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Supreme Court No. 200,926-3

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE DISCIPLINARY PROCEEDING AGAINST

THOMAS R. KAMB,

Lawyer (Bar No. 16944).

**ANSWERING BRIEF OF THE
WASHINGTON STATE BAR ASSOCIATION**

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ORIGINAL

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I. COUNTERSTATEMENT OF THE ISSUES

1. Respondent Thomas R. Kamb (Kamb) intentionally misrepresented to a tribunal the existence of a court order suppressing his client's breath test, then intentionally altered an original court order in an attempt to further his misrepresentation. On appeal Kamb merely restates his version of the facts, which the hearing officer rejected. Should the Court retry the facts?

2. The hearing officer concluded that by lying and then altering the court order, Kamb engaged in knowing, intentional, dishonest, and criminal misconduct that seriously adversely reflects on his fitness to practice and caused both actual and potential injury to his client and the legal system. He found six aggravating factors and no mitigating factors, and recommended that Kamb be disbarred. The Disciplinary Board affirmed by a vote of 9 to 1. Should the Court adopt the Board's recommendation?

II. COUNTERSTATEMENT OF THE CASE

A. PROCEDURAL FACTS

On April 10, 2009, the Association filed a three-count formal complaint against Kamb:

Count 1: By misrepresenting to Hearing Officer Provoe that a judge had signed an order suppressing Magnuson's BAC test, when no such order existed, and/or by failing to correct his materially false statement to the

[sic] Hearing Officer Provoe that a signed BAC test suppression order existed in Magnuson's court case, Respondent violated RPC 3.3(a)(1).

Count 2: By writing "BAC suppressed not a knowing & voluntary decision to take test" on the previously filed "green sheet order" without authority, Respondent violated RPC 8.4(b) (by violating RCW 40.16.010), RPC 8.4(c), and/or RPC 8.4(d).

Count 3: By failing to discuss suppression of the BAC test with Johnson while negotiating Magnuson's plea to a lower offense, and/or by failing to obtain an order suppressing Magnuson's BAC test before Magnuson's DOL hearing, Respondent violated RPC 1.3.

Bar File (BF) 3 at 4. A disciplinary hearing was held before Hearing Officer Donald W. Carter beginning on June 22, 2010.

On July 15, 2010, the hearing officer filed his Findings of Fact, Conclusions, and Sanction Recommendation finding the following misconduct by a clear preponderance of the evidence:

- Kamb violated RPC 3.3(a)(1) by intentionally misrepresenting to a DOL hearing officer that a judge had signed an order suppressing his client's BAC test results while knowing that no such order existed (Count 1);
- Kamb violated RPC 8.4(b), 8.4(c), and 8.4(d) by intentionally altering a court order that had been entered by a judge and filed in order to add language suppressing his client's BAC test results, thereby committing the crime of Injury to Public Record in violation of Revised Code of Washington (RCW) 40.16.010, a felony (Count 2); and
- Kamb violated RPC 1.3 by failing to ever discuss or negotiate suppression of his client's BAC test results with the deputy prosecutor assigned to the client's case (Count 3).

BF 69, Hearing Officer's Revised Findings of Fact, Conclusions and Sanction Recommendation (FFCL) at 12-13, 14, 16-17. In addition to finding that Kamb acted knowingly and intentionally in regard to Counts 1 and 2, the hearing officer found that Kamb's actions adversely reflected on his fitness to practice law and caused serious injury. Id. at 21-22. The hearing officer applied Standards 4.53, 5.11, and 6.11 of the American Bar Association's Standards for Imposing Lawyer Sanctions (ABA Standards), and recommended that Kamb be disbarred. FFCL at 19-22, 24.

On review, the Disciplinary Board adopted the hearing officer's decision without change.¹ BF 87.

B. SUBSTANTIVE FACTS

Kamb was admitted to the practice of law in Washington on June 1, 1987. FFCL ¶ 3.1. He primarily practices criminal defense and at least 50 percent of his clients are charged with alcohol-related driving offenses. Transcript (TR) Vol. I at 221.²

¹ The vote was 9 to 1. BF 87. The dissenting member would have recommended a one-year suspension followed by two years of probation. BF 88.

² The disciplinary hearing in this matter lasted two days, June 22-23, 2010. The page numbers of the transcript of proceedings restart at page 1 at the beginning of the second day of hearing. As a result, the transcript for hearing day one is referred to as Vol. I and the transcript for day two is referred to as Vol. II.

1. Kamb never negotiated suppression of his client's BAC test results.

In 2008, Monica Magnuson (Magnuson) was arrested for Driving Under the Influence (DUI) and submitted to a Breath Alcohol Content (BAC) test with results of .092 and .104. FFCL ¶ 3.3; EX 1, 3. She was charged with DUI in Skagit County District Court and hired Kamb to represent her. EX 4; FFCL ¶ 3.3. Magnuson's driver's license became subject to suspension by the Washington Department of Licensing (DOL) because of the arrest and BAC test results that were higher than .08. TR Vol. I at 222-23; RCW 46.20.308(2)(c). The DOL proceeding was separate from the criminal proceeding. TR Vol. I at 222-23. If Kamb were able to obtain an order from the criminal court suppressing Magnuson's BAC test prior to the time of a DOL suppression hearing, the doctrine of collateral estoppel could apply and prevent the DOL hearing officer from admitting and considering the BAC test and Magnuson's license would not be suspended. FFCL ¶ 3.15; TR Vol. I at 55-56. But if the suppression order were not entered prior to the DOL hearing, collateral estoppel would not apply. FFCL ¶ 3.15; TR Vol. I at 56-57. Kamb knew this because he had practiced DUI-related law most of his career. FFCL ¶ 3.15.

Magnuson's criminal case was assigned to Skagit County Deputy Prosecutor Sloan Johnson (Johnson). FFCL ¶ 3.4. Johnson reviewed the matter and faxed Kamb a written offer to reduce the charge to Negligent Driving in the First Degree if Magnuson pleaded guilty. TR Vol. II at 11; EX 13. Johnson did not offer to suppress Magnuson's BAC test results. TR Vol. II at 11. It was "exceedingly rare" for him to include BAC suppression as part of a plea offer. Id. at 12-13.

A hearing was set in Magnuson's criminal matter for May 13, 2008 at 8:30 am before Judge David Svaren. FFCL ¶ 3.7; EX 11, 13. Coincidentally, a telephonic hearing in Magnuson's parallel DOL license matter was set for the same day at 2:00 pm before Hearing Officer Lori Provoe. FFCL ¶ 3.12; EX 11. Kamb had another hearing in another matter set before Provoe at 3:00 pm. FFCL ¶ 3.11; EX 11.

Kamb never talked to Johnson about Magnuson's case or negotiated suppression of Magnuson's BAC test prior to the May 13, 2008 court hearing. TR Vol. II at 11-12, 60; EX 13. During the hearing, Kamb prepared an order that amended Magnuson's charge from DUI to Negligent Driving in the First Degree; Johnson signed the order because it was consistent with the written plea offer he had faxed to Kamb. TR Vol. II at 9-10. Kamb used a blue pen when preparing the order. FFCL ¶ 3.7. The order did not contain any language regarding suppression of the

breath test. FFCL ¶ 3.7. There was no discussion about suppressing Magnuson's BAC test results during the hearing. TR Vol. I at 180-81, Vol. II at 13; EX 6.

The order was entered by Judge Svaren, filed, and Magnuson pleaded guilty to the reduced charge. TR Vol. II at 10; EX 5. Kamb left the court without a copy of the Magnuson order. TR Vol. I at 197; EX 18 attached transcript at 3. Kamb did not raise the suppression issue in court or include suppression language in the order because he was busy and forgot to do so. FFCL ¶ 3.9; TR Vol. I at 180-81.

2. Kamb misrepresented the existence of a suppression order to DOL Hearing Officer Provoe.

Magnuson's telephonic DOL hearing before Hearing Officer Provoe convened at 2:00 pm. FFCL ¶ 3.12. The hearing was recorded. EX 18. Contrary to Kamb's repeated representation, there was no substantive discussion between him and Provoe off the record prior to the start of the hearing. TR Vol. II at 93-94; see FFCL ¶ 3.22 (finding Provoe credible).

During the DOL hearing, the following exchange between Kamb and Provoe occurred:

Hearing Officer [Provoe]: Uh, Counsel, will your client be testifying today?

Counsel [Kamb]: No, your honor. I do, uh, have an exhibit that I want to send you, and it is a copy of a order from the District Court suppressing the breath test in this case.

Hearing Officer: Okay, what's the basis for this suppression?

Counsel: The basis is lack of foundation.

Hearing Officer: And that's all it says?

Counsel: No. It goes on to say that the, (pause) that uh (pause), the breath test lacks a foundation and that the decision to take the test was not at all a voluntary decision.

Hearing Officer: Okay, um, uh, well I'll have you go ahead and fax it to me following the hearing, and I'll take a look at that and consider that. I'll go ahead and mark that as Exhibit No. 3, as I don't have it in front of me to read the language on it, so I don't -

Counsel (interrupting): We filed it this morning with the Court. I forgot to take a copy so I'm gonna probably fax it it in to you until tomorrow if that's okay.

Hearing Officer: Oh, that's fine, and it does have the Judge's signature on it?

Counsel: It does.

Hearing Officer: Okay then I'll just go ahead and mark it as Exhibit 3 since I don't have it in front of me to establish it's [sic] sufficiency, um then I will just take it under advisement pending receipt of that. And so, with that, do you have any arguments for the record?

Counsel: Probably this argument that the 4th prong hasn't been met, that the 3rd prong hasn't been met because of the rulings of the Court this morning.

Hearing Officer: Okay.

EX 18, transcript at 2-3. As noted above, the order to which Kamb was referring—the one entered by Judge Svaren that morning that Kamb had drafted—did not contain any language regarding suppression of Magnuson's BAC test. FFCL ¶ 3.7; EX 5. At the time of his representations to Provoe, Kamb knew the order did not contain suppression language. FFCL ¶ 3.16.

Provoe believed Kamb's representation that a suppression order existed and left the hearing record open solely to give Kamb an opportunity to fax her a copy of the order. FFCL ¶ 3.14.

3. Kamb intentionally altered the original court order that had already been filed.

After Magnuson's DOL hearing adjourned, Kamb had approximately thirty minutes before his 3:00 pm hearing with Provoe. During that time, Kamb went to the Skagit County Clerk's Office and asked a clerk for Magnuson's file and a blue pen. EX 15 at 1; FFCL ¶ 3.16.1, Conclusion of Law (CL) 4.2. He took the file and moved to the end of the counter just past some mail slots, turned at an oblique angle to the clerks, and, using the borrowed blue pen, wrote "BAC suppressed not a knowing and voluntary decision to take test" on the original order that had been filed by Judge Svaren that morning. EX 5, 7; TR Vol. I at 91-93; FFCL ¶ 3.16.3. Kamb admitted the act of altering the court order was

intentional. TR Vol. I at 258-59. He knew that this was not the proper way to go about amending a court order. FFCL ¶ 3.17.

After Kamb wrote on the order, he returned to the clerk's window, handed the file back, and asked for a copy of the order. FFCL ¶ 3.16.4. But the clerk, who had watched Kamb through the mail slots and had seen him write on the order, took the file to the clerk who had been in Judge Svaren's court that morning, Deblynne Whittlesey, and recounted what she had seen. FFCL ¶¶ 3.16.3-3.16.4. Whittlesey called Johnson and told him Kamb was in the Clerk's Office seeking a suppression order, but did not explain that Kamb had already written on the order. FFCL ¶ 3.16.5; TR Vol. I at 118, Vol. II at 14. Johnson said he had not agreed to an order suppressing the BAC test results and said, "That's pretty sneaky of him." TR Vol. I at 117-18, Vol. II at 14. Whittlesey then told Kamb he could not have a copy of the altered order and asked him to go speak to Johnson, which he did. FFCL ¶¶ 3.16.5-3.16.6.

Kamb did not disclose to Johnson that Magnuson's DOL hearing had already taken place or that he had already altered the order, which led Johnson to believe that the hearing was upcoming. FFCL ¶ 3.16.6; TR Vol. II at 15-16. Johnson, not knowing Kamb had already altered the order, agreed to sign an order suppressing the BAC test results and sent an email to Whittlesey informing her that she could give Kamb a copy of that

new order. TR Vol. II at 15, 18; EX 9; FFCL ¶ 3.16.6. Had Johnson known the original Magnuson order had already been altered, he would not have agreed to give Kamb a copy of it and said that to think so would be “preposterous.” TR Vol. II at 40.

Kamb returned to the Clerk’s Office after seeing Johnson and again requested a copy of the altered order from the file. FFCL ¶ 3.16.7. He was referred to Judge Svaren’s chambers. *Id.* Judge Svaren confronted Kamb about his actions and deleted the language Kamb had added to the Magnuson order. FFCL ¶¶ 3.16.7, 3.19. Judge Svaren spoke with Johnson the next day and confirmed that Johnson had never agreed to suppress the BAC test results prior to meeting with Kamb in the afternoon of May 13, 2008. FFCL ¶ 3.19; TR Vol. II at 60; EX 13 at 2.

4. Kamb did not contact Provoe to advise her that the suppression order did not exist.

Provoe designated another hearing officer to do her 3:00 pm DOL hearing with Kamb. TR Vol. I at 75. There was no contact between Kamb and Provoe in the weeks following the May 13, 2008 DOL hearing. FFCL ¶ 3.21. In June 2008 Provoe began attempting to contact Kamb because he had never sent her the Magnuson court order. *Id.*; TR Vol. I at 58, 215-216. They eventually spoke after some “phone tag.” TR Vol I at

58. Kamb told Provoe that there was no suppression order, but offered no explanation or apology. Id. at 60, 67.

III. ARGUMENT

A. STANDARD OF REVIEW

The Court reviews findings of fact for substantial evidence. In re Disciplinary Proceeding Against Poole (Poole I), 156 Wn.2d 196, 208, 125 P.3d 954 (2006); In re Disciplinary Proceeding Against Guarnero, 152 Wn.2d 51, 58-59, 93 P.3d 166 (2004). “Substantial evidence” exists if the record contains “evidence in sufficient quantum to persuade a fair-minded, rational person of the truth of a declared premise.” Poole I, 156 Wn.2d at 209 n.2.

An attorney challenging findings of fact must present argument as to why the specific findings are unsupported and cite to the record to support that argument. In re Disciplinary Proceeding Against Kronenberg, 155 Wn.2d 184, 191, 117 P.3d 1134 (2005); ELC 11.5(b). He must do more than argue his version of the facts while ignoring adverse evidence. In re Disciplinary Proceeding Against Marshall, 160 Wn.2d 317, 331, 157 P.3d 859 (2007). The Court should not overturn a hearing officer’s findings “based simply on an alternative explanation or version of the facts previously rejected by the hearing officer.” Id.

The credibility and veracity of witnesses are best determined by the hearing officer before whom the witnesses appear and testify. In re Disciplinary Proceeding Against Selden, 107 Wn.2d 246, 251, 728 P.2d 1036 (1986). Thus, considerable weight is given to the hearing officer's findings of fact, particularly the hearing officer's evaluation of credibility and veracity of witnesses. In re Disciplinary Proceeding Against Poole (Poole II), 164 Wn.2d 710, 724, 193 P.3d 1064 (2008). The hearing officer's determination of state of mind is also a factual determination to be given great weight on review. In re Disciplinary Proceeding Against Cramer (Cramer I), 165 Wn.2d 323, 332, 198 P.3d 485 (2008).

The Court will uphold the conclusions of law if they are supported by the findings of fact. In re Disciplinary Proceeding Against Haley, 157 Wn.2d 398, 406, 138 P.3d 1044 (2006).

B. THE CHALLENGED FINDINGS OF FACT ARE SUPPORTED BY SUBSTANTIAL EVIDENCE

Respondent challenges 13 findings of fact: FFCL ¶¶ 3.6, 3.9, 3.10, 3.14, 3.16, 3.16.6, 3.20, 3.21, 3.22, 3.23, 3.24, 3.25, and 3.26. Respondent's Brief (RB) at 18-20. The other findings of fact are therefore verities on appeal. Poole II, 164 Wn.2d at 722. The findings of fact that are challenged are all supported by substantial evidence and should not be disturbed.

1. Kamb did not discuss suppression of the BAC test results with Johnson prior to or during Magnuson's May 13, 2008 court hearing (FFCL ¶¶ 3.6, 3.9, 3.10).

Kamb challenges the findings that he had no discussions with Johnson about suppressing the BAC test results in the Magnuson case until after her court hearing on May 13, 2008 and that he thereby failed to act diligently. RB at 18 (challenging FFCL ¶¶ 3.6, 3.9, and 3.10). But those findings are supported by the testimony of Kamb himself, as well as Johnson, Judge Svaren, and the exhibits.

First, as to findings 3.6 and 3.9, Johnson testified that he was "quite certain" that there was never any discussion between him and Kamb about Magnuson's case or suppressing her BAC test results until the afternoon of May 13, 2008, after Magnuson's court hearing. TR Vol. II at 11-13, 32. While Kamb states that there must have been a pre-hearing discussion about Magnuson because Johnson knew details about her that only Kamb could have provided, RB at 14, 18, Johnson testified that the information may have been imparted to him during his discussion with Kamb in the afternoon after Magnuson's court hearing. TR Vol. II at 32. When Judge Svaren asked Johnson on May 14, 2008 whether there had been any pre-hearing agreement to suppress Magnuson's BAC test results, Johnson replied that he had not previously discussed suppressing

the test with Kamb. TR Vol. II at 60. And Johnson documented his recollection in writing on May 16, 2008. EX 13.

Second, while Kamb says that he recalls discussing Magnuson's case with Johnson prior to the hearing, RB at 14, he admitted at hearing that those discussions did not include suppression of Magnuson's BAC test. In fact, he admitted there were no discussions at all:

Q. Now, is it your recollection that before the day of that hearing you had had discussions with Sloan Johnson concerning suppression of the breathalyzer test in the Magnuson case?

A. Not specifically in the Magnuson case. . . .

TR Vol. I at 159.

Q: Do you recall discussing the Monica Magnuson case by name with Sloan Johnson at this meeting that occurred approximately a week before the May 13 hearing?

A: I do not recall discussing that case specifically,

Q: But I just want to be clear. It's not that you didn't discuss a specific disposition, you don't recall discussing the Monica Magnuson case by name at all at that meeting, right?

A: I can't recall specifically, no.

TR Vol. I at 169.

Q: Okay. On the morning of May 13, 2008, before the hearing [in the Magnuson case], did you discuss suppressing the breath test results?

A: I don't think it ever came up on that morning.

TR Vol. I at 180.

As to finding 3.10, the finding that Kamb failed to act diligently, the evidence showed that Kamb practiced DUI-related law for most of his career, was very familiar with the DOL process for suspending driver licenses after DUI arrests and the doctrine of collateral estoppel, and believed it was likely that Johnson would agree to suppress Magnuson's BAC test results in light of the particular facts of her case. TR Vol. I at 181, 221, 227-28, 236, Vol. II at 15; FFCL ¶ 3.15. Yet he failed to raise the issue because he was too busy and forgot. TR Vol. I at 180-81. Findings of fact 3.6, 3.9, and 3.10 are supported by substantial evidence and should not be disturbed.

- 2. There was no pre-hearing discussion between Kamb and Provoe and Kamb knew the original Magnuson order did not contain suppression language, yet he intentionally said it did (FFCL ¶¶ 3.14, 3.16).**

Kamb challenges the findings that he intended to cause Provoe to believe that a valid suppression order existed in Magnuson's criminal case prior to the time of the DOL hearing despite knowing that there was no suppression language in the order. He argues that more than one conclusion can be drawn from his behavior and reasserts his hearing testimony that he had a pre-hearing off-the-record discussion with Provoe

wherein he qualified his belief about the existence of a suppression order.

RB at 18 (challenging FFCL ¶¶ 3.14 and 3.16).

But Provoe rejected Kamb's claim that there was an off-the-record discussion with her before the DOL hearing:

Q: Is there any possibility you had a discussion with Mr. Kamb off the record where he told you that he was uncertain regarding whether a suppression order existed?

A: I am certain that discussion didn't occur, because if it had, I would have reiterated on the record

Q: Just so I don't leave any gaps; was there any discussions after you went off the record where Mr. Kamb told you that he was uncertain about the existence of a suppression order?

A: Not about – I don't recall any conversation. But even after we hung up the phone, I was led to believe there was a suppression order in existence. So you know, if there was any discussion about it, no.

TR Vol. II at 93-94. Based on that testimony, and the fact that he found Provoe's account credible but not Kamb's, the hearing officer did not credit Kamb's claim. FFCL ¶¶ 3.14, 3.22; FFCL at 13.³

The finding that Kamb knew, at the time of his misrepresentation, that the Magnuson court order did not contain suppression language and

³ While the hearing officer did not expressly reject Kamb's claim of a pre-hearing discussion in which he qualified his belief that a suppression order existed, he found that Kamb intentionally led Provoe to believe there was such an order, that Provoe did so believe, and that the sole reason the record in the DOL hearing was left open was to allow Kamb to file the order, thereby implicitly rejecting that claim. FFCL ¶¶ 3.14, 3.16.

that he intended to deceive Provoe into believing it did (FFCL ¶ 3.16) is supported by all the evidence of Kamb's actions on May 13, 2008. FFCL at 13. That evidence includes the following:

- Kamb prepared the original order in court just hours before the DOL hearing and did not include suppression language. TR Vol. I at 181, Vol. II at 9-10;
- Kamb made unequivocal representations during the DOL hearing that he had a suppression order, and even purported to read from it though he had no copy of it and had not drafted suppression language. EX 18 transcript at 2-3; TR Vol. I at 181. He agreed that anyone hearing his representations in the DOL hearing would believe he had a suppression order. TR Vol. I at 187;
- After the DOL hearing, Kamb went to the Clerk's Office, asked for the file, and borrowed a blue pen before opening the file and looking at the order. He borrowed a blue pen because he only had a black one with him and wanted his new writing on the order to match the ink he used that morning. This indicates that he knew before he looked at the order that it lacked suppression language and planned to alter it. TR Vol. I at 198-200; EX 15 at 1;
- While Kamb testified that he felt he needed to get a suppression order to Provoe as soon as he could, he made no effort to contact Provoe and correct his misrepresentation to her after altering the order and being stopped in his attempt to obtain a copy of it. He did not tell Provoe that there was no order until after she began calling him in June 2008. TR Vol. I at 58, 215-16.

The hearing officer properly credited Provoe's testimony over Kamb's, drew reasonable inferences from the record, and found that Kamb acted intentionally. See In re Disciplinary Proceeding Against VanDerbeek, 153 Wn.2d 64, 82, 101 P.3d 88 (2004) (hearing officer is

entitled to draw reasonable inferences from the evidence); Cramer I, 165 Wn.2d at 332 (hearing officer's determination of state of mind is a factual determination to be given great weight on review). Findings of fact 3.14 and 3.16 are supported by substantial evidence and should not be disturbed. Marshall, 160 Wn.2d at 331 (findings of fact will not be overturned based simply on alternative explanations or versions of the facts previously rejected by the hearing officer).

3. Kamb did not tell Johnson that the DOL hearing had already happened (FFCL ¶ 3.16.6).

Kamb challenges the finding that he led Johnson to believe that Magnuson's DOL hearing was upcoming, rather than already over, on the ground that the record does not show that he made any misrepresentations to Johnson about the hearing. RB at 19 (challenging FFCL ¶ 3.16.6). But Kamb could not remember disclosing to Johnson that the DOL hearing had already occurred. TR Vol. I at 209. Johnson testified that Kamb's statements that Kamb had a DOL hearing and was pressed for time led him to believe that the hearing was upcoming. TR Vol. II at 15-16. The hearing officer was entitled to find from this evidence that Kamb led Johnson to believe the DOL hearing was still pending. VanDerbeek, 153 Wn.2d at 82. Finding of fact 3.16.6 should not be disturbed.

4. Kamb intentionally altered the court order and thereby committed a felony (FFCL ¶¶ 3.20, 3.26).

Kamb challenges the finding that he knowingly, willfully and intentionally altered the court order in Magnuson's criminal case in an attempt to cover his lack of diligence and knowing misrepresentation to Provoe. He argues that more than one inference may be drawn, he never did such a thing before, and he thought his doing so would be allowed. RB at 19 (challenging FFCL ¶ 3.20).

This finding is a determination of Kamb's state of mind and is given great weight on review. Cramer I, 165 Wn.2d at 332. It should not be overturned simply because Kamb attempted to provide an alternative explanation, and certainly not when that explanation was rejected by the hearing officer. Marshall, 160 Wn.2d at 331. This finding is supported by substantial evidence, some of which has already been noted above:

- Immediately after the DOL hearing Kamb went to the Clerk's Office, asked for Magnuson's file, and borrowed a blue pen, before looking at the original order. TR Vol. I at 198-200; EX 15 at 1.
- He moved down the counter away from the window, turned away from the clerk, opened the file to the order entered that morning, and quickly added suppression language to the order with the blue pen because he "wanted the ink to be the same as that morning." FFCL ¶ 3.16.3; TR Vol. I at 203, Vol. II at 101-02; EX 15 at 1; EX 28-30.
- The language he added is consistent with his misrepresentation to Provoe. Compare EX 18 transcript at 3 with EX 5.

- He admitted that his act of writing on the order was intentional. TR Vol. I at 258-59.
- He took the file back to the window and asked for a copy of the order after he altered it. FFCL ¶ 3.16.4; TR Vol. I at 93.
- He had another DOL hearing with Provoe scheduled for 3:00 pm, and it was already approximately 2:40 pm when he requested the copy. EX 8, 9.
- He knew that the proper procedure for amending a court order would be to draft a new amended order. TR Vol. I at 205-07.

Properly entering an amended order would not have served Kamb's purpose because an order entered after the DOL hearing would not have had any preclusive effect in the DOL proceeding, and he knew that. TR Vol. I at 56-57, 63, 261. The only way for Kamb to fix his error was to, in effect, travel back in time and put suppression language in the original order. See FFCL at 16.

Kamb's argument that he thought the collegial standard of practice in Skagit County would make his alteration of an original court order allowable was roundly rejected by all the other Skagit County witnesses who testified. FFCL ¶ 3.18; TR Vol. I at 96-97, 119-20, 142, Vol. II at 19, 59. Kamb has not challenged finding 3.18, wherein the hearing officer found that the standard of practice in Skagit County is not to write on orders after they were entered by a judge, so that finding is a verity. FFCL ¶ 3.18. Its existence is fatal to his claim that finding 3.20 was erroneous

because he thought his behavior would be "appropriate" in Skagit County.⁴

Kamb challenges finding 3.26 and the portion of finding 3.20 wherein the hearing officer found that he committed a felony. RB at 19, 20.⁵ These findings are supported by the evidence showing that Kamb intentionally and without authorization altered a document that had been filed in the Skagit County Clerk's Office, which evidence proves the elements of the crime of Injury to Public Record. RCW 40.16.010.⁶ He argues that the crime was not consummated. RB at 20. Not so. The crime was complete as soon as he put pen to the order and changed it. Upon looking at the order and seeing that it did not contain suppression language, Kamb had no option but to seek an amended order and should have notified Provoe that the order did not contain suppression language. But instead, he took the blue pen he had borrowed, altered the order, and

⁴ Even if true, local county custom does not supersede the RPC. In re Disciplinary Proceeding Against Carmick, 146 Wn.2d 582, 598, 48 P.3d 311 (2002).

⁵ Kamb states that this is more of a conclusion of law. Even if so, conclusions of law mistakenly stated in the findings of fact will be treated as conclusions of law and upheld if they are supported by substantial evidence. VanDerbeek, 153 Wn.2d at 73 n. 5; Haley, 157 Wn.2d at 406.

⁶ RCW 40.16.010 provides that "[e]very person who shall willfully and unlawfully remove, alter, mutilate, destroy, conceal, or obliterate a record, map, book, paper, document, or other thing filed or deposited in a public office, or with any public officer, by authority of law, is guilty of a class C felony and shall be punished by imprisonment in a state correctional facility for not more than five years, or by a fine of not more than one thousand dollars, or by both."

asked for a copy of it. FFCL ¶ 3.25. Had the clerk not seen what he had done, the order of the court would likely have been forever changed and the crime never detected.

To the extent that Kamb argues that this finding is inappropriate because he was never charged with or convicted of a crime in connection with his alteration of the order, RB at 27, he is incorrect. A criminal conviction is not a prerequisite to imposing a disciplinary sanction for criminal conduct. "A lawyer may be disciplined for acts that also constitute a crime, even if no prosecution was brought or if the lawyer was acquitted or the criminal charges dismissed." Charles W. Wolfram, Modern Legal Ethics 91 (1986); see e.g., Annotated Model Rules of Professional Conduct, Rule 8.4(b) at 579 (6th ed. 2007); In re Disciplinary Proceeding Against Cramer (Cramer II), 168 Wn.2d 220, 225 P.3d 881 (2010); (lawyer disciplined for engaging in criminal conduct despite having not been convicted of a crime); In re Disciplinary Proceeding Against Kuvara, 149 Wn.2d 237, 252-53, 66 P.3d 1057 (2003) (same result); In re Lawrence, 332 Or. 502, 507, 31 P.3d 1078 (2001) (criminal conviction not prerequisite for finding violation of rule equivalent to RPC 8.4(b)). Findings of fact 3.20 and 3.26 should not be disturbed.

5. Kamb failed to timely disclose the lack of a suppression order to Provoe (FFCL ¶¶ 3.21 and 3.25).

Kamb challenges the findings that he was required but failed to timely disclose to Provoe the lack of a suppression order, and had no intent to do so, on the ground that he did disclose to Provoe what happened when they talked in June 2008, and that his original statement to Provoe was only a statement of belief, not a false statement of fact. RB at 19, 20 (challenging FFCL ¶¶ 3.21, 3.25). But Kamb was required to promptly disclose the fact that he had offered false material evidence once he became aware of the falsity. RPC 3.3(c); FFCL ¶ 3.25. As noted above, he knowingly misrepresented the existence of the order in the first place. And there could have been no question about whether he had offered false evidence when he opened the court file, looked at the order, and saw the absence of suppression language. Yet he made no effort to contact Provoe and correct his misrepresentation to her until after she began calling him in June 2008, weeks later. TR Vol. I at 58, 215-16. These findings are supported by substantial evidence and should not be disturbed.

6. Kamb's testimony was not credible (FFCL ¶ 3.22).

Kamb challenges the finding that his version of the facts was implausible and lacked credibility, arguing that the finding is inconsistent with credible testimony of Johnson and Judge Svaren that he had a good

reputation before these events and apologized afterward. RB at 19-20 (challenging FFCL ¶ 3.22).

“An essential function of the fact finder is to discount theories which it determines unreasonable because the finder of fact is the sole and exclusive judge of the evidence, the weight to be given thereto, and the credibility of witnesses.” State v. Bencivenga, 137 Wn.2d 703, 709, 974 P.2d 832 (1999); see also In re Disciplinary Proceeding Against Kagele, 149 Wn.2d 793, 814, 72 P.3d 1067 (2003). Thus, “even if this court were of the opinion that the hearing officer should have resolved the factual finding otherwise, it would be inappropriate for it to substitute its judgment for that of the hearing officer or the Board.” In re Disciplinary Proceeding Against Bonet, 144 Wn.2d 502, 512, 29 P.3d 1242 (2001).

Here, relying on the evidence, the hearing officer rejected Kamb’s testimony, finding it implausible. He had good reason to do so. Kamb’s version of the facts and his attempts to minimize and rationalize his behavior were repeatedly contradicted by the testimony of the other witnesses, including Provoe, Johnson, and Judge Svaren. For example, Kamb claimed that he negotiated suppression of Magnuson’s breath test with Johnson prior to the May 13, 2008 court hearing. TR. Vol. I at 202, 229-30. But that claim contradicted his testimony that he could not recall any specific negotiations about Magnuson and Johnson testified that there

was no pre-hearing discussion with Kamb about suppressing Magnuson's BAC test results. TR Vol. I at 159, 169, Vol. II at 11-13, 32; see EX 13. Johnson's testimony was supported by Judge Svaren, who said he asked Johnson on May 14, 2008 whether there was any agreement and that Johnson replied that he had not previously discussed suppression with Kamb. TR Vol. II at 60. Kamb also claimed there were off-the-record discussions with Provoe in which he advised her that he was unsure whether a suppression order existed or not. TR Vol. I at 183-85, 190-91. But Provoe unequivocally rejected this claim and testified that she was "certain" there had been no such discussions. TR Vol. II at 92-94.

Particular and considerable weight is given to the hearing officer's evaluation of credibility and veracity of witnesses. Poole II, 164 Wn.2d at 724. The hearing officer's evaluation of Kamb's credibility should not be disturbed.

7. The hearing officer properly found that Kamb's conduct injured Magnuson and the legal system (FFCL §§ 3.23, 3.24).

Kamb argues that the findings that his conduct injured both Magnuson and the legal system should be overturned because Provoe would not unequivocally agree that, had a suppression order existed, she would have applied the doctrine of collateral estoppel and dismissed the license action. RB at 20 (challenging FFCL §§ 3.23, 3.24); see TR Vol. I

at 72-73.⁷ But Kamb misconstrues Provoe's testimony. She testified that the language Kamb added to the Magnuson order would have been sufficient for suppression if Kamb gave her more information about the proceeding and agreed that the test for collateral estoppel would likely have been met. TR Vol. I at 83-84.

In any event, Kamb's failure to negotiate suppression with Johnson and properly obtain a suppression order eliminated any opportunity Magnuson had to argue collateral estoppel before Provoe. That loss is an injury. In re Disciplinary Proceeding Against Cohen, 150 Wn.2d 744, 759, 82 P.3d 224 (2004) (lawyer's inaction caused actual harm by depriving client of "his day in court"); In re Disciplinary Proceeding Against Lopez, 153 Wn.2d 570, 591-92, 106 P.3d 221 (2005) (lawyer's failure to file opening appellate brief caused both actual and potential injury to his client and to the legal system by delaying the client's appeal and subjecting it to potential dismissal); In re Disciplinary Proceeding Against Juarez, 143 Wn.2d 840, 877, 24 P.3d 1040 (2001) (lawyer's failure to pursue client's appeal caused potential for grave injury); In re Disciplinary Proceeding Against Halverson, 140 Wn.2d 475, 493, 998 P.2d 833 (2000) ("The potential for injury caused by the lawyer's

⁷ Kamb also challenges findings 3.23 and 3.24 because of his rejected claim of an off-the-record discussion with Provoe. RB at 20. As noted above, this claim was properly rejected by the hearing officer and need not be re-addressed here.

misconduct need not be actually realized.”). Magnuson’s license was, in fact, suspended for 90 days, a serious injury that could well have been avoided had Kamb done his job. EX 16, 17. The DOL proceeding was delayed solely to give Kamb time to present the non-existent suppression order and Provoe was required to expend additional time on Magnuson’s matter, both of which constitute actual harm to the legal system. See Lopez, 153 Wn.2d at 591-92. Findings of fact 3.23 and 3.24 are supported by substantial evidence and should not be disturbed.

C. THE HEARING OFFICER CORRECTLY CONCLUDED THAT DISBARMENT IS THE PRESUMPTIVE SANCTION.

The ABA Standards govern sanctions in lawyer discipline cases. Cohen, 150 Wn.2d at 758. First, the Court considers whether the hearing officer determined the correct presumptive sanction, considering the ethical duty violated, the lawyer’s mental state, and the actual or potential injury caused by the lawyer’s misconduct. See id. Next, the Court considers whether the hearing officer properly weighed the aggravating or mitigating factors. See id.

1. The presumptive sanction for Count 1 is disbarment.

Kamb argues that the hearing officer applied the wrong ABA Standards to his conduct because he was merely negligent, there was little if any injury to the client and the legal system, and that the hearing officer should therefore have concluded that the presumptive sanction for Count I

was reprimand. RB at 21-22. As noted above, those claims were rejected by the hearing officer, who was free to do so. In re Disciplinary Proceeding Against Whitt, 149 Wn.2d 707, 722, 72 P.3d 173 (2003) (“[A] hearing officer is not bound by various explanations if he or she is not persuaded by them.”). And a hearing officer’s finding on state of mind is given great weight on review. Cramer I, 165 Wn.2d at 332.

The hearing officer applied both ABA Standards 5.11(b) and 6.11 to the conduct charged in Count 1. FFCL at 19-20 (¶ 5.2).⁸ Under ABA Standard 5.11(b), disbarment is the presumptive sanction when a lawyer engages in intentional dishonest conduct that seriously adversely reflects on the lawyer’s fitness to practice. Under ABA Standard 6.11, disbarment is the presumptive sanction when a lawyer engages in dishonest conduct with the intent to deceive the court and causes a significant or potentially significant adverse effect on the proceeding.

The hearing officer found that in committing the misconduct charged in Count 1, Kamb acted intentionally and that he later altered the Magnuson court order with intent to use it to further his act of misrepresentation. FFCL ¶¶ 3.14, 3.16, 3.25. The hearing officer found that the misconduct caused a significant or potentially significant adverse

⁸ The hearing officer used paragraph number 5.2 twice in his conclusions of law. See FFCL at 19, 20. We therefore cite to ¶¶ 5.2 by page number.

effect on the DOL proceeding because it caused Provoe to delay the matter for the sole purpose of allowing Kamb to present such an order. Had Kamb presented the altered order, Provoe most likely would have dismissed DOL's action against Magnuson's driver's license based on false information. FFCL ¶¶ 3.14, 3.25; FFCL at 20; see In re Disciplinary Proceeding Against Christopher, 153 Wn.2d 669, 680, 105 P.3d 976 (2005) (serious injury to the profession and to the judicial system was caused by possibility that court might have relied on forged documents and false declarations submitted by lawyer). The hearing officer also found that Kamb's false representation "obviously adversely reflects" on his fitness to practice. See id., at 679 (intentional making of false statements under oath with intent to deceive an arbitrator severely adversely reflected on lawyer's fitness to practice). The hearing officer's findings support the conclusion that the presumptive sanction for Count 1 is disbarment. The Court should adopt that conclusion. Haley, 157 Wn.2d at 406 (the conclusions of law will be upheld if they are supported by the findings of fact).

2. The presumptive sanction for Count 2 is disbarment.

As he did with Count 1, Kamb argues that he was merely negligent, that there was little if any injury to the client and the legal

system, and that the presumptive sanction for Count 2 should also be reprimand. RB at 21-22. This argument should again be rejected.

The hearing officer applied ABA Standards 5.11(a) and 5.11(b) to the misconduct charged under Count 2. FFCL at 20-22. ABA Standard 5.11(a) applies when a lawyer engages in serious criminal conduct, a necessary element of which includes intentional interference with the administration of justice, misrepresentation, or fraud. ABA Standard 5.11(b) applies when a lawyer engages in intentional dishonest conduct that seriously adversely reflects on the lawyer's fitness to practice.

The hearing officer found that in committing the misconduct charged in Count 2, Kamb acted willfully and with the intent to cover his lack of diligence on Magnuson's behalf and his intentional misrepresentation to Provoe, and that he committed a felony by altering the court order. FFCL ¶¶ 3.20, 3.26. The hearing officer found that Kamb's misconduct in altering the court order constituted an act of dishonesty and misrepresentation and an intentional interference with the administration of justice. FFCL ¶ 3.26. He further found that the misconduct inherent in altering a court order to corroborate prior misrepresentations and cover up a lack of diligence seriously adversely reflects on a lawyer's fitness to practice. FFCL at 21-22. These findings support the conclusion that disbarment is the presumptive sanction for

Count 2. Christopher, 153 Wn.2d at 680 (disbarment is generally the appropriate sanction 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 a significant or potentially significant adverse effect on the legal proceeding (citing ABA Standard 6.11)). The Court should adopt this conclusion.⁹

D. THE AGGRAVATING AND MITIGATING FACTORS SUPPORT DISBARMENT.

Aggravating and mitigating factors are considered to determine whether they call for a deviation from the presumptive sanction. In re Disciplinary Proceeding Against Smith, 170 Wn.2d 721, 735, 246 P.3d 1224 (2011). The presumptive sanction should only be deviated from if the aggravating and mitigating factors are sufficiently compelling to justify such a departure. Id. at 736-37 (citation omitted).

The hearing officer found that the following aggravating factors listed in ABA Standard 9.22 applied in this matter:

- (a) prior disciplinary offense;
- (b) dishonest or selfish motive;
- (c) pattern of misconduct (as to Count 3 only);
- (g) refusal to acknowledge wrongful nature of conduct;
- (i) substantial experience in the practice of law; and

⁹ Kamb does not appear to challenge the hearing officer's conclusion that the presumptive sanction for the misconduct charged in Count 3 is reprimand under ABA Standard 4.53. Other than noting that the ABA Standard 4.43 would be the more appropriate Standard to apply, the Association does not challenge the hearing officer's determination of the presumptive sanction for Count 3.

(k) illegal conduct (as to Counts 1 and 3 only).

FFCL ¶ 6.2. The hearing officer found that none of the mitigating factors listed in ABA Standard 9.32 applied. FFCL ¶ 6.3. Kamb argues that the hearing officer improperly applied the aggravating factors of dishonest or selfish motive, pattern of misconduct, refusal to acknowledge wrongful nature of conduct, and illegal conduct, and failed to apply mitigating factors of character and reputation and remorse. RB at 26-28.

1. The hearing officer properly applied the aggravating factor of dishonest or selfish motive.

Kamb argues that the aggravating factor of dishonest or selfish motive should not be applied because “[n]o facts are presented to support this factor. . . .” RB at 26. This assertion is untrue.

The hearing officer found that this aggravating factor applied because Kamb’s motives in lying to Provoe and altering Magnuson’s court order were “clear,” namely, to lead Provoe to believe there was a suppression order when there was not, and then, to cover up his misrepresentation to Provoe and his lack of diligence in failing to negotiate suppression of Magnuson’s BAC test with Johnson. FFCL ¶¶ 3.16, 3.20, 6.2(B). The hearing officer further found that Kamb’s acts were a series of knowing, intentional acts done out of self interest, that interest being to avoid another ethical violation for lack of diligence while he was on probation after being admonished for similar conduct. FFCL ¶¶

3.27, 5.1, 6.2(A)-(B). Substantial evidence in the record supports this aggravating factor. Poole II, 164 Wn.2d at 735 (aggravating factor of dishonest or selfish motive applied to violation of RPC 8.4(c) because it was unreasonable to conclude that the lawyer acted dishonestly or selfishly but did not act with the motive to do so).

2. The hearing officer properly applied the aggravating factor of pattern of misconduct to Count 3.

Kamb argues that the aggravating factor of pattern of misconduct should not be applied to his conduct charged in Count 3 because it was an isolated event that did not involve multiple acts of misconduct or multiple clients. RB at 26-27. The hearing officer, however, considered Kamb's prior misconduct, wherein he was admonished for failing to appear at multiple court hearings in violation of RPC 8.4(d) (conduct prejudicial to the administration of justice). While the prior admonition was not for violating RPC 1.3, the hearing officer found that the prior conduct evidenced a lack of diligence similar to that here, wherein Kamb negligently failed to prepare before Magnuson's hearings and failed to negotiate suppression of her BAC test. FFCL at 17-18 (§ 4.3). It was proper to consider Kamb's prior misconduct in determining whether to apply this aggravating factor. Cohen, 150 Wn.2d at 761 (lawyer's 1970s and 1990s disciplinary offenses considered as evidence of a pattern of

misconduct); see In re Disciplinary Proceeding Against Dynan, 152 Wn.2d 601, 608-09, 98 P.3d 444 (2004) (evidence of misconduct in three uncharged cases supported aggravating factor of pattern of misconduct, but it was unnecessary to consider those cases because a pattern was proven by the charged cases). And when Kamb's misconduct then and now is considered as a whole, it involved multiple clients. Substantial evidence supports this aggravating factor.

3. The hearing officer properly applied the aggravating factor of refusal to acknowledge wrongful behavior.

Kamb argues that the aggravating factor of refusal to acknowledge wrongful behavior should not be applied because he acknowledged the wrongfulness of his conduct to Johnson and Judge Svaren immediately after the events in question occurred. RB at 27. But Kamb never attempted to contact Provoe and correct his misrepresentation or apologize to her, and only disclosed the lack of a suppression order after she called him weeks later. FFCL ¶¶ 3.21, 3.25; TR Vol. I at 58, 67, 215-16. Rather than simply acknowledge his misconduct at hearing, he claimed that (1) there were prior negotiations with Johnson over suppressing Magnuson's BAC test when there were not, FFCL ¶ 3.6; TR Vol. I at 229-30, Vol. II at 11-13, 32; (2) there were substantive off-the-record discussions with Provoe when there were not, FFCL ¶ 3.21; TR Vol. I at 190-91, Vol. II at

93-94; (3) he thought his intentional misconduct would be acceptable because of the collegial nature of law practice in Skagit County, a claim rejected by every other witness with experience there, see FFCL ¶¶ 3.18, 6.2(E); and (4) his representation of Magnuson was not flawed because Provoe may not have applied collateral estoppel in staying suspension of Magnuson's license. FFCL at 18 (¶ 4.3).

This aggravating factor applies when the lawyer admits the conduct but asserts that it was nevertheless not wrongful or tries to rationalize improper conduct as an error. See In re Disciplinary Proceeding Against Holcomb, 162 Wn.2d 563, 588, 173 P.3d 898 (2007) (citing Kronenberg, 155 Wn.2d at 196 n.8, and Dynan, 152 Wn.2d at 621). That is what Kamb did here. This factor is primarily based on a lawyer's credibility as a witness, and great weight is given to the hearing officer's finding on it. In re Disciplinary Proceeding Against Behrman, 165 Wn.2d 414, 423, 197 P.3d 1177 (2008). Substantial evidence supports this aggravating factor.

4. The hearing officer properly applied the aggravating factor of illegal conduct to Counts 1 and 3.

Kamb objects to application of the aggravating factor of illegal conduct because "no such aggravating factor is referenced in Section 9.2

of the ABA Standards.” RB at 27. He is mistaken. Illegal conduct is an aggravating factor. ABA Standard 9.22(k).

He also objects because he was not charged with or convicted of a crime. RB at 27-28. As noted above, a criminal conviction is not a prerequisite to imposing a disciplinary sanction for criminal conduct. Annotated Model Rules of Prof'l Conduct, Rule 8.4(b) at 579 (6th ed. 2007); see Kuvara, 149 Wn.2d at 252-53. It is also not a prerequisite for application of this aggravating factor. In re Depew, 290 Kan. 1057, 1072, 237 P.3d 24 (2010) (ABA Standard 9.22(k) does not require that a respondent be charged or convicted by law enforcement before conduct may be considered illegal. “[T]he fact that an individual is not charged or convicted does not mean that the individual's acts did not violate a criminal statute”).

Kamb further contends that since criminal conduct was an element of the RPC 8.4(b) charge in Count 2, it should not also be considered as an aggravating factor. RB at 27. He is correct as to Count 2, but this aggravating factor may still be applied to the other counts. Whitt, 149 Wn.2d at 720 (where submission of false evidence was part of the factual basis of a count against a lawyer, submission of false evidence could not be considered as an aggravating factor with respect to that count); see also

Poole II, 164 Wn.2d at 735 (interpreting Whitt). This aggravating factor is properly applied to Kamb's misconduct charged in Counts 1 and 3.

5. The hearing officer properly rejected the mitigating factor of character or reputation.

Kamb argues that the hearing officer erred in not applying the mitigating factor of character and reputation because Johnson and Judge Svaren testified that they believed Kamb was skilled and trustworthy and no contradictory evidence was offered. RB at 28. A respondent has the burden of proving a mitigating factor. In re Disciplinary Proceeding Against Carpenter, 160 Wn.2d 16, 30, 155 P.3d 937 (2007). A hearing officer is in the best position to assess witness testimony and is not bound by testimony if he is not persuaded by it. See In re Disciplinary Proceeding Against Dann, 136 Wn.2d 67, 78-79, 960 P.2d 416 (1998). Contradicting the evidence of Kamb's good reputation was his own testimony, which the hearing officer found to be implausible and not credible. FFCL ¶ 3.22. After considering all of the evidence, the hearing officer declined to apply the mitigator of good character or reputation. The hearing officer was entitled to disregard the testimony of reputation in its entirety, even if that testimony was not directly contradicted. Plancich v. Williamson, 57 Wn.2d 367, 370, 357 P.2d 693 (1960). The Court

should not substitute its evaluation of the testimony for that of the hearing officer and should not apply this mitigating factor.

In any event, character and reputation do not outweigh the aggravating factors. Dynan, 152 Wn.2d at 622 n.26 (whether character or reputation adopted as a mitigating factor was inconsequential because it was not enough to alter the presumptive sanction); In re Disciplinary Proceeding Against Miller, 149 Wn.2d 262, 285, 66 P.3d 1069 (2003) (mitigating factors including character or reputation were not persuasive enough to alter the presumptive sanction of disbarment).

6. The hearing officer properly rejected the mitigating factor of remorse.

Kamb argues that the hearing officer erred in not applying the mitigating factor of remorse because Johnson and Judge Svaren testified that Kamb appeared remorseful after he was caught. RB at 28-29. Contradicting his claim of remorse is testimony of Judge Svaren who, when asked if Kamb had been apologetic, answered, "I wouldn't say apologetic. He's told me on a couple of occasions that he doesn't bear me any ill will." TR Vol. II at 89. That is not an expression of remorse. Further, Kamb did not contact Provoe to correct his misstatement to her after the events of May 13, 2008; he did not talk to her until after she called him much later and never apologized for having knowingly

misrepresented the existence of a suppression order. TR Vol. I at 58, 67, 77, 79-81. This too shows a lack of remorse. As with refusal to acknowledge wrongful nature of misconduct, this aggravating factor is primarily based on the lawyer's credibility as a witness and great weight is given to the hearing officer's decision. Behrman, 165 Wn.2d at 423. Application of the aggravating factor of refusal to acknowledge wrongful nature of the conduct would also cancel out this mitigating factor as one cannot deny wrongful conduct yet atone for it at the same time. See Christopher, 153 Wn.2d at 165 (remorse mitigating factor applied in part because lawyer acknowledged wrongful nature of her actions). The Court should not apply this mitigating factor.

E. THE REMAINING NOBLE FACTORS SUPPORT DISBARMENT.

1. Kamb fails to meet his burden to prove disproportionality.

In proportionality review, the Court compares the case at hand with "similarly situated cases in which the same sanction was either approved or disapproved." VanDerbeek, 153 Wn.2d at 97. The lawyer bears the burden of proving that the recommended sanction is disproportionate. Id. The fact that a lawyer subjectively believes that the conduct of another lawyer is more egregious than his does not mean that the presumptive sanction is disproportionate.

Kamb cites two cases, Dynan, 152 Wn.2d at 601, and Christopher, 153 Wn.2d at 669, where lawyers were suspended for misconduct in submitting false documents to courts, in an attempt to prove that it would be disproportionate to disbar him because he claims his conduct was “less egregious” than that of those lawyers. RB at 22-25, 29. But Dynan and Christopher are not similarly situated cases. Both Dynan and Christopher falsified evidence that they submitted to the court and opposing counsel. Dynan, 152 Wn.2d at 615-16; Christopher, 153 Wn.2d at 674-75. The harm to the legal system was that the courts might, or did, rely on false evidence in ruling. Dynan, 152 Wn.2d at 618; Christopher, 153 Wn.2d at 680. But here, Kamb altered the court’s order itself, and by doing so usurped the power of the court to himself. This conduct strikes at the heart of the legal system in a way that Dynan and Christopher did not. In fact, there do not appear to be any Washington disciplinary opinions that involve conduct similar to Kamb’s.

There are many other differences between this case and Dynan. Dynan was not found to have acted with intent to deceive the court; Kamb was. Compare Dynan, 152 Wn.2d at 621, with FFCL ¶¶ 3.14, 3.20. Dynan was not found to have violated RPC 8.4(b) by committing a

crime¹⁰; Kamb was. Compare 152 Wn.2d at 610-11 with FFCL ¶¶ 3.26, 4.2. The mitigating factors of absence of a dishonest or selfish motive and no prior discipline were applied in Dynan, but the converse aggravating factors were applied to Kamb's misconduct. Compare Dynan, 152 Wn.2d at 620 with FFCL ¶¶ 6.2(A) and (B) (Kamb was admonished for violating RPC 8.4(d) two months prior to the conduct here).

Christopher also had no prior discipline. Christopher, 153 Wn.2d at 683. And the Court found that at least six mitigating factors, including inexperience in the practice of law and substantial remorse, outweighed the two aggravating factors of multiple offenses and dishonest or selfish motive in her case. Id. at 685-86. Here, there are six aggravating factors and no mitigating factors. FFCL ¶¶ 6.2, 6.3.

As both Dynan and Christopher are dissimilar, Kamb has not met his burden of proving that disbarment would be a disproportionate sanction.

2. The Disciplinary Board was nearly unanimous in recommending disbarment.

Kamb argues that since the Board's recommendation of disbarment was not unanimous, the Court should use that as a ground for deviating

¹⁰ While Dynan was not charged with committing a crime in violation of RPC 8.4(b) and no such violation was found by the hearing officer, the Court nevertheless applied ABA Standard 5.11(a), which applies when a lawyer engages in serious criminal conduct, in finding that disbarment was the presumptive sanction. Dynan, 152 Wn.2d at 610-11, 619.

from the presumptive sanction of disbarment. RB at 29. But the Court has found sufficient unanimity in cases where the Board voted overwhelmingly in favor of a particular sanction. See, e.g., In re Disciplinary Proceeding Against Vanderveen, 166 Wn.2d 594, 616, 211 P.3d 1008 (2009) (Board voted 10 to 1 in favor of disbarment). In Vanderveen, the Court hesitated to grant a lesser sanction in view of the degree of deference to which the Board is entitled, the high degree of unanimity, and the Board's expertise in disciplinary matters. Id.; see also Cohen, 150 Wn.2d at 763 (Board voted 11 to 1 in favor of suspension. The Court, noting the near unanimity, upheld the recommendation).

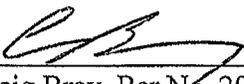
Here, the Board voted 9 to 1 in favor of disbarment. BF 87 n.1. The lone dissenter, while also finding that Kamb engaged in knowing and intentional misconduct, recommended a one-year suspension with a two-year probationary period. BF 88 at 10. The Court should take note of the Disciplinary Board's nearly unanimous vote, and the fact that the Board unanimously found intentional misconduct, and defer to the Board's disbarment recommendation.

IV. CONCLUSION

The Court should adopt the hearing officer's finding of fact and conclusions of law and disbar Kamb.

RESPECTFULLY SUBMITTED this 18th day of July, 2011.

WASHINGTON STATE BAR ASSOCIATION



M Craig Bray, Bar No. 20821
Disciplinary Counsel

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re

THOMAS R. KAMB,
Lawyer (Bar No. 16944)

Supreme Court No. 200,926-3

DISCIPLINARY COUNSEL'S
DECLARATION OF SERVICE BY
MAIL

The undersigned Disciplinary Counsel of the Washington State Bar Association declares that he caused a copy of the Association's Answering Brief to be mailed by regular first class mail with postage prepaid and emailed on July 18, 2011 to:

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The undersigned declares under penalty of perjury under the laws of the State of Washington that the foregoing declaration is true and correct.

7/18/2011, Seattle, WA
Date and Place


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Dear Clerk:

Attached for filing in the above-captioned matter are the Association's Answering Brief, cover letter, and a Declaration of Mail Service. Thank you.

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