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Supreme Court No. 201,327-9

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE DISCIPLINARY PROCEEDING AGAINST

MATTHEW F. PFEFER,

Lawyer (Bar No. 31166).

ANSWERING BRIEF OF THE
OFFICE OF DISCIPLINARY COUNSEL

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ORIGINAL

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I. COUNTERSTATEMENT OF THE ISSUE

1. Lawyer Matthew F. Pfefer (Pfefer) failed to diligently pursue his client's case, failed to communicate with her about her matter, including not communicating the opposing party's settlement offer, and improperly withdrew from her representation. He acted knowingly and injured his client. The hearing officer and unanimous Disciplinary Board recommended that he be suspended for six months and required to pay restitution. Should the Court adopt the recommendation?

2. In In re Disciplinary Proceeding Against Burtch, the Court held that whether a lawyer's conduct violates the RPC is a question of law that the hearing officer is fully capable of deciding, and that expert testimony is not required to prove such violations. ODC did not proffer expert testimony. The hearing officer concluded that Pfefer violated the RPC based on substantial factual evidence, including Pfefer's own admissions. Did the hearing officer err by rendering conclusions about the RPC violations without expert testimony?

3. RPC 3.7 provides that a lawyer shall not act as advocate at a trial where the lawyer is likely to be a necessary witness. Pfefer listed his law partner as a witness, then, at hearing, sought to have his partner represent him. This would have put Pfefer's partner in the position both to testify and to cross-examine witnesses about the same events. The hearing

officer ruled that Pfefer had to choose either to have his partner testify or represent him. Did the hearing officer err?

II. COUNTERSTATEMENT OF THE CASE

A. PROCEDURAL FACTS

On October 10, 2012, the Office of Disciplinary Counsel (ODC) filed a three-count Formal Complaint against Pfefer charging him with failing to act with reasonable diligence and to make reasonable efforts to expedite litigation in representing his client Ana Ortiz, failing to keep Ortiz reasonably informed about the status of her case or to consult with her so that she could make informed decisions about the representation, and improperly withdrawing from the representation and failing to take steps to protect Ortiz's interest. BF 5 (attached as Appendix A).

Pfefer answered the Formal Complaint and the matter was assigned to Hearing Officer James M. Danielson. BF 17, 19.

A hearing was held on September 16-18, 2013. On September 26, 2013, the hearing officer filed his Findings of Fact, Conclusions of Law, and Hearing Officer's Recommendation. BF 63 (FFCL, attached as Appendix B).¹ The hearing officer found by a clear preponderance of the evidence that Pfefer committed the misconduct alleged in Counts 1

¹ The hearing officer numbered Findings of Fact, but did not number Conclusions of Law or other portions of the FFCL. Findings of Fact are cited by paragraph number (FFCL ¶ #). Conclusions of Law are cited by page number (FFCL at #).

through 3. FFCL at 8-9.²

The hearing officer applied Standards 4.42 and 7.2 of the American Bar Association's Standards for Imposing Lawyer Sanctions (1991 ed. & Feb. 1992 Supp.) (ABA Standards) to find that the presumptive sanction was suspension. FFCL at 9-11. He found two aggravating factors (multiple offenses and indifference to making restitution) and two mitigating factors (absence of a prior disciplinary record and absence of dishonest or selfish motive), and found that the factors were balanced. Id. at 11-12. He recommended a six-month suspension and that Pfefer be required to pay Ortiz restitution in the amount of \$6,580.06. Id. at 12.

The Disciplinary Board reviewed the matter under ELC 11.2(b)(1). It amended Finding of Fact 35 to indicate that Pfefer notified his client of his withdrawal by certified mail, reduced the amount of restitution to \$5,834.15, and unanimously adopted the hearing officer's recommendation of a six-month suspension with reinstatement conditioned on payment of restitution. BF 94 (attached as Appendix C).

B. SUBSTANTIVE FACTS

Pfefer was admitted to practice law in Washington on June 14,

² Pfefer moved to amend the FFCL on various grounds. BF 65. The hearing officer granted the motion in part, amending FFCL ¶ 40 in regard to the viability of Ortiz's daughter's claim after her case was dismissed. BF 67.

2001. FFCL ¶ 1.

Ana Ortiz and her minor daughter were injured in an automobile accident that occurred on February 16, 2006, when a car driven by James Hajek hit theirs.³ FFCL ¶ 2. Ortiz hired Pfefer in mid-2007 to represent her and her daughter in seeking recompense for their injuries. Id. ¶ 3.

On February 10, 2009, six days before the statute of limitations lapsed, Pfefer filed a complaint against Hajek on behalf of Ortiz and her daughter in King County Superior Court. Id. ¶ 8; EX 101. The court entered a comprehensive case schedule order setting a trial date of July 26, 2010, assigning the matter to Judge Carey, and setting several deadlines, including a deadline of July 21, 2009 for filing a confirmation of joinder and a deadline of April 19, 2010 for moving to change the trial date. FFCL ¶ 9; EX 102. The complaint was served on Hajek and lawyer Patrice Cole appeared on his behalf. FFCL ¶ 11; EX 109, 110.

Pfefer did not file the confirmation of joinder. Transcript (TR) 121. Under King County Local Rules (LCR), the plaintiff is responsible for filing this pleading. LCR 4.2(a)(1). Pfefer also failed to comply with other deadlines set in the case schedule, but those deadlines became largely irrelevant when, on the April 19, 2010 deadline for moving to change the

³ Ortiz's husband Felipe Segura was also in their car and injured, but was not a client of Pfefer and settled his claim separately from Ortiz and her daughter. FFCL ¶ 2, 4.

trial date, Pfefer filed a Motion to Continue Trial. FFCL ¶ 12; EX 113. The court continued the trial to March 21, 2011, and entered an Order Amending Case Schedule that set new deadlines for the case. FFCL ¶¶ 13-14; EX 117. The amended order required that settlement/mediation/ADR was to be accomplished no later than February 22, 2011, and that a Joint Confirmation of Trial Readiness be filed by February 28, 2011. EX 117. Plaintiff was jointly responsible for preparing and filing a Joint Confirmation of Trial Readiness. LCR 16(a)(1).

On February 8, 2011, the court entered another order requiring completion and filing of the Joint Confirmation of Trial Readiness by February 28, 2011, and reminding the parties of other case schedule deadlines including the February 22, 2011 deadline for engaging in mediation. FFCL ¶ 15; EX 118.

Pfefer did not comply with the deadlines set forth in the court's Order Amending Case Schedule or in its February 8, 2011 order. FFCL ¶ 17; TR 158-59. He did not conduct formal discovery. TR 150-51, 154. He did not disclose witnesses. TR 149. He did not submit the case to mediation, despite cooperation from the opposing party, or move to waive mediation. EX 525, 528; TR 159. He did not exchange exhibit lists or exhibits with the defense. TR 159. He did not meet with or confer with Ortiz or other witnesses to prepare them for trial. FFCL ¶ 22-23. He did

not file the Joint Confirmation of Trial Readiness by February 28, 2011. FFCL ¶¶ 17-18.⁴

Pfefer's paralegal Patty Schoendorf reminded him more than once that the Joint Confirmation of Trial Readiness was due for filing, but he ignored her. FFCL ¶ 20; TR 238-39. She said that by the Friday before the March 21, 2011 trial date, she was worried about Ortiz's case because she had "never seen a case that had gone by with so little attention." TR 234.

On February 28, 2011, Judge Carey's bailiff telephoned Pfefer to remind him of the need to file the joint confirmation. Pfefer failed to comply. The hearing officer rejected as not credible Pfefer's testimony that he was confused about the joint confirmation and its requirements. FFCL ¶ 19; TR 157, 177.

Because Pfefer had not filed the Joint Confirmation of Trial Readiness and the matter had not been mediated, the case was not sent out for trial. See TR 168; EX 529 at 5. But Pfefer did not inform his client that her case was not going to trial; he said he would see her at trial, arranged to meet with her on March 19, 2011, to discuss trial, then canceled the meeting because her friend and former employer, Annie Miller, was in the

⁴ Pfefer also never filed an amended complaint to correct the name of Ortiz's daughter and an issue with the defendant's identity despite discussing amending the complaint with staff, obtaining opposing counsel's consent to file it, and telling his paralegal he would "take care of it." TR 122-23, 215-16; EX 507, 508.

hospital. TR 299, 398-99, 401. He also failed to notify his office that trial was not happening. TR 222-23.

Because Pfefer did not tell Ortiz and Miller that the trial was not taking place, they appeared at the courthouse on March 21, 2011, expecting a trial. TR 300-01, 402. Pfefer did not appear. Id.

Due to Pfefer's failure to appear in court on the trial date and his failure to comply with the court's February 8, 2011 Order Requiring Completion of Joint Confirmation of Trial Readiness, the court dismissed Ortiz's case on March 21, 2011. FFCL ¶ 24; EX 119; LCR 4(g)(1), (i)(1) (failure to comply with scheduling orders or to appear on a scheduled trial date could result in dismissal). The case scheduling orders had notified Pfefer that missing a scheduled trial date or failing to comply with the terms of the orders could result in dismissal. EX 102 at 2-3, 118 at 1. And here, it did.

Though Ortiz and Miller were at the courthouse, Ortiz was apparently unaware that the court dismissed her case, and Pfefer did not tell her after he learned about that. TR 300-01; FFCL ¶ 28.

On March 24, 2011, in response to a letter from Pfefer, opposing counsel offered to settle Ortiz's case for \$6,580.006 [sic]. EX 528. Pfefer did not communicate the settlement offer to Ortiz. FFCL ¶ 26. Pfefer claimed at hearing that it was proper not to communicate the offer to Ortiz

because it was “ineffective” under “the law regarding offers to form contracts.” TR 586, 651. The hearing officer rejected this claim as not credible. FFCL ¶ 27. Ortiz would have accepted the settlement offer if Pfefer had consulted with her. TR 303.

On March 31, 2011, Pfefer filed a Motion for Reconsideration seeking to vacate the dismissal of Ortiz’s case. FFCL ¶ 29; EX 120. He did not inform Ortiz that he had filed the motion. TR 303.

The court granted reconsideration and set a new trial date of June 13, 2011. FFCL ¶ 30; EX 131. The court entered another order amending case schedule and a new Order Requiring Completion of Joint Confirmation of Trial Readiness that required that mediation/ADR occur on or before May 16, 2011. FFCL ¶ 31; EX 129, 130.

Pfefer did not comply with the new case deadlines. Instead, on May 5, 2011, he filed a Notice of Immediate Withdrawal, “effective immediately.” EX 132; FFCL ¶ 32. Pfefer informed Ortiz of his withdrawal by leaving a message with her friend, Miller, and mailing a copy of the Notice of Withdrawal to her. FFCL ¶ 35; Appendix C at 1-2.

Pfefer’s Notice of Immediate Withdrawal violated Rule 71 of the Superior Court Civil Rules (CR), which requires that the effective date of withdrawal be at least 10 days after service of a notice of withdrawal. FFCL ¶ 36. Ortiz attempted to file an objection to Pfefer’s notice of

withdrawal, but the court struck it because she failed to provide proof of service and to include a proposed order. EX 135. Pfefer took no steps to protect Ortiz's interests thereafter other than sending her some documents from the client file, but not the whole file. TR 182, 307, 419-20.

On May 19, 2011, the court held a hearing with Ortiz present *pro se* and granted a defense motion to dismiss Ortiz's case. EX 138. The statute of limitations ran six days later and Ortiz lost the ability to pursue her claims against the defendant. FFCL ¶ 40.⁵

III. ARGUMENT

A. STANDARD OF REVIEW

Unchallenged findings of fact are treated as verities on appeal, while properly challenged findings of fact are upheld if supported by substantial evidence. In re Disciplinary Proceeding Against Marshall (Marshall II), 167 Wn.2d 51, 66–67, 217 P.3d 291 (2009). “Substantial evidence exists if the record contains evidence in sufficient quantum to persuade a fair-minded, rational person of the truth of a declared premise.” In re Disciplinary Proceeding Against Poole (Poole I), 156 Wn.2d 196, 209 n.2, 125 P.3d 954 (2006) (internal quotation marks omitted).

⁵ Ortiz's daughter's claim remained viable because she was a minor. BF 67 (amending FFCL ¶ 40).

The Court gives considerable deference to a hearing officer's findings of fact and upholds the hearing officer's conclusions of law if they are supported by the findings of fact. In re Disciplinary Proceeding Against Hall, ___ Wn.2d ___, 329 P.3d 870, 874 (2014). The credibility and veracity of witnesses are best determined by the hearing officer before whom the witnesses appear and testify. In re Disciplinary Proceeding Against Selden, 107 Wn.2d 246, 251, 728 P.2d 1036 (1986). Thus, particular weight is given to the hearing officer's evaluation of credibility and veracity. In re Disciplinary Proceeding Against Poole (Poole II), 164 Wn.2d 710, 724, 193 P.3d 1064 (2008). The Court should not overturn a hearing officer's findings "based simply on an alternative explanation or versions of the facts previously rejected by the hearing officer. . . ." In re Disciplinary Proceeding Against Marshall (Marshall I), 160 Wn.2d 317, 331, 157 P.3d 859 (2007).

Sanction recommendations are reviewed de novo, but where a sanction is recommended by a unanimous Disciplinary Board, the Court will uphold the sanction "in the absence of a clear reason for departure." In re Disciplinary Proceeding Against Sanai, 177 Wn.2d 743, 760, 302 P.3d 864 (2013) (citation omitted).

B. THE HEARING OFFICER PROPERLY RULED THAT PFEFER'S LAW PARTNER COULD EITHER REPRESENT HIM OR TESTIFY ON HIS BEHALF, BUT NOT BOTH.

Pfefer has represented himself throughout this matter, both before and after the disciplinary hearing. Prior to the hearing, Pfefer listed his law partner Robert Caruso as a witness. BF 21, 35; TR 52.⁶ Caruso has never entered a notice of appearance in this matter.

On the first day of the disciplinary hearing, Pfefer appeared with Caruso and identified Caruso as co-counsel. TR 26. ODC objected to Caruso being both the lawyer for Pfefer and a witness. Id. at 36-37. In response, Caruso stated that, as an advocate, he would question Pfefer to avoid awkwardness in Pfefer questioning himself, and would cross-examine two ODC witnesses, Ortiz and Miller. Id. at 38-39. He further stated that, as a witness, he planned to testify about directing Pfefer to withdraw from Ortiz's case and why, and might give expert testimony. Id. at 38-39, 41. The hearing officer ruled that RPC 3.7 (lawyer as witness) applies in disciplinary hearings, that it was impermissible for a lawyer to testify as a fact witness and appear as an advocate, and that Pfefer had to choose whether to have Caruso represent him or testify. Id. at 39-40. Pfefer chose to represent himself and have Caruso testify. Id. at 51. The hearing officer allowed Pfefer to testify in the narrative to address the awkwardness issue and allowed Caruso to remain at counsel table and consult with Pfefer throughout the hearing. Id. at 39-40, 427, 438.

⁶ The Association never listed Caruso as a witness. BF 22, 23, 34, 46.

Pfefer argues that the hearing officer erred in applying RPC 3.7 and requiring him to choose whether to call Caruso as a witness or have him act as counsel. Petitioner's Brief (PB) at 15-19. But there was no error because the hearing officer properly found that RPC 3.7 applies to hearings before tribunals and Caruso was going to be advocating for his own credibility.

1. **RPC 3.7 applies in all situations where a lawyer will argue his own veracity before a tribunal.**

RPC 3.7 states in pertinent part that:

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

- (1) the testimony relates to an uncontested issue;
- (2) the testimony relates to the nature and value of legal services rendered in the case;
- (3) disqualification of the lawyer would work substantial hardship on the client; or
- (4) the lawyer has been called by the opposing party and the court rules that the lawyer may continue to act as an advocate.

The standard of review of the hearing officer's decision on RPC 3.7 is abuse of discretion. State v. Schmidt, 124 Wn. App. 662, 666, 102 P.3d 856 (2004). A trial court abuses its discretion when it bases its decision on untenable grounds or untenable reasons. Id.

Pfefer argues that RPC 3.7 only applies to an "actual trial" and that a disciplinary hearing is not an actual trial. PB at 16-17. While Pfefer is correct that the language of RPC 3.7(a) refers to "trial," the rule is not

interpreted narrowly. See In re Disciplinary Proceeding Against McGlothen, 99 Wn.2d 515, 522, 663 P.2d 1330 (1983) (court rules “must be construed so as to foster the purposes for which they are enacted.”). According to the commentary to RPC 3.7, the rule is intended to protect “tribunals” from prejudice and confusion. RPC 3.7 cmt. 1-5. A “tribunal” is defined as “a court, an arbitrator in a binding arbitration proceeding or legislative body, administrative agency or other body acting in an adjudicative capacity.” RPC 1.0(m). Disciplinary hearings, held by the Association under authority of this Court, ELC 2.1, fall within this definition.

RPC 3.7 is virtually identical to Rule 3.7 of the ABA Model Rules of Professional Conduct, the only difference being subsection (a)(4), regarding lawyers who have been called as witnesses by the opposing party, which is not at issue here. Compare RPC 3.7 with Model Rules of Prof'l Conduct R. 3.7 (2011). The ABA Standing Committee on Ethics and Professional Responsibility has interpreted the Model Rule to allow a lawyer who is expected to testify at trial to represent his client in pretrial proceedings, with consent, but not in any situation requiring the lawyer to argue his own veracity to a court or other body – whether in a hearing on a preliminary motion, an appeal, or other proceeding. ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 89-1529 (1989).

Here, Caruso's veracity was at issue. For example, he testified that Miller and Ortiz lied when they said that Ortiz's chiropractor's office said that a lawyer at Pfefer's firm told the office not to treat Ortiz any longer. TR 480, 510. But Schoendorf had written a memo to Caruso stating that the chiropractor's receptionist admitted telling Ortiz she could not be seen anymore and had talked with Ortiz's lawyer about that. EX 771. Caruso testified he had not seen Exhibit 771. TR 556-57. Also, Caruso intended to cross-examine Ortiz and Miller in an attempt to prove they had lied, and thereby advocate for his own testimony and credibility. In this situation, the hearing officer correctly concluded that RPC 3.7 applied.

Pfefer argues that the exception found in RPC 3.7(a)(1) (testimony relates to uncontested issue) applies because ODC "has not identified any [contested] matters" in Caruso's testimony. PB at 17. But in light of the discussion above, this argument is without merit. Pfefer also argues that the exception in RPC 3.7(a)(2) (nature and value of legal services rendered) applies because Caruso's testimony "centrally concerned" legal services provided to Ortiz. *Id.* But Caruso's testimony was not offered in attempt to prove what services were provided to Ortiz and their monetary value, it was offered in attempt to justify Pfefer's misconduct.

2. The hearing officer did not "disqualify" Caruso.

In any event, the hearing officer did not disqualify Caruso from

representing Pfefer. He held that Caruso could represent Pfefer if Pfefer so chose. TR 39. This was not a case where the opposing party listed a lawyer as a necessary witness and then sought to disqualify the lawyer, requiring the court to balance issues of materiality and necessity against prejudice. See e.g., Public Utility Dist. No. 1 of Klickitat County v. International Ins. Co., 124 Wn.2d 789, 811-12, 881 P.2d 1020 (1994) (court denied motion of defendants to disqualify plaintiffs' lawyer). ODC was not calling Caruso as a witness. So despite Pfefer's contrary argument, PB at 18, the hearing officer was not required to decide whether the evidence was material or necessary to ODC's case or whether it sought to have Caruso give testimony that was prejudicial to Pfefer.

It was up to Pfefer to decide if Caruso's testimony was necessary to his case, in which case Caruso would be a witness, if it was unnecessary, in which case Caruso could act as counsel, or to argue that despite being a necessary witness, Caruso's testimony fell within one of the exceptions to RPC 3.7. Pfefer chose to have Caruso testify. TR 51. The hearing officer did not "disqualify" him as counsel.

3. Pfefer was not prejudiced by the hearing officer's ruling.

Even if it were error to require Pfefer to choose how to use Caruso, Pfefer cannot show prejudice. Although Caruso did not represent Pfefer during hearing, he was allowed to remain at counsel table and consult with

Pfefer throughout. See e.g., TR 40, 427, 438. And the hearing officer allowed Pfefer to testify in the narrative, addressing his concern about questioning himself *pro se*. TR 38-39, 563. As a result, the Court should reject Pfefer's argument that it was error to make him choose.

C. THE RECORD SUPPORTS THE HEARING OFFICER'S CONCLUSION THAT PFEFER FAILED TO DILIGENTLY REPRESENT HIS CLIENT AND FAILED TO EXPEDITE THE LITIGATION (COUNT 1).

RPC 1.3 states that “[a] lawyer shall act with reasonable diligence and promptness in representing a client.” RPC 3.2 states that “[a] lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.”

The hearing officer concluded that Pfefer violated RPC 1.3 and 3.2 by failing to act with reasonable diligence and promptness in representing Ortiz and by failing to make reasonable efforts to expedite her case. FFCL at 8. This conclusion is supported by the following findings of fact:

- Pfefer's firm was hired to represent Ortiz and he was responsible for handling her case. FFCL ¶¶ 3, 6, 7;
- Pfefer did not comply with any of the deadlines set forth in the court's February 8, 2011 Order Requiring Completion of Joint Confirmation of Trial Readiness, including the requirement that the case be submitted to mediation. Id. at ¶¶ 16-17;
- Pfefer did not file the Joint Confirmation of Trial Readiness by February 28, 2011 as required by the court's orders despite being reminded of the deadline by his paralegal and the court's bailiff. Id. at ¶¶ 18, 20-21;

- Pfefer did not meet or confer with his client or other witnesses to prepare them for trial. Id. at ¶¶ 22-23;
- Pfefer did not appear in court on the scheduled March 21, 2011 trial date. Id. at ¶ 24;
- The court dismissed Ortiz's case because Pfefer failed to prosecute the case on her behalf. Id.;
- After reinstating the case, the court entered a new Order Requiring Completion of Joint Confirmation of Trial Readiness requiring that mediation occur on or before May 16, 2011. Id. at ¶ 31;
- Pfefer did not submit the case to mediation. Instead, he filed a Notice of Immediate Withdrawal that violated CR 71. Id. at ¶¶ 32, 36;
- Pfefer admitted making a mistake by not filing a request to extend the time for mediation and not beginning to start the mediation process until February 11, 2011. Id. at ¶¶ 42-43; and
- Pfefer admitted he erred in not filing a Joint Statement of Trial Readiness or contacting the court to ask for an extension of time. Id. at ¶ 44.

These findings are supported by substantial evidence, which included testimony from Ortiz and her friend Miller about the progress of the case and its eventual dismissal, testimony of Pfefer's own paralegal Schoendorf regarding his disregard of reminders and lack of attention to the matter, TR 234, 238-39, and Pfefer's own testimony, wherein he admitted that he erred in not timely filing confirmations of joinder and trial readiness, erred in not seeking extensions of time to file them, erred in not timely submitting the matter to mediation, and did not engage in any

formal discovery or prepare witnesses. TR 573-76.⁷

The Court should adopt the hearing officer's conclusion that Pfefer violated RPC 1.3 and 3.2 because it is supported by the findings of fact, which are themselves supported by substantial evidence.

1. Expert testimony on "reasonableness" was not required to prove that Pfefer violated the RPC.

Pfefer argues that expert testimony is required to prove the reasonableness, or lack thereof, of his conduct. PB at 21-22. Since ODC did not offer any expert testimony, Pfefer argues that the hearing officer erroneously concluded that he violated RPC 1.3 and 3.2 as charged in Count 1. PB at 22. He makes the same argument in regard to Counts 2 and 3. Id. at 23-24. While Pfefer cites authority requiring expert testimony in legal malpractice cases, PB at 21-24, he cites none requiring it to prove violations of the RPC. It may then be assumed that there is none. DeHeer v. Seattle Post-Intelligencer, 60 Wn.2d 122, 126, 372 P.2d 193 (1962).

Indeed, while expert testimony is generally required in disciplinary proceedings to establish medical facts that cannot be discerned by a

⁷ Finding of Fact 19 states that "Respondent's testimony that he did not file [the Joint Confirmation of Trial Readiness] because he was 'confused' was not credible." Pfefer argues that the finding is not supported by the record because it misstates his testimony that he was confused "in the context of a specific phone call." PB at 19-20 (citing TR 157-58). Pfefer fails to note his other testimony on this issue, wherein he claimed confusion about the document and said he had told the court's bailiff he had not realized the document was due for filing that day. TR 177. Substantial evidence supports the finding, and the credibility determination is entitled to great weight on review. Poole II, 164 Wn.2d at 724.

layperson, In re Disciplinary Proceeding Against Cohen (Cohen II), 150 Wn.2d 744, 756, 82 P.3d 224 (2004), such testimony is not required to establish a lawyer's violation of the RPC. Whether a lawyer's conduct violated the RPC is a question of law that the hearing officer, a lawyer, is fully capable of deciding. In re Disciplinary Proceeding Against Burtch, 162 Wn.2d 873, 891, 175 P.3d 1070 (2008); accord Brown v. State, Dept. of Health, Dental Disciplinary Bd., 94 Wn. App. 7, 13-14, 972 P.2d 101 (1998), rev. denied, 138 Wn.2d 1010 (1999) (“[a]n administrative agency may use its experience and specialized knowledge to evaluate and draw inferences from the evidence when finding unprofessional conduct.”). Though testimony by an expert regarding the ultimate issue may be allowed, it is not required, and the hearing officer has the discretion to reject any such testimony in whole or in part. Burtch, 162 Wn.2d at 891.

In Burtch, the Court held that the hearing officer did not err in rejecting some expert testimony on the issue of standard of care and reasonableness in the lawyer industry, was not required to give any weight to the expert testimony that was admitted, and properly concluded that the lawyer violated RPC 1.3. Id. at 882, 891.

Pfefer further argues that the hearing officer erred in denying his motion in limine to exclude lay opinion testimony and allowed improper lay opinion and argument on issues that required expert testimony. PB at

14. It appears he is referring to witnesses' testimony as to their personal knowledge of the relevant events. There was no attempt to disguise lay testimony as expert opinion and thus no error in denying Pfefer's motion.

Pfefer also argues it was error to deny his motion for clarification, which sought disclosure of ODC expert witnesses and exhibits prior to deadlines set in the hearing officer's scheduling order. PB at 1, 11-13; BF 38 (Pfefer's motion), 40 (scheduling order), 41 (order denying motion for clarification). But ODC did not list or call any expert witness, so there was nothing to disclose. Further, at the time of his motion, Pfefer had already been provided with copies of relevant non-privileged information under ELC 10.11(a), which he admitted, BF 38 at 2, ODC had already disclosed its witnesses, and Pfefer stipulated to the dates for exchange of exhibits and disclosure of witnesses set in the scheduling order – deadlines he chose in an order that he drafted. BF 39 at 3.

The Court should reject Pfefer's argument that expert testimony was required to prove that he violated the RPC.

2. The hearing officer did not improperly testify or rely on personal knowledge of the matter.

Pfefer argues that the hearing officer "improperly considered his own knowledge and experience without any supportive expert testimony in concluding that Pfefer committed the charged violations," "acted as his

own expert” in violation of Evidence Rule (ER) 605, and, remarkably, conducted a “secret investigation.” PB at 25-26, 28. There is, however, no evidence that the hearing officer had any personal knowledge of this case or conducted any outside “secret investigation.”

Because, as noted above, expert testimony is not required to establish violations of the RPC, there was no impropriety in the hearing officer drawing inferences and reaching conclusions based on the evidence before him. See In re Disciplinary Proceeding Against Cohen (Cohen I), 149 Wn.2d 323, 333, 67 P.3d 1086 (2003) (appropriate for the hearing officer to draw reasonable inferences from the testimony and sequence of events presented at the disciplinary hearing). Similarly, there was no impropriety in the hearing officer using his experience and specialized knowledge as a lawyer to evaluate and draw inferences when evaluating unprofessional conduct. In re Disability Proceeding Against Diamondstone, 153 Wn.2d 430, 440, 105 P.3d 1 (2005) (citing Brown, 94 Wn. App. at 13-14 (“administrative agency may use its experience and specialized knowledge to evaluate and draw inferences from the evidence when finding unprofessional conduct.”)).

Contrary to Pfefer’s view, PB at 40-41, this is not a situation like that in In re Disciplinary Proceeding Against Kagele, where the hearing officer reached conclusions regarding the percentage of work the lawyer

had done absent evidence in the record to support those conclusions. 149 Wn.2d 793, 813, 72 P.3d 1067 (2003). Here, the record contained documentary exhibits, testimony of witnesses about the history of the case and its eventual dismissal, and Pfefer's own testimony including his admissions of error. Based on that evidence, the hearing officer reasonably could conclude that Pfefer violated RPC 1.3 and 3.2 as well as the other charged violations despite the absence of expert testimony. In re Disciplinary Proceeding Against VanDerbeek, 153 Wn.2d 64, 81-82, 101 P.3d 88 (2004) (rejecting argument that hearing officer made findings based on her "personal opinion of factual matters unsupported by the record," but instead reasonably drew inferences from documents and testimony presented).

D. THE RECORD SUPPORTS THE HEARING OFFICER'S CONCLUSION THAT PFEFER FAILED TO COMMUNICATE AND CONSULT WITH HIS CLIENT (COUNT 2).

RPC 1.2(a) states in relevant part that "a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued." RPC 1.4 states in relevant part that "[a] lawyer shall promptly inform the client of any decision or circumstance with respect to which the client's informed consent . . . is required . . . ; reasonably consult with the client about the means by which the client's

objectives are to be accomplished; keep the client reasonably informed about the status of the matter; . . . explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”

The hearing officer concluded that Pfefer violated RPC 1.2(a) and 1.4 by failing to notify Ortiz that her case had been dismissed and failing to consult with her about the defendant’s settlement offer. FFCL at 9. This conclusion is supported by the following findings:

- Pfefer met in person with Ortiz on one occasion to prepare her for her deposition, but did not thereafter meet or confer with her to prepare her for trial. FFCL ¶ 22;
- The defendant made a settlement offer on Ortiz’s case, but Pfefer did not communicate the offer to Ortiz. FFCL ¶¶ 25-26;
- The court dismissed Ortiz’s case on March 21, 2011, because plaintiff failed to prosecute the case, failed to appear in person for trial, and failed to comply with the court’s deadlines. FFCL ¶ 24;
- Pfefer did not inform Ortiz that the court had dismissed her case or of the reasons for the dismissal. FFCL ¶ 28; and

- Pfefer's testimony that he did not communicate the offer because it was ineffective in light of the dismissal was not credible. FFCL ¶ 27.⁸

Substantial evidence supports these findings, including Pfefer's admissions that he did not communicate the dismissal or the offer, TR 173, 178, and Ortiz's testimony that she would have accepted the settlement offer if Pfefer had consulted with her. TR 303.

Pfefer challenges the conclusion that he violated RPC 1.2(a) and 1.4, arguing that he did not have to communicate the dismissal because (1) Miller later discovered it, (2) communicating that fact would cause Ortiz to be upset, and (3) that he did not have to communicate the settlement offer because it was "ineffective" and a "sham," and "inadequate." PB at 29-37. These arguments are meritless.

As to the dismissal, Pfefer was required to keep Ortiz reasonably informed about the status of her matter. RPC 1.4(a)(3). The RPC govern the conduct of lawyers. The fact that Miller discovered the dismissal on her own after the fact did not relieve Pfefer of the duty to Ortiz of that occurrence himself. By failing to advise his client of the dismissal and the

⁸ Pfefer argues that Finding of Fact 27 erroneously finds that he incredibly testified that he "did not communicate the offer because he thought it was 'ineffective.'" PB at 20-21. But Pfefer admitted that he did not communicate the settlement offer to Ortiz or Miller, TR 178, and did not tell Caruso about it "because the [first] dismissal [of Ortiz's case] suggested to me that the offer wasn't effective." TR 586. There was no error. The hearing officer drew a reasonable inference from Pfefer's testimony. And the hearing officer's credibility finding is entitled to great weight. Poole II, 164 Wn.2d at 724.

reasons for it, Pfefer prevented his client from making informed decisions about the representation, such as whether to seek new counsel.

As to the settlement offer, whether to settle a matter is a decision that must be made by a client. RPC 1.2 cmt. 2. A lawyer must promptly communicate a settlement offer to a client. RPC 1.4 cmt. 2. This Court has explained a lawyer's communication obligations with clients with respect to settlement offers:

An attorney must communicate offers of settlement to the client and discuss in meaningful terms the advantages or disadvantages of accepting the proposal. This includes the lawyer's fees and costs associated with the various options. Then the attorney should make recommendations to the client about what is best, but the client controls and decides what to do regarding the claims.

In re Disciplinary Proceeding Against Van Camp, 171 Wn.2d 781, 800, 257 P.3d 599 (2011). None of that happened here.

Pfefer argues that he properly declined to inform Ortiz of the offer because the offer would have left her no recovery and she had already agreed such an offer was unacceptable. PB at 37. But Pfefer did not consult with Ortiz about the value of her case or explain how settlement funds would be divided. Ortiz testified that while Pfefer did discuss settlement with her one time and asked her how much she was expecting to receive, he laughed at her when she said \$10,000, said "it was good to dream," and told her she might get \$2,000. TR 297-98. Ortiz cannot be

deemed, based on this exchange, to have made an informed decision authorizing Pfefer to reject an offer without communicating it to her. Pfefer could not unilaterally decide to ignore it.

Pfefer's claim that the settlement offer was "ineffective" and a "sham" is based on his belief that once Ortiz's case was dismissed the first time she no longer had a claim against the defendant and therefore had nothing to offer as consideration in forming a settlement contract. See PB at 32-34. But this argument ignores the fact that if Ortiz agreed to settle the case she would give up her right to move for reconsideration of the dismissal, as Pfefer did, or to appeal the dismissal, thereby giving the defendant finality of decision.

On this record, the hearing officer reasonably could conclude that Pfefer's failure to communicate to Ortiz the dismissal of her case and the defense's settlement offer violated RPC 1.2(a) and 1.4. In re Disciplinary Proceeding Against Starczewski, 177 Wn.2d 771, 771, 306 P.3d 905 (2013) (lawyer suspended, in part, for failing to consult with client about case and failing to communicate a settlement offer).

E. THE RECORD SUPPORTS THE HEARING OFFICER'S CONCLUSION THAT PFEFER IMPROPERLY WITHDREW FROM HIS CLIENT'S REPRESENTATION (COUNT 3).

RPC 1.16(c) states that "[a] lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a

representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.” RPC 1.16(d) states that, “[u]pon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client”

The hearing officer concluded that Pfefer violated RPC 1.16(c) and (d) by making his withdrawal from Ortiz’s case effective immediately. FFCL at 9. This conclusion is supported by the following findings:

- On May 5, 2011, Pfefer filed a Notice of Immediate Withdrawal effective immediately. FFCL ¶ 32;
- Pfefer advised Ortiz of his withdrawal by leaving a message with Miller and mailing a copy of the notice to Ortiz. FFCL ¶ 35;
- Pfefer’s Notice of Immediate Withdrawal did not comply with CR 71. FFCL ¶ 36;
- Ortiz attempted to object to Pfefer’s withdrawal by sending a letter to the court on May 11, 2011, but the court struck the objection because it had not been properly served. FFCL ¶¶ 37-38; and
- The court dismissed Ortiz’s case on or about May 19, 2011. FFCL ¶ 39.

These findings are supported by substantial evidence including Pfefer’s admission that he withdrew effective immediately; the notice of withdrawal itself, EX 132, which did not provide that withdrawal be

effective at least 10 days after the service of the notice, did not include the date set for trial and was not served on Ortiz prior to being served on the defendant, all of which are required by CR 71; and by Pfefer's failure to appear in court with Ortiz on May 19, 2011, forcing her to try and pursue her case *pro se*. EX 138.

Pfefer argues that since he publicly withdrew, rather than doing so "privately or secretly," he did not violate RPC 1.16(c), which he claims exists only to prevent withdrawal without notice to the tribunal. PB at 37-39. But he ignores the portion of RPC 1.16(c) that required him to comply with applicable law. That law is CR 71(c)(1), which required him both to file – thereby giving notice to the court – and serve – thereby giving notice to other involved parties – a notice of withdrawal that provided an effective date of withdrawal at least ten days after service. The purpose of the 10-day rule is to give anyone who received notice the opportunity to serve an objection on him. By violating CR 71, Pfefer deprived Ortiz and the other parties of the opportunity to meaningfully object and thereby deprived the court of the opportunity to hear and decide any objections.

Alternatively, Pfefer argues that immediate withdrawal with no notice substantially complied with the CR 71(c)(1) requirement that withdrawal be effective not less than 10 days after service of a notice of

withdrawal. PB at 38. But zero-days notice instead of 10-days notice cannot be considered substantial compliance.

Pfefer next argues that since the court struck the *pro se* objection to withdrawal that Ortiz mailed to the court but failed to properly serve, the end result was the same. *Id.*; EX 135, 136. But had he filed and served a proper notice of withdrawal, Ortiz would merely have had to serve an objection on him, not on the court and the other parties, in order to trigger the requirement that he seek court permission to withdraw. CR 71(c)(1) and (4). The onus would have been on Pfefer to file and serve a motion to withdraw, not on his *pro se* former client. Pfefer's argument merely shows that his client was injured by his conduct. Indeed, in addition to finding that Pfefer's immediate withdrawal did not comply with CR 71, the hearing officer found that it deprived Ortiz of an adequate opportunity to object. FFCL at 11.⁹

Pfefer also argues that the findings are insufficient to support a violation of RPC 1.16(d) because the hearing officer made no findings that "Pfefer's representation for ten more days would have made any difference," "that connect the immediate withdrawal with the time a client has to employ 'other counsel,'" or that "connect the immediate withdrawal

⁹ This finding is contained in a conclusion of law. "Statements of fact included within conclusions of law will be treated as findings of fact." Kunkel v. Meridian Oil, Inc., 114 Wn.2d 896, 903, 792 P.2d 1254 (1990).

with providing 'papers and property' to the client." PB at 39-40. Again, he ignores the portion of RPC 1.16(d) that indicates that protecting a client's interests includes providing reasonable notice of withdrawal to the client, which he did not do.

Finally, Pfefer argues that he cannot be found to have violated RPC 1.16(d) because Caruso ordered him to withdraw immediately, and he therefore acted in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty. PB at 38-39 (citing RPC 5.2(b) (responsibilities of a subordinate lawyer)). First, the evidence does not support Pfefer's claim that Caruso was a supervisory lawyer. When asked about the professional arrangement between him and Caruso, Pfefer testified that they were shareholders in a professional services corporation and that he was vice president of the corporation. TR 52. He further stated that some of his firm's cases were primarily his, some were primarily Caruso's, and that he consulted with Caruso on some cases. Id. at 53. Pfefer's professional relationship with Caruso is not a supervisor-subordinate relationship to which RPC 5.2(b) applies. Second, even if Caruso were deemed a supervisor, the professional duty at issue is not arguable and his decision to withdraw in violation of CR 71 was not reasonable. See TR 515-16 (Caruso unreasonably testified that giving the proper 10-day notice would prejudice the client). And Pfefer is bound by

the RPC regardless of whether he acted at the direction of Caruso. RPC 5.2(a).

The hearing officer's conclusion that Pfefer violated RPC 1.16(c) and (d) as charged in Count 3 is supported by the findings and substantial evidence. The Court should adopt it.

F. THE COURT SHOULD ADOPT THE SIX-MONTH SUSPENSION RECOMMENDATION OF THE HEARING OFFICER AND UNANIMOUS DISCIPLINARY BOARD.

1. The hearing officer and unanimous Disciplinary Board correctly concluded that the presumptive sanction is suspension.

This Court requires that the ABA Standards be applied in all lawyer discipline cases. In re Disciplinary Proceeding Against Halverson, 140 Wn.2d 475, 492, 998 P.2d 833 (2000). Application of the ABA Standards to arrive at a disciplinary sanction is a two-stage process. First, the presumptive sanction is determined by considering (1) the ethical duty violated, (2) the lawyer's mental state, and (3) the extent of the actual or potential harm caused by the misconduct. In re Disciplinary Proceeding Against Dann, 136 Wn.2d 67, 77, 960 P.2d 416 (1998). The second step is to consider any aggravating or mitigating factors that might alter the presumptive sanction. Id.

Here, the hearing officer found that Pfefer acted knowingly, engaged in a pattern of neglect as to Count 1, and that his conduct injured

Ortiz and the legal system. FFCL at 9-11. Based on those findings, the hearing officer correctly applied ABA Standard 4.42 to Pfefer's failure to act with reasonable diligence and to expedite litigation in representing Ortiz (Count 1) and to his failure to adequately communicate with her (Count 2), and ABA Standard 7.2 to Pfefer's improper withdrawal from representation (Count 3). Id.¹⁰ The hearing officer found that the presumptive sanction for all counts was suspension. Id.

Pfefer argues that the hearing officer erred in finding he acted knowingly and caused injury, and therefore erred in the application of the ABA Standards. PB at 53-55.

a. The hearing officer correctly found that Pfefer acted knowingly.

As to the findings that he acted knowingly, Pfefer first argues that the definitions of "knowledge" and "negligence" in the ABA Standards are unconstitutionally vague. PB at 42-43. He cites Winters v. New York, 333 U.S. 507 (1948) (vacating a conviction for possession with intent to sell an obscene magazine on the ground that the underlying statute was vague), and Baggett v. Bullitt, 377 U.S. 360 (1964) (holding that Washington statutes requiring the execution of oaths of allegiance and anti-subversiveness by state employees were unduly vague) in support of

¹⁰ Copies of these Standards are attached as Appendix D.

this proposition. But neither of these cases deal with the mental state definitions contained in the ABA Standards. Since he has cited no authority on point, this argument may be disregarded. DeHeer, 60 Wn.2d at 126; see also In re Disciplinary Proceeding Against Schafer, 149 Wn.2d 148, 168, 66 P.3d 1036 (2003) ("naked castings into the constitutional sea are not sufficient to command judicial consideration and discussion." (citations omitted)). The Washington Supreme Court has long cited and applied these definitions. See, e.g., In re Disciplinary Proceeding Against McMullen, 127 Wn.2d 150, 169, 896 P.2d 1281 (1995).

Pfefer next argues, as to Count 1, that he could not be found to have acted knowingly when neglecting Ortiz's case because he could not have foreseen that the court would dismiss it. PB at 44. But the hearing officer's determination that Pfefer acted knowingly is a factual finding to be given great weight on review. In re Disciplinary Proceeding Against Longacre, 155 Wn.2d 723, 744, 122 P.3d 710 (2005) (hearing officer is in the best position to determine the applicable mental state based on the evidence presented). And knowledge is based on Pfefer's actions, not the consequences. ABA Standards at 17 (defining knowledge as "the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result."). Here, Pfefer knew of the court's scheduling orders and

his responsibility to meet them, yet failed to do so despite reminders from staff and the court. On this record, the hearing officer could reasonably conclude that Pfefer knew, when he was failing to meet the deadlines, that he was failing to represent Ortiz diligently and expeditiously. See Starczewski, 177 Wn.2d at 789 (lawyer who knew of the deadlines in a case scheduling order and the responsibility to meet them, yet failed to do so, acted knowingly when she failed to diligently represent her client).

Pfefer argues, as to Count 2, that the hearing officer's finding that he acted knowingly in not communicating the settlement offer to Ortiz "implies a criticism" of him for not ignoring the fact of the dismissal of Ortiz's case and the impact of fees and costs on her recovery. PB at 44. By so arguing, Pfefer disregards the duty he had to consult with Ortiz and discuss with her the dismissal, the settlement offer, and consequences of accepting the proposal. See Van Camp, 171 Wn.2d at 800. Instead of advising his client, Pfefer chose not to inform Ortiz of the dismissal after learning of it, TR 172-73, told her he could not advise her about the value of her claim, TR 297, and then after receiving the settlement offer, chose not to communicate it to her. TR 178. On this record, the hearing officer could reasonably conclude that Pfefer knew he was failing to inform and explain matters to Ortiz. See Starczewski, 177 Wn.2d at 789 (lawyer knew that when she was failing to have conversations with her client, she was

failing to inform and explain matters).

Pfefer argues, as to Count 3, that the finding that he acted knowingly is unsupported because he did not know that there was a difference between “ten-day noticed withdrawal and an immediate withdrawal.” PB at 45. But Pfefer was familiar with CR 71 and its requirements for withdrawal by notice, TR 180-82, and nevertheless withdrew effective immediately and did nothing else to assist his client. On this record the hearing officer could reasonably conclude that Pfefer knew he was withdrawing improperly and not protecting any interests but his own. The Court should adopt the findings that Pfefer acted knowingly.

b. The hearing officer correctly found that Pfefer engaged in a pattern of neglecting Ortiz’s case.

Pfefer assigns error to the hearing officer’s finding that he engaged in a pattern of neglect, PB at 2, but he fails to present any argument as to why or citation to the record. The Court should decline to address this inadequately briefed assignment of error. In re Disciplinary Proceeding Against Whitney, 155 Wn.2d 451, 467, 120 P.3d 550 (2005).

In any event, substantial evidence in the record supports this finding. During the ill-fated course of Ortiz’s case, Pfefer failed to file court-ordered confirmations, FFCL ¶¶ 17-18, ignored reminders, id. ¶¶ 20-21, erred in not timely submitting the matter to mediation, id. ¶ 43,

failed to file an amended complaint despite obtaining agreement from the defendant to do so, TR 121-23, failed to seek to consolidate Ortiz's case against Hajek with another case of Ortiz's that arose out of a 2007 accident, FFCL ¶ 45, and failed to conduct any formal discovery. TR 150, 154. His paralegal who had worked in his office for eight years testified that she had "never seen a case that had gone by with so little attention." *Id.* at 234. The Court should adopt this finding.

c. The hearing officer correctly found that Pfefer's conduct injured Ortiz and the legal system.

The hearing officer found that Pfefer's knowing misconduct injured both Ortiz and the legal system. FFCL at 9-11. His determination is supported by the findings that Pfefer's misconduct caused Ortiz's case to be dismissed after he withdrew, lost her an opportunity at settlement that she testified she would have accepted, and forced the court to deal with the fallout from his dilatory conduct and untimely withdrawal. FFCL ¶¶ 21, 24-27, 30-31, 37-38, 40; TR 303. These findings are consistent with those in similar cases. See e.g., *In re Disciplinary Proceeding Against Lopez*, 153 Wn.2d 570, 592-93, 106 P.3d 221 (2005) (lawyer's failure to file opening appellate brief caused both actual and potential injury to his client and to the legal system in that it delayed the client's appeal and subjected it to potential dismissal and required the court to expend

resources); Starzewski, 177 Wn.2d at 790 (lawyer's failure to act diligently and communicate with client caused injury to client who never received current information about case, never had opportunity to consult with the court or seek another attorney, and never had opportunity to accept or reject a settlement offer).

As to Count 1, Pfefer argues at length that there was no injury because the court's first dismissal of Ortiz's case was improper. PB at 45-50. But that dismissal caused at least potential harm to Ortiz because the court might not have reconsidered the dismissal. In re Disciplinary Proceeding Against Behrman, 165 Wn.2d 414, 425, 197 P.3d 1177 (2008) (lawyer subject to discipline because conduct subjected client to potential injury even if she had not suffered actual injury). And Pfefer ignores the fact that the court's orders and rules gave notice that failure to meet the court-ordered deadlines and to file required documents could be grounds for dismissal, which he knew. EX 102, 118; TR 105-06. He also ignores the harm caused by his delay and the ultimate final dismissal of Ortiz's case, which is directly attributable to his misconduct.

As to Count 2, Pfefer argues that failing to communicate the fact of the first dismissal caused no harm because there is no link between the dismissal and any injury. PB at 51. And he argues that not communicating the settlement offer caused no harm because the offer was invalid or

would have yielded no net benefit. Id. As noted above, not communicating the dismissal or the settlement offer and not consulting with Ortiz about them deprived her of the opportunity to make informed decisions about the representation and the opportunity to accept or counter the offer. Cohen I, 149 Wn.2d at 338-339 (lawyer injured clients by not advising them of the status of their case).

As to Count 3, Pfefer argues that there is no evidence that his untimely withdrawal injured Ortiz or the legal system because an “imaginary world” in which his providing proper notice would have given Ortiz adequate opportunity to object and prevented the court from having to deal with *pro se* objections is “simply not real.” PB at 52. As noted above, Pfefer’s act deprived Ortiz of the ability to object by merely serving an objection on him, and interfered with the power of the court to hear and rule on the issue. FFCL at 11.

The Court should adopt the hearing officer’s findings that Pfefer acted knowingly and injured Ortiz, his application of the ABA Standards, and the conclusion that the presumptive sanction for all counts is suspension.

2. The aggravating and mitigating factors do not support deviation from the presumptive sanction of suspension.

Aggravating and mitigating factors may support deviation from the

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

- (d) multiple offenses; and
- (j) indifference to making restitution.

FFCL at 11. Pfefer does not challenge the aggravating factors.

The hearing officer found that the following mitigating factors listed in ABA Standard 9.32 applied:

- (a) absence of a prior disciplinary record; and
- (b) absence of a dishonest or selfish motive.

Id. Pfefer argues that the hearing officer erred in not applying the mitigating factor of timely good faith effort to rectify consequences of misconduct because he timely filed a motion for reconsideration of the first dismissal. PB at 52-53.

Pfefer bears the burden of proving mitigating factors. In re Disciplinary Proceeding Against Carpenter, 160 Wn.2d 16, 30, 155 P.3d 937 (2007). While Pfefer did file a motion for reconsideration of the first dismissal of Ortiz's case, he did little else to protect his client's interests. Rather than beginning to diligently pursue Ortiz's case after the dismissal was vacated, Pfefer withdrew effective immediately. EX 132. After withdrawal he did nothing to assist his client other than send some documents to her. TR 182, 307. The hearing officer properly declined to apply the mitigating factor of good faith effort to rectify consequences.

The length of a suspension depends on the aggravating and mitigating factors. Halverson, 140 Wn.2d at 493. Generally, the minimum suspension is six months. Id. at 495; Cohen I, 149 Wn.2d at 339. The minimum suspension is only warranted “where there are either no aggravating factors and at least some mitigating factors, or where the mitigating factors clearly outweigh any aggravating factors.” Halverson, 140 Wn.2d at 497. Here, although there are as many aggravating as mitigating factors, the hearing officer concluded that the weight of the aggravating and mitigating factors was balanced and recommended the minimum suspension of six months. FFCL at 11-12. The hearing officer did not err in formulating the sanction recommendation.

3. The remaining Noble factors support the Disciplinary Board’s recommendation.

Finally, the Court reviews the factors of unanimity and proportionality. In re Disciplinary Proceeding Against Kuvvara, 149 Wn.2d 237, 259, 66 P.3d 1057 (2003). “The court will generally adopt the Board’s recommended sanction unless the sanction departs significantly from sanctions imposed in other cases or the Board was not unanimous in its decision.” In re Disciplinary Proceeding Against Haley, 156 Wn.2d 324, 339, 126 P.3d 1262 (2006).

a. The Disciplinary Board's unanimous recommendation is entitled to great deference

The Disciplinary Board voted 13-0 in favor of a six-month suspension. BF 94 at 1 n.1. The Court gives great deference to the recommendation of a unanimous Board and will uphold it “in the absence of a clear reason for departure.” In re Disciplinary Proceeding Against Simmerly, 174 Wn.2d 963, 989, 285 P.3d 838 (2012) (quotation omitted). Such deference is based on the Board’s “unique experience and perspective in the administration of sanctions.” Id. Pfefer has provided no clear reason to depart from the Board’s unanimous recommendation.

b. Pfefer fails to meet his burden of proving that the recommended sanction of suspension is disproportionate.

While not expressly stating so, Pfefer appears to argue that suspension is disproportionate. PB at 53-55. In proportionality review, the Court compares the case at hand with “similarly situated cases in which the same sanction was approved or disapproved.” VanDerbeek, 153 Wn.2d at 97. The lawyer bears the burden of proving that the recommended sanction is disproportionate. Id.

Pfefer cites several out-of-state cases, also cited in the commentary to the ABA Standards, for the proposition that reprimand is the proper sanction. PB at 53-55. All of these cases were decided in 1980 or earlier and were decided prior to the ABA’s approval of the ABA Standards in

1986 or their adoption in Washington in 1990. In re Disciplinary Proceeding Against Lynch, 114 Wn.2d 598, 610, 789 P.2d 752 (1990) (adopting the ABA Standards for use in all lawyer discipline cases). These cases are less appropriate for proportionality review than Washington cases decided under the Standards. In re Disciplinary Proceeding Against Wickersham, 178 Wn.2d 653, 676, 310 P.3d 1237 (2013) (“should be wary of relying on cases that predate the adoption of the ABA Standards in a proportionality review.”); Halverson, 140 Wn.2d at 495 n.13 (declining to consider cases decided before drafting or adoption of the ABA Standards that did not articulate specific mitigating circumstances); In re Disciplinary Proceeding Against Curran, 115 Wn.2d 747, 773, 801 P.2d 962 (1990) (“[c]onsistency within a jurisdiction is more important than consistency between jurisdictions.”).

The six-month suspension in this case is proportionate to other cases with similar misconduct. In Cohen II, 150 Wn.2d 744, the lawyer was found to have violated RPC 1.3, 1.4, and 3.2 by knowingly failing to diligently represent or communicate with his client and failing to expedite litigation. After weighing eight aggravating factors against one mitigating factor, the Court suspended Cohen for one year and ordered him to pay restitution of \$1,846.32. 150 Wn.2d at 764. In Starzewski, 177 Wn.2d at 771, the lawyer was found to have violated RPC 1.3, 1.4, 3.2, by

knowingly failing to diligently represent her client, failing to expedite litigation, and failing to communicate with her client, including failing to communicate a settlement offer. But she was also found to have violated RPC 8.4(c) (dishonest conduct) by lying to her client. After weighing six aggravating factors against no mitigating factors, the Court suspended Starczewski for two years and ordered her to pay restitution of \$15,000. 177 Wn.2d at 791-96. The six-month suspension recommended here is proportional to Cohen and Starczewski because the conduct is similar, but there are less aggravating factors and no dishonest conduct.

4. The hearing officer properly ordered Pfefer to pay restitution to Ortiz.

Pfefer argues that the hearing officer and Disciplinary Board erred in ordering him to pay restitution to Ortiz because ELC 13.7(a) is “void for vagueness,” the settlement offer was worthless, and the hearing officer should have deducted his costs. PB at 55-58.

Pfefer cites no authority for the proposition that rules authorizing restitution in disciplinary cases are unconstitutionally vague. In fact, the ELC specifically provides that an attorney may be ordered to pay restitution to persons who are financially injured by the attorney’s misconduct. ELC 13.7(a). The standard for ordering restitution, which Pfefer mistakenly claims is absent, PB at 55, is that it first be found that a

lawyer committed misconduct, and then, that the misconduct financially injured the client. ELC 13.1, 13.7(a). The hearing officer did that, concluding that Pfefer violated the RPC by failing to communicate and consult with Ortiz about the offer and finding that she was injured by that misconduct. FFCL at 9-10. The lost opportunity to accept the offer is a financial injury, especially since Ortiz testified she would have accepted it after proper consultation. Starzewski, 177 Wn.2d at 796-97; TR 304.

As to Pfefer's claim that the offer was worthless, PB at 56, no one will ever know whether the defense might have made a better offer had Pfefer diligently represented Ortiz.

Pfefer next argues that the restitution amount recommended by the hearing officer and the Disciplinary Board should be reduced by his firm's costs and expenses, plus amounts owed by Ortiz for unpaid medical bills and PIP liens. PB at 57-58. The Disciplinary Board already reduced the recommended amount of restitution by the amount of Pfefer's costs directly related to Ortiz's case – from \$6,580.06 to \$5,834.15. Appendix C at 2. Further deduction would be inappropriate. The hearing officer properly found that Pfefer was not entitled to any deduction for fees due to his misconduct. And he is not responsible for paying Ortiz's outstanding medical bills and PIP liens, so he is not entitled to any deduction for those amounts. To reduce the restitution award to Ortiz by amounts that she

owes, but Pfefer does not, would provide a windfall to Pfefer and leave Ortiz hanging.

G. PFEFER'S OBJECTIONS TO COSTS WERE NOT TIMELY RAISED BEFORE THE CHAIR OF THE DISCIPLINARY BOARD AND SHOULD NOT BE CONSIDERED.

Pfefer objects to costs and expenses ordered by the Chair of the Disciplinary Board under ELC 13.9(e), arguing on numerous factual and policy grounds that they are unreasonable and unnecessary. PB at 58-64. But he failed to timely raise these objections before the Chair. As a result, the Court should decline to consider them.

ODC filed its statement of costs and expenses on May 6, 2014. BF 97. Pfefer had 20 days from service of the statement of costs and expenses to file exceptions, i.e., by May 29, 2014.¹¹ ELC 13.9(d)(4). On May 27, 2014, Pfefer filed a blanket exception to "all costs stated by disciplinary counsel" on the ground that "no documentation supports any of these costs." BF 98 at 1. ODC had ten days to reply, i.e., by June 9, 2014, and did so by filing documentation supporting the claimed costs and expenses. BF 100. ELC 13.9 does not provide for further exceptions or replies.

The Chair waited ten days, until June 19, 2014, to enter a cost order under ELC 13.9(e). BF 101. After that, on June 20, 2014, Pfefer

¹¹ Three days are added to the prescribed period when service was made by mail. ELC 4.4; Rule 6(e) of the Superior Court Civil Rules (CR).

filed supplemental objections and exceptions to the costs and exceptions. BF 102. The Chair did not consider Pfefer's untimely supplemental exceptions or the factual issues raised therein, which Pfefer is now attempting to raise again.

Pfefer waited to file his initial blanket exception to all the costs until the end of the 20-day period for filing exceptions, and then did not file his supplemental exceptions until June 20, 2014. By doing so, he effectively gave himself an extension of time to file exceptions to the costs and expenses claimed by ODC, and did so without any authorization from the Chair. Since his exceptions to costs and expenses were not timely raised before or considered by the Chair and not allowed by rule or order, the Court should decline to consider them. Rule 2.5(a) of the Rules of Appellate Procedure (RAP); Associated General Contractors of Washington v. King County, 124 Wn.2d 855, 864, 881 P.2d 996 (1994) ("we generally decline to reach issues not raised below, even issues of constitutional dimension.").

If the Court wishes to consider the costs and expenses issues untimely raised by Pfefer, it should remand that portion of this matter to the Chair for further proceedings.

H. PFEFER IS NOT ENTITLED TO AN AWARD OF FEES AND COSTS.

Pfefer argues that he is entitled to an award of attorney fees and

costs under RCW 4.84.350(1), apparently because he believes he is a qualified prevailing party. PB at 64.

First, awards of costs and expenses are controlled by ELC 13.9, which provides only for assessment of costs and expenses in favor of ODC against a lawyer “who is ordered sanctioned or admonished.” ELC 13.9(a). The ELC do not provide for assessment of costs and expenses against ODC.

Second, Pfefer has not prevailed in this litigation. Both the hearing officer and a unanimous Disciplinary Board have concluded that he violated the RPC and recommended that he be sanctioned.

Third, the provisions of RCW Chapter 4.84 do not apply to agencies in the judicial branch. RCW 4.84.340(1). Even if the Association were considered a state agency, which, for these purposes, it is not, Matter of Washington State Bar Ass'n, 86 Wn.2d 624, 625, 548 P.2d 310 (1976), it is contained within the judicial branch and carries out the functions delegated to it by the Court. State ex rel. Schwab v. State Bar Ass'n, 80 Wn.2d 266, 269-72, 493 P.2d 1237 (1972).

Finally, Pfefer claims he is entitled to attorney fees and expenses under 42 U.S.C. § 1988, PB at 64, which allows for attorney fees in actions brought to enforce a provision of 42 U.S.C. § 1983. This case is not such an action.

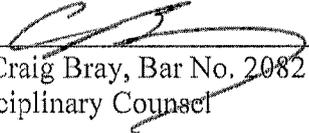
Pfefer's demand for an award of fees and costs has no basis in law and should be denied.

IV. CONCLUSION

The Court should adopt the recommendation of the hearing officer and the unanimous Disciplinary Board that Pfefer be suspended for six months, order him to pay restitution to Ortiz, and condition reinstatement on him paying the restitution.

RESPECTFULLY SUBMITTED this 8th day of September, 2014.

OFFICE OF DISCIPLINARY COUNSEL



M Craig Bray, Bar No. 20821
Disciplinary Counsel

APPENDIX A

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OCT 10 2012

DISCIPLINARY BOARD

BEFORE THE
DISCIPLINARY BOARD
OF THE
WASHINGTON STATE BAR ASSOCIATION

In re

MATTHEW F. PFEFER,

Lawyer (Bar No. 31166).

Proceeding No. 12#00051

FORMAL COMPLAINT

Under Rule 10.3 of the Rules for Enforcement of Lawyer Conduct (ELC), the Washington State Bar Association (the Association) charges the above-named lawyer with acts of misconduct under the Rules of Professional Conduct (RPC) as set forth below.

ADMISSION TO PRACTICE

1. Respondent Matthew Pfefer was admitted to the practice of law in the State of Washington on June 14, 2001.

FACTS REGARDING COUNTS 1 - 3

2. On or about February 16, 2006, Ana Ortiz (Ortiz), her husband Felipe Segura (Segura), and their minor daughter were injured when their car was struck by a car driven by James Hajek (Hajek) when he attempted an illegal u-turn.

3. In or around mid-2008, Ortiz hired Respondent to represent her and her daughter.

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- 1 4. Segura settled his claim.
- 2 5. On February 10, 2009, Respondent filed a complaint against Hajek on behalf of
- 3 Ortiz and her minor daughter in King County Superior Court.
- 4 6. Presiding Judge Bruce Hilyer issued a comprehensive case schedule setting a trial
- 5 date of July 26, 2010.
- 6 7. The case was assigned to Superior Court Judge Cheryl Carey.
- 7 8. Lawyer Patrice Cole filed an appearance on behalf of Hajek.
- 8 9. On April 19, 2010, Respondent filed a Motion to Continue Trial.
- 9 10. On May 18, 2010, Judge Carey entered an agreed order continuing the trial to March
- 10 21, 2011.
- 11 11. On May 18, 2010, Judge Carey also entered an agreed Order Amending Case
- 12 Schedule, which set dates and deadlines for the case.
- 13 12. On February 8, 2011, Judge Carey entered an order requiring the parties to complete
- 14 and return a Joint Confirmation of Trial Readiness by February 28, 2011.
- 15 13. The order required that settlement/mediation/ADR was to be accomplished no later
- 16 than February 22, 2011.
- 17 14. Respondent did not comply with the deadlines set forth in the Court's May 18, 2010
- 18 Order Amending Case Schedule.
- 19 15. Respondent did not comply with the deadlines set forth in the Court's February 8,
- 20 2011 Order Requiring Completion of Joint Confirmation of Trial Readiness.
- 21 16. Respondent did not file the court-mandated Joint Confirmation of Trial Readiness on
- 22 or before its due date of February 28, 2011.
- 23 17. Respondent did not meet with or confer with his clients before the trial to prepare
- 24

1 | them for their testimony at trial.

2 | 18. Respondent did not meet with or confer with Ortiz's treating physician, Dr. Perez,
3 | before the trial to prepare him for his testimony.

4 | 19. On or about March 21, 2011, Judge Carey dismissed the case, without prejudice and
5 | costs, because plaintiff failed to prosecute the case. The parties failed to appear in person or by
6 | Counsel for trial, failed to participate in mediation by February 22, 201, and otherwise failed to
7 | comply with the Order Requiring Completion of the Joint Confirmation of Trial Readiness,
8 | even after plaintiff's counsel was prompted with a phone call from the bailiff on February 28,
9 | 2011.

10 | 20. On March 24, 2011, in response to a letter from Respondent, Ms. Cole made a
11 | settlement offer on Ortiz's case.

12 | 21. Ms. Cole declined to make any offer in Ortiz's daughter's case because there was no
13 | evidence that she had ever been treated for any injuries resulting from the February 16, 2006
14 | accident.

15 | 22. Respondent did not communicate Ms. Cole's offer to Ortiz.

16 | 23. Respondent did not communicate to Ortiz and/or Segura and/or their daughter that
17 | Ms. Cole declined to make any offer on their daughter's case.

18 | 24. Respondent did not inform his clients that the case had been dismissed.

19 | 25. On March 31, 2011, Respondent filed a Motion for Reconsideration.

20 | 26. On April 15, 2011, Judge Carey entered an order setting a new trial date for June 13,
21 | 2011.

22 | 27. Judge Carey also entered a new Order Requiring Completion of Joint Confirmation
23 | of Trial Readiness, requiring that mediation/ADR occur on or before May 16, 2011.

1 28. On May 5, 2011, Respondent filed a Notice of Withdrawal, "effective immediately."

2 29. Respondent informed Ortiz of his withdrawal by leaving a message with her
3 employer and mailing a copy of the Notice of Withdrawal by first class mail.

4 30. Respondent's Notice of Withdrawal did not comply with CR 71.

5 31. On or about May 11, 2001, Judge Carey received a letter from Ortiz objecting to
6 Respondent's withdrawal, and advising that she was attempting to secure new counsel.

7 32. Judge Carey struck the objection.

8 33. On or about May 19, 2011, Judge Carey dismissed Ortiz's and her daughter's case
9 without prejudice.

10 34. Because the statute of limitations had run, Ortiz and her daughter were precluded
11 from pursuing their claims against Hajek.

12 **COUNT 1**

13 35. By failing to prosecute Ortiz's case, by failing to comply with the dates and/or
14 deadlines set forth in the May 18, 2010 Order Amending Case Schedule and/or the deadlines in
15 the February 8, 2011 Order Requiring Completion of Joint Confirmation of Trial Readiness
16 and/or failing to meet with and prepare Ortiz and her daughter and plaintiff's witnesses for the
17 March 21, 2011 trial, Respondent violated RPC 1.3 and/or RPC 3.2.

18 **COUNT 2**

19 36. By failing to consult with Ortiz regarding defendant's offer to settle the case, failing
20 to consult with Ortiz and/or her daughter about her daughter's case, and failing to advise her
21 that her case had been dismissed, Respondent violated RPC 1.2(a) and/or RPC 1.4.

22 **COUNT 3**

23 37. By making his withdrawal effective immediately, Respondent violated RPC 1.16(b)
24 and/or RPC 1.16(c) and/or RPC 1.16(d).

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THEREFORE, Disciplinary Counsel requests that a hearing be held under the Rules for Enforcement of Lawyer Conduct. Possible dispositions include disciplinary action, probation, restitution, and assessment of the costs and expenses of these proceedings.

Dated this 10th day of October, 2012.



Debra Slater, Bar No. 18346
Disciplinary Counsel

APPENDIX B

SEP 26 2013

BEFORE THE DISCIPLINARY BOARD
OF THE
WASHINGTON STATE BAR ASSOCIATION

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|------------------------|---|--------------------------------|
| In re: |) | Proceeding No. 12#00051 |
| |) | |
| MATTHEW F. PFEFER, |) | FINDINGS OF FACT, |
| |) | CONCLUSIONS OF LAW, AND |
| Lawyer (Bar No. 31166) |) | HEARING OFFICER'S |
| |) | RECOMMENDATION |

Pursuant to Rule 10.13 of the Rules for Enforcement of Lawyer Conduct ("ELC"), a hearing was held before the undersigned Hearing Officer September 16-18, 2013. Disciplinary counsel Debra Slater appeared for the Association, and Respondent appeared personally pro se.

I. FORMAL COMPLAINT

The Respondent was charged by Formal Complaint dated October 10, 2012, with three counts of violation of the Rules of Professional Conduct.

COUNT 1

By failing to prosecute Ortiz's case, by failing to comply with the dates and/or deadlines set forth in the May 18, 2010 Order Amending Case Schedule, and/or the

DLB

1 | deadlines in the February 8, 2011 Order Requiring Completion of Joint Confirmation of
2 | Trial Readiness, and/or failing to meet with and prepare Ortiz and her daughter and
3 | plaintiff's witnesses for the March 21, 2011 trial, Respondent violated RPC 1.3 and/or
4 | RPC 3.2.

5 | **COUNT 2**

6 | By failing to consult with Ortiz regarding defendant's offer to settle the case,
7 | failing to consult with Ortiz and/or her daughter about her daughter's case, and failing to
8 | advise her that her case had been dismissed, Respondent violated RPC 1.2(a) and/or
9 | RPC 1.4.

10 | **COUNT 3**

11 | By making his withdrawal effective immediately, Respondent violated
12 | RPC 1.16(b) and/or RPC 1.16(c) and/or RPC 1.16(d).

13 | **II. HEARING**

14 | At the hearing September 16, 2013, the Association moved to dismiss the
15 | allegation in Count 3 that the conduct violated RPC 1.16(b). That motion was granted
16 | and the allegation relating to RPC 1.16(b) was dismissed with prejudice.

17 | Before the opening statements, Respondent made a request that Robert Caruso be
18 | allowed to appear as co-counsel. Mr. Caruso had not previously appeared in the matter,
19 | and was listed by Respondent as a witness. The Association objected, and the Hearing
20 | Officer ruled that Mr. Caruso could appear as attorney for Mr. Pfefer, but that if he did so
21 | he would not be allowed to testify as a witness. Respondent Pfefer chose to have

1 Mr. Caruso appear as a witness, not as co-counsel.

2 During the 3-day hearing, witnesses were sworn and presented testimony, and
3 exhibits were admitted into evidence. Having considered the evidence and argument of
4 counsel, the Hearing Officer makes the following findings of fact, conclusions of law,
5 and recommendation.

6 **III. FINDINGS OF FACT**

7 The following facts were proven by a clear preponderance of the evidence.
8 ELC 10.4(b).

9 1. Respondent Matthew Pfefer was admitted to the practice of law in the
10 State of Washington on June 14, 2001.

11 2. On or about February 16, 2006, Ana Ortiz ("Ortiz"), and her domestic
12 partner, Felipe Segura ("Segura"), and their minor daughter were injured when their car
13 was struck by a car driven by James Hajek ("Hajek") when he attempted and illegal
14 U-turn.

15 3. In or around August 2007, Ortiz hired Respondent to represent her and her
16 daughter.

17 4. Segura settled his claim and was not a client of Respondent.

18 5. Ortiz's primary language is Spanish, and while she had some capacity to
19 read and understand English, she was not comfortable communicating in English.

20 6. Anne Miller was an acquaintance and former employer of Ortiz. Anne
21 Miller had provided assistance from time to time to Robert Caruso, Respondent's partner.

FINDINGS, CONCLUSIONS, RECOMMENDATION

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1 She served papers, located witnesses, provided transportation, and otherwise occasionally
2 assisted Caruso's practice when he had cases in King County. Anne Miller referred Ortiz
3 to Caruso.

4 7. Caruso was scheduled for cancer surgery and told Anne Miller that
5 Respondent Pfefer would be handling her case. Ms. Miller agreed to be a go-between,
6 translating and assisting with service of papers and communicating with Ortiz.

7 8. On February 10, 2009, Respondent filed a complaint against Hajek, on
8 behalf of Ortiz and her minor daughter, in King County Superior Court.

9 9. Presiding Judge Bruce Hilyer issued a comprehensive case schedule
10 setting a trial date of July 26, 2010.

11 10. The case was assigned to Superior Court Judge Cheryl Carey.

12 11. Lawyer Patrice Cole filed an appearance on behalf of Hajek.

13 12. On April 19, 2010, Respondent filed a Motion to Continue Trial.

14 13. On May 18, 2010, Judge Carey entered an agreed order continuing the
15 trial to March 21, 2011.

16 14. On May 18, 2010, Judge Carey also entered an agreed order amending
17 case schedule, which set dates and deadlines for the case.

18 15. On February 8, 2011, Judge Carey entered an order requiring the parties to
19 complete and return a Joint Confirmation of Trial readiness by February 28, 2011.

20 16. The order required that settlement/mediation/ADR was to be
21 accomplished no later than February 22, 2011.

FINDINGS, CONCLUSIONS, RECOMMENDATION

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1 17. Respondent did not comply with any of the deadlines set forth in the
2 Court's February 8, 2011 Order Requiring Completion of Joint Confirmation of Trial
3 Readiness.

4 18. Respondent did not file the court-mandated Joint Confirmation of Trial
5 Readiness on or before its due date of February 28, 2011.

6 19. Respondent's testimony that he did not file because he was "confused"
7 was not credible.

8 20. Respondent was reminded by the office paralegal, Patty Schoenders,
9 numerous times in the weeks preceding February 28, 2011, that the Joint Confirmation of
10 Trial Readiness was due February 28, 2011. Respondent did not acknowledge those
11 reminders, which were given both by memo and verbally, in any way.

12 21. The Court's bailiff called Respondent to remind him that he needed to file
13 a Joint Confirmation of Trial Readiness, and notwithstanding those notices, Respondent
14 did not file.

15 22. Respondent met in person with Ortiz on one occasion to prepare her for
16 her deposition, but he did not thereafter meet with her or confer with his clients or with
17 witnesses to prepare them for their testimony at trial.

18 23. Respondent did not meet with or confer with Ortiz's treating physician,
19 Dr. Perez, before the trial to prepare him for his testimony.

20 24. On or about March 21, 2011, Judge Carey dismissed the case, without
21 prejudice and costs, because plaintiff failed to prosecute the case. The parties failed to

FINDINGS, CONCLUSIONS, RECOMMENDATION

Page 5
1071371

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1 appear in person or by counsel for trial, failed to participate in mediation by
2 February 22, 2001, and otherwise failed to comply with the Order Requiring Completion
3 of the Joint Confirmation of Trial Readiness, even after plaintiff's counsel was prompted
4 with a phone call from the bailiff on February 28, 2011.

5 25. On March 24, 2011, in response to a letter from Respondent, Ms. Cole
6 made a settlement offer on Ortiz's case in the amount of \$6,580.006 (*sic*)(*Exhibit 528*).

7 26. Respondent did not communicate Ms. Cole's offer to Ortiz.

8 27. Respondent's testimony that he did not communicate the offer because he
9 thought it was "ineffective" given the dismissal of the case was not credible. The letter
10 containing the offer was dated after the date of the dismissal.

11 28. Respondent did not inform his clients that the case had been dismissed.

12 29. On March 31, 2011, Respondent filed a Motion for Reconsideration.

13 30. On April 15, 2011, Judge Carey entered an order setting a new trial date
14 for June 13, 2011.

15 31. Judge Carey also entered a new Order Requiring Completion of Joint
16 Confirmation of Trial Readiness, requiring that mediation/ADR occur on or before
17 May 16, 2011.

18 32. On May 5, 2011, Respondent filed a Notice of Withdrawal "effective
19 immediately."

20 33. Respondent testified that he filed the Notice of Withdrawal "effective
21 immediately" because he was instructed to do so by Robert Caruso, and that Mr. Caruso

1 had determined that there was a conflict of interest in continuing the representation
2 because of his concerns over discrepancies in Ms. Ortiz's deposition testimony and
3 statements by Ms. Miller. Respondent was aware of the inconsistencies well before
4 May 5, 2011, and did not see it as anything more than a trial strategy issue.

5 34. Respondent and Mr. Caruso at hearing claimed that Ms. Miller was the
6 source of inconsistent statements and that Ms. Miller was "a liar." Those concerns about
7 Ms. Miller were not communicated to their client, Ortiz, other than Ortiz listening to a
8 heated telephone conversation between Mr. Caruso, Respondent, and Ms. Miller.

9 35. Respondent informed Ortiz of his withdrawal by leaving a message with
10 Ms. Miller and mailing a copy of the Notice of Withdrawal by first class mail. He did
11 not discuss his reasons for withdrawing.

12 36. Respondent's Notice of Withdrawal did not comply with CR 71.

13 37. On or about May 11, 2011, Judge Carey received a letter from Ortiz
14 objecting to Respondent's withdrawal, and advising that she was attempting to secure
15 new counsel.

16 38. Judge Carey struck the objection because it had not been properly served.

17 39. On or about May 19, 2011, Judge Carey dismissed Ortiz's and her
18 daughter's case without prejudice.

19 40. Because the statute of limitations had run, Ortiz and her daughter were
20 precluded from pursuing their claims against Hajek.

21 41. Ortiz has retained counsel and is pursuing a claim for malpractice against

1 Respondent.

2 42. Respondent acknowledged that he made a mistake by not filing a request
3 to extend the timeline for MAR.

4 43. Respondent testified that he made a mistake in delaying to start the ADR
5 process until February 11, 2011.

6 44. Respondent acknowledged that he made a mistake in not filing a Joint
7 Statement of Trial Readiness and that, at a minimum, he should have contacted the court
8 to obtain an extension.

9 45. Respondent also admitted that he made a mistake and should have asked
10 for consolidation of a second case that he filed, arising out of a 2007 accident.

11 46. Respondent's failure to consider the consolidation when he was preparing
12 the second complaint was attributed to his father's untimely death at or about the time he
13 was preparing the pleadings.

14 IV. CONCLUSIONS OF LAW

15 Based on the foregoing findings of fact, the Hearing Officer makes the following
16 conclusions of law.

17 COUNT 1 By failing to comply with the dates and deadlines set forth in the
18 May 18, 2010 Order Amending Case Schedule and the deadlines in the February 8, 2011
19 Order Requiring Completion of Joint Confirmation of Trial Readiness and failing to meet
20 with and prepare Ortiz and her daughter and plaintiff's witnesses for the March 21, 2011
21 trial, Respondent violated RPC 1.3 and RPC 3.2,

FINDINGS, CONCLUSIONS, RECOMMENDATION

Page 8
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ABA Standard 4.42 provides:

Suspension is generally appropriate when:

- (a) A lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client, or
- (b) A lawyer engages in a pattern of neglect and causes injury or potential injury to a client.

ABA Standard 4.43 provides:

Reprimand is generally appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes injury or potential injury to a client.

Respondent acted knowingly in failing to inform Ortiz the settlement offer and failing to advise her that her case had been dismissed. The client was injured. The presumptive sanction on Count 2 is suspension.

COUNT 3 ABA Standard 7.0, Violations of Duties Owed as a Professional, applies to the allegations of Count 3. Among other duties, the standard includes "improper withdrawal from representation."

ABA Standard 7.2 provides:

Suspension is generally appropriate when a lawyer knowing engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.

ABA Standard 7.3 provides:

Reprimand is generally appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.

1 Respondent acted knowingly when he withdrew "effective immediately." There
2 was injury to the client because she did not have an adequate opportunity to object and/or
3 to find substituting counsel before her case was dismissed, and the statute of limitations
4 had run. There was injury to the legal system because of the wasted efforts considering
5 pro se objections that were not properly served and the consumption of court time dealing
6 with an unrepresented plaintiff.

7 VI. AGGRAVATING OR MITIGATING FACTORS

8 Pursuant to the ABA Standard 9.22, the following aggravating factors apply:

- 9 • 9.22 (d) multiple offenses;
- 10 • 9.22 (j) indifference to making restitution

11 Pursuant to ABA Standards 9.32, the following mitigating factors apply:

- 12 • 9.32 (a) absence of a prior disciplinary record;
- 13 • 9.32 (b) absence of a dishonest or selfish motive;

15 VII. RESTITUTION

16 The Hearing Officer finds and concludes that Respondent should provide
17 restitution to Ortiz in the amount of the uncommunicated settlement offer, \$6,580.06.
18 The restitution should be paid as a condition of Respondent's reinstatement from
19 suspension hereinafter recommended. Any payment to Ortiz by malpractice carrier or
20 otherwise should be credited against the restitution ordered herein.

21 In closing, Respondent argued, among other things, that any restitution should be

1 reduced by the amount of contingent attorney fees that would have been due if the
2 settlement offer had been accepted, and further reduced by PIP payments (net of Mahler
3 deduction) and an unpaid balance due to a chiropractic service. The Hearing Officer
4 concludes there should be no deduction. Given the ethical misconduct found to exist in
5 this case, no attorney fees or costs are due Respondent, and no deduction is available to
6 Respondent because the Hearing Officer has no authority to order payments of PIP or
7 unpaid medical bills.

8 With respect to Count 1, the weight of aggravating and mitigating factors are
9 balanced, and the Hearing Officer recommends suspension for six months.

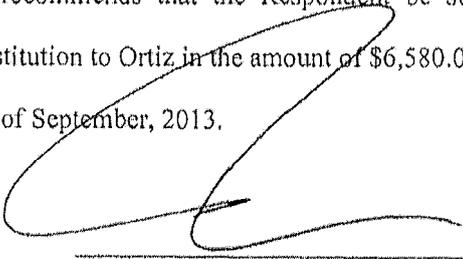
10 With respect to Count 2, the weight of aggravating and mitigating factors are
11 balanced, and the Hearing Officer recommends suspension for six months.

12 With respect to Count 3, the weight of aggravating and mitigating factors are
13 balanced, and the Hearing Officer recommends suspension for six months.

14 **VII. RECOMMENDATION**

15 The Hearing Officer recommends that the Respondent be suspended for six
16 months and required to pay restitution to Ortiz in the amount of \$6,580.06.

17 DATED this 26 day of September, 2013.



18
19
20 JAMES M. DANIELSON, WSBA #1629
Hearing Officer

21

CERTIFICATE OF SERVICE

I certify that I caused a copy of the PDF COL & HO's Recommendation
to be delivered to the Office of Disciplinary Counsel and to be mailed
to Nathan Pieter Respondent/Respondent's Counsel
at 1047 E. U. Highway #105 Spokane Valley, WA 99216 by certified first class mail
postage prepaid on the 20th day of September, 2012

[Signature]
Clerk/Counselor of the Disciplinary Board

APPENDIX C

FILED

APR 01 2014

BEFORE THE
DISCIPLINARY BOARD
OF THE
WASHINGTON STATE BAR ASSOCIATION

DISCIPLINARY BOARD

In re

MATTHEW FRANKLIN PFEFER,

Lawyer (WSBA No.31166)

Proceeding No. 12#00051

DISCIPLINARY BOARD ORDER
AMENDING HEARING OFFICER'S
DECISION

This matter came before the Disciplinary Board at its March 21, 2014 meeting, on automatic review of Hearing Officer James Myron Danielson September 26, 2013 Findings Of Fact And Conclusions Of Law And Recommendation Of Hearing Officer entered following a hearing, recommending a six month suspension and payment of \$6,580.06 in restitution.

The Board reviews the hearing officer's findings of fact for substantial evidence. The Board reviews conclusions of law and sanction recommendations de novo. Evidence not presented to the hearing officer or panel cannot be considered by the Board. ELC 11.12(b).

Having reviewed the materials submitted, and considered oral arguments and the applicable case law and rules,

IT IS HEREBY ORDERED THAT the Hearing Officer's decision is adopted¹ with the following amendments:

Finding of Fact 35 is amended to read: Respondent informed Ortiz of his withdrawal by leaving a message with Ms. Miller and mailing a copy of the Notice of

¹ The vote on this matter was 13-0. Those voting were: Berger, Bloomfield, Broom, Carrington, Coy, Davis, Dremousis, Egeler, Evans, Fischer, McInvaillie, Mesher, and Neiland.

894

1 Withdrawal by certified mail. He also sent a letter explaining his reasons for withdrawing.

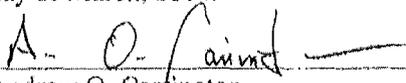
2 **The Restitution section is amended to read:**

3 **VII. RESTITUTION**

4 The Hearing Officer finds and concludes that Respondent should provide restitution
5 to Ortiz in the amount of \$5,834.15, the total amount of the uncommunicated settlement
6 offer less costs directly attributable to Ortiz's case.

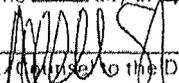
7 (The remaining provisions of the Restitution section are unchanged.)

8 Dated this 31st day of March, 2014.

9 
10 Andrew O. Carrington
11 Disciplinary Board Chair

12 **CERTIFICATE OF SERVICE**

13 I certify that I caused a copy of the DB Under Amending HO's Decision
14 to be delivered to the Office of Disciplinary Counsel and to be mailed
15 to Matthew P. Kelly Respondent's Counsel
16 at 10417 E. 4th Ave #10 Spokane Valley, WA 99216 by first class mail
17 postage prepaid on the 18 day of April, 2014


Clerk of the Disciplinary Board

APPENDIX D

American Bar Association's Standards for Imposing Lawyer Sanctions (1991 ed. & Feb. 1992
Supp.) (ABA Standards)

Standards Applied by the Hearing Officer:

4.4 *Lack of Diligence*

- 4.41 Disbarment is generally appropriate when:
 - (a) a lawyer abandons the practice and causes serious or potentially serious injury to a client; or
 - (b) a lawyer knowingly fails to perform services for a client and causes serious or potentially serious injury to a client; or
 - (c) a lawyer engages in a pattern of neglect with respect to client matters and causes serious or potentially serious injury to a client.
- 4.42 Suspension is generally appropriate when:
 - (a) a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client, or
 - (b) a lawyer engages in a pattern of neglect and causes injury or potential injury to a client.
- 4.43 Reprimand is generally appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes injury or potential injury to a client.
- 4.44 Admonition is generally appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes little or no actual or potential injury to a client.

7.0 *Violations of Duties Owed as a Professional*

- 7.1 Disbarment is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system.
- 7.2 Suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.
- 7.3 Reprimand is generally appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.
- 7.4 Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence that is a violation of a duty owed as a professional, and causes little or no actual or potential injury to a client, the public, or the legal system.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re

MATTHEW F. PFEFER,

Lawyer (Bar No. 31166)

Supreme Court No. 201,327-9

DECLARATION OF
SERVICE BY MAIL

The undersigned Disciplinary Counsel declares that he caused a copy of the Answering Brief of the Office of Disciplinary Counsel to be mailed by first class mail with postage prepaid on September 8, 2014 to:

Matthew F. Pfefer
Attorney at Law
10417 E 4th Ave Apt 10
Spokane Valley, WA 99206-3638

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

9/8/2014; Seattle, WA
Date and Place


M Craig Bray, Bar No. 20821
Disciplinary Counsel
Washington State Bar Association
1325 4th Avenue – Suite 600
Seattle, WA 98101-2539
(206) 239-2110

OFFICE RECEPTIONIST, CLERK

To: Craig Bray
Cc: Matthew F. Pfefer; Allison Sato
Subject: RE: In re Disciplinary Proceeding Against Pfefer, Supreme Court No. 201,327-9

Received 9-8-14

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

From: Craig Bray [mailto:craigb@wsba.org]
Sent: Monday, September 08, 2014 10:33 AM
To: OFFICE RECEPTIONIST, CLERK
Cc: Matthew F. Pfefer; Allison Sato
Subject: In re Disciplinary Proceeding Against Pfefer, Supreme Court No. 201,327-9

Dear Clerk:

Attached for filing in the above matter are the Answering Brief of the Office of Disciplinary Counsel, Appendices to the Brief, and a Declaration of Service by Mail. Thank you.

Craig Bray
Disciplinary Counsel
Washington State Bar Association
1325 Fourth Avenue, Suite 600
Seattle, WA 98101-2539
(206) 239 2110
craigb@wsba.org

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