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SUPREME COURT  
STATE OF WASHINGTON

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No. 200,811-9

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BEFORE THE SUPREME COURT OF THE STATE OF  
WASHINGTON

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In Re:

W. RUSSELL VAN CAMP,  
Lawyer (Bar No. 5385)

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W. RUSSELL VAN CAMP'S BRIEF IN OPPOSITION TO  
DISCIPLINARY BOARD DECISION

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## **Assignments of Error**

**Assignment Of Error 1.** Error is assigned to the Hearing Officer's decision to allow rebuttal testimony by the Association's expert witness after excluding that testimony from the case in chief.

**Assignment Of Error 2.** Error is assigned to the Hearing Officer's decision not to allow examination of witnesses concerning events occurring during Mediation in the underlying case.

**Assignment Of Error 3.** Finding of Fact No. 13:

13. HONKALA received Campbell's e-mail (exhibit 5), but was unable to open the attached document. HONKALA did not understand the meaning of a "permanent injunction". He also did not understand whether, by agreeing the stipulation, Wendle would have to dismiss the action.

**Assignment Of Error 4.** Finding of Fact No. 19:

19. At the first meeting, Respondent told HONKALA that he would require a retainer of \$25,000. Respondent did not explain to HONKALA how the funds would be applied. Respondent told HONKALA that if the case settled within a week he would refund most of the \$25,000 retainer. Respondent did not keep contemporaneous time records. Exhibit 63.

**Assignment Of Error 5.** Finding of Fact No. 20:

20. HONKALA hired Respondent to put pressure on Wendle to settle. Respondent fully expected that the case would settle prior to trial. Respondent did not explain to HONKALA that if he agreed to a permanent injunction, the action could have been dismissed on those terms.

**Assignment Of Error 6.** Finding of fact No. 27:

27. At the inception of the Retainer Agreement, HONKALA believed that he was retaining Respondent on an hourly rate basis, and that Respondent's fees would be charged against the retainer.

**Assignment Of Error 7.** Finding of Fact No. 39:

39. Respondent did not consider the preliminary injunction order very serious. He characterized this as a tort case and believed that HONKALA's objective was to obtain damages from Wendle for loss of the power lease and lost profit. There is no evidence Respondent advised HONKALA on the significance of the preliminary injunction order.

**Assignment Of Error 8.** Finding of Fact 67:

67. HONKALA's instructions were unclear at some points during the representation. Initially, he wanted to pursue Wendle for damages in a counterclaim. Later, he only wanted to settle the case and recover no damages. Respondent's representation of HONKALA demonstrated a lack of any serious effort to pursue the counterclaims, and the only effort Respondent made toward reaching a settlement took place at the mediation. Thus, Respondent did not advance either course of action.

**Assignment Of Error 9.** Finding of Fact No. 68:

68. Respondent took a risk in delaying discovery to the deadline, because a motion to extend discovery cutoff is entirely within the discretion of the assigned judge, even if the parties agree. There is no evidence that Wendle would have agreed to such an extension.

**Assignment Of Error 10.** Finding of Fact No. 80:

80. Several months after he was terminated, Respondent offered to engage in fee arbitration with HONKALA. That did not occur. Respondent has not refunded any portion of the \$25,000 fee.

**Assignment Of Error 11.** Error is assigned to Conclusions of Law No. 2, 3, 4, 5, 6 and 9:

2. Respondent failed to assist HONKALA in making informed decisions, failed to abide by HONKALA's instructions throughout the period of representation, failed to fully advise him throughout, failed to assist him in weighing the pros and cons of his options, and failed to advise him that the claims filed by Wendle could have been settled by stipulating to permanent injunction. Respondent violated RPC 1.2(a), as alleged in Count 1.

3. Respondent violated RPC 1.3 by failing to respond to Wendle's offers to settle, including those contained in the December 15,

2006 letter and subsequent communications, as alleged in Count 2.  
4. Respondent violated RPC 1.4(a), by failing to timely provide HONKALA with copies of correspondence and settlement proposals, and specifically, by withholding copies of the proposed preliminary injunction even after repeated requests, as alleged in Count 3. RPC 1.4, comment 2.

5. Respondent violated RPC 1.4(b) and 1.5(b) by failing to communicate to HONKALA, either before or within a reasonable time after commencing representation, how Respondent's fee would be calculated, and/or how HONKALA's \$25,000 payment would be applied, as alleged in Count 4. Respondent further violated RPC 1.4(b) and 1.5(b), as alleged in Count 4, by asking HONKALA to enter into the Retainer Agreement, which is ambiguous as to the basis for the fee because includes a description of both hourly and "earned retained" type fee arrangements, and is devoid of any description of the scope of the representation to be provided by the Respondent.

6. By charging \$25,000 under the facts of this case, Respondent violated RPC 1.5(a), as I alleged in Count 5. Under RPC 1.5(a), factors (1),(4),(7) and (9) warrant particular consideration and import in the conclusion that the fee is unreasonable under the circumstances.

9. As to Count 9, the Association proved that Respondent knowingly misrepresented in his July 31, 2007 letter to HONKALA that Campbell had provided a proposed preliminary injunction with his December 15, 2006 letter, Respondent violated RPC 8.©.

**Assignment of Error 12:** Error is assigned to the recommendations of the hearing officer.

**Assignment of Error No. 13:** Error is assigned to the Hearing Officer's failure to dismiss upon motion by VAN CAMP.

**Assignments of Error No. 14:** Error is assigned to the Disciplinary Board Sanction Analysis for Counts 4 and 5.

**Assignments of Error No. 15:** Error is assigned to the Disciplinary Board finding of Aggravating Factors.

**Assignments of Error No. 16:** Error is assigned to the Disciplinary Board Sanction Analysis and recommendation.

## FACTS

RANDOLPH HONKALA moved from Phoenix Arizona to Spokane, and began working at WENDLE FORD. HONKALA left after a few months, saying he left because he was remodeling his home, and didn't have time to handle the job, [Exh. 287] but later asserting he quit "because of crooked deals and High Pressure tactics," [Exh. 210 p. 2] and that he was discriminated against by failure to accommodate his AADD.

Mr. HONKALA obtained what are called "power lease" certificates, which gave him priority to purchase a new Shelby Mustang when it first came out. Those certificates cost him about \$15,000.00 [Tr. 290] and he believed he could net \$ 10,000.00 or more by reselling the cars. [Tr. 290] There were problems in the ordering and delivery of the cars, causing Mr. HONKALA to return the car to Wendle: HONKALA expected the car to go back to Ford. Instead, Wendle marketed the car on the internet, to the general public. Mr. HONKALA responded by posting numerous statements on various message board websites expressing anger at Wendle.

Wendle sued HONKALA in Federal Court asserting appropriation of trade secrets, tortious interference, defamation, Lanham Act violations, Consumer Protection Act violations, treble damages and attorneys fees as well as injunctive relief. Mr. HONKALA was served documents, including a copy of a proposed preliminary injunction. [Exh. 213]

HONKALA attended a hearing by phone where Wendle's attorney, Richard Campbell, stated he was interested in settling the case [Exh. 212 p. 5] by restraining Mr. HONKALA from internet postings or messages defaming Wendle . [Exh. 212 p. 6] Mr. HONKALA stated he understood somewhat, and he had no problem with being restrained from making postings or contacting buyers, since he had stopped doing so anyway. [Exh. 212 p. 9]

The next day, December 12, 2006, Richard Campbell wrote an email to Randy HONKALA [Exh. 217] stating:

Please find the enclosed stipulation and permanent injunction. Although it has a strong claim for damages against you, Wendle's primary focus of the Complaint is for you to cease and desist your internet postings concerning it and the convertible, your emails to Ford concerning Wendle of the convertible, and distribution of proprietary information. Agreeing to the stipulation will of course save you from significant costs, time and attorney fees. The stipulation and order provide for a mutual ban on defamation, as you requested and were granted in the TRO hearing. Please advise before noon tomorrow, December 13, 2006. By 5:00 p.m. tomorrow, I need to file a motion for preliminary injunction. As you may recall, the purpose of the preliminary injunction is to continue the temporary restraining Order through trial on the merits. I will also serve the discovery and clone your hard drive as allowed by the TRO signed by the judge if we cannot reach agreement.

Mr. HONKALA admitted he received a copy of the injunction. [Tr. 174-5] HONKALA then retained VAN CAMP. At the initial meeting with Mr. HONKALA, Mr. VAN CAMP (per his testimony) requested a flat fee retainer of \$25,000.

Mr. HONKALA signed a retainer agreement prepared by paralegal Don SHAW, and paid the \$ 25,000.00 the next day. HONKALA now says neither VAN CAMP or SHAW explained the 'flat fee' nature of the retainer. VAN CAMP & Shaw testified they did: the fee covered all work required through and including trial and appeal, and was a maximum amount.

The fee agreement uses the phrase "earned retainer" with a small symbol pointing at the phrase. It also says, "monies paid by the client shall be considered as earned towards the ultimate total fee, unless otherwise designated." [RP Exh. 6]

HONKALA also says he wanted to settle by agreeing to an injunction and walking away right from the start. But Mr. HONKALA wanted to sue Wendle back for damages. Mr. HONKALA eagerly participated in the litigation, including preparation of numerous documents. Mr. VAN CAMP treated the preliminary injunction as a minor issue, since Mr. HONKALA had said he didn't much care about such an injunction. Thereafter VAN CAMP's office prepared interrogatory responses, but held off further discover pending mediation.

HONKALA wrote to VAN CAMP March 5, 2007, [Rp Exh. 14] asserting that he wanted to see the case dismissed as quickly as possible, but he said "resolved quickly," with no mention of agreeing to Wendle's injunction. [RP Exh. 230] That letter notwithstanding, Mr. HONKALA

continued with dozens of email communications about all aspects of the case.

Mrs. HONKALA asked for a copy of all pleadings. Mr. VAN CAMP directed this be done and the file was copied and sent March 2. [RP Exh. 237] As far as VAN CAMP knows, everything, including a 12/15/06 letter from Campbell, was sent to HONKALA, but HONKALA denies receiving it. The parties met March 4 and Mr. VAN CAMP explained that the fee Mr. HONKALA had paid was a flat, maximum fee, they would not be charged more no matter what. The HONKALAs went away, apparently happy.

No further complaint was made about the fee until the Bar Grievance received in August.

In May, a formal mediation was set up with retired Superior Court Judge Harold Clarke, which occurred July 25, 2007. Mr. HONKALA, Mrs. HONKALA and Mr. VAN CAMP all attended. Judge Clarke was not able to settle, but he told Plaintiffs he thought he could get Wendle to pay them some money. [RP Exh. 32] Clarke certainly conveyed to HONKALAS that Wendle would settle for HONKALA's acceptance of a permanent injunction. Mr. HONKALA ordered VAN CAMP to continue to pursue the suit, not settle.

Mrs. HONKALA asked for another copy of the file and VAN CAMP directed another secretary, Donna Davis to compile the documents

and copy them for Mr. HONKALA. Mr. VAN CAMP signed a cover letter purporting to enclose all requested documents. However VAN CAMP learned, after this matter was before the Bar, that Donna Davis altered that letter.

Around August 9, 2007 Mr. VAN CAMP received a copy of a Bar Grievance made by HONKALAs. For the first time Mr. HONKALA claimed he had not understood the flat fee terms. But Mr. HONKALA also continued to complain that he wanted counterclaims for various issues. He again says, "we would like to get this matter resolved," [Exh. 254] without saying how – with or without him getting any money? He wrote [Exh. 259], 'we would like to get this settled but we have not seen an offer to settle in writing,' ignoring the offer received in December.

Renee HONKALA wrote on 8/22/2007 [Exh. 261]:

We do want to settle this case through mediation if possible. If Wendle is willing to pay a portion of the attorney fees we would be agreeable to that. If they are not willing to pay any of the attorney fees, we still want to pursue settlement as long as the terms outlined in the permanent injunction (which we still have not seen) are agreeable to us and we have assurance that all claims related to this lawsuit are being dropped.

Russ VAN CAMP replied – again – that the only settlement offer ever made was the same as what was given Randy HONKALA before VAN CAMP was hired. And again, how to get money before giving up? Mr. VAN CAMP then took the deposition of Chud Wendle with Mr. HONKALA's active participation. At a prep meeting, VAN CAMP

specifically asked if HONKALA wanted to continue, or give up.

HONKALA wanted to continue.

After the deposition Mr. HONKALA wrote a long e-mail on 8/28/2007 [RP Exh. 272 and 273] requesting that VAN CAMP set up numerous depositions and subpoena numerous records, and to expand counterclaims. He also asked about adding Chud Wendle's wife to the lawsuit, as well as Rick Keys, Andy Green (Wendle employees) and their wives. [RP Exh. 275] VAN CAMP set up several depositions, but was then discharged by Mr. HONKALA.

HONKALA then tried to get some money directly from Mr. Campbell. When Campbell declined, HONKALA then agreed to enter into a stipulated injunction which was substantively identical to the one sent to HONKALA by Campbell in December, 2006.

Mr. HONKALA never made a specific demand to VAN CAMP for return of any specific portion of the fee. VAN CAMP offered to discuss the fee and arbitrate if HONKALA would not agree to an amount, but wanted all his money and refused arbitration. In fact Mr. HONKALA even made application to the Client Protection Fund. [RP Exh. 295]

Mr. VAN CAMP refunded \$15,000.00 to Mr. Honkala.

## ARGUMENT

### I. THE DISCIPLINARY BOARD'S PENALTY RECOMMENDATION IS UNSUPPORTABLE

This court uses a two-step process to set a penalty, first looking to the presumptive sanction by considering the ethical duty the attorney violated, the attorney's mental state, and the harm caused by the attorney's conduct, then considering aggravating and mitigating factors. *In re Disciplinary Proceeding Against Blanchard*, 158 Wash.2d 317, 331, 144 P.3d 286 (2006).

#### A. COUNTS 4 and 5

##### 1. Hearing Officer's Finding of Injury

The Disciplinary Board departed from the Hearing Examiner's finding no 'serious' injury and recommendation of suspension, instead recommending disbarment. That sanction is unsupportable.

The Board proceeded under ABA Standards std. 7.1 which provides:

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 cause[s] serious or potentially serious injury to a client, the public, or the legal system.

The Hearing Officer however specifically found 7.1 did not apply and instead applied ABA Standards § 7.2:

Suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty as a professional and causes injury or potential injury to a client, the public, or the legal system.

The difference between the 2 sections is the intent to benefit and “serious or potentially serious” injury. The Disciplinary Board amended the Hearing Officer’s finding that there was no serious harm, p. 2 fn. 4, finding “the client suffered financial injury,” and stating at p. 3 fn. 5:

Counsel for Mr. Van Camp admitted at oral argument that the fee was not reasonable based on the actual amount of work done. He also stated at oral argument that Mr. Van Camp had not sent a refund because Mr. Honkala had not come up with an appropriate number. This admission that the fee was unreasonable and the attempt to shift responsibility to the client to take steps to obtain a refund further justifies finding serious harm.

With respect, the Board mischaracterizes Mr. VAN CAMP’s position and fails to articulate a justification for overturning the Hearing Examiner on this issue.

#### **a. Serious Harm**

The DEFINITIONS contained in the ABA, Standards for Imposing Lawyer Sanctions (1991 & Supp.1992) include:

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

‘Harm’ is different than ‘serious harm.’ E.g., *In re Disciplinary*

*Proceeding Against Marshall*, \_\_ Wn.2d \_\_, ¶ 92, 217 P.3d 291 (2009).

There is no clear line of demarcation between the two, which makes this issue uniquely subject to the Hearing Officer's discretion.

Serious harm has been found *In re Disciplinary Proceeding Against Marshall*, where a lawyer improperly billed \$21,787.50 over a flat fee, filed a lien and sued to collect. His "actions caused potential serious injury as to the loss of [the clients'] legal claim. Additionally, the clients were actually injured by the fees they had paid to that point, apparently in excess of \$50,000.00. This case doesn't support the idea that a too-high fee alone is a serious injury. Compare *In re Disciplinary Proceeding Against Hicks*, \_\_ Wn.2d \_\_, 214 P.3d 897 (2009) where misuse of trust account to the extent of \$45,000 did not establish serious harm.

In this case there was no serious harm. Honkala has been repaid \$15,000.00 and did not indicate that the money was a serious issue to him.

#### **(1) Amount of Money**

The Board at p. 3 fn. 4 states only that the client suffered "financial harm" and concluded that the Hearing Officer's finding that the harm was not serious should be struck. But the Hearing Officer was in the best position to make the judgment of whether there was serious harm and a number of facts support the conclusion that it was not serious.

First, although the Bar argues that Mr. Honkala borrowed the money and therefore it must have been significant, in fact, Mr. Honkala had just purchased two very expensive automobiles, [Tr. 318] which is

what led to this conflict. [Tr. 289,] Mr. Honkala had left employment and was receiving a disability pension on top of his Wife working. [Tr. 133 ] He owned a valuable home which he was preparing to sell. [Tr. 318-319] Borrowing may have been just a means of dealing with cash flow: there is no evidence in the record that the \$25,000.00 fee was a financial strain to Mr. Honkala.

Indeed, had there been no confusion as to the nature of the fee, that \$25,000.00 would still have been paid to some attorney, placed in a trust account and charged against. It is speculative that the lawsuit would have settled before most or all of that money was exhausted. The primary criticism of VAN CAMP's handling of the suit was that he did not invest enough effort early on to resist the preliminary injunction and that would have burned up a significant portion of the fee. Mr. Honkala would have been out significant money no matter what.

## **(2) Shifting Responsibility**

The Board then note in fn. 5 that counsel admitted the fee was excessive and that Van Camp expected Honkala to take steps to get a refund. Respectfully that is not what counsel stated (or at least not what he meant). Mr. Honkala had not agreed to any process, formal or not, to resolve how much he was due. [Tr. 377] He stated he didn't trust Mr. VAN CAMP and felt the Bar Association process would be best for him. [Tr. 376-377]

VAN CAMP has always stated that he was uncertain how much of the fee was actually earned. Mr. Honkala has always demanded return of the entire fee, [Tr. 377] although he agreed that the services rendered were worth \$7,500.00 to \$ 10,000.00. [Tr. 424] After the excruciatingly detailed review of the fee in the hearing process it appears that in fact less work was done than would justify the full fee, and in fact Mr. VAN CAMP has refunded \$15,000.00 to Mr. Honkala.<sup>1</sup> That does not make the fee unreasonable. It is undisputed that the fee was reasonable at its inception as a flat fee. Mr. VAN CAMP agreed to convert the fee to an hourly fee as soon as Mr. Honkala informed him that he didn't agree the fee was flat fee. But he was still representing Honkala so it couldn't be determined to reasonable or not until the job was finished. After he was fired the fee could be determined and only then could the reasonableness standard be applied.

If Mr. VAN CAMP were now saying, it was Honkala's duty to determine how much the fee should be, then the Board's position would make sense. But that is not and never has been what happened here.

FIRST, Honkala complained about the flat fee: Mr. VAN CAMP agreed to treat it as an hourly fee thereafter, and Honkala had Mr. VAN CAMP continue as his lawyer, knowing Mr. VAN CAMP would accrue

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<sup>1</sup> Who has stated that he wants the entire fee back. RP

additional fees.

SECOND, Mr. Honkala fired Mr. VAN CAMP and demanded a 100% refund of the fees, even though he would later admit that Mr. VAN CAMP had done work worth upwards of \$7,500.00 to \$10,000.00. [Tr. 377]

THIRD, before he was discharged, Mr. VAN CAMP offered in writing via the Bar to *negotiate* the fee issue or to *arbitrate* the fee issue. Honkala never negotiated, instead insisting on a full refund; and he never agreed to arbitrate, even though Mr. VAN CAMP offered to do so and offered to set the process up if Honkala would just participate. Honkala refused, he said, because he didn't trust VAN CAMP. The real reason, clear from the record, is that Honkala didn't want to pay any money to Mr. VAN CAMP at all.

Now, this is not a case of shifting responsibility to the client. Mr. VAN CAMP did everything but drag Mr. Honkala into arbitration, and this was reasonable. There is no dispute that Mr. VAN CAMP was due some fee; and since Mr. Honkala was unwilling to talk, there had to be some process to determine how much he was due back.

### **(3) Hearing Officer's Decision**

The Hearing Officer was able to observe Mr. Honkala and determine his credibility. Her determination of 'serious' harm was an inference based on his testimony and correctly found that Mr. Honkala,

while ‘harmed’ to the extent of not getting his money back, was not ‘seriously’ harmed because he exhibited no indication that the money represented anything significant to him.

The hearing officer alone may assess the credibility of witnesses. *In re Disciplinary Proceeding Against Stansfield*, 164 Wash.2d 108, 125, 187 P.3d 254 (2008), and her determine as to seriousness of injury should be given great weight. This Court has not, insofar as Mr. VAN CAMP can determine, rejected a Hearing Officer’s finding of lack of serious injury. See, e.g., *In re Disciplinary Proceeding Against Hicks*, \_\_\_ Wn.2d \_\_\_, ¶30, 214 P.3d 897 (2009). If the sanction recommended by the Board differs from the recommendation of the hearing officer, this Court would generally give more weight to the Board's recommendation; but the recommendation of a divided Board is entitled to less weight. *In re Disciplinary Proceeding against Marshall*, 160 Wn.2d 317, 157 P.3d 859 (2007).

In this case the Court should find no ‘serious injury’ given that Mr. Honkala had the ability at any time to agree to a process to recover whatever money he was owed, but elected not to pursue it, instead trying to extort a full refund via the Bar grievance process.

## **2. Mental State**

### **a. Negligence**

The Hearing Officer found that Mr. VAN CAMP did not explain

how the fee would work [Finding 19] and that the fee agreement was not clear [findings 26 – 32]. She concluded that the agreement was ambiguous. [Conclusion No. 5] **There is no specific finding that Mr. VAN CAMP was aware of the ambiguity of the agreement or intended to deceive**, save the comment in the discussion of sanctions, findings p. 25 lines 7 - 9. At line 14 the Hearing officer states the “fee arrangement was drafted expressly and knowingly by the Respondent with the intent to benefit the lawyer,” which addresses the ‘benefit’ issue but not the ‘ambiguity’ issue. **The Hearing Officer simply did not make any factual finding supporting a conclusion that Mr. VAN CAMP knew his explanation of the fee was ambiguous when he entered into the agreement.** In fact she specifically found,

Respondent intended that ‘earned retainer’ was akin to a flat fee which is paid at the beginning of the representation.

[Finding of Fact 30 p.10 line19] So the only actual finding touching on Mr. VAN CAMP’s state of mind is that he intended the fee agreement to mean “flat fee,” but the agreement was ambiguous as written by Mr. SHAW. The hearing officer’s finding that Mr. VAN CAMP did not explain the fee to Mr. Honkala [Finding 19 p. 8 line 10] actually supports this: according to her finding, the nature of the fee was not discussed. There is no finding that Mr. Honkala’s subjective understanding of how the fee would be handled was ever communicated to Mr. VAN CAMP at the time of the

initial retainer. Of course later, as soon as Mr. Honkala objected to Mr. VAN CAMP's interpretation of the fee, VAN CAMP agreed to treat it as an hourly fee.

Absent a finding by the Hearing Officer that Mr. VAN CAMP knew there was a misunderstanding and intended to get a different fee arrangement than what Mr. Honkala expected, his mental state must be that of 'negligence' rather than 'intent' or 'knowledge.' The DEFINITIONS section of the ABA Standards provides:

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

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

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

The record supports that Mr. VAN CAMP intended to sign Mr. Honkala up to a flat fee agreement; and though he does not agree, the record may support finding that the fee agreement was not explained and the form used was ambiguous. But the Hearing Officer does not find that VAN CAMP knew he was entering into a deceptive agreement. For all he knew, a flat fee would be just fine with Mr. Honkala. This was a misunderstanding that the lawyer did not at the outset clarify.

To determine whether a lawyer breached an ethical duty "

knowingly," we use the "knew or should have known" standard. However, when assessing a lawyer's state of mind for purposes of imposing sanctions, we do not apply the "knew or should have known" standard. *In re Stansfield*, 164 Wash.2d at 127, 187 P.3d 254. To do so would eviscerate the negligence standard by forcing us to assume the lawyer should have known the substantial risk of his actions rather than allowing us the flexibility to conclude that he simply failed to heed that substantial risk. *Id.* Instead, when assessing a lawyer's mental state for purposes of imposing sanctions, we look to his state of mind relative to the consequences of his misconduct rather than the duty violated.

*In re Disciplinary Proceeding Against Eugster*, 166 Wn.2d 293, 318, 209 P.3d 435 (2009). *In re Disciplinary Proceeding against Stansfield*, 164 Wn.2d 108, 127, 187 P.3d 254 (2008) discussed whether a lawyer had a 'conscious awareness' of his misconduct. Here the findings actually made by the Hearing Officer support no other conclusion but that Mr. VAN CAMP was not consciously aware he had made an ambiguous deal with Honkala: at worst he was negligent in using a poor form and doing a poor job of explaining.

#### **b. Selfish Motive**

Almost by definition, any misconduct involving a fee agreement has a selfish motive. Mr. VAN CAMP cannot argue that he did not intend to benefit from the fee agreement. But it was his intent to return value for the fee.

#### **3. Amount of Fee**

Mr. VAN CAMP has argued consistently that he was willing to work out the amount of the fee with Honkala in an appropriate

manner. At first, in August before Honkala discharged him, Mr. VAN CAMP offered to negotiate or arbitrate. Later after the matter became adversary Mr. VAN CAMP repeatedly offered fee arbitration, which Honkala knew but refused. Finally Mr. VAN CAMP repaid Honkala \$15,000.00 since it was by then clear Honkala would not participate in any process to determine the fee.

The amount of the fee was, however, never set in stone. Mr. VAN CAMP cannot be deemed to have taken an excessive fee when the fee was never determined.

**B. COUNTS 1,2, 3 and 9**

The Board held that suspension is the presumptive sanction for counts 1, 2, 3 and 9. Mr. VAN CAMP does not agree, asserting that his state of mind in each case was negligence and there was no harm to Mr. Honkala. These issues are discussed below.

**C. UNANIMITY AND PROPORTIONALITY**

**1. Not unanimous**

The Disciplinary Board decision was 7 - 3 in favor of disbarment, which vitiates the deference due from this court. *In re Disciplinary Proceeding Against Sanai*, 167 Wn.2d 740, 225 P.3d 203 (2009)

**2. Not proportional**

A lawyer has the burden to show lack of proportionality. *In re Disciplinary Proceeding Against Marshall*, \_\_ Wn. 2<sup>nd</sup> \_\_, 217 P.3d 291

(2009). Here Mr. VAN CAMP negligently failed to explain a fee agreement, and communicated poorly with a client who was having a hard time making up his mind. At its essence this is a fee dispute. As noted in *In re Disciplinary Proceeding Against Eugster*, 166 Wash.2d 293, 320, 209 P.3d 435 (2009),

Disbarment is the most severe sanction. We have historically reserved disbarment for grievous acts of ethical misconduct. Disbarment has generally been applied to four categories of misconduct: (1) the commission of a felony of moral turpitude, ... (2) forgery, fraud, giving false testimony and knowing misrepresentations to a tribunal, .... (3) misappropriation of client funds, and, (4) extreme lack of diligence. [Citations omitted]

None of these categories apply here. As to suspension this court continued,

Generally, when we apply the sanction of suspension, we start with a minimum of six months. ... However, given the seriousness of Eugster's misconduct, the duties breached, the findings that he acted with knowledge and intent, the seriousness of the injury or potential injury, and four aggravating factors and only one mitigating factor, we conclude a suspension for 18 months is the appropriate sanction. Eugster should also pay restitution to Mrs. Stead's estate in the amount of \$13,500.

Consider also *In re Plumb*, 126 Wash.2d 334, 892 P.2d 739 (1995).

Despite conviction for first-degree theft, this court concluded that although disbarment would act as a deterrent, it would do little else, and imposed suspension.

In fact, cases supporting suspensions in excess of 6 months all involve much more serious offenses. For instance:

- *In re Disciplinary Proceeding against Hicks*, (Slip Op. No. 200, 606-0, August 27, 2009), a 24 month suspension was upheld for trust account violations, and lies to the WSBA during investigation.

- *In re Disciplinary Proceeding Against Poole*, 156 Wash.2d 196, 208, 125 P.3d 954 (2006) upheld a one year suspensions for misbilling clients and multiple trust account overdrafts.

- *In the Matter of the Disciplinary Proceeding Against Stephen D. Cramer*, 165 Wn.2d at 331, 225 P.3d 881 (2008) upheld eight months suspension for placing client funds in his business account and making misrepresentations to the Bar.

Whereas suspensions for 6 months or less have been handed down for worse offenses:

- *In re Disciplinary Proceeding Against Botimer*, \_\_ Wn.2d \_\_, 213 P.3d 133 (2009) imposed 6 months for failure to obtain informed consent in writing to a conflict of interest and improper disclosure of client confidences.

- *In re Disciplinary Proceeding Against DeRuiz*, 152 Wn.2d 558, 562, 99 P.3d 881 (2004), the attorney neglected client cases, failed to communicate with clients, failed to refund unreasonable and unearned fees, and failed to

cooperate with grievance investigations in two separate matters. Multiple aggravators were applied-bad faith obstruction and submission of false evidence and false statements or deceptive practices during the disciplinary proceedings. But for all of this, this court imposed 2 six-month sanctions running consecutively.

- *In re Disciplinary Proceeding Against Holcomb*, 162 Wash.2d 563, 591, 173 P.3d 898 (2007) upheld a 6 month suspension for an attorney obtaining interest free loans from a client with appropriate disclosures.

- *In re Disciplinary Proceeding against Trejo*, 163 Wn.2d 701, 185 P.3d 1160 (2008) trust account overdrafts caused by an employee embezzling funds supported 3 month suspension.

This Court should limit any suspension to 6 months or less.

#### **D. AGGRAVATING AND MITIGATING FACTORS**

##### **1. Prior Discipline**

The Disciplinary Board was most troubled by Mr. VAN CAMP's use of a phrase in his fee agreement that had been the source of prior discipline.

The 2002 matter, No. 01#00067 [Exh. 71] involved a client, Ms. Fafara, who signed a contingent fee agreement, paid \$1,000.00 down and signed a fee agreement providing that the \$1,000.00 was an "earned retainer fee." VAN CAMP did specifically explain the fee as being nonrefundable. [Exh. 71 P. 3 ¶ 3] However the check that was received was noted to be for "medical materials and investigation." The Hearing officer found the fee was a mixed cost and advance fee

payment, and was not adequately explained to the client. The Hearing officer found the use of the phrase “earned retainer fee” created confusion in this case where it included a costs component. [Exh. 71 P. 11 ¶ 44] At no time did the Hearing Officer hold that the phrase “earned retainer” was improper.

In the Honkala case, while there is a question whether Honkala understood that the phrase meant ‘flat fee,’ there was not an issue of whether the money was to go for costs nor was the question of whether the money was “earned.” It was understood to be a fee, the only issue being whether it was refundable. There was even a subsequent paragraph stating, “monies paid by the client shall be considered as earned towards the ultimate total fee, unless otherwise designated.” [RP ]

So while the Fafara case did place Mr. VAN CAMP on notice that he needed to explain the breakdown of cost vs. fees when using the phrase ‘earned retainer,’ it did not prohibit him from using the term and did not involve the same issues in the meaning of the term.

## **2. Other**

The remaining analysis by the Hearing Officer and Board is correct.

## **II. PROCEDURAL ERRORS**

The Hearing Officer committed errors that deprived Mr. VAN CAMP of a fair hearing, which he was entitled to as a matter of due process. *In re Disciplinary Proceeding Against Sanai*, 167 Wn.2d 740, 225 P.3d 203 (2009).

### **A. PERMITTING THE ASSOCIATION TO CALL A REBUTTAL**

## **EXPERT**

The scheduling order required the Bar to name witnesses, including experts, in March. The BAR did not list any experts. Mr. VAN CAMP relied on that failure in determining his witnesses. Counsel then sought to name an expert witness and the Hearing officer denied that request as untimely and prejudicial. But the Association was permitted to bring in their same expert as a rebuttal witness.

ELC 10.13 (d) states:

The parties have the right to cross-examine witnesses who testify and to submit rebuttal evidence.

But that final sentence should not be interpreted to allow calling an expert previously excluded due to prejudice. The Rule uses the word "evidence," not 'witnesses' and not 'unnamed expert witnesses.' Rebuttal evidence should be limited to exhibits or previously disclosed witnesses. Mr. VAN CAMP'S whole approach to the case was shaped by the absence of a Bar Association expert.

Rebuttal evidence in general:

[I]s admitted to enable the plaintiff to answer new matter presented by the defense. Genuine rebuttal evidence is not simply a reiteration of evidence in chief but consists of evidence offered in reply to new matters. The plaintiff, therefore, is not allowed to withhold substantial evidence supporting any of the issues which it has the burden of proving in its case in chief merely in order to present this evidence cumulatively at the end of defendant's case. Evidence which could have been offered during a party's case in chief may be rejected when offered for the first time during rebuttal.

*State v. White*, 74 Wash. 2d 386, 394-95, 444 P.2d 661 (1968) .

## **B. LIMITING QUESTIONING REGARDING MEDIATION**

The Hearing Officer did not allow VAN CAMP to delve into the events that

occurred at Mediation with Judge Clarke, either with Clarke or with Mr. HONKALA or VAN CAMP. HONKALA and VAN CAMP did remember and were not permitted to go into the events there. There is a Mediation Privilege, but it did not apply here. RCW 7.07.020 states:

A person that discloses or makes a representation about a mediation communication which prejudices another person in a proceeding is precluded from asserting a privilege under RCW 7.07.030, but only to the extent necessary for the person prejudiced to respond to the representation or disclosure.

RCW 7.07.030 provides:

- (1) There is no privilege under RCW 7.07.030 for a mediation communication that is:
- (f) Except as otherwise provided in subsection (3) of this section, sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediation party, nonparty participant, or representative of a party based on conduct occurring during a mediation.

Both provisions apply. Mr. Honkala's duplicity in his Bar complaint would have been further exposed had he been examined on what happened at mediation.

### **III. OPPOSITION TO SUBSTANTIVE FINDINGS**

The Hearing Officer's mixed findings of law and fact are not supported by the record.

#### **A. COUNT 1 FAILURE TO INFORM AND FOLLOW GOALS**

##### **1. Honkala Gave Conflicting Instructions**

The Hearing Officer recognized that Mr. HONKALA's goals changed during the lawsuit, [Finding 67] and her own findings contradict the assertion that Mr. VAN CAMP was acting contrary to any clear instruction by HONKALA. [e.g.,

Finding 52, 72] HONKALA never did clearly decide whether he wanted money or to give up wanting the case "resolved," but never saying that resolving it without getting money from WENDLE would be acceptable.

HONKALA knew what the injunction called for right from the beginning, in a December 12 e-mail saying [Exh. 217]:

Please find the enclosed stipulation and permanent injunction. Although it has a strong claim for damages against you, Wendle's primary focus of the Complaint is for you to cease and desist your internet postings . . . Agreeing to the stipulation will of course save you from significant costs, time and attorney fees.

HONKALA lied repeatedly in his grievances:

In his original bar grievance received 8/8/2007 [Exh. 60, 289] Mr.

HONKALA states that the permanent injunction "was never communicated to us." But he had the injunction and stipulation of dismissal before he hired VAN CAMP [Exh. 217].

Then Mr. HONKALA said Mr. VAN CAMP had discussed the injunction generally with him on February 23, but he had never seen the actual proposed permanent injunction. [Exh. 290 p. 2] This contradicts his original grievance [Exh. 289] saying he discussed the injunction with Mr. VAN CAMP on April 4, 2007, and at the mediation. [Exh. 294]

HONKALA acknowledges that at mediation, he was told that WENDLE would settle and drop the whole case if he signed the injunction, but says he had not seen the permanent injunction. [Exh. 290 p. 2]:

On July 25, 2007, we attended a mediation session regarding this matter. Once again, we indicated that we were not looking for anything in

this case, but we did not feel it was appropriate that we should have to lose the \$25,000 in legal fees that Mr. VAN CAMP had taken as an "earned retainer". When this was communicated to the plaintiff attorney, they indicated that they were willing to drop the case, as they had communicated in the permanent injunction, but they were not willing to pay any attorney fees.

HONKALA the writes on 1/8/2008 [Exh. 294]:

Although I had received a copy of the permanent injunction from Mr. Campbell on December 12, 2006, there was no wording in the document that indicated that all charges would be dropped in the case if I signed that injunction.

Then December 10, 2007[Exh. 293] Mr.HONKALA changes his story again, saying that he wanted to negotiate the terms of the injunction. He claims that the settlement agreement he ultimately entered into was not purely "acceptance", but rather a "counter offer" with concessions on both sides." [Exh. 293] In fact there were no substantive concessions.

VAN CAMP believed the case was primarily one for HONKALA's damages against WENDLE. [Finding No. 39]. He believed that because HONKALA told him so; his web postings complained bitterly of HONKALA losing money due to WENDLE's actions (See Findings 6 and 7); his intake notes [Exhibit 222 referenced by the Hearing Officer in Finding 25] show HONKALA intended to sell the car on ebay, that HONKALA was "really ticked off" by WENDLE'S profiting on the car, depriving him of profit, that he lost the value of his 'power leases,' and that he left WENDLE in part because of this matter. HONKALA testified at hearing, 'I was willing to put up a fight, if it didn't go away ... I wasn't going to be backed into a corner and do nothing.' [RP 182:6]

As of early February all signs indicate this is a case where HONKALA wants to recover damages against WENDLE via counterclaim and doesn't much care about the injunction, although he doesn't really want it to be in place.

Then on March 5, 2007 [Ex. 14, Finding 44, 45] comes the letter saying, we just want the case resolved (not "settled"). Now if the client had continued to hold to this position, the idea that Mr. VAN CAMP wasn't following instructions might have some validity. But it is simply not true: what Mr. HONKALA meant by the 'we just want to settle' letter was, 'we want some money from WENDLE and then we'll settle.' VAN CAMP responded [Ex. 17 Finding 46] asking for a meeting. They then met. Now: if the upshot of that meeting had been, "just settle this fast," you would expect communications thereafter to reflect that. Instead Mr. HONKALA writes about countersuing 5/11/07 [Ex. 239] and a new issue involving WENDLE posting on a site called Beebo.

But Mr. VAN CAMP does respond to the desire to settle: in May he sets up a mediation which occurs in July. He prepares a mediation brochure. He attends. Clearly at the Mediation HONKALA has the chance to say to Judge Clarke, 'I don't care about money, just end this.' He doesn't. Why? Because Clarke thinks he can get HONKALA some money: and getting money is more important than ending the case. Clarke, in a letter written after the mediation session, says that he still thinks he might be able to get WENDLE to pay a reduced amount, perhaps 1/2 of the \$25,000.00 fee. [Ex. 283] Judge Clarke wrote on October 2007 that both parties told him they understood their respective positions and acted with advice of their

attorneys. [Exh. 285]

Relying on Mediator's opinion is reasonable, and the Hearing Officer made no finding that Judge Clarke's opinion was not valid. The objective opinion of an effective mediator that a settlement was possible, which was communicated to VAN CAMP, holds way more weight than Campbell and Weatherhead's opinions that were not known to VAN CAMP: at the time Clarke was saying go for it, it's reasonable to go for it.

Then HONKALA makes the Bar Complaint [Exh. 254]: he now says he is depressed and now just wants out. VAN CAMP responds, [Exh. 256] let's meet and decide how we are going to get the case resolved. They meet. And instead of just giving up, HONKALA wants to go forward with the deposition of Chud WENDLE, HONKALA wants to pursue employment discrimination actions [Exh. 266] against WENDLE for Fraud, Hostile Work Environment, HONKALA gives VAN CAMP a list of questions focusing on counterclaim issues.

Testimony based on contemporaneous notes from that meeting [The notes themselves were not admitted] show that RANDY HONKALA was advised we could just quit tomorrow, but he continued. The Hearing Officer made no finding on what happened at this meeting: a fair preponderance of the evidence supports one conclusion, that at this point, after the Bar Complaint, HONKALA was given the option to quit and chose not to.

As late as August 22, 2007 Renee HONKALA writes in Exh. 261: we want to settle and if WENDLE will pay we want that but if not, we still want to settle.

How is a lawyer to determine objectively that WENDLE will not pay? Mr. Campbell now says he was never going to pay anything, but VAN CAMP didn't know that. VAN CAMP only knew that a respected, experienced mediator had told him that settlement was possible.

Mr. Campbell took the position that WENDLE did not owe HONKALA any attorneys fees. That position per se may be correct but HONKALA had a reasonable counterclaim against WENDLE, and the amount of the counterclaim could have offset the attorneys fees. Mr. Campbell perhaps did not understand it in that context, although Judge Clarke presented it that way.

And most damning of all to HONKALA's position: Even after he fired VAN CAMP, HONKALA still tried to get \$ 5000.00 from Mr. Campbell. [Finding 72] He only, finally, gave up when Campbell said no.

In order to have followed HONKALA's instructions VAN CAMP would have needed to be a mind reader. He tried to follow the bouncing ball: first proceeding like the case was one for damages; then trying to settle for some reasonable payment to HONKALA; then asserting counterclaims again. But here is the most important point: there was never once a clear communication from HONKALA to VAN CAMP instructing VAN CAMP to abandon the attempt to get money damages from WENDLE. VAN CAMP was forced to continue at least a minimally aggressive litigation posture if he was to have any hope of getting money. Had he simply told Wendle, 'we quit,' there would certainly never have been a hope of getting any damages, which HONKALA always wanted.

The record simply does not support the conclusion that VAN CAMP failed to follow his client's instructions or goals throughout the representation. At worst he did a bad job guessing what the client really wanted.

## **2. VAN CAMP DID ADVISE HONKALA**

The Hearing Officer's findings that VAN CAMP never explained the injunction to HONKALA and that HONKALA never understood it are not supported by substantial evidence. HONKALA admitted that he discussed the injunction with Mr. VAN CAMP, and Mr. VAN CAMP knew HONKALA had already seen the permanent injunction. HONKALA just doesn't like Mr. VAN CAMP's advice that agreeing to the injunction would essentially be giving up 'and admitting you're ugly, too.' HONKALA, as well as VAN CAMP, was focused on getting money from WENDLE, the injunction was not important. That may not have been a detailed analysis of the injunction, but it Mr. VAN CAMP defends it as an accurate summary of the gist of the injunction.

## **3. MR. HONKALA KNEW HE COULD SETTLE**

As pointed out above, Mr. HONKALA admitted he had the injunction, he talked about it to Mr. VAN CAMP, he knew he could settle by agreeing to sign the injunction. The Hearing Officer appears to have ignored these admissions, but a fair preponderance of the evidence demands that she either acknowledge them, or set out findings that the admissions are somehow not believable.

His confusion, if it actually existed and is not feigned to try to recover his fee, was in how to respond, not what his options were. HONKALA appeared

before an experienced mediator with scores of years' experience. Wendle refused to pay damages in the mediation. If Wendle told the mediator they would settle for an agreed injunction, the Mediator had to have conveyed that to Mr. Honkala.

Honkala:

- told the Bar that he was told at mediation he could settle for an agreed injunction [Exh. 290]

- told the Bar he a got copy of the injunction and knew what it called for. [Exh. 289]

- The Hearing Officer made a finding that HONKALA would not agree to settle unless WENDLE paid him money. [Finding 52]

- HONKALA admitted discussing the injunction with VAN CAMP in December of 2006 and again at the meeting in August 2007.

- Clarke stated he discussed the settlement offers over 3 ½ hours of mediation with HONKALA present. [Tr. 515]

For the hearing officer to conclude that Honkala didn't know he could settle at that time is simply not supported by a fair preponderance of the evidence.

## **B. COUNT 2: FAILURE TO PURSUE SETTLEMENT**

The hearing officer's finding that VAN CAMP did nothing to advance settlement is actually a conclusion, and is unsupportable under the record. VAN CAMP did pursue settlement in a manner he thought would be most effective, which was to set up a mediation. Mr. VAN CAMP did not get HONKALA what he wanted, which was both some money from Wendle and a quick dismissal.

VAN CAMP did see this as a case where he was trying to get money from WENDLE, and the injunction was a secondary consideration. So did HONKALA. HONKALA had already rejected a settlement before hiring VAN CAMP, so Mr. Campbell's letters were merely reiterating offers already rejected by HONKALA. Instead Mr. VAN CAMP used a technique that had served him well in many cases: he pushed the case into mediation. A lawyer is not required to communicate settlement offers that have already been rejected, nor respond to offers already rejected. Comment 1 to RPC 1.4 states,

A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2.

Comment 2 to RPC provides:

[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).

The case at hand presents that scenario: although others disagree, Mr. VAN CAMP

believed in his exercise of professional judgment, that his approach to resolving the case would work. He is an experienced and successful lawyer: he knew WENDLE would spend a lot of money on the case early, and would be faced with spending a lot more if it went to trial. He felt that was sufficient pressure to general a favorable settlement. He was wrong, at least as long as he was allowed to continue with the case: that doesn't mean he failed his duty, simply that his approach was not appreciated by Mr. HONKALA.

### **C. COUNT 3: FAILURE TO PROVIDE COPIES**

Mr. VAN CAMP got confused about what documents he had, and despite several attempts to provide Mr. HONKALA with documents, he failed to transmit one – the final injunction – until after he had represented HONKALA for several months.

Now to be clear: VAN CAMP did not have the proposed STIPULATION AND PERMANENT INJUNCTION until sometime in August. He had the PRELIMINARY INJUNCTION after it was entered in January. He had Campbell's 12/15 letter sans attachment soon after it was sent.

The specific requests for documents that had been received prior to July 26, 2007 had been for copies of documents that VAN CAMP filed, not documents he had received, and VAN CAMP complied. VAN CAMP directed that the entire file be copied and sent to HONKALA on 4/2/07, [Exh. 237] another complete copy was sent on July 27, 2007 [Exh. 245] and again on 7/31/2007. *VAN CAMP has never conceded that the 12/15 letter was not included.* HONKALA claims it

wasn't, but HONKALA is very willing to lie when it suits his purposes.

VAN CAMP believed the preliminary injunction was identical to the permanent one – and for all practical purposes, it was. Mr. Campbell did not include a copy of the Permanent Injunction with the 12/15 letter, but what he referred to in that letter was substantially duplicative of the preliminary injunction, and was identical to the earlier copy he had sent to Mr. HONKALA by email. Mr. HONKALA told Mr. VAN CAMP he was unwilling to be bound by that injunction.

Thus while there were errors in transmitting the correct documents to HONKALA, the record does not show any intentional error, nor does it show any actual injury to the client since HONKALA already had the information.

#### **D. COUNT 4: FAILURE TO COMMUNICATE FEE AGREEMENT**

No final fee has been determined in this case, but Mr. VAN CAMP has refunded \$15,000.00 and continues, as he has since August 2007, to stand ready to arbitrate and refund any further unearned portion.

A "disciplinary proceeding is not the proper forum in which to resolve disputes as to the right to charge or retain attorney fees." *In re Disciplinary Proceeding Against Behrman*, 165 Wash.2d 414, 422, 197 P.3d 1177 (2008).

##### **1. Offer to Arbitrate**

The Hearing Officer made contradictory findings;

- No. 70 says VAN CAMP offered to Arbitrate prior to August 31, 2007,
- No. 80 says that the offer was made several months after termination.

The truth is found at Exhibit 61, VAN CAMP's August 9, 2007 letter to the Bar after Mr. HONKALA's first complaint about the flat fee but before HONKALA discharged VAN CAMP:

If the case is settled, I will be happy to review the fee with Mr. HONKALA. If I feel it is unreasonable I will refund some part of it. If not, and if he disagrees, then I will submit the matter to fee arbitration. If the case is not settled then I will proceed with litigation.

HONKALA got a copy of this letter from the Bar, we know because he responded to it on 9/5/2007 [exh 290] and says: "we believe Mr. VAN CAMP should refund the full \$ 25000 retainer." VAN CAMP responded on October 16, saying that would be unfair, Mr. HONKALA admitted at hearing that he knew Mr. VAN CAMP was willing to arbitrate the fee, but HONKALA refused to do so. [TR 376]

It is important to put this in a chronological perspective.

- The Fee was paid in December, 2006. VAN CAMP and SHAW both testify they explained the fee to HONKALA; the Hearing Officer found VAN CAMP did not but did not address SHAW.
- 3/5/07 was the first letter to VAN CAMP from HONKALA asking about charges billed against the retainer. [Ex 14]
- 3/13/07 VAN CAMP responded by email very clearly saying, "this is a flat fee. You won't be charged more. I don't keep hours." [Ex 17] Now if the December fee agreement was unclear, this is about as clear as it gets. Does the client protest of disagree?

- No: HONKALA asks on 3/14 for a copy of the fee agreement for his wife, [Exh. 18] and makes no further protest. At this point VAN CAMP believes HONKALA understands and agrees to the flat fee.

- By 3/29, 2 weeks later, there is still no protest that fee agreement is wrong. VAN CAMP meets with HONKALAS on March 4 or 5 and VAN CAMP again explains the flat fee; the Hearing Officer did not address is meeting. At this point Mr. HONKALA has asked about the fee, has been told it is a flat fee, and has not said that was not his understanding.

- HONKALAS again do not communicate to VAN CAMP that they dispute the flat fee: instead on 7/31/2007 they make a complaint to the Bar [exh. 60] which VAN CAMP doesn't receive until August 9, 2007. So from 3/13 to 8/9, **5 months**, Mr. Honkala doesn't protest or disagree with Mr. VAN CAMPS clearly stated understanding of the fee agreement.

- As soon as he receives the Bar Complaint VAN CAMP immediately emails HONKALA and says on 8/9/07, [Ex. 249],

I explained the fee at our last meeting; Remember I told Renee there would be no charge over \$25,000.00, even thru appeal. Do you want me to continue to try to settle? Will you meet with me to discuss this?

- And VAN CAMP promptly responds to the Bar on **August 9** (above) offering to review the fee, possibly refund some portion, or to arbitrate.

HONKALA is still his client at this point and work is going on!

- For the first time, on 8/9 [ex 253] HONKALA directly says to VAN CAMP, 'you didn't explain flat fee to us.' This is 5 MONTHS after VAN CAMP

clarified that he was charging a flat fee on 3/13/2007 during which time VAN CAMP assumes the client is happy with his explanation of how the fee works.

- And HONKALA, as usual, is inconsistent in his assertions: in the Grievance [Exh. 289] he says VAN CAMP should get \$2,000 to \$5,000. After VAN CAMP offers to discuss and/or arbitrate the fee HONKALA asserted that he should get the entire fee refunded. At hearing [Finding 76] he estimated the value of the work done at \$7,500 – \$10,000.00.

- The only way to resolve the dispute, if Mr. HONKALA won't sit down and discuss it with Mr. VAN CAMP, is fee arbitration: and Mr. HONKALA knew that option was open (Tr. 376) but refused to engage in it despite numerous offers.

The Hearing Officer's findings that Mr. Honkala did not understand do not jibe with Honkala's actions and admissions. While it is her purview to determine disputed facts, the above facts make her conclusion unsupportable by a clear preponderance of the evidence insofar as she finds that VAN CAMP didn't take reasonable prompt steps to clarify the fee agreement once he found the client didn't understand it, and that the client acted inconsistently with his claim of misunderstanding.

## **2. UNCLEAR FEE AGREEMENT**

### **A. REQUIREMENTS FOR FLAT FEE AGREEMENTS**

In 2006-2007, the law regarding flat fees in Washington was as follows.

- WSBA Formal Opinion 186, The Proper Handling of Advance Fee Deposits and Retainers (1990)(since withdrawn) specifically approved nonrefundable flat fees.

- RPC 1.5 says

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before **or within a reasonable time after** commencing the representation

- Comment to 1.5(b) says:

**Generally, it is desirable** to furnish the client with at least a simple memorandum or copy of the lawyer's customary fee arrangements that states the general nature of the legal services to be provided, the basis, rate or total amount of the fee and whether and to what extent the client will be responsible for any costs, expenses or disbursements in the course of the representation. A written statement concerning the terms of the engagement reduces the possibility of misunderstanding.

The law did not **require** a written fee agreement. It merely required that the terms of the agreement be communicated reasonably to the client, which Mr. VAN CAMP and Mr. SHAW testified they did verbally in addition to the written fee memorandum.

The Hearing Officer found that Mr. HONKALA subjectively did not understand what the fee agreement was. But Mr. VAN CAMP communicated the meaning to him clearly within a reasonable time of commencing representation.

How can a lawyer know when the client misunderstands the fee agreement as proposed by the lawyer? When that misunderstanding becomes clear, what must the lawyer do? The first question is easy: the client has to tell him he

misunderstood.

HONKALA did that on 3/5/07 for the first time, about 3 months after hiring him.

The second is similarly easy: the lawyer has to discuss with the client and attempt to clarify and resolve the dispute. VAN CAMP did that and thought all was well; the clients were mainly concerned about the upper limit of the fee. VAN CAMP clearly explained what he understood the fee to be both in person and by email.

But HONKALAS changed their complaint in the Bar Greivance, to the idea that they didn't understand there was a flat fee. So at that point VAN CAMP agreed that he would not treat the fee as a flat fee. He said would discuss the fee amount upon resolution of the case, or if no agreement is reached, arbitrate.

Comment 9 to RPC 1.5:

[9] If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, the lawyer must comply with the procedure when it is mandatory, and, even when it is voluntary, the lawyer should conscientiously consider submitting to it.

What more can be done? While a clearer written agreement would have been better, VAN CAMP complied with the minimum requirements of his ethical duties at that time. He did not violate RPC 1.5 because he clarified the fee agreement to Honkala within a reasonable time.

## **B. TESTIMONY SHOWING EXPLANATION**

The Hearing Officer made no finding whether Mr. SHAW explained the flat

fee to HONKALA. She made a finding that Mr. VAN CAMP did not explain it at the initial meeting. But again, it is undisputed that VAN CAMP did clarify the terms when he met with HONKALAS in March 2007: HONKALA did not then object to that clarification until the Bar Grievance in August, and VAN CAMP immediately agreed to treat the matter as an hourly case rather than a flat fee.

There is, as well, another internal contradiction in the Hearing Officer's findings. She finds at Finding 19:

At the first meeting, Respondent ... did not explain to HONKALA how the funds would be applied. Respondent told HONKALA that if the case settled within a week he would refund most of the \$25,000 retainer.

Obviously, then, Mr. VAN CAMP did discuss how the retainer would be applied: why would he mention refunding part of the retainer, and not explain that the entire amount would remain with him if the case took a long time? Mr. HONKALA only heard the part about the refund.

So yes: a better written fee agreement would have prevented Mr. HONKALA from claiming that he didn't understand the fee. Perhaps, subjectively, Mr. HONKALA didn't understand; we will never know. But when VAN CAMP learned that HONKALA claimed he didn't understand and wouldn't agree to the flat fee, he then agreed to change it to hourly and arbitrate any dispute over amount. Remember too that when VAN CAMP made that offer in early August he was still representing HONKALA and it was impossible to know how much more work would be needed. Only after HONKALA fired VAN CAMP did the amount of work done become a fixed amount.

### C. VAN CAMP'S MENTAL STATE

Even if we accept that Mr. HONKALA did not, subjectively, understand the flat fee agreement; and that it is sanctionable to simply enter into an unclear fee, even though VAN CAMP responded appropriately to clarify the agreement, it is clear that VAN CAMP himself subjectively believed the fee agreement was clear from the start.

So this is not a case where VAN CAMP changed the rules midstream, or hung on to client money that was never expected to belong to him. At worst, this is a communication error between client and lawyer. HONKALA intended VAN CAMP to have the money, at least part of it. HONKALA (apparently) would have been willing to pay more than the flat amount if he felt it was needed. And when it became clear this was a communications error – at least, was asserted as such, VAN CAMP asserts that objectively, Mr. HONKALA is playing dumb to justify his claim to return the fee – the Mr. VAN CAMP reacted as he is supposed, agreeing to talk and if unable to agree, to arbitrate.

No matter how clear the retainer, a client can always claim they were too depressed to understand the fee. Communication errors always happen even when every attempt is made to avoid them. The key point is that Mr. VAN CAMP asserted his good faith understanding, but also agreed to rethink that position in light of what HONKALA claimed. It is Mr. HONKALA who refused to use the process available to him.

Applied to this case, the discussion in *In re Disciplinary Proc. Against*

*Stansfield*, \_\_ Wn. 2d \_\_, 187 P.3d 254 (2008) is applicable. The case notes,

If a lawyer was given \$100 as an advance against the costs of investigation, took the money, deposited it in a personal checking account, and used it for personal expenses, then the lawyer acted intentionally, the client actually suffered an injury, and the most severe presumptive sanction, disbarment, would be appropriate. *Id.* at 6. By contrast, if the lawyer who received the \$100 advance for investigation costs was in a hurry to get to court, neglected to deposit or inform her staff what to do with the funds and they were erroneously deposited to the general account, and the lawyer upon discovery immediately replaced the money, then the lawyer was merely negligent, little or no damage occurred to the client, and the appropriate presumptive sanction would be either reprimand or admonition.

By this model, if Mr. HONKALA is believed, still Mr. VAN CAMP's actions are negligent rather than intentional, and the minimum discipline is called for.

#### **D. COUNT 5: UNREASONABLE FEE**

Because no fee amount has ever been determined, this count is a total red herring.

##### **1. Reasonable at Inception**

It is undisputed that a \$25,000.00 flat fee for all work necessary to defend a case like this through trial and appeal is reasonable. Mr. VAN CAMP'S requirement of \$25,000.00 was based on his experience that similar litigation, carried through trial, easily exceed that amount. Mr. Roecks agreed that this amount was reasonable. Mr. Campbell had charged \$27,000.00 total, and there is no evidence that he had only billed \$5,000 at the time of mediation: Mr.

HONKALA apparently made that number up. The Hearing Officer found most of Campbell's work was done in the preparation and preliminary injunction phases.

Every fee agreement allocates risk. The agreement VAN CAMP intended Mr. HONKALA to be bound by allocated a lot of risk to VAN CAMP if the case

dragged on, and some risk to HONKALA if it settled early.

## **2. VAN CAMP HASN'T FINALLY CHARGED ANY FEE**

VAN CAMP has returned \$15,000.00 to Mr. Honkala and will participate in further arbitration if demanded.

## **3. ASSERTED INCOMPETENCE**

Most of the hearing was an opportunity to dump on Mr. VAN CAMP's litigation tactics in this case, suggesting that he violated many rules and was too slow doing things. However as time went on it became clear that VAN CAMP didn't violate rules that mattered, and the Hearing Officer finally had to conclude that he took the "risk" that he couldn't correct those errors.

Since VAN CAMP was prevented from completing the case we will never know if he could have won at trial.

VAN CAMP has been practicing for over 35 years and is very successful. His decision to wait until late in the scheduling order process to start doing discovery may not be what other lawyers would do, but it has worked for him. It made sense in this case where a mediation was scheduled, to wait to see if the mediation would succeed. VAN CAMP approached this case as one for damages for HONKALA's loss of business opportunity. He made a tactical decision not to emphasize the injunction based on HONKALA's apparent lack of concern over the injunction. Here is what the Federal Judge ruled in the WENDLE case:

In the Ninth Circuit, a party may obtain a preliminary injunction by showing either "a combination of probable success on the merits and the possibility of irreparable harm; or (2) that serious questions are raised and the balance of

hardships tips in its favor." *Faith Ctr. Church Evangelistic Ministries v. Glover*, 462 F.3d 1194, 1201-02 (9th Cir. 2006); *E. & J. Gallo Winery v. Andina Licores S.A.*, 446 F.3d 984, 990 (9th Cir. 2006). This language does not refer to two distinct tests. Rather, the considerations recited above represent a sliding scale whereby an increase in the probability of success on the merits will compensate for a lesser probability of irreparable harm, and vice versa. *Glover*, 462 F.3d at 1202.

The Court finds that serious questions have been raised and the balance of the hardships tips in favor of the Plaintiff. As the Plaintiff has argued, the Plaintiff's goodwill and business reputation may be damaged by future Internet postings regarding the 500 GT convertible at issue in this case. The Defendant has not suggested that the requested preliminary injunction would impose any hardship upon him

VAN CAMP didn't challenge Lanham Act Jurisdiction because he felt the Plaintiff would succeed in showing jurisdiction, and more important, he needed a forum for the counterclaims. Under 15 USC § 1125, the LANHAM ACT, a claimant must satisfy 3 principles:

- There was a false or misleading statement made,
- The statement was used in commercial advertising or promotion, and
- The statement creates a likelihood of harm to the plaintiff.

HONKALA admitted he purchased the car for resale: he made statements that were allegedly false in commercial blogs, and caused potential harm. By the preliminary showing standard, likely WENDLE would have retained jurisdiction.

VAN CAMP delayed answering because he felt there was a tactical advantage to the delay, a tactic he encounters all the time in his litigation experience. FRCP Rule 26(a) is not self-enforcing, and there was no motion from WENDLE to force an answer, so why not take advantage and delay? The answer was filed prior to mediation to let WENDLE know there was a risk to not settling.

VAN CAMP scheduled the depositions properly and timely under the rules; WENDLE's refusal to carry out the depositions would have given VAN CAMP ample justification to extend discovery. Mr. Campbell argued the notices were flawed, but he was wrong; Mr. Weatherhead however conceded they were technically correct. FRCP 30(b)(1) requires "reasonable written notice," and under FRCP 30(b)(2) a party is entitled to 30 days notice to produce documents, but not to attend deposition.

VAN CAMP didn't discover WENDLE's hard drives, because that process is expensive and appeared unnecessary. WENDLE didn't discover HONKALA's hard drive either: in fact WENDLE didn't do any discovery after the initial interrogatories, either.

VAN CAMP believed he could have obtained an extension to conduct further discovery. The Hearing Officer found this was a risky proposition, although there was evidence that this judge did permit continuances and that Mr. Westhead had in fact been involved in cases where he did. In any event the case for HONKALA's damages could have been tried with the information VAN CAMP already had, or could develop without discovery.

It is particularly frustrating to note that almost everything Mr. VAN CAMP allegedly did wrong was also done wrong by Bar Counsel in this case. Counsel failed to timely raise an objection to Dustin Deissner representing Mr. VAN CAMP, and the objection was denied. Counsel took the deposition on shortened notice. Counsel failed to timely disclose experts, and was only allowed to bring her

expert in due to a strained, and we submit, erroneous interpretation of the ELC's. Every practicing lawyer knows that mistakes happens, rules are bent, and what matters is what happens at the end. HONKALA short circuited that inquiry by firing VAN CAMP and giving up: we will never know if VAN CAMP might have been successful. Had he continued VAN CAMP might very well have obtained money for HONKALA by treating this as HONKALA's case against WENDLE, not the reverse.

#### **E. COUNT 9: MISREPRESENTATION**

No Finding of Fact supports this conclusion. The letter in question states:

Enclosed is a copy of Mr. Campbell's cover letter dated December 15, 2006, with which he provides me a copy of the proposed injunction which he states he proposed to you as a means to resolve the matter without further litigation. This proposed injunction is the Motion for Preliminary Injunction [document #11] which he served on you December 13, 2006 by U. S. Mail before you had engaged our firm to represent you. This motion was granted December 20, 2006, and the Preliminary Injunction was filed as document #22.

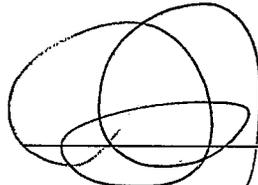
This letter contains a couple of factual errors, but no intentional misrepresentations. First, VAN CAMP is not saying that Campbell did send him a copy of the permanent injunction on 12/15/06, he is just relating content of Campbell's letter, which purported to include the injunction but did not. Second, the permanent injunction is substantially same as the permanent injunction, but is not identical, so Mr. VAN CAMP's statement in that respect is unclear. There is, in any event, no material, intentional misrepresentation.

#### **CONCLUSION**

This Court should:

1. Order a new hearing.
2. Alternatively find that Mr. VAN CAMP did not violate RPC 1.5, or other provisions as argued above, acted at worst negligently and without great harm to the client, and impose only a suspension of 6 months or less.

July 6, 2010

  
\_\_\_\_\_  
Dustin Deissner WSB# 10784

### CERTIFICATE OF SERVICE

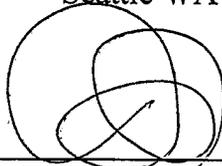
I hereby certify that on July 5, 2010 I caused to be served a true copy of the foregoing document by the method indicated below, and addressed to the following:

- U.S. Mail
- Hand Delivered
- Overnight Mail
- Telecopier (fax)
- email

To:

Diane Abelson  
Disciplinary Counsel  
Washington State Bar Association  
1325 Fourth Avenue Suite 600  
Seattle WA 98101-2539

July 6, 2010

  
\_\_\_\_\_  
Dustin Deissner WSB# 10784