpensive process, for which he could have obtained fees under CR 11, if the attorneys reasons for refusing were frivolous as he contends. Disciplinary Counsel would not use that procedure for two reasons. One it provided for a show cause hearing, and the attorney would not be disciplined. until after ruling upon a show cause hearing and if the ruling was adverse he would be given an opportunity to bring himself into compliance after the ruling¹. Second, he knew a Superior Court Judge would be neutral and would rule on the constitutional issues of this case.

It would be far easier, in Disciplinary Counsel's view, to have his issues heard where guilt had already been predetermined, by a court he already had an opportunity to cozy up to with years of ex parte contacts and common counsel, who must have been worried about covering up both their misconduct and Disciplinary Counsel's, and which they could unilaterally decide there was no grace period and had already decided that the accused attorney was required to produce an unfair discovery request that required abrogation of Mr. King's attorney client privileges as well as an onerous discovery demand that was far beyond what any reasonable court would require.

¹ ELC 4.4

Clark was recommended for a suspension of twenty days, which was bumped up to 60 days by the Supreme Court for an attorney who had, not questioned any of the findings regarding his guilt. The Supreme Court termed that suspension "significant". Here, the accused attorney is facing disbarment because he would not submit to harassment by Disciplinary Counsel who had no justification for his actions or onerous subpoenas of which 7 months have already been served, and will probably spend another year while the court makes its decision.

2. ACCUSED ATTORNEY HAD EVERY REASON TO BELIEVE THAT DISCIPLINARY COUNSEL WAS SEEKING ATTORNEY CLIENT PRIVILEGED INFORMATION.

For the first time, Disciplinary Counsel now contends that he had no intention of asking attorney client privileged information and in fact claims he questioned about Matthews, not Rahrig.

However, the accused attorney had no way to determine what Disciplinary Counsel's intentions were. As a matter of fact, by looking at Exhibit A-433, one could easily conclude that Disciplinary Counsel was seeking the information on Rahrig, and not Matthews. At no point in the deposition does he state that he is deposing on Matthew issues. Look at the order of the subpoenas listed as exhibits. Exhibit 1 is the Rahrig subpoena. Exhibit 2 is the Matthew Subpoena. The Matthew subpoena has a lower case number. Why would he list them in that order if he did not intend to depose on the Rahrig subpoena first?

3. DISCIPLINARY COUNSEL'S ARGUMENT THAT HE MIGHT HAVE PROVEN THE CHARGE IF THE ACCUSED ATTORNEY ATTENDED THE DEPOSITION IS NOT CREDIBLE.

At 22:23 Disciplinary Counsel made the following argument.

I also want to make the point that this is a case in which Mr. Scannell's efforts to stonewall the Association's investigation with the Rahrig matter were successful. We never did get to take his deposition. He never cooperated. We spent years trying to take his deposition. We don't know, what the result would have been had he not stonewalled, had he cooperated.

The reality is we do know what would have happened. In fact, the lawyer spent two days on the stand, subjected to cross examination, and produced all relevant documents. Disciplinary Counsel is now upset because he could not prove his conspiracy theory, which the hearing officer roundly rejected, without the accused attorney having put on a single witness in rebuttal. Disciplinary Counsel cannot point to a single lead that was foreclosed upon by not taking the deposition earlier. The only thing not produced was of course, the attorney client privileged information. If Disciplinary Counsel felt he was entitled to this information why didn't he simply enforce the subpoena? It took the first Chairman of the Disciplinary Board over six months to rule on a simple motion to terminate a deposition. How is that the attorney's fault? Disciplinary Counsel, had his subpoena been legitimate, could have had it enforced in King County Superior Court in one week. The fact that he chose a method where he chose to have it litigated in a biased forum, is not the fault of the accused attorney.

4. DISCIPLINARY COUNSEL STILL CANNOT JUSTIFY HIS ACTIONS GIVEN THIS COURT'S HOLDING IN STATE V. MILES.

At 28:45, for the first time, Disciplinary Counsel attempts to articulate a defense to this court's holding in State v. Miles, 156 P.3d 864, 160 Wash.2d 236 (Wash. 04/26/2007).

With respect to State v. Miles, Miles holds that a person has a constitutionally protected privacy interest in bank records and that a subpoena by the Department of Financial Institutions (DFI) for the bank records is outside the regulatory authority of the DFI and is invalid. Now the opinion points out that DFI would have regulatory authority over licensed professionals and it also points out that DFI could have required of Mr. Miles who is not a licensed professional to submit to a deposition. There is absolutely nothing in State v. Miles to suggest that bar association does have under the court's authority, investigative authority over licensed lawyers could require Mr. Scannell to submit to a deposition.

Disciplinary Counsel misstates the holding in State v. Miles and its application here. The opinion states nothing about a distinction of having regulatory authority over licensed professionals as opposed to those that are not licensed. What happened in State v. Miles is that

the court ruled that a subpoena directed to a third party, without notice to the target of the deposition violated Article I, Section 7 of the Washington State Constitution because the subpoena had asked for private records that were outside of DFI's regulatory authority as the subpoena included private bank records rather than just records connected to the business. The court said that because Mr. Miles was not given notice, he could not count on the bank to argue his position because they were not required to litigate his privacy interests. The court ruled the agency needed to get a warrant, court authorized subpoena, or narrow the focus of their subpoena to include only business records that were not private.

The exact same thing is at issue here. Mr. King obviously has a privacy interest in his attorney client privileged information. In addition, under Civil Rule 30, Mr. King would have had a right to terminate a deposition that is being conducted for the purpose of harassing him by engaging in a fishing expedition. How can Mr. King assert those rights when he is not given notice? Mr. King cannot count on Mr. Scannell to protect those rights for two reasons. First, the lawyer cannot assert attorney client privilege because of ELC 5.4(b). Second, without Mr. King present, and without any knowledge of what the case is about, he runs the risk of being held in contempt if he guesses incorrectly that some questions are not related to the investigation.

5. DISCIPLINARY COUNSEL PRESENTS NO CREDIBLE ARGUMENT THAT THE CHAIRMAN OF THE BOARD CAN RULE ON A MOTION TO TERMINATE A DEPOSITION CONDUCTED UNDER ELC 5.5.

At 30:55, Disciplinary Counsel presents for the first time, his argument as to why the Chairman of the Disciplinary Board can rule on its behalf without a quorum present:

In any case, there is nothing in the ELC that requires the entire board to convene and the board by the way only meets every couple of months. For the entire board to convene to rule on a motion for a protective order. In fact in Title 3 of the ELC there is a rule that provides the chair can rule on motions for protection orders; there's another rule that provides a chair can rule on interlocutory matters and to require the entire board to convene to rule on a motion like the three

motions Mr. Scannell filed would do nothing more than encourage more delay and assist Mr. Scannell in stonewalling.

It is easy to see why Disciplinary Counsel decided to raise this defense in oral argument rather than written because it is so easily defeated.

First, ELC 5.5 requires the Disciplinary Board to act on a motion to terminate the deposition because it states that CR 30 should be followed "to the extent possible". CR 30(d) states that the motion to terminate is brought "in the court in which the matter is pending." Here, the court in which the matter is pending would be the Disciplinary Board itself, not its chairman, as the chairman does not have authority unless he or she has been specifically designated. There is nothing in the rules where this delegation appears.

Disciplinary Counsel's reference to protective orders in Title 3 is not applicable. The only mention of protective orders in Title 3 is ELC 3.2 which has no applicability here. That rule, is referring only to protecting confidential information from the public, not as a tool to protect discovery made under ELC 5.5. Here, there is no need to file a protective order on keeping the deposition confidential to the public, because it is a pre-charging deposition, which is already protected under ELC 3.2(a).

Also, notice that Disciplinary Counsel's argument that the attorney should not be able to stay enforcement until the board meets, does not hold for the ELC 3.2 he refers to. On the contrary, the rule specifically states that no enforcement action can be had until the board rules.

Finally, Disciplinary Counsel appears to refer to ELC 10.9 in claiming that the chairman can rule on an interim review. However, as pointed out in opening brief, Disciplinary Counsel cannot have it both ways. If he claims that the Chief Hearing Officer cannot rule on the motion to terminate in ELC 10.8, because charges have not been filed, then similarly, he cannot argue that the chairman can unilaterally throw out a motion under ELC 10.9 for the same reason.

6. DISCIPLINARY COUNSEL MISLEADS THE COURT AS TO WHETHER ATTORNEY CLIENT PRIVILEGED INFORMATION WAS SOUGHT IN THE RAHRIG CASE.

At 32.25, Disciplinary Counsel alleges the following:

I want to make it clear that Mr. Scannell was never representing Mr. King in the Disciplinary matter involving Mr. Rahrig or the investigation of Mr. King involving Mr. Rahrig. Mr. Scannell apparently represented Mr. King in a reciprocal discipline matter that was concluded in Spring of 2005, when the March 9, 2005 suspension order was entered. There's no reason to suggest that the Association was interested in inquiring to Mr. Scannell's attorney client conversations in that matter, which was over and done with. Mr. Scannell, apparently the genesis of this concern was some opening remarks in the first attempt to take his deposition which related to the Matthews matter, in which Disciplinary Counsel cited a rule, ELC 5.5, that pertains to the non-assertion of attorney client privilege. Mr. Scannell took exception to that. He, on the other hand, never contended that he couldn't inquire into his attorney client communications with Mr. Matthews, so as it is relevant to the issue as to whether he advised Mr. Matthews and Mrs. Matthews with respect to the potential for conflict. That's the only matter the Association was ever interested in inquiring into. There has never been any question asked at any time of Mr. Scannell pertaining to his communication to Mr. King about any matter in which he represented Mr. King, I guessing in respect to that reciprocal discipline matter. He also represented Mr. King in some collection cases in which we had no interest whatsoever..

While it may be technically true that the Bar Association never asked any questions about attorney client privileged information, they had subpoenaed attorney-client information. The subpoena served upon accused attorney asked for "all documents in your possession or control, including email documents and other electronic documents relating to Kurt Rahrig and/or **Kurt Rahrig v. Alcatel USA Marketing et al.**"

These documents would have included 18-20 attorney client privileged documents, (Tr. Dec. 3, p. 13:1-10) including documents where the accused attorney was acting as King's attorney.(Tr. Dec. 3 p. 13:11-25). It included emails where another attorney acted as Mr. Scannell's attorney. (Dec. 3, Tr. P. 14: 1-7) It included emails where Mr. Scannell and Mr. King conferred with each other concerning writing various pleadings. (Dec. 3, Tr. 15:6 to Tr. It also

included a large number of electronic pleadings that were simply rewrites of other pleadings. (Tr. Dec. 3, p.6:12 through 7:3)

At the hearing, Disciplinary Counsel appeared to concede that the original request was overbroad in that Disciplinary Counsel was not seeking actual electronic copies (Tr. Dec. 3: p. 7:4-7) or pleadings including rewrites (Tr. Dec. 3: p. 7:8-9). However, the original subpoena required the petitioner to either produce the electronic documents (which could have included attorney client information in the metadata) or thousands of pages of rewrites of various pleadings that the Disciplinary Counsel already had the final copies.

The charged attorney provided these to the hearing officer, although the hearing officer apparently never did rule on their admissibility on the record. The accused attorney would like to correct his comments in this regard because he was under the impression that the rejection of these exhibits were on the record.

Although the record shows that the hearing officer promised a ruling on the emails after the first recess (Tr. Dec. 3: p. 3), there apparently is no record of the ruling having been made at either that point or at any other break (See Tr. Dec. 3, p.58:22, p. 95:3-5, 191:17, Dec. 4, p. 54:24, p.91:24, p. 122:3). However, the record appears to indicate that the alleged attorney client information was never allowed in as there are no exhibits entered that resembled the documents the accused attorney was referring.

CONCLUSION

The court should allow this statement of supplemental authority. The accused attorney has complained throughout these proceedings that Disciplinary Counsel has not addressed the major issues of this case. With respect to the ex parte contacts of common counsel, and well as the obvious bias of the Disciplinary Board, he still has not. However, Disciplinary Counsel has raised a number of issues in oral argument. If this is allowed, then the accused counsel must be allowed to refute the arguments he should have been allowed to address in writing in a reply

brief. To say otherwise would allow Disciplinary Counsel to steamroll these proceedings so that the most important issues are never thoroughly addressed.

Dated this 28th day of May, 2010.

/S/
John Scannell, WSBA #31035

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In Re:

JOHN R. SCANNELL,

Lawyer

Bar No. 31035

Supreme Court No. 200,744

**EXCERPTS FROM ORAL
ARGUMENT**

Transcript of May 20th, 2010, 1:30 p.m.

Judges: Washington State Supreme Court

Attorney for Bar Association: Scott Busby

Attorney for John Scannell: pro se

At 22:23:

Busby: I also want to make the point that this is a case in which Mr. Scannell's efforts to stonewall the Association's investigation with the Rahrig matter were successful. We never did get to take his deposition. He never cooperated. We spent years trying to take his deposition. We don't know, what the result would have been had he not stonewalled, had he cooperated.

At 28:45:

Busby: With respect to State v. Miles, Miles holds that a person has a constitutionally protected privacy interest to bank records and that a subpoena by the Department of Financial Institutions

(DFI) for the bank records is outside the regulatory authority of the DFI is invalid. Now the opinion points out that DFI would have regulatory authority over licensed professionals and it also points out that DFI could have required of Mr. Miles who is not a licensed professional to submit to a deposition. There is absolutely nothing in State v. Miles to suggest that bar association does have under the court's authority, investigative authority over licensed lawyers could require Mr. Scannell to submit to a deposition.

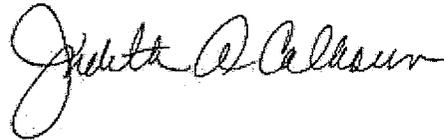
At 32.25:

Busby: I want to make it clear that Mr. Scannell was never representing Mr. King in the Disciplinary matter involving Mr. Rahrig or the investigation of Mr. King involving Mr. Rahrig. Mr. Scannell apparently represented Mr. King in a reciprocal discipline matter that was concluded in Spring of 2005, when the March 9, 2005 suspension order was entered. There's no reason to suggest that the Association was interested in inquiring to Mr. Scannell's attorney client conversations in that matter, which was over and done with. Mr. Scannell, apparently the genesis of this concern was some opening remarks in the first attempt to take his deposition which related to the Matthews matter, in which Disciplinary Counsel cited a rule, ELC 5.5, that pertains to the non-assertion of attorney client privilege. Mr. Scannell took exception to that. He, on the other hand, never contended that he couldn't inquire into his attorney client communications with Mr. Matthews, so as it is relevant to the issue as to whether he advised Mr. Matthews and Mrs. Matthews with respect to the potential for conflict. That's the only matter the Association was ever interested in inquiring into. There has never been any question asked at any time of Mr. Scannell pertaining to his communication to Mr. King about any matter in which he represented Mr. King, I guessing in respect to that reciprocal discipline matter. He also represented Mr. King in some collection cases in which we had no interest whatsoever..

Certification

I certify under penalty of perjury under the laws of the State of Washington that the foregoing transcript excerpts of May 20th, 2010 in No. 200,744 In re John Scannell are a true and accurate transcripts.

Dated this 28th day of May, 2010,



Judith Calhoun

I hereby certify that on May 28th, 2010, I caused to be served a copy of this document by the method indicated below and addressed to the following:

Scott Busby
1325 Fourth Ave., Ste. 600
Seattle, WA, 98101-2539

- Hand Delivered
- U.S. Mail first class postage prepaid
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By: John Scannell

time of completion : _____

/s/
John Scannell, WSBA #31035
Attorney For John R. Scannell

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Subject: RE: In re John R. Scannell, Supreme Court No. 200,744-9

Rec. 6-1-10

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

From: John Scannell [mailto:Zamboni_John@actionlaw.net]
Sent: Friday, May 28, 2010 5:10 PM
To: Scott Busby; OFFICE RECEPTIONIST, CLERK
Cc: Chandler, Desiree R.
Subject: RE: In re John R. Scannell, Supreme Court No. 200,744-9

From: Scott Busby [mailto:ScottB@wsba.org]
Sent: Tuesday, March 09, 2010 10:35 AM
To: supreme@courts.wa.gov
Cc: John Scannell; Desiree.Chandler@courts.wa.gov
Subject: In re John R. Scannell, Supreme Court No. 200,744-9

Attached for filing is the Association's Answer to Respondent's Motion to Allow Additional Evidence. I would appreciate receiving confirmation that this document has been received.

Thank you,
Scott G. Busby

Scott G. Busby, Disciplinary Counsel
Washington State Bar Association
1325 4th Avenue, Suite 600
Seattle, WA 98101-2539
Phone: (206) 733-5998
Fax: (206) 727-8325
scottb@wsba.org

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IN THE SUPREME COURT BY RONALD R. CARPENTER
OF THE STATE OF WASHINGTON

CLERK

In re

John R. Scannell,

Lawyer (Bar No. 7370).

Supreme Court No. 200,744-9

ASSOCIATION'S ANSWER TO
MOTION RE "SUPPLEMENTAL
AUTHORITY"

1. IDENTITY OF ANSWERING PARTY

The Washington State Bar Association submits this answer to Respondent John R. Scannell's "Motion to Allow Submission of Supplemental Authority" filed June 1, 2010.

2. STATEMENT OF RELIEF SOUGHT

The Association respectfully requests that Respondent's motion be denied and that Respondent's "Statement of Supplemental Authority" be rejected for filing.

3. FACTS RELEVANT TO MOTION

This appeal was argued on May 20, 2010, after Respondent submitted an "Opening Brief," a "Revised Opening Brief," a "Second Revised Opening Brief," and a 71-page "Third Revised Opening Brief." On June 1, 2010, Respondent submitted yet another brief that he calls a "Statement of Supplemental Authority."

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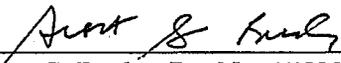
4. GROUNDS FOR RELIEF AND ARGUMENT

Under RAP 10.8, a statement of additional authorities “should not contain argument.” Respondent’s so-called “Statement of Supplemental Authority” contains ten pages of argument. It is not a “statement of additional authorities;” it is yet another brief. As such, it is not permitted by RAP 10.8. The Association respectfully requests that Respondent’s motion be denied and that his “Statement of Supplemental Authority” be rejected for filing.

DATED THIS 2nd day of June, 2010.

Respectfully submitted,

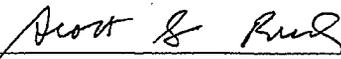
WASHINGTON STATE BAR ASSOCIATION



Scott G. Busby, Bar No. 17522
Disciplinary Counsel
1325 4th Avenue, Suite 600
Seattle, WA 98101-2539
(206) 733-5998

Certificate of Service

I certify that I caused a copy of the foregoing ASSOCIATION'S ANSWER TO MOTION RE "SUPPLEMENTAL AUTHORITY" to be mailed to Respondent John R. Scannell at P.O. Box 3254, Seattle, WA 98114, by certified mail, postage prepaid, on the 2nd day of June, 2010.



Scott G. Busby
Disciplinary Counsel