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No. 201,256-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN THE MATTER OF THE
DISCIPLINARY PROCEEDINGS AGAINST

RUSSELL K. JONES

An Attorney at Law

Bar Number 10887

OPENING BRIEF OF RESPONDENT JONES

Attorney for Respondent Jones

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ORIGINAL

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SUMMARY OF ARGUMENT

Russell Jones (Jones) is accused of frivolous litigation by pursuing matters allegedly barred by res judicata and the law of the case. It is the argument of Jones that he relied at each stage of the litigation and appeals on Washington authority that res judicata and the law of the case did not apply. He is also accused of lying and hiding things in discovery. He did neither. At the heart of this case is a lawyer who pursued litigation to try to enforce his rights when others would have just liked him to go along as a good guy. Of course, it is always easier if someone just goes along but the justice system has not advanced and grown on the backs of people who just go along. Jones is an experienced lawyer and a former judicial clerk in Division III, without disciplinary history. His actions in the present case represent critical reading and reasoned reliance at each step. Jones has done nothing wrong and the case against him should be dismissed.

ASSIGNMENTS OF ERROR

1. Respondent assigns error the Hearing Officer's Amended Findings of Fact, Conclusions of Law and Hearing Officer's recommendation.

2. Respondent assigns error to the Decision of the Disciplinary Board adopting the Hearing Officer's Findings.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the Hearing Officer and Board apply the correct standard of proof in finding that Respondent committed four counts of misconduct?

2. Did the Hearing Officer and Board improperly look to pleadings and findings in other matters to determine as a matter of law that Respondent filed frivolous pleadings?

STATEMENT OF CASE – PROCEDURAL HISTORY

The hearing on this case was held over several days in August and December 2012 before Hearing Officer David Thorner pursuant to a Formal Complaint, BF 002. The Formal Complaint charged four counts of misconduct:

Count 1

> By failing to make a reasonably diligent effort to comply with one or more legally proper discovery requests served on him by Jeffrey and Peter's lawyers during the course of the pre-trial litigation, it appears that Respondent violated RPC 3.4(c) and (d).

Count 2

> By filing motions for relief, vacation or revision of judgment, disqualification, and/or neutral judge that were frivolous, it appears that Respondent violated RPC 3.1 and/or 8.4(d).

Count 3

> By filing appeals that were frivolous, it appears that Respondent violated RPC 3.1 and/or RPC 8.4(d).

Count 4

> By seeking to inflate the value of the piano in retaliation against Jeffrey and/or valuing the estate house at only $126,000 despite having and/or knowing of appraisals that

> valued the house at $155,000 or more, it appears that Respondent violated RPC 8.4(c) and/or RPC 8.4(d).

Respondent sought clarification in the nature of a statement of specifics from the WSBA regarding which pleadings were at issue in connection with Counts 2 and 3 alleging the filing of frivolous pleadings. A process was followed to get specifics. As a result of this process these proceedings were tried on the basis that five groups of pleadings and exhibits. Amended Findings of Fact, Conclusions of Law, and Hearing Officer Recommendation, (hereafter "AFFCLR"), § Formal Complaint Filed By Disciplinary Counsel. BF 76. The specifics of these five pleading groupings are discussed in detail below and are found at Appendix A.

At the conclusion of the proceeding the Hearing Officer found violations of all counts and that the presumptive sanction under the ABA Standards for Imposing Lawyer Sanctions for each count was disbarment. After finding seven aggravators and one mitigator, he recommended disbarment. AFFCLR, ¶¶ 204 – 218.

Upon review, the Disciplinary Board adopted the entire AFFCLR by 13-0. BF 90. Respondent timely filed a Notice of Appeal and the matter is before this court for review. BF 91.

STATEMENT OF CASE – FACTUAL SUMMARY

Respondent sets forth here his statement of the facts of the case

with citations to the record. Where such facts are at odds with the AFFCLR, Respondent asserts that his citation to the record specifically shows that the Bar failed to prove its assertions and the Hearing Officer failed to have a substantial basis for his decision. To extent that this Factual Summary contains argument on the matters at issue in this case, they are incorporated by this reference in that discussion and constitute reasons the case should be dismissed.[1] The history of the frivolous pleadings and appeals is discussed below so are not reviewed in detail here.

Russell Jones, the Respondent herein, graduated from the University of Montana Law School in 1975. As a result of having graduated from the law school he was automatically admitted to the Bar in Montana in 1975. After law school he clerked for Chief Judge Ben McInturff of the Washington State Court of Appeals, Division III. He worked at the court for two years doing legal research and opinion writing. He then was a deputy prosecuting attorney in Montana doing a variety of cases both criminal and civil. He left that position, returned to Washington and was admitted to the Bar in 1980. He then took a job working for the Snohomish County Prosecutor doing work connected to a "career

[1] Respondent is subject to a serious page limit on this very detailed and complex case and therefore seeks to avoid redundancy by having factual and legal assertions here and the repeating them in the discussion.

criminal" grant. This involved considerable appellate work. In about 1984, he had a short stint with a Yakima insurance defense firm and then opened a solo law practice in Spokane in about 1984 or 1985. He maintained that practice along with handling cases in Montana until his retirement. In his solo practice he first handled insurance defense work and then after a couple of years began to do more plaintiff's personal injury work and gravitated into a small, general practice of law with some probates. He retired in about 2010. [Jones, TR 1049-1070.]

Respondent Jones, is the second oldest of four brothers. David Jones (David) is the oldest, Peter Jones (Peter) is third and Jeffrey Jones (Jeffrey) is the youngest. [Jeffrey, TR 104.][2] Their father died in 1976. [Peter, TR 31.] Their mother, Marcella Jones, died testate on September 2, 1995. [EX A-14; Jeffrey, TR 105.] The petition for probate and the will were filed in the Spokane County Superior Court on September 25, 1995. [EX A-172.] Ms. Jones named Jones as personal representative with nonintervention powers. She left her home and other assets in equal shares to her four sons. [EX A-188.] This disciplinary proceeding involves matters connected to and arising out of the probate.

The assets of Ms. Jones' Estate included the family home, various

[2] As was the protocol at the hearing and to avoid confusion, the brothers are referred to herein by their first names but different than at the hearing Respondent is referred to as "Jones."

stocks and securities, a small amount of cash, household furniture and goods and a car. [EX A-1.] In November 1995, shortly after Ms. Jones' death, a Spokane County assessor, named Archie Jones, showed up at the house for a reassessment. [Jones, TR 1094 and TR 1123-1124.] After the reassessment the house was revalued, in 1996, at $120, 900. The 1996 valuation specifically took into account defects in the house for un-level flooring, roof leaks, cracks in the foundation and problems with the bathroom. [County valuation attached to EX A-158.] Jones received notice of the reassessment by mail about a month before the May 4, 1996, meeting at the home. [Jones, TR 1124.] Based on his law practice he knew that under RCW 84.40.030 the county assessor was required to assess property at 100% of the fair market value. [Jones, TR 1125.]

When he was making a decision about how to value the property he was mindful that he had a contemporaneous assessment at what was supposed to 100% of fair value of $120,900. [Jones, TR 1125.] Jones also had two property appraisals done of the house both of which were "subject to appraisals" with a laundry list of repairs which needed to be done. [Jones, TR 1094-1095.] One was by an appraiser T.J. Meenach and one by David Ciszek. [Jones, TR 1106.] The Meenach appraisal was not produced at the hearing.

The Ciszek appraisal was admitted in evidence in this proceeding

at EX R-301. This appraisal was done appraiser David Ciszek (Ciszek) on about December 15, 1995. Ciszek valued the home on the date of death at $155,000 assuming all structural problems have been identified and repaired in a workman like manner. [EX R–301.] Emphasis added. He noted significant structural imperfections and his valuation assumed they had been professionally evaluated and repaired. He specifically noted that "the subject's oil fueled forced warm air heating system had asbestos insulation noted. Several areas were damaged and should be contained." Emphasis added.

Jones intended to take the house as his distributive share so understood that he had to put a value on the family home. He understood that he could look to advice from experts he selected and employed to assist him in his duties as personal representative. He researched the issue and consulted with persons about how to go about it. [Jones, TR 1115-1119.] Jones obtained offers about what it would cost to do repairs from various contractors. [Jones, TR 1124.] He understood that the difference between the assessor's $120,900 assessment and the $155,000 Ciszek appraisal to be the difference between the county's "as is" and Ciszek's "subject to" methods. [Jones TR 1125.] He then took the various appraisals, and the repair bids, particularly the ones for the major repairs, the foundation, the asbestos and the furnace and determined that $126,000

was the appropriate value to place on the house in "as is" condition. [Jones, TR 1125-1126.]

Jones had an inventory and appraisal of the household goods, dated February 23, 1996, prepared by appraiser Carol Worthington. [EXs R-306 and R-310.] Jones sent the inventory to Peter's lawyer by at least by April 5, 1996. [EX A-182.] At the request of Jeffrey a meeting was held on May 4, 1996, at the family home to select personal items from the estate. All four brothers were there. [Jeffrey, TR 109-111.] At the meeting Jeffrey selected the piano which was in the home and which had been listed in the Worthington appraisal of having a value of $5,000. [Jeffrey, TR 112.]

Peter testified that Jones told them the house was appraised at $155,000 less defects and deferred maintenance. [Peter, TR 46.] Jeffrey testified that Jones said the house had appraised at $155,000 less defects.

David testified that on the table there were appraisals for the value of the home and estimates from licensed contractors for repairs which Jones invited the brothers to review. [David, TR 1174 and TR 1175.] He had a specific memory of this because he was very interested in the value on the house and because he knew the house he was interested in what contractors had to say.[David, TR 1175-1176.] He further testified that Jones stated the he (Jones) intended to purchase the house from the estate. [David, TR 1176.]

The best evidence in this case is, and the Hearing Officer did not have substantial basis to find otherwise, that the house appraisal was at the meeting, that all the brothers had an opportunity to review it and the Jones did not take steps to hide the appraisal from them. Further it is clear that each brother had specific knowledge that Jones had an appraisal of the house at $155,000 was subject to defects.

On May 9, 1996, Jones filed an inventory in the estate. He listed the home as having an assessed value of $120,900.00 (the amount from the new assessment by the county) and he identified various other assets of the estate. [EX A-1.] On or about September 30, 1996, Jones sent a letter to Jeffrey containing distribution checks. The letter indicated a value for the piano of $5,000. [EX. A-184.]

In about December 1997, Peter and Jeffrey hired lawyer Frank Gebhardt (Gebhardt) of the Spokane firm of Feltman, Gebhardt, Greer & Zeimantz to make inquiries about the estate. [Peter, TR 58-59; Jeffrey, TR 124 and 139.] In response to inquiries to Jones, Gebhardt learned that Jones was distributing the house to himself and Gebhardt advised Jeffrey of this and probably Peter as well. [Jeffrey, TR 161; Peter, TR 81-82.]

Jones was representing a Stephan Bagmanyan (Bagmanyan) in an auto accident case. By pure coincidence, it turned out that Bagmanyan was an expert on pianos and piano appraisals. In late 1997, and before

February 18, 1998, Jones and Bagmanyan got into a discussion about the estate piano and Jones showed him the picture and description. Bagmanyan opined that the piano was probably worth $15,000. [Jones, TR 1132-1133; EX A-307.]

On February 3, 1998, Gebhardt wrote Jones stating that he had been provided a copy of the February 23, 1996, appraisal and requested various financial documents including bank records and check registers. [Exhibit A to EX R-303.] On February 18, 1998, Jones wrote to Gebhardt about various matters and stated "A second appraisal is necessary on the estate piano. Will Jeffrey Jones cooperate?"[Exhibit B to EX R-303.] Jeffrey testified that if Gebhardt said anything to him that Gephardt said "to just ignore it, because we're not going to do anything about it." [Jeffrey, TR 149-150.]

Jones testified that he then had a face-to-face meeting with Gephardt in February after the February 18 letter. At the meeting Jones renewed his request for access to the piano for a reappraisal and he also attempted to provide the home appraisals to Gephardt but Gephardt kept "pushing them back" to Jones. [Jones, TR 1138-1139.] Gephardt did not testify and contrary to the Hearing Officer's findings, based on this unrebutted testimony, it is clear that sometime in February 1998 Jones verbally sought access to the piano for a reappraisal and also brought with

him to a meeting with Peter's attorney the real estate appraisals.

On June 26, 1998, Gebhardt filed in the estate proceedings a Petition For Judicial Proceedings to Require Personal Representative To Provide Information and Documents. [EX A-2.] The petition asked for various documents including the bank records and the estate account check register but did not ask for any appraisals on the house.

A hearing was held on August 17, 1998, before a Court Commissioner who entered findings and an order that same day, directing Jones to provide the requested estate records including the check registers. [EXs A-3 and A-4.] On August 25, 1998, Jones filed a Motion for Revision for the Commissioner's Order. [EX A-5.]

On behalf of Jeffrey and Peter, on November 25, 1998, Gebhardt filed in the estate proceedings a Petition for Judicial Proceedings a separate action against Jones for breach of fiduciary duties. . [EX A-6; A-7.] The record shows and the testimony confirmed that these lawsuits were tried together and treated as one matter. On December 30, 1998, Jones filed a Declaration of Completion in the probate case. On that same day, December 30, 1998, Jones filed his Answers to Petition, Rule 8(c) Defenses and Rule 12(b) Defense in both the estate case, Spokane County, 95-4-0114-6, and the case against him, Spokane County 98-2-07511-7.

Jones' Motion for Revision regarding the Commissioner's Order

that Jones provide documents to the heirs was ruled on by Superior Court Judge Rebecca Baker on February 19, 1999. She found that "The personal representative of an estate has no duty to produce information concerning the estate to heirs during the administration" and reversed the Commissioner's Order in its entirety. [EX A-19.]

Gebhardt had sought to subpoena bank records from Wells Fargo Bank. Jones objected and filed a Motion to Quash. On February 23, 1999, Judge Baker denied Jones' Motion for a Protective Order and Motion to Quash and directed Wells Fargo to produce the records. [EX A-20.] In due course Wells Fargo produced the records and based on those records Peter was able to do an accounting of the bank account of Marcella Jones and the Estate of Marcella Jones. He was able to ascertain that estate had been paying the property taxes, property insurance, unities, water, sewer, garbage and electric. [Peter, TR 74-75.] Peter's accounting was used in the trial. [EX R-310.]

On March 7, 2001, Gebhardt served "Plaintiff's First Set of Interrogatories and Requests for Production of Documents." Jones filed his Answers on May 21, 2001. [EX A-24A.] These are discussed in detail below so are not set forth here. A Second Set of Interrogatories as sent by Gebhardt, on April 3, 2001, asking for expert witness information. [EX A-24B.] Neither set of Interrogatories asked for production of any appraisals

of the house that Jones may have had. [EXs A-24A and A-24B.] No motions to compel or to complete answers were filed by Gebhardt or Greer. [Greer, TR 948; EXs A-172 and 173 – Superior Court Dockets.] No additional interrogatories or requests for production were sent to Jones. [Jones, TR 1148.] Jones was never deposed and he was not contacted about any of his answers. Jones, TR 1159.]

As a result of the lawsuit there was a mediation held before Hon. Harold D. Clarke, II. [Peter, TR 76; Jeffrey, TR 127 and 141.] There is a July 9, 2001, letter from Jones with estate asset distribution lists attached. [EX A-186.] Both Peter and Jeffrey they saw the letter and lists at or very near the time of the mediation. [Peter, TR 76-77; Jeffrey, TR 127.]

During the course of the mediation, the value for the piano came up. [Jones, TR 1267: EX R-311.] The listing for Jeffrey showed the value of the piano as $14,950. [EX A-186.] The listing for Jones showed distribution of the house with a value to him of $125,866.27 and that he had allocated to himself as a distributive share the $4,024.25 in utilities that the estate had paid out. [EX A- 186.] Peter admitted that he had been previously been told by Gephardt that Jones was taking the house as a distribution. [Peter, TR 81-82.]

The values for the piano was based on the comments from Bagmanyan, and since he had not had any response from his inquiry about

getting cooperation from Jeffrey about a reappraisal Jones felt he had to make sure the issue of the piano's value was on the table so he included it at the increased value in his offer regarding what should be Jeffrey's distributive share submitted as part of the mediation documents. This letter and the lists have been misunderstood in this proceeding. They were in a mediation and Jones was not providing an accounting, he was putting his offer of what he was willing to settle for in the mediation. Jones was offering to compromise on the issue including getting another appraisal on the piano. The mediation was unsuccessful. [Peter, TR 86.]

On about July 3, 2001, appraiser Q. Kirk Davis (Davis) appraised the home on behalf of Peter and Jeffrey. [EX A-25.] He developed a "laundry list" of conditions he observed, some of which are summarized as follows::

- Some missing roof singles need replacing
- A rather large crack was observed in rear concrete foundation and that no apparent structural conditions exist at this time
- The furnace system is inoperative and 2nd level has electrical base board type unit
- Main level carpeting is in need of replacing
- Asbestos wrapping on the furnace pipes. No adverse conditions were noted.
- Minor amount of broken or cracked windows observed. No adverse values condition was estimated.
- The basement exit to the rear yard needs a deck and stairs installed. This is a minor expense.

He was asked to provide an appraisal price as of the date of death, September 2, 1996. His appraisal was based on "no adverse environmental conditions observed" and even though he had his laundry list the only "condition of appraisal" was the installation of furnace system to provide heat to all rooms. In other words, his appraised price assumed such heating but did not assume any other repairs were done. [Davis, TR 721 and 728-731. He appraised by a "market data approach" at $162,000 with a new furnace. [Davis, TR 731; EX A-25.] The cost to cure is the "raw physical cost to correct" a deficiency. [Davis, TR 7568.] Davis did not take into account any cost to cure elements in his appraisal. [Davis, TR 758.]

On August 23, 2001, a week before trial, Greer sent a letter to Jones stating that while Jones may have shown them a copy of Jones' appraisal at the mediation he was now asking for a copy of that appraisal. [Exhibit B to EX A-59.] Jones did not send him the appraisal.

There was a trial before Judge Baker on September 4, 2001, to September 7, 2001. [EX A-27.] During the trial she refused to allow Jones to submit evidence regarding the values he had assigned to the house. [Greer, TR 308.] The house value turned on whether specific defects such as asbestos contamination, broken foundation, and an inoperable 1928 furnace which could not be repaired, were or were not depreciation to be subtracted from gross value in order to reach fair market value. Jeff and

Peter argued that the defects were not depreciation. Jones argued that they were depreciation. The trial court decided in favor of Jeff and Peter, and that Jones had not valued the house at fair market value.

Jones testified that in attempt to research authorities on the issue of his contractor's repair offers Jones went to the Gonzaga Law Library on the evening of September 6, 2001. There was a reception going on in the foyer of the Law Building and as he was going through to the library he heard his name and turned and saw Judge Baker. He heard her say to another person "Russell Jones, I can't listen to him" and he made eye-contact with her. [Jones, TR 1292-1295.] He stewed about what to do and waited the next morning at trial for her to mention it, but when she did not and rejected his authorities before moving on to her oral opinion he decided that at that point the case was over so he might as well take his case on to the Court of Appeals. [Jones, TR 1295-1296.] Jones later sought to disqualify Judge Baker based on these remarks. At the time she did not deny the remarks and, in fact, made a decision on the premise that even if true, the disqualification motion was not timely. [EX A-77.] At this hearing some 11 years later, Judge Baker denied making the remarks. [Judge Baker, TR 420-421.] It is not necessary in the proceedings to resolve whether she in fact made the remark since the issue is Jones' good faith belief that he had heard the remark. He told the Judge Baker what he

believed he had heard and she did not deny or even deny that she had been to such a reception.

Judge Baker made an oral ruling on September 7, 2001. [EX A-27.] In her written Findings and Judgment filed on October 23, 2001, in regards to the issues in this disciplinary hearing she determined that Jones had refused to provide a copy of the $155,000 less unspecified defects appraisal to Peter and Jeffrey at the May 4, 1996, meeting and that at all times through the trial he refused to provide a copy of that appraisal, that Jones had signed a deed of trust for the property which was never recorded, that during the pendency of the litigation Jones had refused to provide bank and financial records of the estate, that Jones had breached his fiduciary duties, that she was reducing the value of appraisal submitted by Jeffrey and Peter from $162,000 to $159,000, that Jones had paid $4,084.25 for the utilities from the estate account, and concluded the value of the piano was $5,000. She removed Jones as personal representative, directed an accounting be filed and directed Jones to be personally liable for attorney fees and costs of $34,000. [EX A-28 and A-29.] On August 22, 2002, the $34,000 judgment against Jones for attorney fees and costs was satisfied. [EX A-34.]

The trial court also found that "Russell K. Jones signed as personal representative ... a deed to the estate house, naming himself as grantee ...

The deed was never recorded..." **Findings and conclusions filed 10/23/01, findings 21-23.** The findings are a failure to understand a basic point of probate law. The house was a partial distribution. A partial distribution is tentative and subject to modification by statute and Supreme Court precedent until a final order in probate is entered and the estate is closed. RCW 11.72.006; *Estate of Million*, 18 Wn.2d 824, 833, 140 P.2d 560 (1943) ("...partial distribution had been made pursuant to interim reports and orders. These were subject, however, to subsequent examination and modification on the final hearing.") Here, there was no conveyance of the estate house, only a tentative transfer of title which might but might not ripen into an actual conveyance on the final order in probate. There could be no delivery of a deed until then.

On November 5, 2001, attorney James V. Woodard (Woodard) was appointed successor personal representative.

Jones retained attorney Philip A. Talmadge (Talmadge) to represent him. On November 9, 2001, Talmadge filed an appeal on behalf of Jones with the Court of Appeals, Division III. [EX A-31.]

On April 3, 2003, the Court of Appeals issued its opinion in regards to Jones' appeal of Judge Baker's rulings. [EX A-34.] The court found that there were insufficient grounds for intervention in the nonintervention probate but that the court did have jurisdiction to conduct

a hearing about whether Jones was guilty of faithlessness, waste, embezzlement, mismanagement, fraud or neglect. It found that Peter and Jeffrey had not shown the necessary degree of culpability to intervene to resolve disputes on the fairness or reasonableness of Jones administration of the estate. The Court of Appeals reversed Judge Baker's determination that Jones had breached his fiduciary duties in refusing to turn over financial information and records before completing his administration and noted that while a personal representative must keep records and ultimately render an accounting the personal representative is under no obligation to do so on an interim basis. The Court found that Jones was not required to provide an interim accounting, that there had not been commingling, that he was authorized to distribute the home to himself, that it was error to not allow Jones to admit his exhibits regarding the basis for the valuation of the house, that Jones' state of mind regarding the piano appraisal was irrelevant and that Jones had the power to change it, citing *In re Estate of Million*, 18 Wash.2d 824, 833, 140 P.2d 560 (1943). The Court then reversed the entire decision of Judge Baker.

Peter and Jeffrey sought and were granted review of the Court of Appeals' case by the Supreme Court. The Supreme Court filed its decision on July 1, 2004. [EX A-36.] The Court determined that the Superior Court did have the power to remove Jones but that it could only do so if there

were valid grounds. They found that distribution of the house to himself was not "by itself" sufficient to remove Jones but the Court determined that Judge Baker properly excluded Jones' evidence to show his good faith value placed on the house so accepted as verities the value established at the trial. From this the Court concluded that Jones had breached his duty by not using the fair market value for the house value. Regarding the piano, the Court found that interim reports and orders may be modified on final accounting, citing *Million, supra.* Even though there had not yet been a final accounting, the Court nonetheless indicated that Jones' revaluing the piano was questionable while conceding that the record was not clear. It based its decision on the incorrect belief that Jeffrey was not aware of proposals to revalue the piano and had received no notice of the revaluation. The Court concluded, however, that the issue regarding the piano (and an issue relating to a car) were not, "standing alone," sufficient to remove Jones.

However, based on Jones' possessing the house in an individual capacity, by not using fair market value for the house during distribution and by failing to pay rent, utilities, property taxes and insurance while residing in the house there was sufficient grounds for his removal. The Court reversed the Court of Appeals and affirmed the trial court. Important to Jones' argument in this matter, is the Court's direction <u>that the case be</u>

remanded for a final accounting.

The Supreme Court's Mandate issued on July 29, 2004. After the Supreme Court Mandate, [EX A-37.], and throughout the rest of the case, Jones believed that the issues of the appraisals of the home and piano had not been finally decided as a result of the September 2001 trial. [Jones, TR 1081-1084.]

On remand, on August 4, 2004, Jones sought disqualification of Judge Baker for "actual bias against Jones." [EX A-38.] The history of this motion and subsequent ones are discussed more fully below.

On August 16, 2004, Jones filed a motion for reappraisal for the piano "to verify equal distributive shares" citing *Million, supra.* [EX A-39.]

Peter and Jeffrey sought from the Superior Court additional attorney fees and costs related to time on the case from the time of trail until the appeal. [Greer, TR 332-333] On November 19, 2004, Judge Baker awarded the additional fees and costs, finding *inter alia* "The Supreme Court did not reverse this court as to the award of fees and costs entered at the time of the October 23, 2001, Judgment. The Supreme Court's decision is final." Of note, is that the statement that the Supreme Court's decision is final relates to the prior award of attorney fees and is not broader. [EX A-43, page 10, paragraph # 2.]

On January 28, 2005, Woodard filed a Motion to Establish Distributions and For Other Relief. He noted in that motion that Jones had paid back to the estate more than the distributions he had initially received, that Jones had made proposals on how to resolve the disputes regarding the estate, that Peter and Jeffrey had made counter-proposals and that they disputed some of Jones' calculations. [EX A-45.]

On January 31, 2005, Bagmanyan, the piano appraiser Jones had discussed the piano with in 1998, signed a declaration attesting that he had talked with Jones in 1998 about the piano, that he had seen color pictures and read a description of the piano and had told Jones that the piano was worth approximately $15,000 in 1995. He further declared that although he had not examined the piano given the description it was currently his informed position that a reasonable value on the piano in 1995 would be approximately $15,000 and that it would have been substantially undervalued at $5,000. [EX R-307.]

On February 12, 2005, Worthington, who had done the household furniture and goods inventory in 1995, signed a declaration in which she advised that the value she had placed on the piano in the inventory was based on the claimed expertise of a third person, not her own expertise, that the person she relied upon was not qualified and that she could not vouch for the accuracy of the piano appraisal and, therefore, was

withdrawing it. [EX R-306.]

On February 14, 2005, Jones filed a Motion For Appraisal asking for a reappraisal of the piano, citing RCW 11.72.002 and 11.72.006. [A-47.] He included the declarations from Bagmanyan and Worthington. In his accompanying brief he argued, with citations, that the Supreme Court's opinion on issues other than his removal as personal representative was not final in the Superior Court proceeding since no final order had yet been entered in the Superior Court proceeding and that without a decree of distribution the decision of the probate court remained tentative and subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of the parties. He noted language from the *Million* case, *supra* at page 833, to the effect that '... partial distribution had been made pursuant to interim reports and order. These were subject, however, to subsequent examination and modification on final hearing." He argued that the piano was subject to a second appraisal because the value of the piano was not before the Supreme Court on a final order and remained subject to revision. [EX A-48.]

On March 2, 2005, Jones filed a Motion for Relief From Judgment on the basis of CR 60(b)(4) (misrepresentation by an adverse party), CR 60(b)(11) (any other reason justifying relief from a judgment) and CR 54(b) (orders subject to revision any time before entry of judgment

adjudicating all the claims). [EX A-52.] In his Brief On Relief from Judgment, Jones argued that there had been a misrepresentation (even perhaps innocent) regarding the value of the house. He also argued in regard to the piano that there were factual errors in the prior record regarding when Jeffrey or his lawyer knew that Jones was seeking a reappraisal of the piano. [EX A-55.]

On March 2, 2005, Jones also filed a Motion for Witness Testimony in support of his Motion for Relief. Attached to his motion were unsigned affidavits in the nature of an offer of proof. [EX A-51 is the motion which is dated March 1, 2005; EX A-173, is the court docket showing the motion was filed March 2, 2005.] The affidavits were to the effect that appraisers reasonably rely on contractor bids and home inspector reports to determine cost to cure defects and physical deterioration in the property. [EX A-55, page 2.] These were to bolster his argument that the Davis appraisal was suspect.

Peter and Jeffrey objected to the Motion for Relief, arguing that there was claim preclusion or res judicata because the issues of the fair market value of the house and piano had been raised and litigated at the trial and had been affirmed by the Supreme Court and that Jones' other arguments were without basis and were frivolous. They argue that there had been a final judgment by the Superior Court because Jones invoked

the jurisdiction of the appellate court on that basis. [EXs A-56 and A-58.] On March 7, 2005, Peter and Jeffrey filed a Motion for Sanctions Pursuant to CR 11 for Jones having sought his Motion for Relief From Judgment. [EX A-57.]

On March 11, 2005, Jones replied that the only judgment which had been appealed was the removal of him as personal representative as the rest of the probate was still incomplete. Consistent with his prior arguments, he argued that under CR 54(b), RCW 11.72.002 and RCW 11.72.006, that the piano appraisal remained tentative since there had been an interim distribution but not a final distribution and that since the piano was worth more than the prior amount assigned to it, Jeffrey would be getting more than his distributive share. He also argued on the basis that since the person who had appraised the piano in the first instance had withdrawn that appraisal, that another appraisal was appropriate. [EX A-61.]

On March 11, 2005, Jones also filed a response regarding the res judicata argument presented by Peter and Jones. He argued with citations that re judicata only applied to second actions on the same claim and that what he was seeking was not on a second claim. [EX-A-63.]

During this same time Woodard's Motion regarding distributive shares remained open. [EX A-45.] Jones filed replies on March 7, 2005,

and March 11, 2005, arguing for his position on the value of the house, interest issues, application of rent and taxes/utilities all in regards to the proposed distributive shares sought by Woodard. [EX A-54 and A-62.]

On April 4, 2005, Jones filed a Motion for a CR 54(b) Finding. [EX A-66.] He was seeking a final resolution of multiple issues for purposes of appeal. [EX A-76.]

On April 6, 2008, Woodard filed his response on Jones' response to Woodard's Proposed Order on Distribution. He agreed with offsets identified by Jones, pointed out that in the trial findings the judge had found that no accounting had been made and argued about various interest issues. [EX A-72.]

On April 13, 2005, Jones filed a Reply Brief on Presentment. In that brief he argued regarding the issues presented to the Court by Woodard in his response including the offset issues and interest issues as well as issues regarding CR 54(b) and attorney fees. Of relevance to the allegations raised here, he also included additional argument regarding the disqualification of judge to the effect that his prior motion had been denied on procedural reasons and that his third motion was presented as a request for a clear ruling on the merits. [Ex A-76.]

On April 20, 2005, Judge Baker filed Findings and Order on Resetting Presentation Dates, Setting Hearings on Some Newly Filed

Issues, and Denying Certain Other Newly Filed Motions. [EX A-77.] After ruling on the disqualification issue, discussed below, she set dates for presentation, overruled objections filed by Jones to a telephonic hearing and advised that on May 9, 2005, she would hear Jones' Objections to Order on Distribution as a motion for reconsideration; Jeffrey's and Peter's Second Motion for Sanctions; and Jones' Motions for CR 54(b) and Attorney Fees.

On May 9, 2005, Judge Baker entered an Order on Motion to Establish Distributions and Other Relief. [EX A-78.] She ruled on various issues regarding ownership of the house, interest, rent, payments by Jones, offsets Jones was entitled to, negotiations regarding purchase of the house by Jones and access to family photos by Peter. On May 11, 2005, Judge Baker denied Jones' Motion for Relief and Motion for Appraisal. [EX A-80.] Judge Baker granted Jeffrey's and Peter's Motion for CR 11 Sanctions stating that any reasonable inquiry would have revealed that Jones' Motion for Relief from Judgment concerning the fair market value of the house was not well grounded in fact or warranted by existing law or a good faith argument for the extension, modification or reversal of existing law. [EX A-79.] In addition, on May 11, 2005, Judge Baker entered an order denying Jones' request for a CR 54(b) finding that "Until there is a final distribution order, a CR 54(b) finding is not appropriate."

[EX A-81.]

On June 6, 2005, attorney Michael Schein (Schein), of the law firm Reed, Longyear, Malnati, Ahrens & West, PLLC in Seattle, as attorney for Jones, filed a Notice of Dictionary Review with the Court of Appeals, Division Three. [EX A-84.] It was Greer's position that there could not be an appeal at this time since there had not been a final judgment. [Greer, TR 434.]

On August 26, 2005, Judge Baker entered an order Authorizing the Sale of Real Property Subject to Court Confirmation. This allowed Woodard to make arrangements to sell the family home. [Attached to EX A-88.] On September 15, 2005, Schein, on behalf of his client Jones, filed a Notice of Appeal to Division Three, Court of Appeals, seeking review of the Order Authorizing Sale of Real Property Subject to Court Confirmation. [EX A-88.]

On December 30, 2005, the Commissioner for the Court of Appeals entered an order regarding the Motion for Discretionary Review and Peter's and Jeffrey's objection to the appeal regarding the Order Authorizing Sale of Real Property. The Commissioner found that the Order Authorizing Sale of Real Property was appealable as a matter of right. [EX A-89.]

Woodard filed a summary judgment seeking to eject Jones from

the house. [Woodard, TR 816.] On April; 12, 2006, the Honorable Harold D. Clarke III, in the Superior Court for Spokane County, entered an Order of Summary Judgment for Plaintiff permitting immediate possession of the family home by the estate and ejecting Jones from the home. [EX A-92.] On April 20, 2006, Jones filed a Notice of Appeal to the Washington Court of Appeals, Division III, seeking review of the summary judgment filed April 2, 2006. [EX A-98.]

On April 30, 2007, the Court of Appeals, Division Three filed an unpublished decision denying the appeal concluding that the challenged judgments were final and not subject to review based on the doctrine of res judicata and the law of the case. It found that the appeal was frivolous. [EX A-121.] The Court did not discuss *Million* but it did discuss RCW 11.44.035 regarding the issue that "Any party in interest in the estate may challenge the inventory and appraisement at any stage of the probate proceeding." The Court reasoned that Peter and Jeffrey had done that in regards to the house and piano appraisals at the removal trial so that Jones had, had his opportunity to litigate those issues at trial and could not relitigate them after the Supreme Court had affirmed the trial judge.

Jones petitioned the Supreme Court for review of the Court of Appeals decision. He argued that res judicata did not apply because there had not been a final judgment on the merits since the estate remained open

and the probate was pending. He pointed out that Judge Baker herself had entered an order stating that a CR 54(b) finding was not appropriate since there had not been any final order. He argued that the law of the case did not apply since on remand he had presented new evidence regarding the home appraisal and the piano value which had not been included in the record on reviewed by the Court of Appeals and Supreme Court during the appeal of his removal. [EX A-195.]

On September 3, 2008, the Supreme Court issued an order denying review and allowing attorney fees for Peter and Jeffrey under RAP 18.1(j). [EX A-122.] RAP 18.1(j) provides that attorney fees can be awarded when a party answering a Petition for Review was awarded fees by the Court of Appeals and the petition is then denied. The rule has nothing to do with frivolous pleadings.

On April 29, 2009, Woodard obtained an appraisal of the family home from appraiser Deanna Englehart. She appraised the house as having a value in 2009 of $149,000. This was an "as is" value. [EX R-308.] Woodard felt the appraisal was too low so sought another one from Davis. [Woodard, TR 609.] On July 1, 2009, Davis, the appraiser originally hired by Peter and Jeffrey for the trial, prepared a new appraisal for the house at the request of Woodard to establish the sale price of the house. [Attachment B to EX A-157.] He "cloned over" his laundry list from the

first appraisal to the second appraisal because there were no changes. [Davis, TR 772.] But then he made change on the second appraisal. I the new appraisal he changed his analysis from the prior appraisal from "subject to repairs" to "as is." His prior appraisal, EX A-25, had noted cracks in the foundation but stated and that there was no apparent structural conditions. His new appraisal asserted that while no apparent structural conditions existed he was now qualifying his statements since he "is not a structural engineer" and that only a final determination by a structural engineer could determine whether there were structural conditions. In the prior appraisal he had stated that there was asbestos wrapping on the furnace pipes but that no adverse conditions were noted regarding it. In the new appraisal he still stated that there was asbestos wrapping on the furnace pipes but that no adverse conditions were noted regarding it but now he also stated that the furnace was "an older octopus with asbestos wrapping which needs mitigation and replacement." He placed the sale value of the house in 2009 at $168,000. [Attachment B to EX A-157.]

Davis testified regarding his two appraisals that they "were two different stories" since one was "as is" and one was "subject to." [Davis, TR 776] He also testified that "of course" another appraiser could come up with a different number. [Davis, TR 792.] Judge Baker approved the sale

of the house on February 23, 2010, for $175,000. [EX A-127.]

On June 30, 2010, Woodard filed his Final Accounting and Petition for Distribution as well as his declaration regarding the accounting and a petition to pay his attorney fees. [EXs A-134, A-135 and A-136.] On July 23, 2010, Jones prepared objections to the allocations for rent and contesting the appraisal of the piano, a Motion for Relief from Judgment and an Affidavit in Support of the Motion for Relief. [EXs A-140, A-141 and A-142.] He did not file them at that time but rather directly presented them to the court due to the shortness of time before the hearing was set.

In the objections to distribution he raised objections to the value being allocated to the piano. He argued that the Supreme Court wrongly believed that Jones had not asked for reappraisal of the piano, that the original appraisal had been withdrawn, that the personal representative (Woodard) had done nothing to address the correct value of the piano and that as a result Peter was getting an unequal share. He pointed out that the reason to review the appraisal was that the Court of Appeals and the Supreme Court did not have as part of the record the a letter Jones had sent in June 1998 to the effect that he was seeking a second appraisal of the piano.

In the motion for relief and in his affidavit he challenged his

removal under CR 60(b)(4) arguing that the court could modify it order at any time as long as the estate remained open and that because the appraiser (Davis) had submitted contrary appraisals at different phases of the case with differing calculations regarding how to take into account the defects in the house that new grounds now existed for review of the his removal. He also argued that because of these changed circumstances the house appraisal found at the time of the trial was now subject to review.

On July 28, 2010, the Motion for Distribution came on for hearing and the court approved the final accounting and distribution without considering the Objections to Distribution and Motion for Relief filed by Jones because she did not consider them properly filed. [EXs A-145 and A-148.] This was the first time there was a final accounting in the estate. [Greer, TR 983.]

Jones asked for reconsideration but Judge Baker refused to reconsider and on August 17, 2010, on her own motion and without notice to Jones entered a finding that if he filed any more pleadings in regards to his removal, the house, the piano, taxes/utilities and discovery that he would be subject to a show cause hearing to declare him in contempt of court and/or a vexatious litigant. [EXs A-146 and A-148.]

DISCUSSION

GENERAL ISSUES:

First, we discuss general issues which are part of the argument of this case and are necessary to understand the specific arguments raised hereafter.

Burden of Proof: It is important to remember the heavy burden of that falls on the Bar to prove the specific allegations it has made. ELC 10.14 This is important in this case because as discussed below the Bar has attempted to shift the burden to Jones to prove he is innocent on the allegations of frivolous litigation without first proving their case and then responding to his affirmative defenses. This is particularly important as the record does not provide substantial evidence that the Bar proved by a clear preponderance that Jones' affirmative defenses were wrong. To do so they would have to show that as a matter of law there were violations of the frivolous test set up by the RPCs and they failed to do so.

Notice and Specific Charges: Jones needs to defend only the specific charges made against him since, at the barest minimum, a respondent in a Bar proceeding is entitled to notice and due process. *In re Ruffalo*, 390 U.S. 544, 551, 88 S. Ct. 1222, 529, 20 L. Ed. 2d 117 (1968). He does not have to defend against generalizations or allegations which provide insufficient notice as to the assertions being made against him. Again this particularly important in regards to the frivolous pleadings allegations.

Opinions of Other Courts Not Proof of Violations: In this matter, orders and opinions of the Superior Court, the Court of Appeals and the State Supreme Court were admitted to show the history of the legal proceedings but it is not appropriate for them to be used for the truth of the legal determinations made therein. In a Bar proceeding there is a higher burden of proof with different rules than considered by those courts. As such the Bar must have proven its case independent of the decisions made in those other courts. The Bar can use these hearsay orders and opinions to establish what happened in the case and to show notice to Jones but it cannot use them to prove the truth of matter that violations of court rules occurred or that RPC violations occurred. *In re Sanai*, 177 Wn.2d 743, 302 P.3d 864 (Wash. 2013).

Pleadings are not evidence: Many pleadings were submitted in this matter but just because something was said in a pleading, that does not prove the facts asserted therein. *Beulah Ulve, Executrix v. The City Of Raymond*, 51 Wn.2d 241, 251, 317 P.2d 908 (1957).

DISCUSSION REGARDING COUNT 1:

Count 1 brings into sharp focus Jones' constitutional right to notice of the allegations against him and his right to only have to defend the specific allegations made against him. It is possible that other RPC violations, including making knowingly false statements under oath, could

have been asserted but they were not.[3] Count 1 specifically relates to the alleged failure to comply with "legally proper discovery requests." In making a determination regarding such alleged violation it is necessary to look first at the specific discovery request at issue and then the specific response provided. The discovery requests at issue here were requests for production of documents, as such, contrary to what the Hearing Officer found, in this case there can only be a violation if Jones failed to make reasonably diligent efforts to provide the requested documents. The Hearing Officer found such violations in regard to three matters. (There are numerous findings regarding the alleged failure to produce the appraisals but they cannot be the basis of a violation of Count 1 since the appraisals were never requested by a "legally proper discovery request"

[3] Respondent denies making any such statements and there is not substantial evidence in the record showing they were false. Jones explained the basis for what he said and the Hearing Officer did not find he lacked credibility in his statements. The only evidence is that pure fact of the various payments and there is no evidence that Jones intentionally told falsities as opposed to poorly wording his statements. After all he was providing and pointing them to very documents which showed who had paid what and when, as was clear from the face of the checks. He did pay the utilities in his role as personal representative; they were not paid by some other person who wrote the checks. He gave them the bills and they had the checks from the bank, there was no way that he was going to "trick" them into thinking that the funds came from his personal accounts particularly where he specifically flagged the amount (the exact amount of which was consistently assigned to him all the way to the end of the case.) He knew they had the bank records showing what was paid from the estate account. P. Jones was able to compile his accounting on this for the trial.

and they will not be discussed here.[4]) Two of the alleged violations deal with Jones' statements regarding utilities. Jones volunteered this information and they have nothing to do with failing to comply with a discovery request. The third alleged violation related to the failure to provide a check register but the record fails to establish that in doing so Jones did not make reasonably diligent efforts to provide the records requested. Those records are:

Utilities and Taxes: The requests and responses at issue from EX A-24A are (emphasis added):

Request for Production No. 3 stated and was answered as follows:

> Request: Please provide copies of all documents evidencing the payment by you of any utility bills for the residence from September 25, 1995 to the date of your response to this request. [Itemization of records sought deleted.]
>
> Response: Attached. Russell Jones paid $4,084.25 for all utilities from 6/96 to 11/98, or from 5/4/96 meeting of heirs to declaration of completion.

Request for Production No. 5 stated and was answered as follows:

> Request: Please produce copies of all documents evidencing the payment by the Estate of any real estate taxes for the residence from September 25, 1995 to the date

[4] Despite two sets of interrogatories being sent to Jones, no legally proper interrogatories or request for production were sent to him asking for the appraisals. All that happened as an informal request from Geer a week before trial which no one has contended is "a legally proper discovery request." The Bar has produced no legally proper discovery request for the appraisals.

> of your response to this Request. Documents to include, but not limited to bills from the county/city, checks, receipts, etc.
>
> Response: Provided by bank records. Russell Jones paid all property taxes after 5/96.

Jones complied with the actual requests. He attached the documents in the case of the utilities and he referred them to records they already had for the taxes. There is no finding that he did not comply or make reasonably diligent efforts to do so with the actual request for production. Instead the violations found for these discovery requests are based on information volunteered by Jones. He cannot have failed to make a reasonably diligent effort to comply when he was volunteering information which was not even asked.

Check Register: The Hearing Officer makes reference to "check registers and checkbooks" i.e. AFFCLR 59, 60 and 61. As far as we are able to tell there is only one check register at issue. It is this check register that is the true focus of Count 1.

Request for Production No. 8 stated and was answered as follows:

> Request: Please provide a copy of all ledgers, journals or other documents evidencing entries by you, or entries by someone on your behalf, showing receipts of funds belonging to or paid to the Estate, and showing disbursements of Estate funds.
>
> Response: Provided in bank records.

It is true that Jones had the check register and that he did not provide it but that is not the end of the inquiry. To find a violation the Bar had to prove as a matter fact that he did not make a reasonably diligent effort to comply with the specific request for production at issue and that as a matter of law, that such response was not sufficient.

The thrust of the request is that they were asking for documents showing receipts of funds belonging to or paid to the Estate and showing disbursements of Estate funds – the bank records did that and no one has shown that they did not. The Hearing Officer found Jones did not want them to see the check register since it would show that the estate had been paying the utilities and taxes but this is absurd. The checks from the bank showed that the estate was making these payments. Peter and Jeffery already had those records before Jones replied.

Jones told them that the records had the information the request was seeking. He felt that the information in the check register was duplicative and indeed it was. TR 1158 and TR 1161-1162. In fact in his answer, he did not provide documents but rather openly refused to provide actual document stating that they already had the information. This is an affirmative defense recognized in the rules: "... except for an open refusal based on an assertion that no valid obligation exists." RPC 3.4(c). Neither the Bar nor the Hearing Officer provided any law that as a matter of law, his open refusal was improper. Jones did not have to prove at hearing that

as a matter of law his response was adequate. The WSBA had to prove as a matter of law that it was not. It put on no such law and the Hearing Officer provided none. The Bar has to prove its case on two levels, first that there are facts which support the allegation and secondly that as a matter of law, there was a violation. If the Bar does not put forth the law it claims overcomes the statutory defense, in this case "open refusal" to provide them, Jones lacks notice of the allegation against him and cannot defend.

In this matter the RPCs offer an affirmative defense and the issue is where does the burden of proof rest in such matters. Since this a rule which statutorily provides an affirmative defense we can look to how the burden on affirmative defenses is allocated in criminal case. This is a "statutory" affirmative defense contained within the rule itself and the burden of proof rests with the Bar. *State v. Camara,* 113 Wn.2d 631, 638, 781 P.2d 483 (1989). Here the rule provides the defense of open refusal. The Bar did not provide facts or law which overcomes this defense. Count 1 was not proven under the strict test applied in a Bar proceeding and must be dismissed.

DISCUSSION REGARDING COUNTS 2 AND 3

These are the allegations that Jones filed frivolous pleadings. At the heart of Jones' argument is that assertion that the Bar had an affirmative duty to show that the alleged pleadings were frivolous under

the RPCs. They presented no law on these matters and did not meet their burden of proving frivolous pleadings. Instead they, as does the Hearing Officer and the Board, ignore the issues entirely and simply make bald face allegations that the pleadings were frivolous. These are issues of law, not fact. Jones cannot have filed frivolous pleadings unless, under the RPCs, there are findings of why his assertions are frivolous. The Bar and the Hearing Officer cannot rely upon what other courts may have said, as these are hearsay and the test is not the same. *In re Sanai, supra.*

At no point did the WSBA provide the law that proves that Jones did not have a good faith basis in law or fact for his arguments. What the Bar has done in this case is attempt to seek to shift to Jones the obligation to prove that he did or could make such good faith arguments. They simply put into the record a series of hearsay findings by various courts and say "Well, these other courts made the decision that these actions were frivolous so make Jones prove they are not." That is not the test, the Hearing Officer, and the Board, had to make an independent legal decision applying the burden of proof in this proceeding as to why Jones' positions were frivolous.

The Bar's "proof" is limited to them pointing to decisions made by courts with a different burden of proof. They have not shown that under an RPC 3.1 allegation that res judicata applies to the point where it cannot be challenged or that RCW 11.44.035 does not apply or that it is bad faith to

ask a judge to recuse when a party thinks he is not getting a fair shake or on any of the myriad of other orders and pleadings they claim are frivolous. Jones is entitled to have the WSBA put on the record with legal argument for each specific pleading made by Jones, under their high burden of proof, a showing that Jones violated the state of mind requirements required for these counts.

Lacking proof that litigation was frivolous, we have to ferret out by implication from the pleadings and decisions in the cases at issue here what the Bar must intend to be its proofs. The rules do not require such a snipe hunt. The Hearing Officer did not follow the framework provided by the ABA Standards. He was required to enter findings that clearly identified findings of fact and conclusions indicating violations of specific provisions of the Rules of Professional Conduct. *Matter of Disciplinary Proceeding Against Johnson*, 114 Wn.2d 737, 790 P.2d 1227 (1990).He did not do so but rather leaves us guessing at what he means by frivolous. There is a failure of proof in this case regarding the allegations of frivolous pleadings and that alone requires dismissal of Counts 2 and 3.

<u>What Does Frivolous Mean in The Context of This Case</u>: What does "frivolous" mean in the context of RPC 3.1 allegations. The alleged frivolous pleadings straddle a time period from before Washington had adopted the comments to the ABA Model Rules of Professional Conduct

to when, with some modifications not relevant here, the comments were adopted.

In regards to frivolous, this is what the comments to RPC 3.1 say:

> [1] The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.
>
> [2] The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

The comments properly recognize that "the law is not always clear and never is static" and that "in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change."

An "action is frivolous ... if the lawyer is unable to either to make a good faith argument on the merits of the action or to support the action taken by a good faith argument for an extension, modification or

reversal of existing law." The comment does not seem to require the lawyer to have made his argument for an extension, modification or reversal of the law specifically in the action he or she took but rather allows the lawyer to support the action taken, past tense, by a later good faith argument. In any case, the test is the "good faith" of the lawyer. Therefore, in a Bar case the lawyer's state of mind is paramount. This is not the same as the standard in an appellate case where "An appeal is frivolous if there are "no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility' of success." *West v. Thurston County*, 169 Wn.App. 862, 868, 282 P.3d 1150 (Wash.App. Div. 2 2012) citing *In re Recall Charges Against Feetham,* 149 Wash.2d 860, 872, 72 P.3d 741 (2003) (internal quotation marks omitted) (quoting *Millers Cas. Ins. v. Briggs,* 100 Wash.2d 9, 15, 665 P.2d 887 (1983) Nor is the same as in a lower court case where "A lawsuit is frivolous when it cannot be supported by any rational argument on the law or facts." *Skimming v. Boxer*, 119 Wn.App. 748, 756, 6 82 P.3d 707 (Wash.App. Div. 3 2004) (quoting *Tiger Oil Corp. v. Dep't of Licensing,* 88 Wn.App. 925, 938, 946 P.2d 1235 (1997). These tests do not pay attention to the lawyer's state of mind but rather go to whether the results which may be obtained has any possible chance of success under the law.

There is no contrary authority in probate. Jones read these authorities to mean that if a personal representative removed for reasons of estate asset values, the values are subject to modification, thereby making removal also subject to modification. This reading is within the words of the legislature and Supreme Court, is reasonable and not frivolous.

A lawyer in a case might in good faith seek to test the boundaries of the law and either he or his client may be willing to take a chance that it could be ruled frivolous with financial penalties under the applicable court rules.. In taking such good faith risk the lawyer should not be subject to the fear of losing his or her license. The courts recognize that too strict an application of frivolous rules can have a chilling effect on the rights of clients: "We are mindful that not every attorney who files appeals is an appellate expert and we are concerned that there not be a chilling effect on the right to appeal by too vigorous an application of sanctions." *Orwick v. Fox*, 65 Wn.App. 71, 90, 828 P.2d 12 (Wash.App. Div. 1 1992). The possible impact on clients' rights being chilled is even greater where the risk is the possible loss of the lawyer's license.

Accordingly, being mindful of the great care which must be taken not to have a chilling impact on the bringing of case, the test here must be whether the Bar proved by a clear preponderance of the evidence that Jones did not have a good faith belief, whether ultimately right as a matter

of law, that either permitted him to file the pleadings he did or permit him to have a good faith argument for an extension, modification or reversal of existing law.

What Pleadings Are At Issue: To determine whether a specific pleading was frivolous we must identify the pleadings placed at issue. Counts 2 and 3 were tried on the basis that five groups of pleadings and exhibits were at issue. AFFCLR pages 2 – 4. These are set forth in detail Appendix A.

Partial Distributions: As discussed more below, in this matter it is important to understand that the distributions at issue such as the house and piano, were partial distributions and were not final. Partial distributions are always subject to review. This is an important point missed in this entire case and one which seems to have eluded the decision makers. For example, the Supreme Court agreed that Jones could legally distribute the house to himself "in any partition or distribution...." *In Matter of Estate of Jones*, 152 Wn.2d 1, 12, 93 P.3d 147 (2004) (Citing current and former RCWs and *Estate of Ehler*, *supra*). The court went on to determine that "Interim reports and orders may be modified on final accounting", *Jones*, at 15, citing *In re Estate of Million*, 18 Wn.2d 824, 833, 140 P.2d 560 (1942). *Million* says at page 833 "Moreover, many of the assets had been sold by the administrator, and a former partial

distribution had been made pursuant to interim reports and orders. These were subject, however, to subsequent examination and modification on the final hearing. *In re Deming*, 192 Wash. 190, 203, 73 P. (2d) 764, 772; *In re Krueger's Estate*, 11 Wn. (2d) 329, 350, 119 P. (2d) 312, 322; *In re Peterson's Estate*, 12 Wn. (2d) 686, 716, 123 P. (2d) 733, 748."[5] Yet the court in Jones' case did not address that the house was just such a partial distribution and that the value assigned to it by Jones was not final and was subject to revision.

We will address each of the pleading groups.

Group 1 – The Bar asserts that Jones filed frivolous pleadings in connection with a CR 60(b) motion when he moved for relief from the trial court's 2001 judgment seeking appraisals of the house and the piano and challenging his removal as personal representative. These all occurred after the case had been returned to the Superior Court on remand from the Supreme Court. They all relate to the issue of whether Jones could get new appraisals for the home and the piano. Although the Bar alleged in its Formal Complaint that these raised issues challenging his removal as personal representative, none of the pleadings identified by them make such assertion. They all relate to whether Jones could get relief from the

[5] Original citation did not include years. *Deming* is 1937 *Kruger* is 1941, *Peterson* is 1942.

judgment which purported to fix the price of the house and piano. On remand before the same visiting judge, Russell Jones filed two motions for modification of house and piano values. The purpose of the motions was to enforce the will of the testator for equal shares. *Estate of Bergau*, 103 Wn.2d 431, 435, 693 P.2d 703 (1985) ("...paramount duty of the court is to give effect to the testator's intent.")

The key here is whether Jones could believe in good faith that the issue of the piano and house remained open for additional review. If it was, then the other parts of his arguments and motions including which rules to use as well as such things as to why he felt new appraisals were necessary and why he felt the prior ones were wrong all fall within proper subject matter for such motions. Jones was proceeding in good faith when he made the claims that he did.

As a general proposition it seems clear that the *Jones* case at the Supreme Court was a significant case on the issue of personal representatives and estates. These issues were far from settled law given the Court of Appeals decision and as is shown by the amicus briefs filed in the case. The whole issue where there has been a removal and then challenges to assets based on partial distribution remains unsettled.

By the time Jones made these motions the Supreme Court had made its decision in the removal case. *In Matter of Estate of Jones*, 152

Wn.2d 1, 12, 93 P.3d 147 (2004) [EX A-36, herein.] In the course of that proceeding the court had stated "Interim reports and orders may be modified on final accounting", *Jones*, at 15, citing *In re Estate of Million*, 18 Wn.2d 824, 833, 140 P.2d 560 (1942). *Million* says at page 833 "Moreover, many of the assets had been sold by the administrator, and a former partial distribution had been made pursuant to interim reports and orders. These were subject, however, to subsequent examination and modification on the final hearing." The court cites in support, *In re Deming's Guardianship*, 192, Wash. 190, 73 P.3d 764(1937). That court says at page 203:

> In this connection, as to when such order should be set aside, the rule was laid down in Re Rohne's Guardianship, supra, as follows: 'When, upon passing upon a guardian's final account, it appears that the acts of the guardian, even though approved by the court, have resulted in injustice to the ward, it is the duty of the court to scrutinize the account carefully and to disallow expenditures, even though the same were allowed by the court having immediate jurisdiction of the proceeding, if it appears that the same were improvidently approved and were manifestly in derogation of the rights of the ward, and of such a nature as to amount in law to the exercise of bad faith on the part of the guardian.'

At various places in the motions and pleadings at issue, he also cited the following to support his position that the piano and house could be reviewed again (the cites were not necessarily to the extent set forth here but he did cite them):

- RCW 11.72.002 which contains language to the effect that after property has been distributed to a beneficiary as a partial distribution "The court may at <u>any time prior to the decree of final distribution</u> order him or her to return such property to the personal representative." [Emphasis added.]

- RCW 11.72.003 which deals with the right to make partial distributions and that "Such distribution shall be as conclusive as a decree of final distribution with respect to the estate distributed <u>except to the extent that other distributees and claimants are deprived of the fair share or amount which they would otherwise receive on final distribution</u>."[Emphasis added.]

- RCW 11.76.050 which deals with final distributions to the effect that "Any person interested may file objections to the said report and petition for distribution, or may appear at the time and place fixed for the hearing thereof and present his or her objections thereto.' And "The court shall have the authority to make partition, distribution and settlement of all estates in any manner which to the court seems right and proper, to the end that such estates may be administered and distributed to the persons entitled thereto."

- For the proposition that while the removal order may have been final, the rest of the Judge Baker's Finding and Order was not since the piano appraisal was not properly before the court as a final order *Gorman v. Cook*, 168 Wash. 79, 10 P.2d 996 (1932) where one judge in probate had entered an order about fees and another judge vacated which was then appealed. The court found that such order was not a final order and said at pages 86 and 87 that "We must hold that the order complained of is not a final judgment in the present action. A study of the order indicates that it was an attempt to void a previous order by Judge Beeler to require the executrix to file a complete account in the matter of the estate of Thomas Wren Gorman, who died leaving a nonintervention will, and to retain jurisdiction for all intermediate orders in the present case necessary or proper pending its final disposition." And went on to say "The

> question whether the trial court was correct in entering the order of June 2, 1931, above referred to, is not before this court."

Additionally, although not cited in this series of pleadings there is an additional basis for his good faith belief which can be considered after the fact under the comments to the RPCs discussed above. There is RCW 11.44.035 which states that "Any party in interest in the estate may challenge the inventory and appraisement at any stage of the probate proceeding." Greer, Woodard, Judge Baker and Jones all agree there was no final accounting on the Marcella Jones Estate until Judge Baker signed an order to that effect on July 28, 2010. [EX A-145.]

The opposing parties in this matter as well as the various courts have never really addressed the issue of the applicability of RCW 11.44.035 and there does not appear to be any case law settling the issue. The whole issue where there has been a removal and then challenges to assets based on partial distribution remains unsettled.

The opposing parties and the courts have relied on res judicata to determine that Jones should have known that he could not ask for a reappraisal of the home or piano. However, there is no case law dealing with the issue of the element of res judicata that requires a final judgment on the merits to have been entered and the interaction between that and RCW 11.44.035 which specifically allows the inventory and appraisement

to be challenged at any stage of the probate proceeding." [Emphasis added] The statute contains no exceptions and appears to grant an absolute right of review at any stage. It is arguable that RCW 11.44.035 provides an exception to res judicata and Jones was entitled to make such argument in order to get ruling on these issues where the is no law on this specific point. Jones also looks to *Estate of Wood*, 77 Wn.App. 973, 947 P.2d 782 (1997). as resolving two questions on res judicata. Among the elements of res judicata, "(res) judicata (is) an affirmative defense barring the same parties from litigating a second lawsuit on the same claim." *Roberson v. Perez*, 156 Wn.2d 33, 41, 123 P.3d 844 (2005). In *Wood*, Division III said that removal of a P.R. is one issue within the larger probate action. One lawsuit; no res judicata. Res judicata also requires a final judgment on the merits. *Hisle v. Todd Shipyards*, 151 Wn.2d 853, 845, 93 P.3d 108 (2004) ("The threshold determination of res judicata is a final decision on the merits of a question.") In *Wood*, Division III said that removal of a personal representative is not a final decision. No final decision; no res judicata. See also, *Estate of Baker*, 27 Wn.2d 933, 936, 181 P.2d 826 (1947) ("The court can order re-appraisement of the property in an estate whenever it is satisfied that the prior appraisement is too high or too low.")

Group 2 – The Bar asserts that Jones filed frivolous pleadings when he filed motions to disqualify Judge Baker. *See* pleadings and exhibits identified in Appendix A. The history here is simple. Once they got back to Superior Court Jones had concerns that he was not getting a fair shake from Judge Baker. Jones filed three Motions for Disqualification and two for a Neutral Judge. (In order to correct the lack of a declaration he filed the second motion twice but it was not considered again and was quickly superseded by the third one.)

Judge Baker denied the first motion because it did not state grounds for disqualification. Jones filed a second motion stating the grounds. Judge Baker denied the second one because it was not sworn. Jones filed the third one with grounds and under oath. The first ground was based on the argument of actual bias based on comments which Jones overheard being made by Judge Baker during the evening at Gonzaga Law School when he went there to do some research. This was the night before she issued her oral decision in the trial. The judge, the other lawyers, the Bar and the Hearing Officer seem to have focused on this with the Hearing Officer finding that Jones did not hear such remark.[6]

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[6] Jones contests this finding as being unsupported in the record, additionally, what is relevant is that Jones believed he heard such comments which he clearly did. All the hearing officer found was that Jones was not credibly on whether he

However, most importantly, there was also another ground claiming actual bias as demonstrated by the rulings she had made in her findings at the trial. Jones cited to remarks in her findings that Jones was hostile and contentious, that he had been retaliatory, that he had improperly commingled funds, that he had engaged in self-dealing, that he acted improperly in regards to the car and that he had not given proper discovery. Some of this was demonstrably just not true and he believed that she had shown actual bias by making these findings. Even if the comments at the reception are not accepted Jones still had another basis, which was not discounted by the Hearing Officer, and as such, was not frivolous pleading since there was at least on sufficient basis for making the motion.

Regarding the issue of the Motions for Neutral Judge: There seems to be some confusion about these. These are not alternative motions for disqualification. As they say on their face all he was seeking was to have the decision about whether Judge Baker had demonstrated actual bias made by another judge. There is nothing frivolous about this and Jones could make such motion in good faith and no one, not the Hearing Officer or the Bar, has demonstrated why seeking a neutral judge to hear a matter is frivolous as a matter of law..

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had proven he had heard such comment. Jones had a good faith which is sufficient.

The real issue here is whether it was frivolous for him to raise the disqualification issue at all. The other lawyers and ultimately the Judge and apparently the Hearing Officer felt the motion was untimely but that would only apply to the comments at Gonzaga if it applied at all. What was untimely about his motion based on the statements she had said in her findings? These could not be raised until the case was remanded which he promptly did.

Finally, the decision to disqualify by a judge is discretionary – maybe if he had gotten a direct ruling and come back for more, an argument could be made that he was filing frivolous motions but she denied for failing to set forth grounds and then for not putting the grounds under oath. He got no ruling based on any law. When she denied as untimely he did not again file his motion.

In his arguments Jones cited the Code of Judicial Conduct and cited amongst other cases, *Wolfkill v. Martin*, 103 Wn.App. 836, 841, 14 P.3d 877 (2000), to the effect that "Due process, the appearance of fairness, and Canon 3(D)(1) of the Code of Judicial Conduct require disqualification of a judge who is biased against a party or whose impartiality may reasonably be questioned." [Emphasis added.] He was entitled to seek a discretionary ruling arguing that the CJC required her to be disqualified if she showed actual bias. He believed she had so he could

see his motion in good faith and the Bar has not proven these motions were frivolous.

Group 3 – The Bar asserts that Jones filed frivolous pleadings when he petitioned Division III for discretionary review of the orders denying his motions and the trial court's denial of his motion for reconsideration; when he appealed an August 2005 order authorizing the sale of the house; when he later appealed an April 2006 summary judgment that authorized immediate possession of the estate house by the new personal representative; and when he abandoned his CR 54(b) arguments on appeal and instead argued that he was entitled to seek revision of the trial court's orders under CR 54(b).

Following trial on the removal petition, Russell Jones considered a remedy. Was the removal order a final decision from which appeal would lie? RAP 2.2(a)(1). Or was the removal order an interlocutory order within the probate action from which appeal would not lie until entry of the final order in probate? Was a petition for discretionary review the remedy? RAP 2.3. Russell Jones considered and discarded a CR 54(b) motion for revision in the probate, a case of multiple issues. A motion for revision would be in front of the same visiting judge. In answer to these questions, Division III had earlier resolved that an order removing a personal representative is not a final judgment, but is appealable as one issue

among multiple issues in a probate action, and a "written decision affecting a substantial right in a civil action that in effect determines the action... RAP 2.2(a)(3)." *Estate of Wood*, 77 Wn.App. 973, 947 P.2d 782 (1997). Acting in reliance on Division III, Russell Jones decided to appeal to Division III.

The pleading identified by the Bar on this issue do not provide any information sufficient to argue this matter.

- Exhibit A-66 – Jones Motion for CR 54(b) Finding – April 4, 2005, is a lead up document but does not deal with the appeal.

- Exhibit A-84 – Jones Notice for Discretionary Review to Court of Appeals, Division Three, filed by attorney Michael Schein – June 6, 2005 – Jones cannot be accused of filing frivolous pleadings when he did not file it. A well respected lawyer filed this and it contained nothing more than the notice of appeal. The mere filing of a notice of appeal is not a frivolous filing and there is no law to support that it is.

- Exhibit A-88 – Jones Notice of Appeal to Division Three, Court of Appeals, Filed by attorney Michael Schein – September 13, 2005 – This the same issue – Jones did not file this, another lawyer did an it is nothing more than a notice.

- Exhibit A-98 – Jones Notice of Appeal – April 20, 2006 – Jones did file this one but again it is nothing more than then notice.

Without submitting the actual pleadings at issue containing the arguments made by Jones the Bar and the Hearing Officer contend that that those pleadings were frivolous. decision cannot be based on the

decisions filed by the courts on these appeals. There has to be an independent determination that specific pleadings are frivolous. There must be an independent decision based on RPC 3.1 and the test in a disciplinary case and such decision cannot be made based on decisions made in other courts with different rules, different burdens of proof and different tests. The Bar did not submit documents which would permit review and which would allow us to reply and defend. This allegation must be dismissed.

Group 4 – The Bar asserts that Jones filed frivolous pleadings when he filed a Petition for Discretionary Review at the Supreme Court. Just as with Group 3, the Bar has not provided any information sufficient to argue this matter. The only pleadings identified by the WSBA was Exhibit A-122, the Order of Court dated September 3, 2008. Again there has to be an independent determination that a specific pleadings was frivolous. There must be an independent decision based on RPC 3.1 and the test in a disciplinary case and such decision cannot be made based on decisions made in other courts with different rules, different burdens of proof and different tests. The Bar did not submit documents which would permit review and which would allow us to reply and defend. This allegation must be dismissed.

Furthermore, all the Supreme Court order says is that it was

denying review and allowed attorney fees for P. Jones and J. Jones under RAP 18.1(j). RAP 18.1(j) provides that attorney fees can be awarded when a party answering a Petition for Review was awarded fees by the Court of Appeals and the petition is then denied. The rule has nothing to do with frivolous pleadings.

The Bar did not identify Exhibit A-195 – Jones Petition for Review at Supreme Court -as one of the documents it was relying on. This was a new document and was admitted after a break in the hearing scheduled. The Bar did not assert nor amend its list to indicate this exhibit was intended for use in connection with Counts 2 and 3 and it cannot now be properly used against him.

In the petition Jones argued that res judicata did not apply because there had not been a final judgment on the merits since the estate remained open and the probate was pending. He pointed out that Judge Baker herself had entered an order stating that a CR 54(b) finding was not appropriate since there had not been any final order. He argued that the law of the case did not apply since on remand he had presented new evidence regarding the home appraisal and the piano value which had not been included in the record on reviewed by the Court of Appeals and Supreme Court during the appeal of his removal. We discuss below the good faith reasons Jones had for such arguments.

The Bar did not prove frivolous pleadings by the single order it submitted in this area and even if somehow the argument is expanded to include EX A-195, that document does not show that Jones was not making his arguments in good faith.

Group 5 – The Bar asserts that Jones filed frivolous pleadings when he filed motions on July 28, 2010, just prior to a hearing before the trial court on the personal representative's motion for final approval of an accounting and distribution of the estate and a hearing set by Jeffrey and Peter Jones for a charge of attorney fees against the estate.

In the objections to distribution Jones raised objections to the value being allocated to the piano. He argued that the Supreme Court wrongly believed that Jones had not asked for reappraisal of the piano, that the original appraisal had been withdrawn, that the personal representative (Woodard) had done nothing to address the correct value of the piano and that as a result P. Jones was getting an unequal share.

In the motion for relief and in his affidavit he challenged his removal under CR 60(b)(4) arguing that the court could modify its order at any time as long as the estate remained open and that because the appraiser (Davis) had submitted contrary appraisals at different phases of the case with differing calculations regarding how to take into account the defects in the house that new grounds now existed for review of the his

removal. He also argued that because of these changed circumstances the house appraisal found at the time of the trial was now subject to review. All Jones was doing was seeking the rights he believed in good faith were granted to him when there was a statute that said "Any party in interest in the estate may challenge the inventory and appraisement at any stage of the probate proceeding." RCW 11.44.035. Furthermore, he also had the issue of whether the rulings at the Supreme Court were sufficient when the Court had an incomplete record. The Hearing Officer and the Bar, without authority or argument, apparently feel that it is beyond any legal question that the issue of whether this statute left open the motions Jones could be made in good faith. There is no basis for a finding that the issue of what is left open by RCW 11.44.035 is resolved beyond any doubt. The Bar did no provided no independent law or facts that Jones was not operating in good faith when he made these motions and these group of documents do not form the basis for any finding of a violation of the RPCs.

There is no basis for the findings of misconduct at Counts 2 and 3, and they must be dismissed.

DISCUSSION REGARDING COUNT 4

These allegations assert that Jones was dishonest when during a mediation he listed the piano at a higher value then he had originally applied and listed the house at a lower value then what he had told the

brothers the house had been appraised. These "changes" happened openly and directly during the mediation phase of the proceedings. The assertion seems to be that since he had appraisals with different values it was dishonest for him to do this and that he could never have changed position even when he had a basis for doing so. Jones needed to only defend on the allegations relating to the piano and the house. He is alleged to have engaged in this dishonest conduct in connection with listing the value of the piano at $15,000 and the house at $126,000.

The changes in value occurred in documents Jones provided to the Honorable Harold Clarke, II as part of the mediation. EX A-186. These were not part of any accounting he filed with the court as the personal representative and there is no evidence that they were ever filed with the court. These are documents provided to a mediator to stake out Jones' position during the mediation.

His position was specific and open. They all knew that the piano had previously been appraised by Worthington at $5,000 and now it was being listed at a different number. How can this possibly be dishonest? It cannot be and was not.

As for the house, there was uniformity by all four brothers that Jones, at a minimum, told them at the May 4, 1997, meeting that the house

had appraised at $155,000 and Peter and Jeffrey knew this full well was but hat Jones had concerns about the depreciation. TR 46 and 158.

The Hearing Officer finds there was intentional misrepresentation. This is a legal conclusion and is subject to de novo review. How can there be misrepresentation when he told them that the appraisal on the piano was $5,000 and he had now had assigned $15,000 value and that the appraisal on the house had been $155,000 less defects and as result he was claiming a value of $126,000? The only way this is possible is if there is some legal standard that *ipso facto* makes it a lie to change your opinion on values during the handling of an estate. Of course, there is no such legal standard.

He did not lie about the piano appraisal or the house value and Count 4 must be dismissed.

OTHER ISSUES IN THE AFFCLR

The Hearing Officer finds at paragraphs 185 – 192 and at 194 - 203 that Jones engaged in bad faith in regards to the hearing proceeding when he served a lawsuit on Peter just before disciplinary case, in not paying the sanctions against him and in refusing to answer questions as to what he had done with an attorney fee on an unrelated case. Jones had a good faith belief that he had still not obtained a final ruling on whether the case remained open, see discussion regarding frivolous above. He is

entitled to file lawsuits on this issue and he did so. There is no basis in the record, other than timing, for a finding by a clear preponderance of the evidence that he did so to intimated Peter. .

The Hearing Officer said the Jones lacked credibility, at paragraph 17 and 73, regarding whether Jones had shown Peter or, his lawyers the appraisal; at paragraph 30 regarding attempts to give Gebhardt the check registers and at paragraph 106 regarding overhearing the judge make remarks about him. None of these are crucial to allegations made against Jones and even if accepted they do not prove any violation.

The Hearing Officer said the Jones made false statements at paragraphs 39,40, 41 regarding what all the heirs had agreed to; at paragraph 48,49, 50, 51 regarding false responses on utilities and at paragraph 53, 54, 55 56 regarding false responses on property taxes. Falsity is not proven just because Jones has a different recollection than his brothers about what had happened at the meeting at the house. Given the confusion over the meeting and the testimony of David there is not substantial evidence in the record to show that Jones did not believe what he said. The issue of the utilities and taxes is addressed above. When the context of what was being said and exactly what was asked, the record does not support any finding of false statement.

The Hearing Officer finds at 34 and 69 that Jones' motive in seeking a higher piano appraisal was to punish Jeffery. The record does

not support this since Jones did not even asset a price when he first asked, had information that the prices was wrong and agreed to go along with whatever the second appraiser found.

The Hearing Officer, without citation to the record claims at paragraph 61 that Jones admitted that his failure to provide records in discovery was to prevent Peter from getting them. There is no substantial evidence in the record to support the contention that in the specific instances at issue Jones specifically said those words.

There are numerous findings in the initial part of the AFFCLR which relate Respondent not giving his brothers documents or other materials. Jones was not required to do so, an issue he prevailed on when he appealed.

The Hearing Officer makes findings regarding which rules were violated, the relevant Standard to apply, aggravating and mitigating factors and the recommendation of disbarment with readmission conditioned on payment of all sanctions. AFFCLR 204 to 218. Except for the aggravating factor of substantial experience in the practice of law and the mitigating factor of absence of prior disciplinary a record, Respondent contests them all.

Regarding aggravators:

- The record does not support an aggravator that he acted from dishonest or selfish motive. He had a right to seek a

different value on the house and piano, he had a right to seek his lawsuit and to appeal them as discussed above.

- The records supports a pattern of misconduct and multiple offenses only if Respondent engaged in the misconduct alleged, which he did not.

- The record does not support bad faith obstruction of the disciplinary process. This is discussed above.

- The record does not support a finding of refusal to acknowledge. He is not required to confess and is not required to agree with the charges made against him.

- The record does not support indifference to make restitution. He paid some of the sanctions and in other instances he is contesting the validity of them There is no law to show that not paying sanctions is the same as restitution and there is no legal basis for finding this aggravator. The parties remedy is through the civil court system, not attorney disciplinary proceedings.

As is clear from our argument we contest the recommendation in its entirety.

CONCLUSION

Jones always acted in reliance on licensed appraisers and contractors, in reliance on Washington Supreme Court and Washington Court of Appeals decisions in the underlying probate and other Washington precedent, Title 11 of the Probate Code, Washington Rules of Civil Procedure and Washington Rules of Appellate Procedure. Litigation is not frivolous if grounded in fact and law. A lawyer has breached no ethical standard simply because he did not prevail. Jones is an experienced

lawyer and a former judicial clerk in Division III, without disciplinary history. His actions in the present case represent critical reading and reasoned reliance at each step. Jones has done nothing wrong and the case against him should be dismissed.

Dated this 6th Day of February, 2014.

/s/
Kurt M. Bulmer, WSBA # 5559
Attorney for Respondent Jones

APPENDIX A

LISTING OF PLEADINGS ASSERTED B Y THE BAR TO RELEVANT TO ASSERTIONS OF FRIVOLOUS PLEADINGS

These proceedings were tried on the basis that five groups of pleadings and exhibits were at issue in regards to Counts 2 and 3, AFFCLR pages 2 – 4. These are

> **Group 1** – Assertion, based on paragraph 39 of the Formal Complaint, that Russell Jones filed frivolous pleadings in connection with a CR 60(b) motion when he moved for relief from the trial court's 2001 judgment seeking appraisals of the house and the piano and challenging his removal as personal representative.
>
> The pleadings identified by the WSBA and which would be at issue for this group are:
>
> Exhibit A-39 – Jones Motion for Appraisal – August 16, 2004
> Exhibit A-47 – Jones Motion for Appraisal – February 14, 2005
> Exhibit A-48 – Jones Brief on Appraisal – February 14, 2005
> Exhibit A-51 – Jones Motion for Witness Testimony – March 1, 2005
> Exhibit A-52 – Jones Motion for Relief From Judgment – March 1, 2005
> Exhibit A-55 – Jones Brief on Relief From Judgment – March 7, 2005
> Exhibit A-61 – Jones Reply Brief on Appraisal – March 11, 2005
> Exhibit A-63 – Jones Reply Brief on CR 60(b) – March 11, 2005
>
> **Group 2** – Assertion, based on paragraphs 42, 43, and 44 of the Formal Complaint that Russell Jones filed frivolous pleadings when he filed motion to disqualify Judge Baker which was denied, filed another motion to disqualify, coupled with a motion for a neutral judge which was denied and filed a third motion to disqualify Judge Baker and a second motion for a neutral judge which was denied.

The pleadings identified by the WSBA and which would be at issue for this group are:

Exhibit A-38 – Jones Motion for Disqualification – August 3, 2004

Exhibit A-46 – Jones Motion for Neutral Judge – February 14, 2005

Exhibit A-49 – Jones Motion Second Motion for Disqualification – February 14, 2005

Exhibit A-50 – Jones Brief on Disqualification – February 14, 2005

Exhibit A-64 – Jones Second Motion for Disqualification – March 14, 2005

Exhibit A-67 – Jones Second Motion for Neutral Judge – April 4, 2005

Exhibit A-68 – Jones Third Motion for Disqualification – April 4, 2005

Exhibit A-76 – Jones Reply Brief on Presentment – April 13, 2005

Group 3 – Assertion, based on paragraphs 46, 47, 49, and 51 of the Formal Complaint, that Russell Jones filed frivolous appeals when he petitioned Division III for discretionary review of the orders denying his motions and the trial court's denial of his motion for reconsideration; when he appealed an August 2005 order authorizing the sale of the house; when he later appealed an April 2006 summary judgment that authorized immediate possession of the estate house by the new personal representative; and when he abandoned his CR 54(b) arguments on appeal and instead argued that he was entitled to seek revision of the trial court's orders under CR 54(b).

The pleadings identified by the WSBA and which would be at issue for this group are:

Exhibit A-66 – Jones Motion for CR 54(b) Finding – April 4, 2005

Exhibit A-84 – Jones Notice for Discretionary Review to Court of Appeals, Division Three, filed by attorney Michael Schein – June 6, 2005

Exhibit A-88 – Jones Notice of Appeal to Division Three, Court of Appeals, Filed by attorney Michael Schein – September 13, 2005
Exhibit A-98 – Jones Notice of Appeal – April 20, 2006

Group 4 – Assertion, based on paragraph 54 of the Formal Complaint that Russell Jones filed a frivolous Petition for Discretionary Review at the Supreme Court.

The pleadings identified by the WSBA and which would be at issue for this group are:

Exhibit A-122 – Order of Court – September 3, 2008

Additionally, although not listed by the WSBA in its identification but introduced as a new exhibit in the second phase of the hearing after the letters were circulated:

Exhibit A-195 – Jones Petition for Review at Supreme Court – November 15, 2007

Group 5 – Assertion, based on paragraph 57 of the Formal Complaint, that Russell Jones filed a frivolous motion when on July 28, 2010, just prior to a hearing before the trial court on the personal representative's motion for final approval of an accounting and distribution of the estate and a hearing set by Jeffery and Peter for a charge of attorney fees against the estate, Respondent presented a motion to the trial court seeking relief or vacation of the court's 2001 judgment under CR 60(b), challenging his removal as personal representative, and challenging the valuations of the estate house and piano.

The pleadings identified by the WSBA and which would be at issue for this group are:

Exhibit A-140 – Jones Objection to Final Accounting – July 23, 2010
Exhibit A-141 – Jones Motion for Relief from Judgment – July 23, 2010
Exhibit A-142 – Jones Affidavit of Russell Jones – July 23, 2010

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From: OFFICE RECEPTIONIST, CLERK
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From: Kurt Bulmer [mailto:kbulmer@comcast.net]
Sent: Thursday, February 06, 2014 5:25 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Craig Bray
Subject: Opening Brief - Jones - 201,256-6

Please file the attached opening brief in In re Russell K. Jones – Supreme Court No. 201,256-6.

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