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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE:)	Court No. 201,255-8
)	Proceeding No. 10#00084
ALAN F. HALL,)	
)	PETITIONER'S REPLY
Lawyer (Bar No. 1505).)	BRIEF
)	
)	
)	
)	
)	

COMES NOW Appellant ALAN F. HALL, by and through his
counsel of record, Hawley Troxell Ennis & Hawley LLP, and files
Petitioner's Reply Brief.

 ORIGINAL

PETITIONER'S REPLY BRIEF

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I.

INTRODUCTION

In the Answering Brief of the Washington State Bar Association (“WSBA”), the WSBA inaccurately asserts that Respondent/Appellant Alan F. Hall (“Mr. Hall” or “Respondent”) has failed to assign error to the factual findings of the Disciplinary Board of the Washington State Bar Association (“Disciplinary Board”). However, Mr. Hall’s opening brief specifically assigned error to a number of factual findings and legal conclusions made by the Disciplinary Board. Thus, the Disciplinary Board’s findings are not entitled to be “treated as verities” in this appeal, as the WSBA argues. *See* RAP 10.3(g); *In re Disciplinary Proceeding Against Cramer*, 168 Wn.2d 220, 230, 225 P.3d 881 (2010). On the contrary, the evidence noted in Mr. Hall’s opening brief—and reiterated below—demonstrates that the Disciplinary Board erred in its findings of fact *and* conclusions of law. Therefore, the decision of the Disciplinary Board should be reversed and remanded for reevaluation.

II.

ARGUMENT

As fully explained in Mr. Hall’s opening brief, the Disciplinary Board erred in both its findings of fact and conclusions of law. There was no evidence that Mr. Hall exploited his clients. In fact, the evidence

shows that he obtained fully informed, written consent for his actions, charged only reasonable fees for his services, and was attempting to protect his clients from exploitation when he took the steps the Disciplinary Board believed merited discipline.

In all, the findings of the Disciplinary Board reveal that it did not understand—or disregarded—the substantial evidence presented by Mr. Hall, arbitrarily found that his testimony was not credible, and gave far too much weight to the testimony of Jamie Clausen (“Clausen”). The sanction the Disciplinary Board has ordered—particularly the severe punishment of a two-year suspension from the practice of law on top of the two years Mr. Hall already has been suspended—is unfounded and unwarranted.

A. Mr. Hall did not violate RPC 1.4(b) or RPC 1.7(a)(2) because he obtained Margaret Keen’s fully informed, written consent.

The Disciplinary Board erred in finding that Mr. Hall violated RPC 1.4(b) and RPC 1.7(a)(2) by “making himself” alternate trustee, power of attorney, personal representative, and health care representative without informing Margaret Keen (“Margaret” or “Ms. Keen”) of the risks inherent in those appointments and obtaining written consent. On the contrary, the evidence at hearing showed that Mr. Hall was *requested* by the Keens to fill those roles, took great care to explain to them the

conflicts inherent in those appointments, and memorialized his clients' informed consent in writing.

In its Answering Brief, the WSBA argues only that there was evidence of Ms. Keen's inability to read the documents she indisputably signed, which plainly memorialize her informed consent to have Mr. Hall serve as alternate trustee, power of attorney, personal representative, and health care representative. Exh. R-105. However, this evidence does little to refute the substantial evidence of informed consent in light of the additional evidence presented at the hearing that the Keens specifically *asked* Mr. Hall to fill those roles due to his expertise and the fact that they had no desire for any relative or other acquaintance to fill the roles.

In addition to the signed documents, this was demonstrated at the hearing by Mr. Hall's testimony of the Keens' wishes, Mr. Hall's many meetings with the Keens, and the unrefuted evidence of their competence and ability to understand those meetings. Mr. Hall also testified that he reasonably believed he could continue to perform competent and diligent legal services despite the dual roles and demonstrated that ability by appropriately performing the dual roles of attorney and successor trustee for several months.

The WSBA further relies upon the expert testimony of Barbara Isenhour ("Isenhour"), who testified that a lawyer should never serve as

trustee. TR 134-37. However, this testimony cannot change the fact that there is no per se legal prohibition on a lawyer serving in fiduciary roles, such as that of executor or trustee, so long as informed, written consent is obtained. *See* WSBA Advisory Opinion 946 (1986) (formerly cited as WSBA Published Informal Opinion 86-1); *Estate of Shaughnessy*, 104 Wn.2d 89, 702 P.2d 132 (1985) . Here, the substantial evidence demonstrates that such consent *was* obtained. Thus, Isenhour’s opinion that Mr. Hall’s agreement to serve in the requested roles was not “the norm” is far from determinative of the legal propriety of that conduct. *See* TR 140.

For the same reason, the fact the testimony of Clausen was “in accord” with Isenhour’s opinion has equally little bearing on this issue. *See* TR 188-89. Indeed, Clausen was simply a fact witness whose only knowledge of the dealings between Mr. Hall and the Keens was obtained from the Keens after they made their inexplicable about-face and expressed surprise at the roles they had earlier *requested* Mr. Hall to fill. Indeed, Clausen’s testimony should have had no bearing at all on the Disciplinary Board’s decision on this issue, and the Board erred in relying upon it.

In all, the substantial evidence presented by Hall at the hearing demonstrates only that Hall fulfilled all of the requirements to quell a

conflict of interest under RPC 1.4(b), RPC 1.7(a)(2), and WSBA Advisory Opinion 946. Accordingly, the Disciplinary Board's contrary findings were error as a matter of law, and its findings and conclusions on those counts must be reversed.

B. Mr. Hall did not violate RPC 1.5 or RPC 8.4(c) because his fees were reasonable.

The Disciplinary Board erroneously found that Mr. Hall violated RPC 1.5 and RPC 8.4(c) by charging a flat fee for “managing an unfunded trust” before he was officially appointed trustee and for performing work “for which he was already charging a flat fee.” Mr. Hall only performed the services requested of him by the Keens, never double-billed for those services, and provided significant value for the cost due to his additional investment and special needs trust expertise.

In its Answering Brief, the WSBA continues to rely upon the assertion that the trust was “unfunded” and that Mr. Hall was not yet trustee when he began charging his flat fee. However, the WSBA—like the Disciplinary Board—overlooks the substantial evidence that Mr. Hall's work regarding the trust in December 2008, before Margaret's declination to serve as trustee on January 7, 2009, was done only pursuant to the Keens' instructions. Reliance on the assertion that the trust itself was “unfunded” also ignores the fact that that was the strategy of the

estate plan, and much of Mr. Hall's time was spent managing Margaret's \$400,000 estate in *preparation for* funding the plan at the proper time.

Mr. Hall's testimony demonstrated that, in early December 2008, Mr. Hall was made aware that Margaret would no longer be able to serve as trustee, so he began performing work in preparation for his duties as trustee, in addition to continuing his general legal work on the estate plan. He billed his regular hourly rate for this work, which—as fully explained in Mr. Hall's opening brief—included a number of valuable services. *See* Exhs. R-109, R-110, R-112, and R-125. These services went well beyond simply “manag[ing] the money that was in the trust,” as Mr. Hall was performing tasks of both lawyer and trustee during this time. *See* TR 139. Isenhour's testimony completely disregarded this dual role—and the additional tasks necessitated by it—and, thus, her testimony does little to demonstrate the reasonableness or unreasonableness of the time and effort actually expended and billed by Mr. Hall.

Isenhour's opinion that the additional fees charged by Mr. Hall was “just unnecessary churning” is equally unsupported by the facts of this case. Mr. Hall's testimony demonstrated that, in December 2008, Mr. Hall prepared a memorandum which outlined in great detail the intricacies of the special needs trust and the trustee's duties regarding the same. Exh. R-110. The memo was simply a way for Mr. Hall to organize and record

his thoughts regarding those complexities, a practice not uncommon among attorneys.

And Mr. Hall did not also charge for “receiving duties” as the WSBA asserts, but rather simply spent another hour *reviewing* those trustee duties, which is similarly appropriate and reasonable based on the complexity involved. As explained in Mr. Hall’s factual statement in his opening brief, the September 2008 letters are no basis for discipline because the Keens were not even billed for that work.

Further, Mr. Hall’s fees for the months of January through March 2009 were similarly reasonable. Pursuant to Section 4.14, which explained in writing the terms of the trustee fee arrangement, Mr. Hall was paid \$2,000 for his first-quarter trustee services, some of which had already been earned in December. Instead of double-billing for that amount, Mr. Hall recorded all of his time from December 2008 through March 2009 and simply offset his hourly bill with the amount received pursuant to the trust agreement. Exh. R-125.

In all, the substantial evidence at the hearing demonstrates only that Mr. Hall performed valuable legal services for his clients at their request and with their approval, for which he charged reasonable fees. Thus, the Disciplinary Board erred in finding that Mr. Hall violated RPC 1.5 and RPC 8.4(c).

C. Mr. Hall did not violate RPC 1.15A(f) and RPC 1.16(d) because his refusal to return documents was based on a reasonable belief that his clients were being unduly influenced and exploited.

The Disciplinary Board erroneously found that Mr. Hall violated RPC 1.15A(f) and RPC 1.16(d) by refusing to return original documents when requested by attorney Clausen. Mr. Hall reasonably believed in good faith that his refusal to deliver what documents he had in his possession was in the best interests of his clients.

In its Answering Brief, the WSBA ignores—as did the Disciplinary Board—that the Rules of Professional Conduct provided a basis for Mr. Hall’s conduct that would excuse any discipline. Although Mr. Hall admitted that he failed to return documents, he did so out of a desire to *fulfill* his ethical obligations to his clients. RPC 1.16(d) states that a lawyer must take steps to “protect a client’s interests.” Further, RPC 1.15A(f) provides that the lawyer must return property “to the client” that the client is entitled to receive.

Here, based on the sudden cessation of communications between Mr. Hall and his clients at such an odd time, the sudden reappearance of Linda Orf (“Orf”) in Stephen Keen’s life, and Stephen Keen’s diminishing health and severe alcoholism, it was reasonable for Mr. Hall to believe that simply turning over his client’s confidential documents was *not* in the

Keens' best interests. In other words, he was acting to *protect* his client's interests by refusing to return the documents.

Further, Mr. Hall never received a request for the documents signed by either of his clients—but rather from Clausen—further increasing his suspicions that complying with Clausen's request would not result in the documents returning to his clients. And his clients' reported disbelief at his assumption of the fiduciary roles they specifically asked him to assume further cast suspicion on the situation. Thus, while Mr. Hall's refusal to return documents may have been over-zealous, that conduct was motivated by a desire to protect his clients in compliance with the rules rather than harm them in violation of the rules. *See also* Comment 4 to RPC 8.4 (“A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists.”).

Due to the substantial evidence of Mr. Hall's good faith motivation for his conduct, the Disciplinary Board erred in finding that Mr. Hall violated RPC 1.15A(f) and RPC 1.16(d) by refusing to return the documents to Clausen.

D. Mr. Hall did not violate RPC 8.4(d) because his only “threat” was to bring legal action against Clausen and his communications were designed to protect his clients' interests.

The Disciplinary Board erred in finding that Mr. Hall violated RPC

8.4(d) by “threatening” Clausen, Stephen Keen, and Orf “for providing information to the WSBA and by making false and offensive comments to and about people involved in disciplinary process.” This is a mischaracterization and a misapplication of the law.

As explained in Mr. Hall’s opening brief, the Washington Supreme Court has held that “the conduct prohibited by RPC 8.4(d) is more often associated with physical interference with the administration of justice or the violation of practice norms.” *In re Carmick*, 146 Wn.2d 582, 587, 48 P.3d 311, 318 (Wash. 2002). It is indisputable that no evidence of such “physical interference” was presented in the case at hand.

In its Answering Brief, the WSBA scoffs at Mr. Hall’s “version of the facts” that his conduct was aimed at *promoting* justice and *upholding* practice norms, despite the substantial evidence in support of the same. However, the WSBA does not address the fact that the only “threat” involved in Mr. Hall’s confrontation of Clausen was a reasonable one related to legally exposing what Mr. Hall believed to be professional misconduct on her part. Such a threat is legally insufficient to support discipline under RPC 8.4(d). *See Carmick*, 146 Wn.2d at 587, 48 P.3d at 318. Likewise, however “prolific” and “intemperate” Mr. Hall’s writings and communications to Clausen, the WSBA cites to no legal authority to support its contention that such prolificacy or intemperance provide any

basis for discipline under RPC 8.4(d). *See id.*

In all, the Disciplinary Board erred in finding that Mr. Hall violated RPC 8.4(d).

E. The Disciplinary Board failed to adhere to ELC 13.3 by imposing a two-year suspension where Hall had already been suspended for a period of two years pursuant to a disability.

The Disciplinary Board erred in recommending a two-year suspension in violation of the provisions of ELC 13.3, which plainly says the maximum suspension for misconduct is three years. The WSBA has taken the position that only disciplinary suspensions are limited to three years, and that disability suspensions can theoretically go on forever. Left unsaid but implicit in the WSBA's position is that Mr. Hall can be suspended for more than two years because he was unable to complete his first hearing, and then he can be suspended for an additional three years for misconduct, for a total *actual* punishment exceeding five or more years.

The WSBA continues to argue that that a suspension in violation of the three-year limit in ELC 13.3 is appropriate because Mr. Hall's interim suspension was imposed pursuant to ELC 7.3 rather than ELC 13.3. However, under the circumstances of the case at hand, WSBA relies upon a distinction without a difference. There is no question that the suspension of Mr. Hall from the practice of law on August 18, 2011, was

directly related to this case and the disciplinary charges asserted herein. In fact, it occurred in the course of Mr. Hall's disciplinary hearing on these charges when he determined he could not go on. From the moment he made that decision, he was suspended from the practice of law as a direct result of this case.

Thus, because of the mandatory language of ELC 13.3, any further suspension cannot extend beyond August 17, 2014. ELC 13.3 is very clear and very mandatory: “[a] suspension *must* be for a fixed period of time not exceeding three years.” ELC 13.3 (emphasis added); *see also In re Discipline of Romero*, 152 Wn.2d 124, 135 n.16, 94 P.3d 939, 944 n.16 (2004) (“The maximum term of a suspension is three years.”).

ELC 13.3 does not say a lawyer can be suspended for whatever amount of time it takes to get him to hearing, and then suspended again after the hearing is over. It says a suspension arising from a single incident or course of conduct *must* be for a fixed period of time not to exceed three years. This interpretation is consistent with other Washington statutes, including RCW 9.94A.505, which says the sentencing court in a felony case “shall give the offender credit for all confinement time served before the sentencing if that confinement was solely in regard to the offense for which the offender is being sentenced.” That same logic applies here.

Because of the mandatory language of ELC 13.3, any further

suspension cannot extend beyond August 17, 2014. The Disciplinary Board erred in imposing a suspension extending beyond that date.

F. The Disciplinary Board's two-year suspension was otherwise excessive or improper based on the facts and circumstances of the case.

The Disciplinary Board's two-year suspension was also in error because it was excessive and improper in light of the substantial evidence presented at the hearing. The WSBA disingenuously argues that Mr. Hall's opening brief presented insufficient argument to support his assignments of error as to the Board's sanctions. To the contrary, the entire argument thoroughly made in Mr. Hall's opening brief—and highlighted above—provides ample support for a less severe sanction than that imposed by the Disciplinary Board.

To reiterate the discussion in Mr. Hall's opening brief:

As for Count 1, a suspension is only the presumptive sanction “when a lawyer knows of a conflict of interest and does not fully disclose to a client the possible effect of that conflict, and causes injury or potential injury to a client.” *ABA Standard 4.32*. Here, as explained above, the evidence presented demonstrates Mr. Hall fully disclosed to his clients in writing all the requisite elements under the rules and Committee guidance. Therefore, no injury or potential injury was involved and no sanction is appropriate.

As for Count 2, suspension is only generally appropriate for unreasonable fees where “a lawyer knowingly engages in such conduct” and “causes injury or potential injury to a client, the public, or the legal system.” *ABA Standard 7.2*. Here, the evidence presented demonstrates that Mr. Hall did not bill unreasonable fees for his work as lawyer and trustee. Even assuming that he did commit a technical violation of that duty, such violation would constitute negligence or even an “isolated instance of negligence” under *ABA Standard 7.3* or *ABA Standard 7.4*, warranting only reprimand or admonition. Suspension is, therefore, equally inappropriate for Count 2.

As for Count 3, suspension is only appropriate for failure to return a client’s property where “a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury.” *ABA Standard 4.12*. Here, the evidence presented demonstrates that Mr. Hall did not violate this duty because his actions were carried out in a good faith attempt to protect his clients’ interests. Even if a violation did occur, no injury or potential injury was risked because the clients had many of the original estate documents and copies of the rest and, regardless, they executed new estate documents with Ms. Clausen. Suspension is, therefore, equally inappropriate for Count 3.

As for Count 4, suspension is only appropriate for conduct

prejudicial for the administration of justice when a lawyer “engages in communication with an individual in the legal system when the lawyer knows that such communication is improper, and causes injury or potential injury to a party or causes interference or potential interference with the outcome of the legal proceeding.” ABA *Standard* 6.32. The evidence presented demonstrates that Mr. Hall engaged in communications with Ms. Clausen and others with the good faith desire to get to the bottom of the paradoxical behavior reportedly being exhibited by his former clients, as well as protect those clients against exploitation. Thus, even if Mr. Hall committed a technical violation, he did not do so knowingly. Further, because there was no violation, there was no actual or potential injury.

Even assuming (without conceding) that a technical violation of one of the rules occurred, the aggravating factors asserted here—other than “prior disciplinary offenses” factor—do not apply to Mr. Hall. Again, the WSBA disingenuously asserts that no argument has been provided regarding these factors, yet the entire discussion in Mr. Hall’s opening brief, reiterated above, is germane. Indeed, the evidence presented shows that Mr. Hall was not acting out of dishonest or selfish motives, but out of a desire to protect his clients.

Further, it is Mr. Hall’s position that he *did not* commit multiple

offenses, and that his conduct was appropriate and justified by the RPCs. This is not the same as “rationalizing . . . improper conduct” as error, as the WSBA asserts. Additionally, the undisputed evidence demonstrated that the Keens *were not* vulnerable at the time of the initial representation, as they were both competent and able to understand the advice and services Mr. Hall was providing. Further, “indifference to making restitution” simply does not apply, as restitution was not an issue in the disciplinary action at hand.

Further, Mr. Hall has presented substantial evidence—and made substantial argument—germane to the mitigating factors in the case at hand. Again, Mr. Hall’s entire position is that he was not acting dishonestly or selfishly, but in a good faith effort to protect his clients. Further, as uniquely demonstrated by Mr. Hall’s inability to represent himself in the initial proceeding, personal or emotional problems also exist in the case at hand. Finally, Mr. Hall’s prior reprimand was indeed remote in time and in type from the violations at issue in this case.

In all, the Disciplinary Board erred in assessing the aggravating and mitigating factors in this case.

III.

CONCLUSION

For the reasons stated in the opening brief and above, Mr. Hall respectfully requests that this Court reverse the decision of the Disciplinary Board and remand the matter for reevaluation.

RESPECTFULLY SUBMITTED THIS 7th day of February, 2014.

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I HEREBY CERTIFY that on this 7th day of February, 2014, I caused to be served a true copy of the foregoing PETITIONER'S REPLY BRIEF by the method indicated below, and addressed to each of the following:

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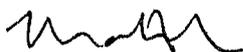
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Please see attached Petitioner's Reply Brief for Filing.

Thank you,

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