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IN THE WASHINGTON STATE SUPREME COURT

IN RE THE DISCIPLINARY MATTER
OF
THOMAS KAMB
WSB #16944

APPEAL FROM THE DISCIPLINARY
HEARING BEFORE THE
WASHINGTON STATE BAR ASSOCIATION

OPENING BRIEF OF APPELLANT

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ORIGINAL

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I. INTRODUCTION

Mr. Kamb appeals the Disciplinary Board's recommendation of disbarment. Mr. Kamb, a long-time practitioner from Skagit County, represented an individual in a DUI case and also in a subsequent Department of Licensing hearing. On the date the DUI case was resolved, Mr. Kamb forgot to include certain suppression language in the court order that could have been used in the Department of Licensing hearing. During a prehearing conversation with the Department of Licensing Hearing Officer, Mr. Kamb informed the Hearing Officer that he believed that he had an order that would suppress the BAC. When Mr. Kamb returned to Court to obtain a copy of the order, he noticed that the order did not include the suppression language. As such, Mr. Kamb wrote on the court order with the intention of obtaining the prosecutor's signature and then presenting it to the judge for his approval. Unfortunately, after Mr. Kamb wrote on the court order, a court clerk notified both the prosecutor and the judge of Mr. Kamb's actions. From that point forward, Mr. Kamb has been labeled as a dishonest lawyer which is contrary to his reputation and character. Respectfully, Mr. Kamb appeals the Disciplinary Board's recommendation.

The Disciplinary Board's recommendation of disbarment for violations set forth in Counts I and II of the Statement of Charges is not supported by the evidence. Respectfully, Mr. Kamb urges that the Disciplinary Board, in approving the Hearing Officer's Findings of Fact, Conclusions of Law and Sanction Recommendations, erred when it found that Mr. Kamb knowingly and intentionally misrepresented the existence of a signed BAC suppression order to the Department of Licensing Hearing Officer. Rather, a review of all of the testimony reflects that Mr. Kamb acted negligently when he

discussed the suppression order with the Hearing Officer, thus warranting a sanction less than disbarment.

Additionally, Mr. Kamb urges that even though he wrote on a filed court order by adding suppression language to it, the Hearing Officer's conclusion as to what his plans were after writing on the order are not supported by the record.

Finally, neither the Hearing Officer nor Disciplinary Board acknowledged any mitigating factors for Mr. Kamb, and four of the six aggravating factors are not supported by the record.

Respectfully, Mr. Kamb urges this court to strike or modify the Findings of Fact and to impose sanctions that are properly supported by the record.

II. ASSIGNMENTS OF ERROR

1. The Washington State Bar Association Disciplinary Board erred when it determined that Mr. Kamb knowingly and intentionally misrepresented to the Department of Licensing hearing officer the existence of a BAC suppression order.
2. The Washington State Bar Association Disciplinary Board erred when it determined that Mr. Kamb engaged in a criminal act when he wrote on the filed court order.
3. The Washington State Bar Association Disciplinary Board erred when it determined that the appropriate sanction is disbarment for Counts I and II.
4. The Washington State Bar Association Disciplinary Board erred when it failed to consider the mitigating factors of remorse and character or reputation.
5. The Washington State Bar Association Disciplinary Board erred when it failed to strike the aggravating factors of selfish or dishonest motive, refusal to acknowledge wrongful nature of conduct, pattern of misconduct, and illegal conduct.
6. The Washington State Bar Association Disciplinary Board erred when it failed to conduct an unanimity and proportionality review to determine the appropriate sanction.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether Mr. Kamb knowingly and intentionally deceived the Department of Licensing hearing officer when, in an off record conversation, he told the hearing officer he believed he had an order suppressing the BAC result? (Assignment of Error #1).

2. Whether Mr. Kamb's conduct of writing on a filed court order was an intentional and knowing alteration of the court order when he never had an opportunity to present it to the court, but the prosecuting attorney agreed to the added language? (Assignment of Error #2)

3. Whether Mr. Kamb should be disbarred when his conduct was negligent and was an isolated event? (Assignments of Error #1, 2, 3 and 6).

4. Whether the Disciplinary Board erred by not acknowledging mitigating factors existed that were supported by a clear preponderance of the evidence.? (Assignment of Error #4).

5. Whether the aggravating factor of selfish or dishonest motive should be stricken as the clear preponderance of the evidence does not support such finding? (Assignment of Error #5)

6. Whether the aggravating factor of failure to acknowledge wrongful nature of conduct should be stricken as the clear preponderance of the evidence does not support such finding? (Assignment of Error #5)

7. Whether the aggravating factor of pattern of misconduct should be stricken as the clear preponderance of the evidence does not support such finding?
(Assignment of Error #5)

8. Whether the aggravating factor of illegal conduct should be stricken as the clear preponderance of the evidence does not support such finding? (Assignment of Error #5)

IV. STATEMENT OF THE CASE

A. Procedural History

On April 10, 2009, the Washington State Bar Association filed a Formal Complaint against Thomas R. Kamb alleging three counts of misconduct under the Rules of Professional Conduct surrounding Mr. Kamb's representation of a DUI client in both the criminal case and an ancillary Department of Licensing hearing. The RPC's at issue include RPC 3.3(a)(1); RPC 8.4(b), (c) and (d) and RPC 1.3. BF 3.

A disciplinary hearing was held June 22-23, 2010 before Hearing Examiner Donald W. Carter. On July 14, 2010, Hearing Officer Carter entered his Findings of Fact, Conclusions of Law and Sanction Recommendations. BF 69. Significantly, Mr. Carter recommended disbarment for Counts I and II, and reprimand for Count III. The sanction recommendation arises from Mr. Kamb's insertion of a statement on a filed court order to correct an earlier oversight and statements regarding said order to a Department of Licensing Hearing Examiner.

On April 4, 2011, in a 9-1 decision, the Disciplinary Board approved the disbarment recommendation. The Disciplinary Board Dissent recommended a one year suspension. BF 88.

Without question, Mr. Kamb's conduct was improper. But the presumptive sanction determined by the hearing officer, and recommended by the Disciplinary Board, is excessive given the facts of this case and a proportionality review. Respectfully, Mr. Kamb urges this Court to reject and/or strike certain findings of fact and conclusions of law, to depart from the Disciplinary Board's disbarment

recommendation, and to impose the appropriate sanction of reprimand for Counts I and II.

B. Facts

Mr. Kamb began practicing law in the State of Washington June 1, 1987. TR 155. FFCLR 3.1, 3.2. Mr. Kamb has focused his practice on criminal defense, and about one-half of Mr. Kamb's cases are DUI cases. TR 157. Mr. Kamb represented Monica Magnuson on a DUI charge in 2008. TR 155. FFCLR 3.3.

On May 13, 2008, Monica Magnuson appeared before the Honorable David Svaren whereupon she entered a guilty plea to Negligent Driving in the First Degree, which was reduced from DUI. Neither Mr. Kamb nor the prosecutor, Sloan Johnson, mentioned suppressing the breath test during the hearing, and there was no reference of suppressing the breath test in Judge Svaren's order. TR 158-159. FFCLR 3.7.

Mr. Kamb handled 15 cases in the District Court, including Ms. Magnuson's, on the morning of May 13, 2008. After her hearing, Mr. Kamb handled the 11:00 Mount Vernon Municipal Court calendar, which usually finishes around noon, then drove to Oak Harbor for a hearing at 1:00 p.m., he then returned to his Mount Vernon office. TR 238-240. FFCLR 3.8.

About a week before entering Ms. Magnuson's plea, Mr. Kamb recalled speaking generally with Mr. Johnson about suppressing breath tests on four or five cases where the client's primary language wasn't English, and the breath test was low. In the Magnuson case, her BAC was .09, she had no criminal history, she wasn't committing other crimes, and her primary language was German. TR 168. Mr. Kamb recalled Mr. Johnson stating "yeah, that doesn't really sound like a problem to me, as long as they don't have other history." TR 159-160. During Mr. Kamb's various discussions with Mr. Johnson about cases, they would sometimes discuss cases by

names and other times they would discuss cases generally. TR 167-168. Mr. Kamb has had numerous contacts with Mr. Johnson both personally and professionally. TR 161. FFCLR 3.5.

On the afternoon of May 13, 2008, Mr. Kamb represented Ms. Magnuson before Laurie Provo, Hearing Examiner for the Department of Licensing, who conducted Ms. Magnuson's Department of Licensing hearing to determine whether Ms. Magnuson's license would be suspended based upon her breath test results. TR 50-51. Mr. Kamb handled weekly DOL hearings before Ms. Provo. TR 68, 75.

Before the DOL hearing began, and before the recording began, Mr. Kamb informed Ms. Provo that he believed he had a district court order from the criminal case that likely contained the appropriate suppression language for DOL purposes, but he wasn't positive. TR 69-70; 183-184; 241.

Consistent with his pre-recorded statement, during the recorded hearing Mr. Kamb informed Ms. Provo that he would offer as an exhibit a copy of a District Court order suppressing the breath test result from the criminal case. TR 53-54. Mr. Kamb informed Ms. Provo that the suppression was based on a lack of foundation and that the decision to take the test was not voluntary. TR 54; 244. Ms. Provo told Mr. Kamb to fax the document to her following the hearing. Mr. Kamb informed her that he would probably fax the document the following day. TR 54-55; 190-191.

After the Department of Licensing hearing, Mr. Kamb went to the Skagit County District Court to review the Magnuson criminal file. When Mr. Kamb obtained the court file, he intended to obtain a copy of the order if it contained the suppression language. If it didn't have such language, his plan was to correct the order, obtain Mr. Johnson's initials, and then present the modified order to Judge Svaren and ask him to sign the corrected order. TR 200-204.

When Mr. Kamb obtained the court file, he noted the suppression language was absent. He then wrote on the court order, "BAC suppressed – not a

knowing and voluntary decision to take test.” He then asked for a copy of the order. TR 93; Ex. 5. Marina Espinoza, a court clerk who witnessed Mr. Kamb’s action, contacted Deblynn Whittlesey, court assistant to Judge Svaren, and told her that Mr. Kamb wrote on the order. TR 94. In response, Ms. Whittlesey called the prosecutor, Sloan Johnson. TR 94. Significantly, Ms. Espinoza never had any prior issues or concerns about Mr. Kamb attempting to alter court orders or take files without permission, and at no time did Mr. Kamb attempt to leave with the file or hide what he was doing. TR 110-111.

After Ms. Whittlesey spoke with Mr. Johnson, she directed Mr. Kamb to speak with Mr. Johnson, and she also told Mr. Kamb she could not provide him a copy of the order. TR 94, 118. Ms. Whittlesey subsequently received an e-mail from Mr. Johnson stating that he was agreeing to suppress the BAC result. TR 123. Ex. 9. After receiving the e-mail, Ms. Whittlesey took the e-mail to Judge Svaren and told him about what had occurred. TR 123. Pamela Springer, the Court Administrator, took the court file to Judge Svaren. TR 137, 140-141.

After speaking with Mr. Kamb, Mr. Johnson testified that he sent an e-mail to Ms. Whittlesey to let the court know that he agreed to suppress the breath test. How it happened, he didn’t know or care, and if he thought that Mr. Kamb was engaging in some underhanded conduct, he would not have agreed to the suppression. TR 41-42. Although Mr. Johnson didn’t believe it was appropriate to alter an original order, he did believe that it would be appropriate to take a copy of the original to the judge, as a shortcut, and believed that the judge would sign off on the copied order. TR 45.

After Mr. Kamb spoke to Mr. Johnson, he spoke with Judge Svaren. TR 208. Mr. Kamb wanted to explain to Judge Svaren what had happened and that he wasn’t trying to deceive anyone, but, rather, that he just simply made a mistake in not including the language earlier. TR 211. Judge Svaren told him it was not the proper way to change an order. TR 58. Mr. Kamb explained that he was not trying to circumvent the court, but that he wanted to correct the order, obtain a copy, take it to

Mr. Johnson have him initial the change and then bring it to Judge Svaren for approval. TR 58. Judge Svaren was very upset with Mr. Kamb for what he had done, and he crossed off the language Mr. Kamb had written on the order. TR 213; 57-59, Ex. 5.

Clearly, Mr. Kamb understood he made a mistake. TR 205. Judge Svaren testified that he had two subsequent conversations with Mr. Kamb and during both conversations, Mr. Kamb reiterated that he was not attempting to deceive the court. TR 62. After Mr. Kamb spoke with Judge Svaren, he called Ms. Springer the next day and apologized for his conduct. TR 251. Mr. Kamb acknowledged to both Judge Svaren and to Ms. Springer the method in which he tried to correct the error was improper. TR 255-256.

Because of the above-referenced events, Mr. Kamb was unable to provide Ms. Provo a copy of any order, but they did exchange six to eight phone calls over a period of time. TR 58. He eventually spoke with Ms. Provo and told her what had occurred regarding the suppression order. TR 216. On September 16, 2008, Ms. Provo entered Findings of Fact and Conclusions of Law and an Order suspending Ms. Magnuson's driver's license for 90 days. TR 59-60, 65-66. Mr. Kamb appealed the Department's decision, but he did not charge Ms. Magnuson any legal fees for the appeal. TR 217-219. At no time did Mr. Kamb give Ms. Provo any reason to believe he was attempting to be dishonest or deceitful to her in the Magnuson hearing. TR 69.

Ms. Provo testified that the District Court's suppression order might collaterally estop the Department of Licensing with respect to the breath test's validity if she determined all the collateral estoppel elements were met. TR 55-56. Ms. Provo also testified that she did not know whether the language in the District Court order would be sufficient to suppress the breath test in the DOL hearing. TR 70. Even if the District Court suppression order contained the exact language that had been struck from the order entered in Ms. Magnuson's case, Ms. Provo could not guarantee that she

would have ruled that Ms. Magnuson's license should not be administratively suspended. TR 71. If the proposed order had been submitted to Ms. Provo on May 13, 2008 with the same language set forth in the crossed out order, Ms. Provo would not have dismissed the suspension of Ms. Magnuson's license without further analysis. TR 73. Ms. Provo testified she would have needed to inquire about the circumstances of the order's entry before she could make a discretionary decision about whether it was in the interest of justice to apply the collateral estoppel doctrine to Ms. Magnuson's case. TR 85.

Mr. Kamb is very familiar with Skagit County courts, is familiar to the court clerk and staff, and has known Judge Svaren his entire career. TR 51; 109-110; 125; 228. Throughout his career, he has been trustworthy, which characteristic has been critical to his effectiveness as a defense attorney within Skagit County. TR 228. Mr. Kamb testified that he was certain he discussed the Magnuson case with Mr. Johnson before the hearing because there were certain aspects of her case that only Mr. Kamb could have communicated to the prosecutor. TR 229-230. Mr. Kamb acknowledged, however, that during the Magnuson plea, he simply forgot to include the language related to the suppression issue on the order and made an error in trying to correct it. TR 181; 236. Mr. Kamb had no doubt that had he reminded Mr. Johnson of their earlier discussion, he would have obtained a suppression order before Judge Svaren on May 13, 2008. TR 181. Mr. Kamb has never altered a filed court order previously. TR 205.

Mr. Kamb believed that his method of correcting the order would have been appropriate because of the collegial atmosphere he had developed and enjoyed with the prosecutor and the judges over many, many years. TR 206. Mr. Kamb's expectation that he could get the order to include the suppression language signed by the judge off the record was reasonable as he has approached judges in the past to have these particular types of orders signed out of court. TR 44-45. Mr. Kamb knew that if he had the language on the criminal order, it would have given him an opportunity

to try to convince Ms. Provo that she should dismiss the proposed suspension against Ms. Magnuson in the Department of Licensing hearing. TR 237. Mr. Kamb expected, based upon his prior experience with Judge Svaren, that if both Mr. Kamb and Mr. Johnson presented an order with their signatures, Judge Svaren would have signed the modified order. TR 247-248. Mr. Kamb did not willfully or deliberately act to deceive the court or Ms. Provo. TR 256-257.

Mr. Johnson was familiar with Mr. Kamb before he began working in the Skagit County Prosecutor's Office. TR 4-5. Mr. Johnson acknowledged that Mr. Kamb would negotiate cases with him, and they would discuss several cases at a time or may talk in court whenever convenient. TR 9:14-18. Mr. Johnson acknowledged that it would have been appropriate in Ms. Magnuson's case to suppress the breath test because she was not a U.S. citizen. TR 14-15. Mr. Johnson testified that in Skagit County, after you gain the court and counsel's trust, the court will treat you with respect and accept your word. Mr. Johnson has that type of relationship with Mr. Kamb and he trusts him. TR 24:8-25:2.

Throughout his working relationship with Mr. Kamb, Mr. Johnson believes they have worked on several thousand cases, and he has dealt with Mr. Kamb on more criminal cases than with any other lawyer in Skagit County. Mr. Kamb has been a very effective defense attorney over the years. TR 25. Mr. Johnson acknowledged that over the time of negotiating cases with Mr. Kamb, certain patterns have emerged in terms of what the philosophy is for cases, and Mr. Kamb is familiar with the parameters set forth for resolving criminal cases within Skagit County District Court. TR 26-27.

Mr. Johnson testified that when Mr. Kamb returned to Mr. Johnson's office after speaking to the judge, he appeared to be very remorseful. TR 46. Mr. Johnson was impressed that Mr. Kamb felt sorry for what he had done and that this conduct would not happen again. TR 20.

Judge Svaren is familiar with Mr. Kamb as a criminal defense attorney, acknowledges that he has a high number of cases compared to other lawyers in town, that he is an effective criminal defense attorney, obtains good results for his clients, and has a good relationship with attorneys and police. TR 66. Although some attorneys would make it a practice to prepare a separate order for suppression of the breath test, Mr. Kamb would typically write the suppression language on the green sheet on the motion to amend. TR 70-71. Generally, if the prosecutor and defense attorney are in agreement, the judge will sign an agreed order, barring something unusual. TR 72-73. Had Mr. Kamb taken a copy of the court order, but not the original, and had added the additional language to it, and had he made clear that it was to amend the original order and was signed by Mr. Johnson, the judge would have accepted it. TR 73. Although the judge was upset at Mr. Kamb, he did not believe that Mr. Kamb intentionally tried to mislead or create a deceitful situation with the court based upon his prior relationship with Mr. Kamb. TR 75-76.

V. ARGUMENT

A. Standard of Review

"This court has the ultimate responsibility and authority for determining the nature of lawyer discipline." In Re Disciplinary Proceeding Against Christopher, 153 Wn.2d 669, 677, 105 P.3d 976 (2005). "In disciplinary proceedings the Supreme Court has 'plenary authority' and the court's discretion is limited only by the evidence before it." In Re Disciplinary Proceeding Against Dynan, 152 Wn.2d 601, 607, 98 P.3d 444 (2004). The court treats unchallenged findings of fact as verities and will overturn challenged findings of fact if not supported by a clear preponderance of evidence. Id.

"The court reviews conclusions of law de novo and will uphold those conclusions if they are supported by the findings of fact." Id. at 608.

This Court follows the ABA Standards when imposing sanctions in attorney discipline cases in Washington. In Re Disciplinary Proceeding Against Kuvara, 149 Wn.2d 237, 251, 66 P.3d 1057 (2003). The Standards were designed to increase uniformity when imposing sanctions. Id. at 256-57. The Standards constitute a model, setting forth a comprehensive system for determining sanctions while permitting flexibility and creativity when imposing sanctions. Id. at 258.

Further, Bar discipline is not to be imposed as punishment for misconduct. In Re Disciplinary Proceeding Against Plumb, 126 Wn.2d 334, 892 P.2d 739 (1995). Rather, the primary concern of discipline is to protect the public and deter other lawyers from similar misconduct. Id.

When analyzing a lawyer discipline case, the Court must first determine a presumptive sanction. Kuvara, 149 Wn.2d at 252. When determining the appropriate sanction, the Court must consider the following questions: (1) What ethical duty did the lawyer violate? (2) What was the lawyer's mental state? and (3) What was the extent of the actual or potential injury caused by the lawyer's misconduct? Id.

Second, if this Court determines a sanction should be imposed, the Court must also consider whether any aggravating or mitigating factors suggest that the presumptive sanction should be altered. Kuvara, 149 Wn.2d at 252.

"Finally, the court will adopt the Board's recommended sanction unless the sanction departs significantly from sanctions imposed in other cases or the Board was not unanimous in its decision." In Re Disciplinary Proceeding Against Dynan, supra.

Mr. Kamb respectfully urges this Court to review not only the Findings of Fact, but also the hearing transcript as the testimony, and inferences to be drawn, are not adequately stated in the Findings.

B. Mr. Kamb Objects to the Findings of Fact that are not Supported by a Clear Preponderance of the Evidence

1. As set forth in the Statement of Facts, Mr. Kamb discussed Ms. Magnuson's case with Mr. Johnson approximately one week before the hearing as this was Mr. Kamb's practice when negotiating with the prosecutor. Mr. Kamb was confident that he had done so because Mr. Johnson became aware of certain aspects of Ms. Magnuson's case that could only have been communicated by Mr. Kamb. As such, he objects to Finding of Fact 3.6.

2. Given Mr. Kamb's method of dealing with DUI clients over his 23 years of practice, he did negotiate suppression of the BAC results and did give thought to suppressing the BAC, but simply forgot to include the appropriate language on the court order. As such, Mr. Kamb objects to Finding of Fact 3.9.

3. Finding of Fact 3.10 lacks any support in the record as the only witness specifically addressing Ms. Magnuson's case is Mr. Kamb. As stated, with respect to his earlier objection to Finding of Fact 3.6, Mr. Kamb specifically recalls talking to Mr. Johnson about Ms. Magnuson's case because of the particular facts of her situation that Mr. Johnson could only have learned from Mr. Kamb. As such, he objects to Finding of Fact 3.10.

4. Given that more than one conclusion exists regarding Mr. Kamb's intent regarding his representations at the DOL hearing, specifically because Mr. Kamb addressed his beliefs to Ms. Provo about what the court order contained before the DOL hearing began, Mr. Kamb objects to Findings of Fact 3.14 and 3.16.

5. Finding of Fact 3.16 makes the bold finding that Mr. Kamb led Mr. Johnson to believe that the DOL license suspension hearing was upcoming. This finding is erroneous. Although Mr. Johnson “assumed” the hearing was later in the afternoon, the record does not establish that Mr. Kamb made any such representations to Mr. Johnson or inferred such representation of fact. As such, Mr. Kamb objects to this finding.

6. Finding of Fact 3.20 is more a conclusion of law than a finding of fact, but, given Mr. Kamb’s practice over more than two decades, this finding that Mr. Kamb’s conduct was knowing, willful and intentional is not the only reasonable inference to be drawn. As Mr. Kamb testified, he has never previously altered a court order, and he thought that by adding the proposed language to the order and by obtaining appropriate signatures, Judge Svaren would have signed such order. As such, he objects to this finding.

7. Finding of Fact 3.21 is not supported by substantial evidence. Mr. Kamb and Ms. Provo exchanged six to eight phone calls over a short period of time whereupon Mr. Kamb, after finally connecting with Ms. Provo, told her what had occurred with respect to the District Court order. Ms. Provo did not deny that this conversation occurred, only that she didn’t recall the conversation. As such, Mr. Kamb did not fail to timely disclose the lack of the order to Ms. Provo, and he objects to this finding of fact.

8. Finding of Fact 3.22 is internally inconsistent. In order for the Hearing Officer to find that Mr. Johnson’s and Judge Svaren’s testimony are credible and consistent, he must accept what their testimony states. Their testimony included opinions and comments that Mr. Kamb had a stellar reputation before this event, was incredibly remorseful after the event, and still maintained his reputation after the event. Given their credible testimony, there is a lack of evidence to suggest a finding that Mr.

Kamb's testimony lacked in credibility and plausibility when he stated he was sorry and remorseful for his actions. Therefore, Mr. Kamb objects to this finding.

9. Finding of Fact 3.23 is not supported by a clear preponderance of the evidence based upon Ms. Provo's testimony. Ms. Provo did not testify that the proposed suppression language would collaterally estop the Department's actions. As such, Mr. Kamb objects to this finding.

10. Finding of Fact 3.24 is objectionable because it fails to recognize the process surrounding the Department of Licensing hearing that included both on the record and off the record conversations. To consider only "on the record" discussions places the hearing in a vacuum. Mr. Kamb's statements to Ms. Provo on the record during the May 13, 2008 hearing cannot be considered "clearly demonstrative" of Mr. Kamb's intent without considering their conversation before the hearing as well as Mr. Kamb's conversation with Ms. Provo during the hearing. As such, Mr. Kamb objects to this finding.

11. Mr. Kamb objects to Finding of Fact 3.25 because of the comment that he was "duty bound under the RPCs to notify the hearing officer of a false statement of facts made by him." Mr. Kamb did not make a false statement of facts to Ms. Provo; he made a statement of belief. As such, Mr. Kamb objects to this finding.

12. Mr. Kamb did not commit a felony per Finding of Fact 3.26 as nothing was consummated. He wrote on a court order, he didn't willfully alter it, as illustrated by his testimony. As such, Mr. Kamb objects to this finding.

Based upon the aforementioned, Mr. Kamb objects to the above-referenced Findings of Fact as they are not supported by substantial evidence and such findings should be modified to conform to the evidence or be stricken in their entirety.

C. **Mr. Kamb Objects to the Conclusions of Law Regarding His Mental State and Recommended Sanction**

1. *The Hearing Officer Applied the Incorrect ABA Standards for the Ethical Violations in Counts I and II.*

In Count I, the Hearing Officer concluded that Mr. Kamb violated RPC 3.3(a)(1) by intentionally misrepresenting to DOL Officer Provo that Judge Svaren had suppressed Ms. Magnuson's BAC results, and in Count II concluded that Mr. Kamb violated RPC 8.4(b) by willfully and intentionally altering the court order without the court's or opposing counsel's authority. FFCLR 4.1, 4.2. Respectfully, both conclusions surrounding Mr. Kamb's mental state are erroneous and this Court is to review such conclusions "de novo." Appropriately, this Court should find that Mr. Kamb's conduct was negligent, as opposed to willful and intentional, and apply the appropriate ABA Standard consistent with such mental state.

The Hearing Officer applied either ABA Standard 5.11 or 6.11 for Counts I and II to Mr. Kamb's conduct, which state as follows:

Disbarment is generally appropriate when:

(a) a lawyer engages in serious criminal conduct a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft; or the sale, distribution or importation of controlled substances; or the intentional killing of another; or an attempt or conspiracy or solicitation of another to commit any of these offense; or

(b) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

ABA Standard 5.11.

Disbarment is generally appropriate when a lawyer, with the intent to deceive the court, makes a false statement, submits a false document, or improperly withholds material

information, and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding.

ABA Standard 6.11.

Respectfully, Mr. Kamb urges that the appropriate ABA Standard to apply to Counts I and II is that of reprimand pursuant to either Section 5.13 or 6.13, which state as follows:

Reprimand is generally appropriate when a lawyer knowingly engages in any other conduct that involves dishonesty, fraud, deceit, or misrepresentation and that adversely reflects on the lawyer's fitness to practice law.

ABA Standard 5.13.

Reprimand is generally appropriate when a lawyer is negligent either in determining whether statements or documents are false or in taking remedial action when material information is being withheld, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding.

ABA Standard 6.13.

Without question, two facts are clear in this case: (1) Mr. Kamb's conduct was an isolated event, and (2) there was little, if any, injury to the client and to the integrity of the legal process.

Mr. Kamb's situation should be compared with this Court's recent decisions in In Re Disciplinary Proceeding Against Christopher, 153 Wn.2d 669, 105 P.3d 976 (2005) and In Re Disciplinary Proceeding Against Dynan, 152 Wn.2d 601, 98 P.3d 444 (2004).

In Christopher, this Court imposed an 18-month suspension and three years probation against an attorney whom the hearing officer found had falsified documents filed with the court and had forged her secretary's signature on one of the

falsified documents. Christopher violated RPC 3.3(a)(1), 3.3(a)(4), 3.3(b), 8.4(b), 8.4(c) and 8.4(d). The Bar Association argued for disbarment.

The allegations arose after Christopher was involved in a civil arbitration action whereupon the arbitrator ruled in favor of the plaintiff on August 25, 1999. On that same date, Christopher, who was concerned that she had made a mistake by not submitting an offer of judgment to the plaintiff prior to the arbitration, created an offer of judgment pleading, signed and back dated it to July 27, 1999, and then attached a stamped declaration of mailing on which she forged her secretary's signature. Christopher then filed the offer of judgment pleading, mailed a copy to opposing counsel, and created a false entry in her billing records surrounding her conduct.

When this matter was discovered, the Bar Association charged four counts of misconduct including falsifying documents filed with the court, making false statements under oath, and forging the signature of her secretary on a falsified document. The hearing officer found violations of RPC 3.3(a)(1), 3.3(a)(4), 8.4(c) and 8.4(d) and after considering both the mitigating and aggravating circumstances, recommended that Christopher receive a reprimand and a two year period of probationary oversight. In a 6-4 decision, the Disciplinary Board determined that the presumptive sanction was disbarment, but because the mitigating factors outweighed the aggravating factors, recommended an 18-month suspension and three years probation. The Association appealed the Board decision and requested that Christopher be disbarred.

This Court, upon reviewing the facts, focused on the appropriate ABA standard for the violations committed, reviewed the aggravating and mitigating factors,

and considered the recommended sanction. The Court was concerned whether unanimity and proportionality justified a departure from the presumptive sanctions of disbarment. Although the Court determined that the Board's disagreement did not provide a reason for departing from the recommended sanction, the Court conducted a proportionality review to determine whether the Board's recommended sanction, i.e., suspension, was proper when compared to similarly situated cases.

For the proportionality review, the Court considered In Re Disciplinary Proceeding Against Dynan, supra. There, Dynan was involved in three separate, but similar, cases where, after resolving the cases, Dynan sought attorney's fees pursuant to statute and mandatory arbitration rules. In his request for fees, however, rather than using the actual billings he submitted to the insurance companies, Dynan directed his staff to conceal the actual fees charged and insert higher amounts. In each case, Dynan submitted sworn declarations to the Court in support of his motion for attorney's fees along with the false billing records. Dynan also sent the false billing records to opposing counsel.

The Court, noting that the presumptive sanction for Dynan's knowing alteration of the bills and his submissions of false declarations was disbarment, looked at the mitigating and aggravating factors and noted that the aggravating factors slightly outweighed the mitigating factors. After conducting a proportionality analysis, however, the Court reduced the Board's recommended sanction of a nine month suspension to a six month suspension.

After considering Dynan, the Christopher Court found that because Christopher forged her secretary's signature, such conduct justified a harsher sanction

than in Dynan. Noting that the Court was not bound by the Board's recommendation, but does not lightly depart from it, the Court adopted the Board's recommendation of an 18-month suspension.

In Mr. Kamb's case, he told Ms. Provo he believed he had an order suppressing Ms. Magnuson's BAC, but upon reviewing the court file, noted the language wasn't included on the order. Although he did write the proposed language on the order, that's the extent of Mr. Kamb's conduct regarding the filed court order. He never presented an altered and/or forged document to any individual. Mr. Johnson acknowledged that if a copy of the order was presented to him, he would have signed the order with the expectation that Judge Svaren would also sign the order. Mr. Kamb did not file any forged document with the court, did not file any false declarations, and never sought to mislead the court. Any finding of such conduct is not supported by a clear preponderance of the evidence. As such, the circumstances surrounding Mr. Kamb's situation are less than what occurred in Dynan, supra, and substantially less egregious than in Christopher, supra. Given Mr. Kamb's conduct, he urges that he simply acted negligently, as opposed to willfully and deliberately. He was negligent because the manner in which he sought to modify the order was below the standard we expect of counsel.

Furthermore, the injury to Ms. Magnuson was unknown because Ms. Provo would not state that she would have suppressed the BAC results for DOL purposes if she had received the order with the proposed language. As such, the injury to Ms. Magnuson appears to be de minimus because it is speculative.

Understandably, we, as lawyers and the public, do not want lawyers randomly accessing court files to modify orders. But Mr. Kamb's isolated conduct did not rise to the level of disgracing the legal profession. He made an error in judgment, and it was an isolated event. As such, and given the nature of this conduct, this Court should conclude that the injury to the profession was also de minimus.

2. ***The Hearing Officer Erred in Applying Certain Aggravating Factors and Not Applying any Mitigating Factors.***

Mr. Kamb objects to the following aggravating factors:

- (1) dishonest or selfish motive;
- (2) pattern of misconduct;
- (3) refusal to acknowledge wrongful nature of conduct; and
- (4) illegal conduct.

Dishonest or Selfish Motive

No facts exist to support this factor and the reasons submitted by the Hearing Officer do not establish such aggravating conduct. The only motive appropriately attributable to Mr. Kamb, from the facts presented at the hearing, is that he was attempting to correct his earlier mistake in order to benefit his client, Ms. Magnuson. As such, the aggravating factor should not apply.

Pattern of Misconduct

This was an isolated event that occurred during Mr. Kamb's career of representing thousands of criminal defendants. Nothing about Mr. Kamb's conduct remotely approaches a pattern of misconduct. Further, such aggravator applies in cases where multiple clients are subject to the same improper conduct or where multiple acts of misconduct occur to a single client. See In re Disciplinary Proceeding

Against Shepard, 169 Wn.2d 697, 239 P.3d 1066 (2010) and In re Disciplinary Proceeding Against Holcomb, 162 Wn.2d 563, 173 P.3d 898 (2007). The hearing officer's conclusion that Mr. Kamb's prior discipline established a "pattern of misconduct" is simply not supported by the record because the prior disciplinary matter did not involve any claim of dishonesty. As such, this Court should reject such aggravating factor.

Refusal to Acknowledge Wrongful Nature of Conduct

Not only did Mr. Kamb acknowledge during the hearing that his conduct was wrongful, he also acknowledged that his conduct was wrongful to Judge Svaren and Mr. Johnson immediately after the event occurred and before any disciplinary matter arose, and he also apologized to the court clerk who informed Judge Svaren of the event. Respectfully, the Hearing Officer's opinion that Mr. Kamb and other local lawyers and judges consider Skagit County a backwater jurisdiction is nowhere supported in the record by any witness' testimony. Rather, the record supports a finding that Mr. Kamb acknowledged the wrongful nature of his conduct and verbalized his acknowledgment before disciplinary proceedings began.

Illegal Conduct

Mr. Kamb was never charged with a crime, nor was any crime proved beyond a reasonable doubt. Further, no such aggravating factor is referenced in Section 9.2 of the ABA Standards. To the extent this was a finding of the Hearing Officer in support of a finding of an ethical violation, it should not also be considered an aggravating factor. Additionally, no testimony was offered that this event was considered to be criminal conduct or was referred to the Skagit County Prosecutor for

criminal charges. Further, Mr. Johnson, the deputy prosecuting attorney involved, never testified that he considered Mr. Kamb's conduct illegal or suggested that his conduct be referred for a criminal investigation and/or prosecution. As such, the facts do not support this suggested aggravating factor.

3. ***The Hearing Officer Erred in Failing to Apply Mitigating Factors of Mr. Kamb's Character or Reputation and Remorse.***

Mr. Kamb, based upon the testimony of Judge Svaren and Mr. Johnson, has earned the respect of the judges, prosecutors and his peers for his work as a criminal defense attorney. He is effective in favorably resolving his client's cases. Even after this misstep, he has maintained this respect. Neither the court nor opposing counsel have testified that this act framed the individual – Mr. Kamb.

Additionally, the Hearing Officer's Findings and Conclusions ignore the "good will" Mr. Kamb earned and enjoyed over the years and focuses heavily on this one misstep. What the Hearing Officer failed to appropriately conclude was that Mr. Kamb readily acknowledged his mistake, and he was generally remorseful per Judge Svaren and Mr. Johnson.

As testified to by Judge Svaren and Mr. Johnson, Mr. Kamb's reputation within Skagit County is that of a highly competent and skilled criminal defense lawyer. No contradictory testimony was offered, and except for this issue, his good character and reputation continued after this event. As such, this mitigating factor should be included.

Further, both Judge Svaren and Mr. Johnson testified to the true remorse Mr. Kamb exhibited as a result of his conduct, and he continued to show remorse on multiple occasions.

Respectfully, both of the aforementioned mitigating factors apply to Mr. Kamb.

D. The Revised Noble factors Warrant a Departure from the Disciplinary Board's Recommended Sanction of Disbarment.

After the two-step process is completed to determine the potentially appropriate sanction, the Court considers the revised Noble factors of unanimity and proportionality to determine whether the sanction should be altered. In Re Disciplinary Proceeding Against Kuvara, supra (citing In Re Disciplinary Proceeding Against Noble, 100 Wn.2d 88, 667 P.2d 608 (1993)).

Here, the Disciplinary Board was not unanimous. Further, when considering proportionality of sanctions, disbarment for Mr. Kamb is a much more severe sanction than those imposed in Dynan, supra, and Christopher, supra, which were discussed previously.

When this Court compares the Kamb facts with the other cases disbarment is not the appropriate sanction. At most, a short suspension might be warranted, but a reprimand is much more appropriate given the isolated nature of the event, the aggravating and mitigating circumstances, and the Noble factors of unanimity and proportionality.

VI. CONCLUSION

Mr. Kamb is remorseful for the conduct he engaged in, which was an isolated event. Although he was wrong to write on a filed court order and negligent to make a representation to the hearing officer that was not based in fact, it is also wrong to find that disbarment is the appropriate sanction. Accordingly, upon considering all of

the facts set forth above, and applying the ABA standards and the case law, this Court should reprimand Mr. Kamb for his conduct as alleged in Counts I and II

Respectfully submitted this 17th day of June, 2011.

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Attorneys for Thomas Kamb

By:



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CERTIFICATE OF SERVICE

Kathy Herbstler, hereby certifies under penalty of perjury under the laws of the State of Washington, that on the day set out below, I delivered true and correct copies of the opening brief of appellant to which this certificate is attached, by United States Mail, ABC-Legal Messengers, Inc. or via email, to the following:

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Signed at Tacoma, Washington, this 17th day of June, 2011.



Kathy Herbstler

OFFICE RECEPTIONIST, CLERK

To: Kathy Herbstler
Subject: RE: 200,296,3 In Re Disciplinary Matter of Thomas Kamb - Opening Brief of Appellant

Rec. 6-17-11

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

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Sent: Friday, June 17, 2011 4:35 PM
To: OFFICE RECEPTIONIST, CLERK
Subject: 200,296,3 In Re Disciplinary Matter of Thomas Kamb - Opening Brief of Appellant

Attached is the appellant's opening brief.

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