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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN THE MATTER OF THE
DISCIPLINARY PROCEEDINGS AGAINST

THOMAS F. MCGRATH

An Attorney at Law

Bar Number 1313

OPENING BRIEF OF RESPONDENT MCGRATH

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ORIGINAL

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This is Respondent Thomas F. McGrath's Opening Brief in Opposition to the Disciplinary Board's Decision in this matter. For convenience, and out of no disrespect, last names are used for the various persons involved. Pursuant to ELC 11.5(b), the hearing transcript is referred to as "TR," the exhibits as "Ex of Exh" and the bar file or clerk's papers as "BF." The Second Amended Findings of Fact, Clerks Papers, Bar File 032, are referred to as "2nd AFFCL."

ASSIGNMENTS OF ERROR

1. The Board erred when it adopted the findings and conclusions of law of the hearing officer.
2. The Board erred when it found that six-month suspensions were appropriate for the alleged misconduct and directed that they be served consecutively.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the Board commit error when it adopted the findings and conclusions of law of the hearing officer?
2. Did the Board commit error when it found that six-month suspensions were appropriate for the alleged misconduct and directed that they be served consecutively?

STATEMENT OF CASE

Procedural History

On December 21, 2009, the Bar Association filed a Formal Complaint against respondent Thomas F. McGrath ("McGrath"). Clerks Papers 002. The Formal Complaint charged McGrath with five counts of misconduct:

Count 1 alleged that McGrath made misrepresentations that certain documents did not exist in violation of RPC 4.1 (knowingly making a false statement to a third person) and/or RPC 8.4(c) (dishonesty) and/or RPC 8.4(d) (conduct prejudicial to administration of justice).

Count 2 (later dismissed) alleged that McGrath willfully disobeyed a court order in violation of RPC 8.4(j).

Count 3 alleged that McGrath made a false certification to discovery responses violating RPC 8.4(c) (dishonesty) and RPC 8.4(d) (conduct prejudicial to administration of justice).

Count 4 alleged McGrath manifested prejudice and/or bias toward another party on the basis of national origin in violation of RPC 8.4(h) (conduct prejudicial to the administration of justice by manifesting prejudice).

Count 5 alleged that McGrath improperly had ex parte communication with a judge in violation of RPC 3.5(b) (impartiality and decorum of the tribunal).

McGrath Answered, Clerks Papers 008, a hearing was held on May 24, 235 and 26, 2010, and after some corrections were made to earlier findings, the Second Amended Findings of Fact, Conclusions of Law and Recommendations were filed on July 21, 2010. Clerks Papers, Bar File 032.

The Hearing Officer dismissed those portions of Count 1 which related to McGrath having intentionally failed to provide documents since it was not proven that he knew them to exist but he found a violation of RPC 8.4(d) for conduct prejudicial to the administration of justice on the basis that McGrath did not make reasonable inquiry. It is not entirely clear what the Hearing Officer found in regards to state of mind since he found that it was more then "merely negligent" but was not done with actual knowledge. In view of his reliance on ABA Sanction Standard 6.13 it appears he found the state of mind to be closer to negligent then to knowing. He recommended a reprimand. 2nd AFFCL, page 11 ¶1, and page 13 ¶ 1.

The Hearing Officer dismissed Count 2 since the Bar had failed to show willful conduct by McGrath in regards to a court order. 2nd AFFCL, page 12, ¶ 1.

The Hearing Office found the WSBA had proven Count 3 because McGrath had certified the discovery responses without reasonable inquiry and therefore he made a misrepresentation when he said he had made such inquiry in violation of RPC 8.4(c) and RPC 8.4(d). He found the conduct was intentional, applied ABA Standard 6.2 and recommended a 30-day suspension. 2nd AFFCL, page 12 ¶1, page 13, ¶ 2, and page 16 ¶ 1.

The Hearing Officer found the Bar had proven Count 4 because McGrath had directed argument to the court that the opposing party's national origin and citizenship status compromised her credibility and legal position. He found the conduct was intentional, applied ABA Standard 7.2 and recommended a 30-day suspension. 2nd AFFCL, page 12 ¶1, page 14 ¶3, and page 16 ¶2.

The Hearing Officer found the Bar had proven Count 5 because McGrath had ex parte communication with the judge in violation of RPC 3.5(b) and that the contact was intentional. He found that ABA Standard 6.22 and 6.32 applied and recommended a 30-day suspension. 2nd AFFCL, page 13 ¶2, page 15 ¶4, and page 16 ¶3.

He found the aggravating factors of prior disciplinary offenses, multiple offenses, refusal to acknowledge the wrongful nature of the conduct (as to Count 4 only) and substantial experience in the practice of law. He found the mitigator of remoteness of prior offense. 2nd AFFCL, page 15 part A and page 16 part B.

He recommended the three suspensions run consecutively for a total of 3 months. 2nd AFFCL, page 16.

The Disciplinary Board received briefing from both sides, Clerks Papers 042 and 043, held oral argument on July 20, 2010, and after correcting a minor typographical error entered a Corrected Disciplinary Board Order Modifying Hearing Officer's Decision on March 3, 2010. Clerks Papers 057.

The Board adopted the Hearing Officer Findings and Conclusions of Law but determined that there was no reason to apply a suspension of less than six-months since the mitigators did not outweigh the aggravating factors and that the suspensions should run consecutively for a total of 18-months. Board's Corrected Order, Clerks Papers 057.

Respondent timely appealed, Clerks Papers 053, and the matter is brought before this court for review.

Factual Statement of Case

This case involves two factual patterns stemming from McGrath's representation of a single client. Both factual patterns arise from the same case. Many of the factual issues are not in dispute but rather it is the conclusions to be drawn from them which are at issue. The factual issues are not complicated although in an attempt to make McGrath's conduct seem worse than it was, the WSBA sought to show that it was complicated.

The first fact pattern, Counts 1 and 3, involves allegation of how McGrath prepared and responded to discovery. In summary, *see* specific discussion next, requests for production of documents were sent to McGrath from the opposing side, he asked his client, who was his wife, to find the documents. When his client told him that some of the documents did not exist he responded to that effect in the discovery and certified the discovery under the reasonable inquiry provision of CR 26(g). Some of the documents were later found to exist. Because McGrath was married to the defendant, was a corporate officer, had represented her business previously and shared an office space with her, the Hearing Officer determined that asking her to search for and find documents and then relying upon what she told him was not a reasonable inquiry.

McGrath represented Chiropractic Wellness Center at Capital Hill, P.S. Inc., ("CWC"), a personal service corporation owned by his wife. On behalf of CWC McGrath brought a lawsuit against Katherine Ellison ("Ellison"). Ellison counterclaimed and moved to dismiss CWC's claims which was granted. The case proceeded on Ellison's counter-claims. 2nd AFFCL, ¶3.

Discovery requests were served on defendant. 2nd AFFCL, ¶4. Although there was considerable testimony during the hearing on various discovery questions, the Hearing Officer relied upon two discovery requests – a request for marketing calendars, 2nd AFFCL, ¶4, and requests for payment and other business records, 2nd AFFCL, ¶5, in making his determination. These documents were not provided although later Maxwell testified that some of them did exist. 2nd AFFCL, ¶11 and 12.

McGrath responded to the requests by certifying the responses were being submitted after reasonably inquiry consistent with CR 26(g). The testimony was that the process was that McGrath would provide his client the discovery requests and then ask her to provide the materials. She would provide the materials and then he would submit them. 2nd AFFCL, ¶6. She was responsible for gathering all information responsive to the discovery requests. The Hearing Office concluded that asking her what

documents she had and relying upon what she told him was not a reasonable inquiry under CR 26(g) because McGrath was the defendant's husband, was a corporate officer, had previously represented CWC on business matters and litigation and shared office space with defendant Maxwell. 2nd AFFCL ¶14.

The second fact pattern, Counts 4 and 5, involves allegations regarding ex parte letters McGrath submitted to the court, without sending them to the opposing side and making assertions regarding the opposing party's national origin.

On February 20, 2008, McGrath submitted two letters to Judge Rogers. One was type written and had a handwritten post-script to the effect that "Your Decision is going to effect American's (sic) – How (sic) are you going to trust and believe – a (sic) alien or a U.S. citizen." The second letter was handwritten and raised issues about Ellison being from Canada and asked that her assets be frozen. 2nd AFFCL, ¶¶ 16 – 20; Exhs. A-26 and A-27. A copy of the typed letter without the post-script, Exh. A-26, was provided to the other side. A copy of the handwritten letter, Exh. A-27, was not provided to the other side. 2nd AFFCL, ¶¶ 21 and 22.

Judge Rogers, upon receipt of the letters immediately thought they were violations of the rules. TR 452. Respondent apologized to the court

for his statements. TR 461. The Hearing Office found there had been prior apologies but that McGrath was nonetheless of the belief that national origin and immigration status were valid argument in support of the relief he sought. 2nd AFFCL, ¶ 27. The Hearing Officer found there was actual harm to the public's view of the integrity of the bar and the administration of justice. 2nd AFFCL, ¶ 28.

DISCUSSION

Public Policy Considerations Regarding Discovery and the RPCs

This case raises the issue of whether the RPCs and the disciplinary system should be used as a second forum for allegations of discovery abuse. These discovery issues were litigated and hard fought in the civil litigation, the forum where the violations were alleged to have occurred. Exhibit A-15. The findings regarding discovery in the Bar case, bootstrap off of CR 26(g), without that rule the reasonable inquiry provisions applied as the basis for Count 1 and 3, would not exist and there would be no violation.

It would appear to be long standing public policy that where there are alleged discovery violations and those matters have been litigated to not re-litigate them again in the disciplinary system. For example, below counsel has been unable to find any sanctions or disciplinary proceeding for

the violations found in the discovery abuse foundational cases of *Matter of Firestorm 1991*, 129 Wn.2d 130, 916 P.2d 411 (Wash. 1996) or *Washington State Physicians Ins. Exchange & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 858 P.2d 1054 (Wash. 1993).

If in fact, the WSBA were to start to re-litigate every case where there has been a finding of discovery abuse the cases would be legion. The better public policy is to leave discovery violation determinations to the courts in which they are alleged to have occurred rather than to bog down the already financially constrained Bar disciplinary system with those additional cases. This court, which of course has the ultimate authority over the attorney disciplinary system, ELC 2.1, should use this case as the place to announce that while the system could if it wished take cognizance of and re-litigate allegations of discovery abuse, the better and more efficient place for such determinations is the forum before which the abuse allegedly took place and not the attorney disciplinary system.

Objections to Specific Provisions of Findings

McGrath makes the following objections, many of which are more thoroughly discussed in subsequent sections:

Finding of Fact ¶ 4 - In regards to whether objections were made in good faith: Essentially, the Hearing Officer determines, without evidence,

that McGrath knew what market calendars were and that they existed in the form requested by the opposing party. However, that was not the objection; the objection was that the request was “vague, overbroad, ambiguous, burdensome and invasive.” The client testified that as far as she was concerned marketing calendars could mean more than one thing. As an advocate, McGrath then made an appropriate objection.

Finding of Fact ¶s 9, 10 and 13– These findings are apparently based on court findings and recitations to support the findings in the Bar proceedings - While factually correct recitations of court orders and decisions, they are irrelevant for consideration or proof as to whether McGrath violated CR 26(g) as these determinations by the court are hearsay, are found under a different burden of proof and do not prove the assertions made therein so they should be stricken and not given consideration as to evidence of any alleged violations of the RPCs.

Finding of Fact ¶ 14 – Finding a connection between McGrath’s roles and actual knowledge of documents: *See* discussion below.

Finding of Fact ¶ 15 – Regarding alleged harm because of the discovery issues – *See* discussion below.

Finding of Fact ¶ 23 – In regards to whether McGrath intended the ex parte communications to be persuasive to the court. There is no

evidence that he really thought he was making argument to the court on these issue. His remarks were nothing more than McGrath blowing off steam in ill-advised frustration.

Finding of Fact ¶ 27 – Regarding McGrath’s current beliefs regarding the impact of nationality – *See* also discussions below regarding McGrath’s beliefs and apologies and application of his beliefs as an aggravator. The totality of McGrath’s testimony and his prior apologies shows that his personal belief at the moment he sent the ex parte communications was that he thought that Ellison’s status supported an argument for relief but that he now knows that this position was not a valid argument to make under the rules and law despite his personal beliefs. .

Findings of Fact ¶ 28 – Regarding supposed harm because of the notes to the judge – *See* discussion below

Conclusion of Law Relevant to Count 1, 3, 4 and 5 – Respondent contests these conclusions: *See* discussions below.

Presumptive Sanction – Count 1 – McGrath challenges that a sanction is appropriate for Count 1 since it is merged into Count 3 but if a violation of Count 1 is found, then McGrath accepts that the presumptive sanction is reprimand

Presumptive Sanction – Count 3 – There was no violation but if there was the evidence, see discussion, does not support that McGrath had the conscious awareness of the nature of the conduct required for a knowing finding or that there was harm or potential harm.. See discussion below. At worst his actions merit a presumptive sanction of reprimand. ABA Standard 6.23.

Presumptive Sanction – Count 4 – While it is correct McGrath made the statements he did they were isolated, made in frustration and not disseminated to the public the appropriate presumptive sanction in this “particular case” is reprimand under ABA Standard 7.3.

Presumptive Sanction – Count 5 – The ex parte contact standard under 6.22 and 6.32 requires actual injury or potential injury to a client or party or inference or potential interference with a legal proceeding. Unlike many of the other Standards there is no public component. In this case, there was no chance of any actual or potential injury occurring to a party or interference with the proceeding by this ex parte contact. There is no proof of any and the judge said he just disregarded it completely. The appropriate standard would be admonition under Standard 6.34 since there was little or no actual or potential injury to a party or chance of interference with the outcome of a legal proceeding.

Aggravators – Multiple offenses – While there are findings of multiple counts of misconduct there are only two offenses – improper discovery and submitting improper comments to the court ex parte. This aggravator should be denied or given little weight.

Aggravators – Refusal to Acknowledge Wrongful Nature of Conduct – The Hearing Officer specifically found that this related to Count 4 and presumably deals with McGrath's statements made at the hearing regarding why he sent the remarks. This aggravator, as discussed below should be stricken.

Sanctions Recommendations – See discussions below.

Merging of Counts 1 and 3

The Hearing Officer dismissed the intentional allegations found at Count 1 regarding failure to produce documents. He then found a violation of RPC 8.4(d) for conduct prejudicial to the administration of justice on the basis that McGrath provided discovery responses without making a reasonable inquiry of his client. At Count 3 he also found a violation of RPC 8.4(d) based on McGrath having failed to make a reasonable inquiry for the same discovery response found at Count 1. It appears the difference is that Count 1 was for the responses themselves and Count 3 was for the CR 26(g) certification that he had conducted reasonable inquiry, however,

the basis is the same conduct: failure to conduct reasonable inquiry. The only difference is what he then did based on the alleged failure. The same conduct, failure to conduct reasonable inquiry, is the root of both counts so Count 1 should be considered subsumed into Count 3 and, therefore Count 1 should be dismissed.

Inconsistent Findings at Count 1 and Count 3 Requires Dismissal of Count 3

At Count 3, the Hearing Office found, and the Board adopted, a violation of RPC 8.4(c) (misrepresentation) on the basis that McGrath did not conduct a reasonable inquiry and, therefore, when he certified that he had done so, he made an intentional misrepresentation. However, at Count 1, the Hearing Officer found that McGrath had acted more than negligently but less than intentionally when he provided discovery responses which stated there were no documents, but the premise of the finding of misconduct at Count 3 is that McGrath had actual knowledge that knew he had not conducted a reasonable inquiry. *See* discussion below. The Hearing Officer at 2nd AFFCL, page 14 found in regards to Count 1, that it could not be proven that McGrath had “actual knowledge that responsive information and documents were being withheld.”

If McGrath had no knowledge that documents were being withheld then he would have no basis for asking for more information. The basis for

Count 3 is that McGrath knew there were marketing calendars and that there were more business records and, therefore, he should have pushed his client to get find them. He is supposed to have known those documents existed because he was married to the owner of the business, was a corporate officer, had represented the business and shared office space from the business. However, the finding at Count 1 was that he did not know there were documents being withheld. The inconsistent findings between Count 1 and Count 3 show that the WSBA did not prove, as a matter of law, the violations alleged at Count 3 and therefore, those violations must be dismissed.

McGrath Conducted a Reasonable Inquiry

Counts 1 and 3 found that McGrath did not conduct a reasonable inquiry. Reasonable inquiry in regards to discovery requests is:

On its face, Rule 26(g) requires an attorney signing a discovery response to certify that the attorney has read the response and that after a reasonable inquiry believes it is (1) consistent with the discovery rules and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law; (2) not interposed for any improper purpose such as to harass or cause unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had, the amount in controversy, and the importance of the issues at stake in the litigation.

Whether an attorney has made a reasonable inquiry is to be judged by an objective standard. ^[76] Subjective belief or good faith

alone no longer shields an attorney from sanctions under the rules.
[77]

In determining whether an attorney has complied with the rule, the court should consider all of the surrounding circumstances, the importance of the evidence to its proponent, and the ability of the opposing party to formulate a response or to comply with the request. [78]

Washington State Physicians Ins. Exchange & Ass'n v. Fisons Corp., 122 Wn.2d 299, 343, 858 P.2d 1054 (Wash. 1993) [Footnotes omitted.] *Fisons* at footnote 76, page 343, cited *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 220, 829 P.2d 1099 (Wash. 1992) [Underling added.], on the objective standard

The reasonableness of an attorney's inquiry is evaluated by an objective standard. *Miller*, 51 Wash.App. at 299-300, 753 P.2d 530. CR 11 imposes a standard of "reasonableness under the circumstances". Fed.R.Civ.P. 11 advisory committee note, 97 F.R.D. at 198; see also *Miller* at 301, 753 P.2d 530. The court is expected to avoid using the wisdom of hindsight and should test the signer's conduct by inquiring what was reasonable to believe at the time the pleading, motion or legal memorandum was submitted. See Fed.R.Civ.P. 11 advisory committee note, 97 F.R.D. at 199. The court should inquire whether a reasonable attorney in like circumstances could believe his or her actions to be factually and legally justified. *Spokane & Inland Empire Blood Bank*, 55 Wash.App. at 111, 780 P.2d 853 (quoting *Cabell v. Petty*, 810 F.2d 463, 466 (4th Cir.1987)). In making this determination, the court may consider such factors as:

the time that was available to the signer, the extent of the attorney's reliance upon the client for factual support, whether a signing attorney accepted a case from another member of the bar or forwarding attorney, the complexity of the factual and legal issues, and the need for discovery to develop factual circumstances underlying a claim.

Accordingly, what the Hearing Officer was required to do was "... to avoid using the wisdom of hindsight and should [have] test[ed] the signer's conduct by inquiring what was reasonable to believe at the time the pleading, motion or legal memorandum was submitted." The Hearing Officer found that because McGrath was married to Maxwell, because he was a corporate officer, because he had represented CWC in the past and because they shared office space it was not reasonable for McGrath to rely upon his wife's representation that the documents did not exist. In doing so, the Hearing Office abused his discretion since there is no basis for him to conclude that just because of those factors McGrath should have disbelieved his wife when she told him the documents did not exist.

The Hearing Office found at Count 1 that McGrath did not have actual knowledge of any documents. While a good faith belief is not by itself the basis for a reasonable inquiry, being married to the client, being a corporate officer, having represented the client in the past and sharing office space does not provide the basis for a conclusion that McGrath should have doubted his wife and done more when he did not have actual knowledge of any other documents. The documents involved were peculiar to the day-to-day operations of the office and there was no evidence that McGrath had anything to do with those matters.

At best the Hearing Officer relied upon circumstantial evidence to the effect that because of the four factors he identified McGrath should have know to conduct further inquiry. The hearing office simply makes a leap that because of the factually true statements about McGrath's marriage and prior relationships with CWC that McGrath must have know he needed to ask for more documents. When the WSBA seeks to prove its case by circumstantial evidence the WSBA needs to produce facts from which only one reasonable conclusion may be inferred. *In re Guarnero*, 152 Wn.2d 51, 61, 93 P.3d 166 (2004). The key to this language is that while the WSBA does not have to disprove whatever hair brained alternative a respondent may come up with, the WSBA when meeting its burden of proof and in providing substantial evidence, must exclude or disprove all reasonable alternatives until there is only one reasonable conclusion remaining to be reached.

There is nothing inherent in the four factors identified by the Hearing Officer which would show the McGrath should have questioned his client more about her representations regarding marketing calendars and requests for payment and other business records. A reasonable alternative conclusion that could be drawn from the four prior relationships identified by the Hearing Officer is that McGrath's wife would not mislead

her husband, that he did not learn anything from the prior representations which was contrary to what his wife was telling him and he was not aware of anything from the shared office space which was contrary to his understandings.

The objective conclusion that McGrath did not conduct a reasonable inquiry is not based on subjective facts from which such conclusion can be drawn and, therefore, Counts 1 and 3 were not proven and should be dismissed.

No Showing of Actual Harm to Public Regarding National Origin Remarks

The Hearing Officer found there was actual harm to the public's view of the integrity of the bar and the administration of justice. 2nd AFFCL, ¶ 28. These documents went to the judge who totally disregarded them and then to the opposing party and her counsel. The Hearing Office does not identify how the public's view was impacted in anyway by these documents and there is no evidence that the public has any knowledge or information amount this. There is no evidence to support this very broad non-specific assertion and it should be stricken as not supported by the evidence. What the evidence showed was little or no harm caused by the ex parte letters and notations about national origin.

Sanction Recommendation and Aggravators and Mitigators

The Hearing Officer and the Board found an aggravator of refusal to acknowledge the wrongful nature of misconduct in raising the national origin issue on the credibility of Ellison. This is not correct. As discussed above, McGrath did apologize and acknowledged that he should not have made the argument. What he is being punished for in this aggravator is his personal beliefs on this issue. In short, it is his beliefs which are found to be wrong even though he did acknowledge that rules do not let him make his argument even though he has such beliefs. This aggravator should be stricken since it he did apologize and since this punishes him for his personal beliefs.

Additional Mitigator of Other Penalties and Sanctions

The Hearing Officer and the Board should have found the additional mitigator of other penalties or sanctions, ABA Standard 9.32(k). For the same alleged misconduct in this matter, the Superior Court imposed sanctions against Mr. McGrath personally and his clients of \$5,290. Exh. A-24, 28.

Standard to Be Applied to Certifying Discovery

The Hearing Officer and the Board applied ABA Standard 6.22 in recommending a suspension for the finding that McGrath certified the

discovery responses when he allegedly knew he had not made a reasonable inquiry. The proof did not support a finding that he “knew” he had not make a reasonable inquiry. At best he was negligent in his belief that relying upon his wife’s statements to him about what she had found was sufficient. As such the appropriate ABA Standard is 6.23, reprimand.

Standards to be Applied to Statements About National Origin

The Hearing Office and the Board used ABA Standard 7.2 in regards to the national origin comments made in the two letters submitted to the court. This Standard requires actual injury or potential injury to a client, the public or the legal system. The evidence was that Judge Rogers got the letters and immediately discounted them so there was no actual injury. For ABA Standard 7.2 to apply, there would, therefore, have to be potential injury. If there was any potential injury it would have been from the public learning that McGrath had asked the judge to believe an American citizen over a Canadian citizen. This is not a case in which McGrath used inherently offensive or bigoted terms to refer to Ellison.

This is a case where McGrath appealed to the patriotism of the judge and asked the judge to accept the word of an American over a Canadian. The Hearing Officer engages in raw speculation with any evidence in the record that if this had become public such a request would

have caused potential harm. There is no basis for the harm finding and therefore it cannot be used in any analysis. *See* above discussion.

At best asking a judge to believe an American over a Canadian would have caused little or no harm to a client, the public or the legal system. It may have engendered opinions about whether this was proper or not but controversy is not the same as harm. The implication would appear to be that a member of the public might think that a court would make a decision based on such a standard asserted by an advocate. There is no support in the record for such implication. The little or no harm factor flows from the admonition provisions under ABA Standard 7.4.

This is one of those situations in which the flexibility articulated in the Standards should be applied. "The standards thus are not analogous to criminal determinate sentences, but are guidelines which give courts the flexibility to select the appropriate sanction in each particular case of lawyer misconduct." ABA Standards Part II, Theoretical Framework. If a violation is to be found the appropriate sanction in this "particular case" is reprimand under ABA Standard 7.3. This is the appropriate balancing between suspension, reprimand and admonition. Even if his conduct was not negligent, given that an admonition under Standard 7.4 occurs when, as

in this specific instance, there was little or no actual or potential injury to a client, the public, or the legal system, the middle ground is reprimand.

Standards to be Applied for Ex Parte Conduct

The Hearing Officer and the Board used Standards 6.22 and 6.32 for the two ex-parte letters to the court. A similar analysis is appropriate as used above for the standard about national origin. There was no possible actual injury since they were no pleadings and were not part of the arguments considered by the judge. There was no evidence to support any findings that the letters had the potential for interference in the legal proceeding. Unlike many of the other Standards there is no public component. In this case, there was no chance of any actual or potential injury occurring to a party or interference with the proceeding by this ex parte contact. There is no proof of any and the judge said he just disregarded it completely. The appropriate standard would be admonition under Standard 6.34 since there was little or no actual or potential injury to a party or chance of interference with the outcome of a legal proceeding.

The appropriate finding is little or no harm under Standards 6.24 and 6.34. Since the conduct was not negligent but since there was little or no potential harm the appropriate Standards are ABA Standards 6.23 and 6.32 -- reprimand.

Six-Month Suspensions are Too Long

The Board says that each of the violation requires a six-month suspension simply because that is the general rule. However, the Hearing Officer saw McGrath testify and was in the best position to determine what would be the appropriate suspension in McGrath's specific situation. The Board disregards those observations and without any citation to other cases, applies form over function and fails to show the flexibility required by the Standards. As discussed above if sanctions are to be imposed, the appropriate sanctions are reprimands but if a suspension is to be imposed, when the mitigators, including McGrath already having been sanctioned by the court, are applied against the aggravators and the actual conduct in this specific case are taken into account the recommendations of 30-day suspensions would be the appropriate length.

Consecutive vs. Concurrent Sanctions

The Hearing Officer recommended consecutive sanctions and the Board, while increasing the length of the suspensions, left them as consecutive. The effect is to transform a six-month sanction to an 18-month suspension. The Washington court has adopted the principle found in the ABA Standards that

With multiple ethical violations, the "ultimate sanction imposed should at least be consistent with the sanction for

the most serious instance of misconduct among a number of violations.' "

In re Disciplinary Proceeding Against Cramer, 168 Wn.2d 220, 236, 225 P.3d 881 (2010) citing *In re Disciplinary Proceeding Against Petersen*, 120 Wash.2d 833, 854, 846 P.2d 1330 (1993) (quoting *ABA Standards* at 3).

The effect of the Hearing Officer's and Board's recommendation is to convert the recommendation for the most serious sanction into a three month suspension in the case of the Hearing Officer and an 18-month suspension in the case of the Board. There is no basis for doing so here. The ABA Standards do not address the consecutive vs. concurrent suspensions issue. It appears the court has addressed the issue three times. The first was in a pre-standards case, *In the Matter of McMurray*, 99 Wn.2d 920, 665 P.2d 1352 (1983). There were three counts against McMurray, in the first he failed to remit to a court the bail money he had been provided by his client; the second was for his use of confidences and secrets of the client from count one in a subsequent proceeding while representing another client and the third count was for his failure to cooperate in the investigation. The recommendation was a one-year suspension for count one, a two month suspension to be served consecutively for count two and for count three, a six month suspension to

be served consecutively with the one-year suspension and concurrently with the two month suspension for a total of 18-months. The court adopted the recommendation without discussion of the consecutive/concurrent issue.

In *In re Disciplinary Proceedings Against Cohen*, 150 Wn.2d 744, 762, 82 P.3d 224 (2004) (Commonly called "*Cohen II*"), a second proceeding was brought against Cohen while serving a suspension from a prior matter. A suspension was recommended in the second proceeding. He asked that he be given credit for the overlapping time between the two suspensions. The court rejected the argument stating that:

Lastly, we consider the Board's decision to refuse Cohen credit for the suspension that he received for his misconduct in *Cohen I*. We find that the Board correctly refused Cohen "credit for time served" given Cohen's repeated misconduct. Therefore, Cohen's suspensions in *Cohen I* and this matter should run consecutively.

The court also discussed the consecutive/concurrent issue in *In re Disciplinary Proceeding of DeRuiz*, 152 Wn.2d 558, 582, 99 P.3d 881 (2004):

The WSBA argues that the recommended suspensions should run consecutively, given the fact that the separate disciplinary proceedings against DeRuiz were merely consolidated in the interests of judicial economy. In *Cohen II*, we refused to give concurrent suspensions under similar circumstances given the attorneys repeated misconduct. *See Cohen II*, 150 Wash. 2d at 763, 82 P.3d 224. In light of the

aggravating factors associated with DeRuiz [sic] misconduct, including the repeat nature of his misconduct, we impose the six-month suspensions to run consecutively for a total suspension of one full year.

McMurray offers little guidance on the consecutive/concurrent issue as it is a pre-Standards case and the court offers no discussion on the issue other than the matters were serious. *DeRuiz*, citing *Cohen II*, instructs that the reason the sanctions were to run consecutively is because of the Bar's argument that there really were two different cases and it was just a matter of judicial economy that the matters were even being considered at the same time. In short, just as in *Cohen II*, these were two unrelated and separate cases. This factor combined with "the repeated nature of his misconduct" merited consecutive sanctions.

Those factors are not present here. This case involves a single related case and the misconduct all happened within the confines of that case. There are not findings that the same misconduct happened in other cases, as in *Cohen II* and *DeRuiz*. There is no reason in McGrath's case to deviate from the precept that the sanction to be imposed be consistent with the most serious one. The concept of converting a one month suspension to a three month suspension by having the suspensions imposed run consecutively as opposed to concurrently should be rejected. If any suspension or suspensions are imposed they should run concurrently.

Conclusion

McGrath acted reasonably in regard to the discovery. He is being faulted for believing his wife when the Hearing Office specifically found he had no actual knowledge of any undisclosed documents. The discovery allegations should be dismissed or at most merit a reprimand.

The national origin and ex party contact allegations resulted in no harm and little or no potential harm. While ill advised they do not merit suspension. At the most they should be reprimands.

In any case, there is no reason to convert six-month suspensions into the inordinately long suspension of 18-months so if six-month suspension are to be applied, they should be served concurrently

Dated this 9th day of May, 2011.

Kurt M Bulmer, WSBA 5559
Attorney for Respondent McGrath

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Rec. 5-9-11

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Attached please find the Respondent's Open Brief in this matter.

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