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Supreme Court No. 201,327-9

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THE SUPREME COURT
STATE OF WASHINGTON

In re

Matthew Franklin Pfefer ("Peffer")
Appellant Lawyer, Bar No. 31166

**Appellant-Lawyer's Reply Brief
Opposing The Disciplinary Board's
Decision**

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I. Introduction

A hearing officer who is her own expert witness is not subject to discovery or examination. She has a secret opinion that remains secret except to the extent that she chooses to disclose it in her decision. The secrecy of such opinion impairs appellate review.

Allowing such secret opinion is not consistent with constitutional due process, general legal principles, and basic evidentiary law. If Discipline of Burtch allows such secret opinion, this Court should limit or overrule Discipline of Burtch, 162 Wn.3d 873 (2008).

Likewise, this Court should find that the Office of Disciplinary Counsel of the Washington State Bar Association (hereafter, "Bar") wrongly withheld documents it was obliged to provide this accused lawyer, that the credibility findings are error, and that the Bar executed a false certification in violation of ELC 13.9.

Accordingly, this Court should reverse the Disciplinary Board and the Hearing Officer, dismiss all charges, and award this accused lawyer fees and other expenses including reasonable attorneys' fees against the Bar under the Washington State Equal Access to Justice Act.

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II. Reply Statement of the Case

The Bar now states that Pfefer did not file an amended complaint to correct a party's name. Answering Brief of the Bar (hereafter, "Ans.Br.") ¶4. As the defense had already answered the complaint (EX 110), amending the complaint would require a court order. CR 15(a). Asking to amend the complaint would incur the charge for an order allowing such a filing. LR 40.1(b)(5)(B) (stating that the clerk will assess a processing fee). Pfefer did not incur this charge (for which the client would be "ultimately liable"). RPC 1.5(e)(1).

Pfefer includes further factual discussion in pertinent sections of the argument below.

III. Argument

A. The Hearing Officer's Procedural Errors Before and During Hearing

1. THE BAR'S CHOICE TO WITHHOLD REQUESTED DOCUMENTS FROM Pfefer VIOLATES ITS DISCOVERY OBLIGATIONS.

In this disciplinary proceeding, the Discovery Cutoff was July 15, 2013. BF 40. Some three weeks later, on August 5, 2013, the Bar filed a designation of exhibits that referred to an "Allstate Insurance Notes log," Exhibit 500. BF 55. On August 12, 2013, the Bar provided Pfefer this log with its exhibits. BF 58.

1 The Bar submitted documents to the Review Committee in
2 2012. BF 1. The Bar later provided Pfefer the submitted
3 documents. BF 38 at 2. These documents did not include the
4 “Allstate Insurance Notes log,” Exhibit 500. The Bar acquired
5 Exhibit 500 after the Review Committee entered its order and
6 chose not to disclose this document or provide Pfefer a copy of it
7 until after the Discovery Cutoff. The Bar eventually explained this
8 surprise document to Pfefer during the hearing. TR, 234-235. The
9 Bar chose to violate its discovery obligations regarding Exhibit 500.

10 The Bar also did not refer to the “Wage loss calendar,” Exhibit
11 400, until it designated its exhibits, and did not provide a copy of
12 Exhibit 400, until it delivered its exhibits. (The Bar withdrew Exhibit
13 400. TR, 10.) The Bar chose to violate its discovery obligations
14 regarding Exhibit 400.

15 Until the Bar designated, it did not refer to filings it had received
16 from Ortiz v. Hertz, King County Superior No. 10-2-37757-3,
17 Exhibits 204-206. The Bar also did not provide a copy of these
18 filings until it delivered its exhibits. The Bar chose to violate its
19 discovery obligations regarding Exhibits 204-206.

20 Despite Pfefer's rightful request and despite the Bar's duty to

1 comply, it chose not to provide any of these documents until after
2 the Discovery Cutoff. The Bar's decision to ambush Pfefer with
3 these documents by providing them to him after the discovery cutoff
4 prevented Pfefer from being able to conduct discovery about them.

5 Instead of moving to compel and in the spirit of cooperation
6 under ELC 10.11(a), Pfefer asked for clarification. BF 38.

7 The Bar now states that "at the time of his motion, Pfefer had
8 already been provided with copies of relevant non-privileged
9 information." Ans.Br. 20. (citing BF 38 at 2 and ELC 10.11(a)). This
10 does not refer to any documents after the Review Committee's
11 order.

12 "After a formal complaint is filed, the parties have the right to
13 other discovery under the Superior Court Civil Rules." ELC
14 10.11(c). This Court should find that the Bar chose to violate its
15 discovery obligations to Pfefer and hold that the Hearing Officer's
16 denial of Pfefer's motion for clarification is error.

17 2. THE HEARING OFFICER SHOULD HAVE EXCLUDED IMPROPER LAY
18 OPINION AND ARGUMENT THAT REQUIRES EXPERT OPINION TESTIMONY.

19 Pfefer moved to exclude improper lay opinion and argument that
20 requires expert opinion testimony. BF 49. The Bar represented that
21 it does not intend to "call any expert witnesses at hearing." BF

1 39:4:21-22. For this reason, the Hearing Officer should have held
2 the Bar to its own representation by excluding any expert opinion
3 testimony for the Bar. The Bar now argues that it did not “attempt to
4 disguise lay testimony as expert opinion” and therefore that denying
5 Pfefer’s motion was “no error.” Ans.Br. 20.

6 This motion remains pertinent for at least two reasons. First, the
7 Bar fails to support its speculation that the Hearing Officer
8 committed no error. Instead, the Bar’s reasoning supports—at
9 most—an argument that the error caused no harm. Finding the
10 denial of Pfefer’s motion as error, this Court can resolve this issue.

11 Second, Pfefer’s motion shows his preserving his position that
12 the Bar’s charges against him require expert testimony.

13 This Court should find that the denial of Pfefer’s motion to
14 exclude improper lay opinion testimony and to exclude argument
15 that requires expert opinion testimony is error.

16 3. COUNSEL AT A DISCIPLINARY HEARING MAY ALSO TESTIFY.

17 In his Opening Brief, Pfefer explained that he did not want Mr.
18 Caruso to be arguing his own credibility. Pages 17-18. The Bar
19 answers that the veracity of Mr. Caruso is at issue in some vague,
20 general sense. Ans.Br. 14. Both parties argue based on Informal

1 Opinion 89-1529 from the ABA Commission on Ethics and
2 Professional Responsibility. As the Bar explains, the Commission
3 disagrees with a lawyer's being a witness when the lawyer also
4 needs to "argue his own veracity to a court or other body." Ans.Br.
5 13 (citing ABA Comm. on Ethics and Prof'l Responsibility, Informal
6 Op. 89-1529 (1989)). For this reason, the proper inquiry is about
7 the scope of the lawyer's argument, not the scope of the lawyer's
8 testimony.

9 Although the Mr. Caruso's veracity may have been at issue, Mr.
10 Caruso was not arguing his own veracity. For this reason, the
11 rationale of Inf. Op. 89-1529 does not apply.

12 As Pfefer explained in his opening brief, the disciplinary hearing
13 is not a trial, the Hearing Officer chose not to enter required
14 findings, and the rationale of Informal Op. 89-1529 does not apply.
15 For each of these independent reasons, this Court should hold that
16 the Hearing Officer's disqualification of Robert E. Caruso was error.

17 **B. The Hearing Officer's Erroneous Credibility Findings**

18 1. FINDING 19 MISSTATES THE TESTIMONY.

19 In the context of a specific conversation with a bailiff, Pfefer
20 testified that he had told her that he was confused about when the

1 joint trial confirmation regarding trial readiness was due. TR 157-
2 158 (the context of the Bar's question was "what we had talked
3 about"); TR 177 (Pfefer testified "today [about a specific]
4 conversation"); accord Exhibit 125, ¶ 9. The Bar went on:

10 Q. You didn't realize it was due that day? You had
11 the case scheduling order, didn't you?

12 A. I did.

13 Q. And it says it was due on February 28, 2011.

14 A. (No audible response by the witness.)

5 TR. 177:10-14. The Bar chose to waive its first question (on line 10)
6 by asking its second question. When Pfefer answered the second
7 question and the Bar read from the order, there was no question in
8 front of Pfefer for him to answer. He had no question to which he
9 was allowed to present an "audible response." His silence was
10 entirely justified and appropriate.

11 The Bar now states that Pfefer "fails to note his other testimony
12 on this issue," Ans.Br. 18 n.7. As shown above, however, Pfefer's
13 testimony at TR 177 is perfectly consistent with his testimony at TR
14 157-158, to which he refers in his opening brief.

15 The Bar chose not to present any evidence that Pfefer testified
16 that confusion prevented the filing of any document. The finding
17 that Pfefer testified that confusion prevented filing a document lacks

1 substantial evidence and is error. This Court should give no weight
2 to this credibility determination from an incorrect statement of the
3 testimony. This Court should reject Finding 19 (BF 63:5).

4 2. FINDING 27 MISSTATES THE TESTIMONY.

5 In Pfefer's opening brief, he explains how Finding 27 misstates
6 the testimony. Pages 20-21 (discussing BF 63:6). In its answer, the
7 Bar does not now disagree with Pfefer. Ans.Br. 24 n.8.

8 Instead, the Bar speculates that what the Hearing Officer
9 imagined Pfefer's testimony to be was somehow a "reasonable
10 inference." Id. The Bar chose not to support this speculation with
11 any evidence or argument. Instead, the Bar correctly notes that "the
12 hearing officer's credibility finding is entitled to great weight." Id.
13 (citing "Poole II, 164 Wn.2d [710] at 724").

14 The exact question at issue here is whether a credibility finding
15 based on imaginary testimony "is entitled to great weight." The
16 Bar's cite does not address this exact question at issue.

17 The Bar's cite states as follows, "In assessing the alternative
18 explanations offered by the attorney, the hearing officer may make
19 credibility determinations. This court gives particularly great weight
20 to findings when credibility and veracity of witnesses are at issue."

1 Pooler II, 164 Wn.2d 710, ¶ 23 at 724. This cite would apply only if
2 the attorney and the Bar offer competing or “alternative
3 explanations.” The Bar chooses not to state what it thinks motivated
4 Pfefer’s not disclosing the ineffective offer to the grievant. For this
5 reason, the Hearing Officer did not choose between competing
6 explanations.

7 The Bar’s answering brief is incorrect because it remains based
8 on imagined testimony—not actual testimony—and because the
9 authority it cites only applies to competing explanations. It does not
10 apply when only one explanation is present. This Court should give
11 no weight to the erroneous credibility determination in Finding 27
12 and should reject this erroneous finding that incorrectly states the
13 testimony. BF 63:6 (Finding 27).

14 **C. The Alleged Violations Should Require Proof With Expert**
15 **Testimony.**

16 From three separate points of view, the Bar’s case requires
17 expert testimony—from the point of view of constitutional due
18 process, from the point of view of general legal principles, and from
19 an evidentiary point of view.

20 A simple hypothetical illustrates that these points of view all
21 involve one underlying reality, namely, the secret opinion of the

1 Hearing Officer.

2 If this proceeding went to a disciplinary hearing in front of a
3 hypothetical, different hearing officer, either side could hire the
4 actual Hearing Officer as an expert witness. The actual Hearing
5 Officer would have the same evidence, the same otherwise-secret
6 opinion, and the same conclusion.¹ The opinion would be
7 otherwise-secret because in this hypothetical both sides could
8 depose the actual Hearing Officer (a hypothetical expert witness)
9 and such deposition could reveal his opinion. In this hypothetical,
10 likewise, both sides could examine the hypothetical expert witness
11 (the actual Hearing Officer) at the disciplinary hearing and such
12 examination could reveal his opinion. Outside this hypothetical, the
13 (actual) Hearing Officer's opinion remains secret, hidden from
14 discovery and immune from examination.

15 The (actual) Hearing Officer simply does not enter findings or
16 conclusions without basing them on his secret opinion.

17 Although this is patently improper (and unfair), one expects the
18 Hearing Officer to base his decision on his secret opinion and

¹ The undersigned refuses to believe that the actual Hearing Officer would change his opinion based on who is paying him.

1 expects him to do so because the Bar tells him that doing so is
2 perfectly acceptable. One expects this in the way one expects a
3 person with a foul mouth to keep fouling. One's expectation does
4 not make the foulness legitimate.

5 The Bar does not deny that a hearing officer can enter decisions
6 based solely on the evidence and law instead of adding secret
7 opinion. Judicial officers in the State of Washington enter decisions
8 based solely on the evidence and law —every judicial day!

9 The Hearing Officer's secret opinion—the underlying reality
10 discussed above—arises in three ways.

11 First, the secrecy of the Hearing Officer's opinion prevents any
12 response or interaction from the accused before the Hearing
13 Officer's decision. Pfefer demonstrates in his opening brief, pages
14 24-29. When the Bar fails to deny that Pfefer cannot interact with
15 the Hearing Officer's secret opinion, the Bar tacitly admits that
16 Pfefer cannot do so. Ans.Br. 16-22.

17 Second, the secrecy of the Hearing Officer's opinion means that
18 the parties lack sufficient explanation for his decision.

19 When a finder of fact has multiple theories on which to base a
20 decision, the findings should distinguish which theory is adopted.

1 Little v. King, 160 Wn.2d 696, 707 (2007) (citing Foxtrap, Inc. v.
2 Foxtrap, Inc., 671 F.2d 636, 641-642 (1982)).

3 A “fact-finding process” in which the finder of fact fails “to
4 consider and weigh relevant evidence that was properly presented
5 to the [finder of fact] and made part of the [official] record” is
6 defective. Taylor v. Maddox, 366 F.3d 992, 1001 (9th Cir. 2004)
7 (considering “whether the state courts were objectively
8 unreasonable in [a] finding” (page 996)). “To fatally undermine the
9 state fact-finding process, and render the resulting finding
10 unreasonable, the overlooked or ignored evidence must be highly
11 probative and central to petitioner’s claim.” Id.

12 In making findings, a judge must acknowledge significant
13 portions of the record, particularly where they are
14 inconsistent with the judge’s findings. The process of
15 explaining and reconciling seemingly inconsistent parts
16 of the record lays bare the judicial thinking process,
17 enabling a reviewing court to judge the rationality of the
18 fact-finder’s reasoning. On occasion, an effort to explain
19 what turns out to be unexplainable will cause the finder
20 of fact to change his mind. By contrast, failure to take
21 into account and reconcile key parts of the record casts
22 doubt on the process by which the finding was reached,
23 and hence on the correctness of the finding.

24 Taylor v. Maddox, 366 F.3d at 1007-8. This approach to how a
25 judge should grapple with the record also applies to a hearing
26 officer. A fact-finder’s failure “to consider key aspects of the record

1 is a defect in the fact-finding process.” Id. at 1008 (citing Miller-El v.
2 Cockrell, 537 U.S. 322, 346 (2003) (other citation omitted).

3 It is essential, however, that a reviewing court have some
4 basis for distinguishing between well reasoned conclusions,
5 arrived at after a comprehensive consideration of all relevant
6 factors, and mere boiler-plate approval phrased in
7 appropriate language but unsupported by evaluation of the
8 facts or analysis of the law.^[2]

9 Explanation produces intellectual discipline; a judge who
10 sets down in writing (or articulates in court) the reasons pro
11 and con, and his method of reaching a decision, must work
12 through the factors Before deciding, and we then may be
13 sure that the conclusion is based on appropriate
14 considerations even if not necessarily one we would have
15 reached ourselves.^[3]

16 Again, the Bar chose not to attempt refuting this argument and
17 thus tacitly admits that this argument is correct. Ans.Br. 16-22;
18 compare Washburn v. Beatt Equipment Co., 120 Wn.2d 246, 270
19 (1992) (holding that a party to an appeal who has an opportunity to
20 respond to an opponent’s factual claims and neglects to do so
21 thereby admits the accuracy of the opponent’s factual claims).

22 Third, the secrecy of the Hearing Officer’s opinion prevents the

² Protective Cmte for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 88 S.Ct. 1157, 20 L.Ed.2d 1 (1968) (cited in Nelbro Packing Co. v. Baypack Fisheries, 101 Wn. App. 517, 532-533 (2000)).

³ Horn v. Transcon Lines, Inc., 898 F.2d 589, 592 (7th Cir. 1990) (cited in Nelbro Packing, 101 Wn. App. at 532).

1 parties from arguing to him, to the Disciplinary Board, or to this
2 Court as to whether the Hearing Officer's secret opinion is incorrect
3 and prevents appellate authorities from being able to evaluate his
4 secret opinion. The Bar tacitly admits this argument as well.

5 Ignoring the underlying reality of the Hearing Officer's secret
6 opinion, the Bar also misreads three cases. Ans.Br. 16-22.

7 The Bar implies that Pfefer denies that the hearing officer may
8 draw inferences and reach conclusions based on the evidence
9 before him. Ans.Br. 21 (citing Cohen I, 149 Wn.2d 323 (2003)). This
10 is incorrect. Cohen I involves delay by an attorney in order to collect
11 his fee. 149 Wn.2d at 332. Mr. Cohen knew that the court had
12 dismissed the case and billed the client without disclosing the
13 dismissal. Id. at 332-333. Mr. Cohen's motivation was the subject
14 for which the hearing officer may draw inferences and reach
15 conclusions based on the evidence before him. Id. at 333. The Bar
16 cites this case out of context. This Court should ignore this out-of-
17 context citation to Cohen I. Ans.Br. 21.

18 In a disability proceeding, a hearing officer may use his
19 experience and specialized knowledge to evaluate and draw
20 inferences when evaluating unprofessional conduct. Disability of

1 Diamondstone, 153 Wn.2d 430, 440 (2005). The burden of
2 establishing disability is met by a mere preponderance of the
3 evidence. ELC 8.7. Disciplinary counsel has the burden of
4 establishing an act of misconduct by a clear preponderance of the
5 evidence. ELC 10.14(b). For this reason, the standards for a
6 disability proceeding are not the same as those for a disciplinary
7 proceeding. Because this is not a disability proceeding,
8 Diamondstone does not apply. The Bar's reliance on Diamondstone
9 is misplaced. Ans.Br. 21.

10 Although Attorney Griffin did not bill his client for any telephone
11 calls, VanDerbeek billed her client "for seven alleged conference
12 calls with Griffin." Discipline of VanDerbeek, 153 Wn.2d 64, 81-82
13 (2004). On the basis of this fact, as well as other facts, the hearing
14 officer found that Ms. VanDerbeek charged her client fees for time
15 that she did not spend. Id. For this reason, the hearing officer's
16 findings were not based on "personal opinion of factual matters
17 unsupported by the record." Id. The Bar's reliance on this case is
18 misplaced as well. Ans.Br. 22.

19 In Discipline of Burtch, the accused "contends the hearing
20 officer denied him the opportunity to call expert witnesses to

1 establish the standard of care in the legal industry and
2 interpretation of the RPC.” 162 Wn.2d 873, ¶ 25 (2008). The Bar
3 “argues that expert testimony on the RPC is not admissible in
4 disciplinary hearings.” 162 Wn.2d 873, ¶ 25. In Burtch, no party
5 argued that the Bar must have expert testimony to prove violations
6 that directly or indirectly require finding unreasonableness.

7 “The trial court may properly disregard expert testimony
8 containing conclusions of law.” Burtch, 162 Wn.2d 873, ¶ 27 (citing
9 Eriks v. Denver, 118 Wn.2d 451, 457-58 (1992)). Whether “an
10 attorney’s conduct violated the rules of professional conduct is a
11 question of law.” Burtch, 162 Wn.2d 873, ¶ 27 (citing Eriks, 118
12 Wn.2d 451).⁴

13 In contrast, the “reasonableness” of an “activity, under the whole
14 circumstances of the case,” “is a fact question.” Halvorsen v.
15 Halvorsen, 3 Wn.App. 827, 831 (1970), review denied, 78 Wn.2d
16 996 (1971) (regarding a conflict of interest in an uncontested
17 divorce). Eriks confirms that the reasonableness of an activity is a
18 fact question by stating that “once the court determines as a matter

⁴ Eriks barely mentions the Rules of Professional Conduct, as the underlying actions occurred while the Code of Professional Responsibility was in effect. Eriks, 118 Wn.2d at 456 n.1.

1 of law that an attorney complied with the CPR, then whether the
2 attorney's subsequent multiple representation is reasonable is a
3 question of fact." Eriks, 118 Wn.2d at 458 n.3 (explaining how Eriks'
4 holding does not contradict Halvorsen).

5 Under the Bar's reading of Burtch, proving violation of an ethical
6 rule (even if the rule includes the element of reasonableness
7 directly or indirectly) does not require expert testimony. "Whether a
8 lawyer's conduct violated the RPC is a question of law that the
9 hearing officer, a lawyer, is fully capable of deciding." Ans.Br. 19
10 (citing Burtch, 162 Wn.2d 873 at 891).

11 The Bar's reading of Burtch is in tension with the clear
12 statements in Eriks that "whether the attorney's" conduct "is
13 reasonable is a question of fact." Eriks, 118 Wn.2d at 458 n.3
14 (referring to "subsequent multiple representation" in Halvorsen).

15 The Bar charged Mr. Burtch with seven counts of misconduct, of
16 which he was found to have committed six. Burtch, 162 Wn.2d 873,
17 ¶ 2. One of those counts is "violation of RPC 1.3 (diligence)." Id.
18 Burtch does not connect the disputed expert testimony Mr. Burtch
19 sought to introduce with specific counts.

20 Burtch makes clear that it contemplates the hearing officer's

1 being an expert and having an expert opinion regarding the
2 charges. A witness qualifies as an expert based on “knowledge,
3 skill, experience, training, or education.” Burtch, 162 Wn.2d at ¶ 26
4 (citing ER 702). A hearing officer does not need a party to produce
5 expert testimony, unless the witness is a lawyer with “a specialty in
6 ethics or any other specialty that would assist the trier of fact in this
7 case, the hearing officer, also a lawyer.” Id. Instead of adopting an
8 expert’s opinion or choosing between competing expert opinions,
9 the Burtch court allows the hearing officer to have her own expert
10 opinion regarding the charges.

11 A hearing officer’s being her own expert witness not subject to
12 discovery or examination and thus having an expert opinion that
13 remains secret except to the extent she chooses to disclose her
14 preexisting opinion in her decision is not consistent with
15 constitutional due process, general legal principles, and basic
16 evidentiary law. To the extent that Burtch allows a hearing officer to
17 impose her preexisting secret opinion in the above manner, this
18 Court should limit or overrule Burtch.

19 To the extent that a Rule of Professional Conduct includes a
20 requirement of reasonableness, compliance with that rule is a

1 question of fact. Without agreement of the parties, a hearing officer
2 should not be able to rely on preexisting secret opinion for these
3 questions of fact.

4 Pfefer's opening brief explains why ER 605 applies to
5 disciplinary hearings. Pages 24-26. The Bar does not presently
6 disagree. Ans.Br. 21 (stating without dispute that Pfefer argues ER
7 605). Instead, the Bar ignores the underlying reality of the Hearing
8 Officer's secret opinion and pretends that ER 605 does not apply.

9 Although the Bar quotes some language from the due-process
10 argument in Pfefer's opening brief, the Bar chose not to attempt
11 any rebuttal. Ans.Br. 20-21 (quoting pages 25, 26, and 28).

12 Because the Hearing Officer acted as his own expert in this
13 disciplinary proceeding, he violated ER 605 and Pfefer's due
14 process rights, which violations were error. Due to the Hearing
15 Officer's erroneous violations of ER 605 and Pfefer's due process
16 rights, this Court should dismiss all of the counts against Pfefer.

17 **D. No Violation of Duty to Communicate**

18 Ms. Ortiz testified that she would have accepted the defense's
19 offer if Pfefer had told her that this was the amount that her case
20 was worth, that she deserved. TR 303. The Bar ignores Ms. Ortiz'

1 qualifier. Compare Ans.Br. 8 and 24 with TR 303. Because the Bar
2 says **without any qualification** Ms. Ortiz says that she would take
3 the offer, the Bar's discussion of this testimony is highly misleading.

4 Without analyzing agency law and while agreeing that Ms. Miller
5 was Ms. Ortiz' agent (and "conduit" (TR 365)), the Bar asserts that
6 Pfefer still had a duty to disclose dismissal to Ms. Ortiz even after
7 Ms. Miller discovered it on her own. Ans.Br. 24. Ms. Miller's
8 discovery meant that she was informed as to the status of the
9 matter. Ms. Miller's being a conduit to Ms. Ortiz imputes to Ms.
10 Ortiz her being informed.

11 While Ms. Ortiz' case was dismissed, she could offer no
12 consideration to form a contract to settle her claim. The Bar now
13 claims that Ms. Ortiz could offer consideration anyway. Ans.Br. 26.
14 The Bar implies that a court would somehow be likely to grant relief
15 to Ms. Ortiz if she moves to enforce settlement or files a separate
16 action for breach of settlement contract. Because the Bar cites no
17 authority to support this position, its speculation is not well taken.
18 "Where no authorities are cited in support of a proposition, the court
19 is not required to search out authorities, but may assume that
20 counsel, after diligent search, has found none." DeHeer v. Seattle

1 Post-Intelligencer, 60 Wn.2d 122, 126 (1962).

2 Pfefer and Ms. Ortiz had a detailed discussion of how any
3 settlement funds would be divided. EX 700, 2-3. The details include
4 the attorney's fee for Pfefer's firm, costs owed to Pfefer's firm, the
5 PIP lien, and the Mahler fees on the PIP lien. Id. (Pfefer and Ms.
6 Ortiz may not have discussed any funds owed to medical providers.
7 Compare EX 700, 2-3.) The Bar claims wrongly that Pfefer did not
8 "explain how settlement funds would be divided." Ans.Br. 25.

9 When Pfefer discussed the above issues with Ms. Ortiz, he
10 received her instructions as to "minimum number dollar amounts
11 she would accept." TR 616. The Bar now states that Pfefer deems
12 Ortiz "to have made an informed decision" without mentioning that
13 she identified a minimum dollar amount! Ans.Br. 25-26. The Bar is
14 doing nothing more than attacking a straw man with this argument.

15 Pfefer and Ms. Ortiz discussed how much she would need to
16 end up with in her pocket to resolve her claim. EX 700; TR 615-
17 616. This is not the same question as the value of her claim. The
18 Bar's examination of Ms. Ortiz and the Bar's briefing here treat
19 these issues as if they were somehow identical. See Ans.Br. 25,
20 26. The Bar ignores the distinction between these two questions.

1 Pfefer complied with RPC 1.2(a) and RPC 1.4.

2 **E. Pfefer complied with RPC 1.16(c) and RPC 1.16(d).**

3 The Bar contends deceptively that Pfefer's alleged violation of
4 CR 71 somehow prevented anyone from making any objections.
5 Ans.Br. 27 (stating that the "purpose of the 10-day rule is to give
6 anyone who received notice the opportunity to serve an objection
7 on him.") But Ms. Ortiz made an objection, which disproves the
8 Bar's position here and proves that the Bar's position is deceptive.
9 EX 136, 135.

10 The Bar now remarks that Pfefer's notices of immediate
11 withdrawal "did not include the date set for trial," Ans.Br. 28,
12 implying that this absence somehow prejudiced someone without
13 suggesting who was so prejudiced or how. There can be no
14 prejudice here.

15 The hearing officer claimed that immediate withdrawal deprived
16 Ms. Ortiz of an opportunity to object. BF 63:11; Ans.Br. 28, 29. The
17 immediate withdrawal is a fact. "A finding of fact is the assertion
18 that a phenomenon has happened or is or will be happening
19 independent of or anterior to any assertion as to its legal effect."
20 State v. Williams, 96 Wn.2d 215, 221 (1981) (citation omitted).

1 The immediate withdrawal's supposed legal effect is the alleged
2 deprivation of an opportunity to object. For this reason, the Hearing
3 Officer's claim that immediate withdrawal deprived Ms. Ortiz of an
4 opportunity to object (BF 63:11) is not a finding, but a conclusion of
5 law, to which this Court owes no deference. The Bar now asserts
6 incorrectly that this is a finding. Ans.Br. 29.

7 The Bar now also says that Pfefer's violation of CR 71 "deprived
8 the court" of some opportunity. Ans.Br. 28; compare Id. 29. But the
9 court could certainly have heard Ms. Ortiz's opposition to Pfefer's
10 withdrawal. The trial court heard discussion from the grievant and
11 the defendant regarding Pfefer's withdrawal on May 19, 2011,
12 around two weeks after Pfefer's withdrawal. EX 772. For the above
13 reasons, the claim that Pfefer "interfered with the power of the court
14 to hear and rule on the issue" is a pure fabrication. Ans.Br. 38
15 (citing BF 63:11).

16 The Bar now asserts hypothetically that, had Pfefer "filed and
17 served a proper notice of withdrawal, Ortiz would merely have had
18 to serve an objection on him, not on the court and the other parties,
19 in order to trigger the requirement that he seek court permission to
20 withdraw." Ans.Br. 29. After Pfefer received Ms. Ortiz' hypothetical

1 objection, he would have moved to withdraw and would have filed
2 Ms. Ortiz' objection to explain why his notice did not accomplish his
3 withdrawal. When the trial court struck Ms. Ortiz' objection and
4 denied Pfefer's motion as moot, the same result would have
5 obtained, namely, Pfefer would have ceased representing Ms.
6 Ortiz. A struck objection is of no effect and would require nothing of
7 Pfefer, whether he withdrew with no days notice, with 10 days'
8 notice, or with 100 days' notice.

9 The Hearing Officer based his conclusion that Pfefer violated
10 RPC 1.16(d) solely on the fact that Pfefer's withdrawal was
11 effective immediately rather than after notice of ten days. BF 63:9.

12 Pfefer's opening brief explains why his immediate withdrawal
13 had nothing to do with the alleged violation. Pages 39-41. The Bar
14 now responds solely by pointing to the rule that a withdrawing
15 attorney must provide reasonable notice. Ans.Br. 30. This has
16 nothing to do with the Hearing Officer's actual findings about this
17 alleged violation.

18 The Bar has again chosen not to address Pfefer's detailed
19 factual analysis. For this reason, the Bar tacitly concedes that
20 Pfefer's factual analysis is correct. Washburn, 120 Wn.2d at 270.

1 The Bar also now states that Caruso was not a supervisory
2 lawyer. Ans.Br. 30. The Bar is incorrect.

3 With respect to the law, the structure of Title 5 of the RPCs
4 manifests an intent to equate the test for a lawyer's responsibility
5 for another lawyer's violation of the RPCs in RPC 5.1(c) with the
6 supervisory lawyer in RPC 5.2(b). A "supervisory lawyer" under
7 RPC 5.2(b) is a lawyer "responsible for another lawyer's violation of
8 the Rules of Professional Conduct" when the supervisory lawyer
9 either under RPC 5.1(c)(1) "orders or, with knowledge of the
10 specific conduct, ratifies the conduct involved" or under RPC
11 5.1(c)(2) has

12 managerial authority in the law firm in which the other lawyer
13 practices, or has direct supervisory authority over the other
14 lawyer, and knows of the conduct at a time when its
15 consequences can be avoided or mitigated but fails to take
16 reasonable remedial action.

17 With respect to the facts, Mr. Caruso's relationship to Pfefer
18 reflects this in three distinct contexts.

19 First, the Bar's own witness testified that Pfefer "acted as Bob's
20 [Mr. Caruso's] paralegal," "the researcher, the computer person, or
21 his go-fer" (TR 366) and that Mr. Caruso was representing Ortiz.
22 TR 368 (Ms. Miller's contacts were with Mr. Caruso), TR 373 (Ms

1 Miller “understood that Bob Caruso was representing Ana [Ortiz]
2 and Mr. Pfefer was assisting him”). Although Ms. Miller
3 misunderstood or misrepresented Mr. Caruso’s relationship to
4 Pfefer, her testimony still supports understanding Mr. Caruso as
5 Pfefer’s supervisory lawyer.

6 Second, Mr. Caruso intervened into Ortiz’ case when he
7 investigated the claims of Ortiz and Miller. TR 412. Likewise, Pfefer
8 needed Mr. Caruso’s approval before joining with another firm to
9 represent Ms. Ortiz and sought his approval as early as September
10 2008. EX 724, 725. Pfefer certainly could not have fired Ms. Ortiz
11 without Mr. Caruso’s permission.

12 The way Mr. Caruso was involved here shows that he had
13 managerial authority or direct supervisory authority under RPC
14 5.1(c)(2) and was thus a supervisory lawyer under RPC 5.2(b).

15 Third, Mr. Caruso was the attorney who made the decision for
16 the firm to withdraw from all Ms. Ortiz’ cases. TR 510-512, 514-515.
17 As such, he ordered the conduct involved under RPC 5.1(c)(1) and
18 is thus a supervisory lawyer under RPC 5.2(b).

19 Mr. Caruso’s decision to order Pfefer to withdraw immediately
20 was reasonable. The Bar is incorrect. Ans.Br. 30. Additionally, the

1 Bar's view that Mr. Caruso was incorrect that "the proper 10-day
2 notice would prejudice the client" cannot disprove the necessity of
3 withdrawal. Id. Only Pfefer provided any expert testimony on this
4 issue. TR 514-515, compare TR 38-39. The Bar provided no expert
5 testimony that withdrawing immediately was not reasonable.

6 Pfefer complied with RPC 1.16(c) and RPC 1.16(d).

7 **F. The Hearing Officer Erred in his Findings about State of**
8 **Mind. (Arguendo.)**

9 Pfefer's opening brief engages in a detailed factual analysis of
10 the distinction between a knowing state of mind and a negligent
11 one. Pages 42-45. Pfefer could not understand how to apply the
12 distinction. See page 43. The Bar chose not to explain how to apply
13 the distinction in a way that addresses Pfefer's factual analysis.
14 Ans.Br. 32-35. Instead, the Bar repeatedly misstates Pfefer's
15 specific points and misrepresents his broader position. When the
16 Bar chose not to address Pfefer's factual analysis, the Bar tacitly
17 admits that Pfefer is correct. Washburn, 120 Wn.2d at 270.

18 This Court should hold that the way the distinction between a
19 knowing state of mind and a negligent one is framed is void for
20 vagueness, at least as applied (if not facially).

21 One acts knowingly if one has "the conscious awareness of the

1 nature and attendant circumstances of the conduct but without the
2 conscious objective or purpose to accomplish a particular result.”
3 Discipline of Kagele, 149 Wn.2d 793, 817 (2003) (citations omitted).

4 Pfefer's opening brief claims that the “attendant circumstances
5 of conduct include the consequences of that conduct.” Page 42 n.&.
6 Although the Bar alludes to this issue (Ans.Br. 33), the Bar chose
7 not to refute or contradict this claim. The Bar tacitly admits that
8 Pfefer is correct. Compare Washburn, 120 Wn.2d at 270.

9 Based on the fact that the attendant circumstances of conduct
10 include the consequences of the conduct, Pfefer's opening brief
11 argued that his alleged commission of Count Three would be
12 knowing if he knew that the fact that his withdrawal was effective
13 immediately meant that the trial court would dismiss the grievant's
14 case. Page 45. The Bar now misrepresents Pfefer's position when
15 it states falsely that Pfefer says that he did not know the difference
16 between withdrawal with notice of ten days and immediate
17 withdrawal. Ans.Br. 35. This Court should ignore the Bar's
18 misrepresentation of Pfefer's argument.

19 As the Hearing Officer's findings about Pfefer's state of mind
20 were erroneous, this Court should reject those findings.

1 **G. The Hearing Officer Erred in his Findings of Injury.**
2 **(Arguendo.)**

3 In analysis under the ABA Standards, a finding of injury or harm
4 is only appropriate if harm actually occurs or if harm is a reasonably
5 foreseeable result of the misconduct, even if no harm occurs.
6 Discipline of Halverson, 140 Wn.2d 475, 492-93 (2000).

7 In Pfefer's opening brief, he explains why the charged conduct
8 did not cause actual injury **and** why injury was not reasonably
9 foreseeable. Pages 45-50. The Bar now alleges that Pfefer merely
10 argued against actual injury. Ans.Br. 37. The Bar misrepresented
11 Pfefer's argument. Additionally, by choosing not to respond to
12 Pfefer's detailed factual and legal analysis, the Bar tacitly admits
13 that Pfefer is correct. Compare Washburn, 120 Wn.2d at 270.

14 As Pfefer explained why injury was not reasonably foreseeable,
15 the Bar's reliance on Discipline of Behrman is misplaced. 165
16 Wn.2d 414, 425 (2008). Behrman also does not apply because Mr.
17 Behrman's misconduct occurred over four years. Id., ¶ 24.

18 The Bar also now alleges that "the ultimate final dismissal of
19 Ortiz' case" "is directly attributable to his misconduct." Ans.Br. 37.
20 This Court should ignore this unsupported assertion by the Bar.

21 The Hearing Officer chose injury to the client and did so without

1 explanation. BF 63:9. As explained above, the Bar tacitly concedes
2 that no injury occurred and that none was reasonably foreseeable.
3 The Hearing Officer chose not to identify how the charged conduct
4 supposedly injured the client.

5 This Court should reject the Hearing Officer's finding of injury.

6 **H. Reconsideration Mitigates Count One. (Arguendo.)**

7 Pfefer timely filed a motion for reconsideration of the order of
8 dismissal. Finding 29 (BF 63:6). The trial court granted
9 reconsideration and reinstated the case. EX 131. A timely good
10 faith effort to rectify consequences is a mitigating factor. ABA
11 Standards, § 9.32(d).

12 The Bar now opposes application of this mitigating factor
13 because Pfefer supposedly "did little else" for Ms. Ortiz after
14 reinstatement. Ans.Br. 39.

15 The Bar's own exhibits disprove the Bar's position. Pfefer
16 worked Ms. Ortiz' case after reinstatement. EX 440-443. The above
17 exhibits are dated before Pfefer's withdrawal. Pfefer assisted his
18 client after his withdrawal. EX 453. This Court should apply the
19 successful motion for reconsideration as a timely good faith effort to
20 rectify consequences, a mitigator in ABA Standards, § 9.32(d).

1 I. The Hearing Officer Erred in his Sanctions Analysis.
2 (Arguendo.)

3 The ABA Standards govern all lawyer discipline cases.
4 Discipline of Halverson, 140 Wn.2d 475, 492 (2000). The
5 Standards are supposed to summarize the cited cases. As such,
6 analysis and comparison of the cases is analysis of the Standards.

7 The ABA frames its standards with reference to the duties
8 allegedly violated and then frames what one might call the depth of
9 the violation by referring first to the sanction that would apply and
10 then to the criteria for that sanction. ABA Standard 4.44, for
11 instance, states that “Admonition is generally appropriate when a
12 lawyer is negligent and does not act with reasonable diligence in
13 representing a client, and causes little or no actual or potential
14 injury to a client.” The Standard starts by referring first to the
15 sanction that would apply and then to the criteria for that sanction.

16 Although Pfefer’s opening brief analyzed these Standards by
17 referring to the applicable sanctions in accordance with the
18 Standards’ own pattern, he specifically disclaimed conducting a
19 proportionality analysis. Page 54 n.&&. The fact that Pfefer’s
20 analysis of sanction is not a proportionality analysis is shown by the
21 fact that his analysis does not discuss the applicable Standard

1 under ABA Standard 4.4 (namely, ABA Standard 4.44) because the
2 Standard has no commentary.

3 The Bar now implies that Pfefer's sanctions analysis is a
4 proportionality analysis. Ans.Br. 41-43. The Bar is plainly incorrect.

5 When the Bar chose not to respond to the specifics of Pfefer's
6 factual analysis, the Bar tacitly admits that that Pfefer is correct.
7 Washburn, 120 Wn.2d at 270.

8 If this Court finds any violation, the appropriate action is an
9 admonition.

10 **J. The Hearing Officer Erred in his Recommendation for**
11 **Restitution. (Arguendo.)**

12 "A lawyer subject to discipline may be ordered to make
13 restitution to persons financially injured by the lawyer's conduct."
14 Discipline of Marshall, 160 Wn.2d 217, ¶ 68 (2007); see also ELC
15 13.7(a). Pfefer's opening brief suggests that restitution requires an
16 specific or implied finding that a nexus is present between the
17 alleged violations and the alleged injury. Page 56.

18 The Hearing Officer made no specific findings that a nexus is
19 present between any alleged violation and any alleged injury.

20 If a recommendation of restitution actually requires a finding that
21 a nexus is present and if one cannot tell from the Hearing Officer's

1 decision whether he found the presence of a nexus, one cannot tell
2 whether the Hearing Officer applied the correct legal standard in
3 recommending restitution. If the Hearing Officer applied the wrong
4 legal standard, he abused his discretion. Washington State
5 Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn. 2d 299, 339
6 (1993) (holding that a ruling based “on an erroneous view of the
7 law” is “necessarily” an abuse of discretion).

8 The Bar misstates Pfefer’s argument as to the nexus issue and
9 also misstates Ms. Ortiz’ testimony. Compare Ans.Br. 44 (“Ortiz
10 testified she would have accepted it after proper consultation”) with
11 TR 303 (“If he would have told me that this was the amount that it
12 was worth, that I deserved, I would have said yes.”).

13 Even if restitution were somehow appropriate, issues remain,
14 namely, litigation expenses, unpaid medical bills and PIP liens, and
15 attorney fees.

16 First, without citation to the record, the Bar now states that the
17 Hearing Officer “found that Pfefer was not entitled to any deduction
18 for fees due to his misconduct.” Ans.Br. 44. Whether or not the
19 Hearing Officer so found, Pfefer’s opening brief does not ask for a
20 deduction for fees. Pages 57-58. The Bar’s reference to this

1 deduction is a deliberate attempt to distract from the real issues.

2 Second, Ms. Starczewski evidently received a credit on her
3 restitution amount for unpaid medical bills or PIP liens. Discipline of
4 Starczewski, 177 Wn.2d 771 (2013); compare Pfefer's Opening
5 Brief, page 57. Because she had this credit, Pfefer should as well.

6 Third, Pfefer's opening brief explains why he should receive a
7 credit for litigation expenses that the Board did not include. Pages
8 57-58 (citing RPC 1.5(e)(1)). The Bar now merely asserts that
9 Pfefer should receive no further credit and asserts such without any
10 explanation of the facts or application of RPC 1.5(e)(1). Ans.Br. 44.
11 The Bar does not even mention RPC 1.5(e)(1).

12 This Court should decline to order restitution.

13 **K. The Disciplinary Board Erred in its Order on Costs.**
14 **(Arguendo.)**

15 Under ELC 13.9(b), costs must be "reasonably and necessarily
16 incurred."

17 Although the Bar does not dispute Pfefer's compliance with the
18 rules for objecting to its alleged costs and agrees that Pfefer went
19 above and beyond what the rules require, the Bar implies that this
20 Court should impose all disputed costs on Pfefer. Ans.Br. 45-46
21 (noting that "ELC 13.9 does not provide for further exceptions or

1 replies” and implying that this Court should affirm the costs without
2 considering Pfefer’s objections).

3 Under the Bar’s manner of following ELC 13.9, Pfefer did not
4 have any meaningful notice or opportunity to be heard regarding
5 any meaningful issues.

6 In any event, if this Court somehow orders a sanction or
7 admonition, Pfefer’s objections should—with two exceptions—be
8 heard initially by the Chair of the Disciplinary Board. ELC 13.9(e).

9 The first issue that this Court should decide is whether ELC
10 13.9(b) somehow incorporates the WSBA’s Expense Policy, which
11 Pfefer opposes in his opening brief, pages 62-63. The Bar chose
12 not to address this issue at all. Ans.Br. 45-46.

13 As a purely legal issue, in the interests of judicial economy, and
14 to prevent delay, this Court should decide that ELC 13.9(b) does
15 not somehow incorporate the WSBA’s Expense Policy without
16 response briefing from the Bar.

17 The second issue that this Court should decide is whether the
18 Bar executed a false certification. In filing a statement of costs and
19 expenses, Disciplinary Counsel “must state with particularity the
20 nature and amount of the costs claimed.” ELC 13.9(d)(2).

1 Disciplinary Counsel's "signature constitutes a certification that
2 all reasonable attempts have been made to insure the statement's
3 accuracy." Id. By Disciplinary Counsel's own admission, the ODC's
4 Statement of Costs and Expenses was incorrect. BF 97, 1:24 ("a
5 duplicative charge"). By submitting charges the Bar admits were
6 bogus, it failed to comply with the explicit provisions of ELC 13.9.

7 Although Pfefer explained the Bar's false certification in his
8 opening brief (page 63), the Bar chose not to refute Pfefer's factual
9 explanation and tacitly admits that its certification was false.
10 Washburn, 120 Wn.2d at 270 (holding that a party to an appeal
11 who could have responded to an opponent's factual claims and
12 neglects to do so thereby admits that those factual claims are true).

13 If this Court somehow orders a sanction or admonition, this
14 Court should reverse the erroneous Order Assessing Costs and
15 Expenses, remand for reconsideration, and retain jurisdiction to
16 avoid any requirement that Pfefer appeal again.

17 In any event, this Court should find that the Bar has executed a
18 false certification under ELC 13.9(d)(2).

19 This Court should reverse the Board's erroneous Order
20 Assessing Costs and Expenses. BF 101.

1 **IV. Awarding Fees and Other Expenses to Pfefer**

2 Pfefer is entitled to an award of “fees and other expenses,
3 including reasonable attorneys’ fees.” RCW 4.84.350(1), the
4 Washington State Equal Access to Justice Act (EAJA). ELC 13.9
5 does not prevent an award of fees and other expenses to Pfefer.
6 The Bar now implies otherwise. Ans.Br. 47.

7 The “fundamental objective in construing statutes is to ascertain
8 and carry out the intent.” Moen v. Spokane City Police Dep’t, 110
9 Wn.App. 714, 719 (2002) (citing Rozner v. Bellevue, 116 Wn.2d
10 342, 347 (1991)). Related provisions “should be read together” “to
11 achieve a harmonious statutory scheme that maintains the integrity
12 of the respective statutes.” Moen, Id. (citing State v. Chapman, 140
13 Wn.2d 436, 448, cert. denied, 531 U.S. 984 (2000). If “two statutes
14 pertain to the same subject matter and cannot be harmonized,”
15 then a “more specific statute will supersede a general statute.”
16 Moen, Id. (citing Estate of Kerr, 134 Wn.2d 328, 343 (1998)).

17 The mere fact that one statute does not provide attorney fees to
18 a party, such as to individual claimants in Moen and to accused
19 lawyers here, does not prohibit such fees. Moen, Id., 720.

20 The “EAJA does not authorize an award of attorney fees against

1 a 'purely adjudicatory agency.'" Id. (citing Duwamish Valley
2 Neighborhood Pres. Coalition v. Cent. Puget Sound Growth Mgmt
3 Hearings Bd., 97 Wn.App. 98, 100 (1999)). If the agency is
4 "charged with defending the correctness of its decision," it cannot
5 be a purely adjudicatory agency. Moen, Id. (citations omitted). If the
6 agency has "policymaking authority," the agency cannot be a purely
7 adjudicatory agency either. Id.

8 The Bar's Office of Disciplinary Counsel "is definitely charged
9 with defending the correctness" of the Board's decision and "stands
10 to gain financially from the outcome" of the recommendations for
11 restitution and assessment of costs and expenses. Compare Id.
12 The Bar's Office of Disciplinary Counsel is clearly an agency for the
13 purposes of the EAJA. Compare Id.

14 The EAJA's definition of agency mirrors that of the
15 Administrative Procedures Act, Chapter 34.05 RCW. Moen, Id.,
16 719. Likewise, the ELCs also incorporate to some extent the
17 Administrative Procedures Act, Chapter 34.05 RCW. ELC 10.14(e).
18 This confirms that the Bar's Office of Disciplinary Counsel is an
19 agency to which the EAJA applies.

20 The State Bar Act creates the Bar "as an agency of the state."

1 RCW 2.48.010. The Bar now points to two cases that do not involve
2 the EAJA. Ans.Br. 47. Neither of these cases determines the
3 present issue. Graham v. State Bar Association, 86 Wn.2d 624
4 (1976) (holding that “the meaning of the term ‘agency’ depends on
5 its context”). The Bar as a whole (and not just the ODC) is not
6 subject to the Washington State Auditor at least in part because the
7 Bar does not receive any funds from the State. Id., at 629 (noting
8 that “funds needed for operation of the bar association are not
9 provided by legislative appropriation”). As the Bar does not receive
10 funds from the judicial branch, the judicial-branch exception to the
11 EAJA should not apply.

12 The Bar now asks this Court to exclude its prosecutorial function
13 from the scope of the EAJA. Ans.Br. 46-47. Case law has already
14 developed the above test for whether the EAJA applies to an
15 agency. This Court should simply apply the above test to the Bar’s
16 Office of Disciplinary Counsel and find that the EAJA applies here.

17 Pfefer is entitled to attorney fees and litigation expenses under
18 the Washington State Equal Access to Justice Act.⁵

⁵ As attorneys who represent themselves might not be entitled to fees under 42 U.S.C. § 1988, Pfefer withdraws this basis for his request for attorney fees at this time.

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V. Conclusion

To the extent that a RPC includes a requirement of reasonableness, violation of that rule is a question of fact. The hearing officer should not be able to rely on preexisting opinion for these questions of fact. If Discipline of Burtch allows a hearing officer to rely on her own secret preexisting opinion to find that an accused lawyer acted unreasonably and thus violated a RPC, this Court should overrule or limit Burtch.

Similarly, this Court should find that the Bar wrongly withheld documents it was obliged to provide Pfefer, that the credibility findings are error, and that the Bar executed a false certification in violation of ELC 13.9.

For the above reasons, this Court should reverse the Disciplinary Board and the Hearing Officer, dismiss all charges against Pfefer, and award him fees, other expenses, and reasonable attorneys' fees against the Bar under the Equal Access to Justice Act.

Respectfully submitted this 17th day of November 2014.

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DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

- 1. I am the attorney of record for the Plaintiff, am over the age of 18, am competent to testify, and make these statements upon my own personal knowledge.
- 2. I served this document on Craig Bray, at the Washington State Bar Association, 1325 4th Ave #600, Seattle WA 98101, by prepaid postal mail on the date below.

Signed this 17th day of November 2014 in Spokane, Washington.

Matthew F. Pfefer
Matthew F. Pfefer, WSBA #31166
Appellant In Pro Per

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In re Matthew Franklin Pfefer ("Peffer"),
Appellant-Lawyer, Bar No. 31166
No. 201,327-9

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