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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”)  
Respondent Lawyer, Bar No. 31166

**Respondent-Lawyer’s Brief Opposing The  
Disciplinary Board’s Decision**

Matthew F. Pfefer  
WSBA # 31166  
In Pro Per  
10417 E 4<sup>th</sup> Ave Apt 10  
Spokane Valley  
Washington 99206  
(509) 323-5210 Voice  
(206) 350-4756 Digital Fax/Vm  
Matthew@MatthewPfefer.com

 ORIGINAL

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1                   **I.       Assignments of Error (to Findings) (AE)**

2           1. In a blatant misreading of the Rules for Enforcement of Lawyer  
3   Conduct (ELCs), The Hearing Officer allowed the Bar to keep crucial  
4   information from Pfefer by denying his motion for clarification. Bar File (BF)  
5   41. This denial is error.

6           2. After the Bar represented that it was calling no expert witnesses, the  
7   Hearing Officer encouraged the Bar to sneak in undisclosed expert testimony  
8   by denying Pfefer’s motion in limine. BF 52. This denial is error.

9           3. Without any findings as required before disqualification, the Hearing  
10   Officer forced Pfefer to choose between having Mr. Caruso as advocate or  
11   witness by misreading RPC 3.7, which disqualified Mr. Caruso. Transcript  
12   (TR) 36:23-40:3. This disqualification is error.

13          4. Pfefer testified that he was confused about a specific document during a  
14   conversation with a bailiff. TR 156:21-158:16. The Hearing Officer found that  
15   Pfefer testified that “he did not file” a specific document “because he was  
16   ‘confused’” and that such testimony “was not credible.” Finding (FF) 19 (in BF  
17   63). The finding misstates the testimony and is error.

18          5. Pfefer did not tell Mr. Caruso about the offer because he was concerned  
19   that it was ineffective. The Hearing Officer found that Pfefer testified “that he  
20   did not communicate the offer” [impliedly, to the client] “because he thought it

1 was 'ineffective' given the dismissal of the case" and that such testimony "was  
2 not credible." FF 27. The finding misstates the testimony and is error.

3 6. The Hearing Officer implied that the offer's being dated after the  
4 dismissal somehow disproved Pfefer's position that the offer was ineffective.  
5 FF 27. The Hearing Officer's implied finding that the dates of the offer and  
6 dismissal support the validity of the offer is error.

7 7. Pfefer withdrew based primarily on Mr. Caruso's specific directions and  
8 secondarily on the client's flagrant lies to Pfefer and Caruso in the days before  
9 the withdrawal. Exhibit (EX) 823, 446, 770. Finding that Pfefer "was aware of  
10 the inconsistencies well before May 5, 2011" is error. FF 33.

11 8. Pfefer timely filed and the trial court granted a motion for  
12 reconsideration of the dismissal. FF 29; EX 131. The Hearing Officer erred by  
13 omitting this successful motion as a timely good faith effort to rectify  
14 consequences as a mitigating factor under the American Bar Association's  
15 Standards for Imposing Lawyer Sanctions (1991 ed. & Feb. 1992 Supp.) (ABA  
16 Standards) § 9.32(d).

17 9. For Count One, the Hearing Officer found that Pfefer "acted knowingly  
18 and engaged in a pattern of neglect." BF 63:9:17½. This finding is error.

19 10. For Counts One and Two, the Hearing Officer also found injury to the  
20 client. BF 63:9:17½-18½, 63:10:10½. These findings are also error.

1        11. For Counts Two and Three, the Hearing Officer found that Pfefer “acted  
2 knowingly.” BF 63:10:9½, 63:11:1½. These findings are error.

3        12. For Count Three, the Hearing Officer found that the immediate  
4 withdrawal injured the client by depriving her of “an adequate opportunity to  
5 object and/or to find substituting counsel before her case was dismissed” and  
6 injured the legal system “because of the wasted efforts considering pro se  
7 objections that were not properly served and the consumption of court time  
8 dealing with an unrepresented plaintiff,” BF 63:11:1-7, in an imaginary world  
9 where—somehow—none of this would have happened if Pfefer had continued  
10 to represent the client for just ten more days. These findings are error.

11        13. The Disciplinary Board recommended restitution for \$5,834.15. BF 94.  
12 This recommendation was also error.

13        14. The Bar states numerous costs that were not reasonably or necessarily  
14 incurred. BF 97. The Bar later withdrew two costs. BF 100. Board ordered all  
15 of the non-withdrawn costs. BF 101. Ordering costs that were not reasonably or  
16 necessarily incurred was error.

17        15. The Disciplinary Board evidently equated awardable costs under ELC  
18 13.9(b) with the WSBA Expense Policy and accordingly ordered costs of  
19 \$6,698.63. BF 101. This order was error.

20        16. According to ELC 13.9(h), the Disciplinary Board has discretion as to

1 whether to award costs under ELC 13.9(b) or expenses under ELC 13.9(c) and  
2 failed to exercise its discretion. BF 101. This compounded the previous error.

3 **II. Statement of the Case**

4 The client, Ana Ortiz, was in an accident in December of 2005, in February  
5 of 2006, October of 2007, and December of 2008. EX 317 (Deposition, 20:18-  
6 21:8, 24:3-5, 31:23, 33:25.) The client initially hired Mark A. Hammer and  
7 Associates, Inc., to represent her on the February of 2006 accident. EX 402,  
8 705, 707. In June of 2006, the client received a payment in the amount of  
9 \$1,540.00 from her PIP insurer for lost income related to the accident from  
10 February 2006. EX 608. This payment was based on a report from the client's  
11 treating doctor and on a letter from Ms. Miller. EX 401, 402.

12 In May of 2007, Mark Hammer received a letter from the insurance  
13 adjuster. EX 802. The adjuster had reviewed the demand but was unable to  
14 conclude evaluating the injury because she felt that the client may have  
15 received prior chiropractic treatment for which she had no records. EX 802.  
16 The client "was involved in a prior accident 12/4/05, with reported injuries."  
17 EX 802. Mark Hammer advised the adjuster that the client "did not treat for the  
18 December 2005 MVA." EX 802. The adjuster noted that the client met with a  
19 chiropractor on the same day as her 2006 accident, which was at 1:00 pm. EX  
20 802. "It seems unusual that she would obtain an appointment, and proceed so

1 quickly to a doctor with whom she had no prior contact.” EX 802. The adjuster  
2 concluded that the client had “a prior relationship with the doctor involved” and  
3 requested prior medical records so the adjuster could “conclude the evaluation  
4 of her injury.” EX 802.

5 Ms. Miller later referred the client to the respondent’s firm, and the  
6 respondent’s firm agreed to represent the client. In June of 2008, respondent or  
7 his paralegal talked with Dr. Perez. TR 200-201, 564-565. Dr. Perez speaks  
8 fluent Spanish and stated that no MRI had occurred. Dr. Perez indicated that,  
9 because the client had not come to him with a chief complaint related to the  
10 2006 accident, he never evaluated her for injuries from the accident. Dr. Perez  
11 observed that he has not had anyone else having problems getting to  
12 appointments like the client had. EX 715. After this conversation, respondent’s  
13 firm also wrote the client in English and Spanish that explained what an MRI  
14 is, why it is important, and what she should do to try to obtain one. EX 305.  
15 Respondent later wrote Dr. Perez about the client’s alleging “an increase in  
16 numbness and spasms in her right leg.” EX 727.

17 The deadline to file the “statement of arbitrability” or, alternatively, to file  
18 the “confirmation of joinder” was July 21, 2009. The relevant difference  
19 between the two is the dollar amount of the claim. When the client has  
20 symptoms that do not match her diagnoses, the attorney and the client cannot

1 actually know what is medically wrong with the client. No one can be  
2 confident of actual knowledge in this situation. The above factual situation is  
3 the reason why a demand to the insurance company was not presented. This  
4 factual situation is also a reason to request continuance in 2010. EX 113.

5 In November 2009, Pfefer wrote Dr. Perez about whether the client's  
6 accident caused breast lumps the client was experiencing. EX 742. Dr. Perez  
7 stated that a "collision with a steering wheel or seat belt could exacerbate these"  
8 issues with breast lumps possibly. EX 741. Dr. Perez declined to opine that the  
9 causal relationship existed on a more-probable-than-not basis. EX 741.

10 Pfefer asked Dr. Perez in writing to address the apparent disconnect  
11 between the client's diagnoses and her symptoms. EX 743. Dr. Perez advised  
12 Pfefer by letter that he had referred the client for neurology to find out the cause  
13 of her alleged migraines. EX 744.

14 In February 2011, Pfefer wrote Dr. Perez by email that Pfefer "would hate  
15 to have something be diagnosed long after her legal case is settled, and have  
16 [the client] Ana barred from recovering for damages that are diagnosed too  
17 late." EX 752. Dr. Perez was also asked to apportion her current injuries  
18 between two of her accidents, from 2006 and 2007. EX 752. The email omitted  
19 the 2005 or 2008 accidents.

20 The trial court sent a notice that trial would not proceed without mediation:

1 “If your case is subject to ADR/mediation, it will not be sent out for trial, if you  
2 have not completed it, or unless the court has signed off on an order allowing it  
3 to be waived.” EX 125 (Exhibit A). No order waived ADR.

4 Despite the fact that the trial court had clearly stated that trial would not  
5 occur without mediation, the fact that the trial calendar did not include this  
6 case, and the fact that respondent received a message that the trial was not  
7 going to start on March 21, 2011—when no one appeared for the trial, the trial  
8 court dismissed the case. EX 119. Pfefer timely filed a motion for  
9 reconsideration on March 31, 2011. EX 120. The trial court granted the motion  
10 for reconsideration and reinstated the case. EX 131.

11 On April 14, 2006, Annie Miller, as President of NEXT, wrote a letter  
12 about the client’s wages and employment status. EX 401. Miller states that the  
13 client works in the “shipping department” and has “to lift at least 100 pounds.”  
14 EX 401. Miller also states that the client’s “last check was for \$500.00 which  
15 reflects her \$10.00 per hour salary for 50 hours that week.” EX 401. Miller  
16 states that the client “generally averages 45-50 hours each week.” EX 401.

17 The PIP insurer paid the client \$1,540 for lost income. EX 608.

18 The client stated in her deposition that she was paid \$15.00 per hour. EX  
19 317 (Deposition, 14:22). During the deposition, the defense asked the client if  
20 she ever worked “in a shipping department.” EX 317, 18:20. The client denied

1 that she ever worked in a shipping department. EX 317, 18:24. The defense  
2 also asked the client if she ever worked “for anyone in a capacity that required  
3 [her] to lift 100 pounds.” EX 317, 18:25-19:1. The client denied ever doing so.  
4 EX 317, 19:2. When the defense asked the client how much she weighed, the  
5 answer was, “I think it’s 105 pounds. I’m not sure.” EX 317, 19:3-4. During  
6 Pfefer’s inquiry, the client still could not provide an answer to help reconcile  
7 her work in the “shipping department” (as Ms. Miller wrote) with her  
8 testimony at the deposition. EX 317, 45:13-25.

9 Ms. Miller provided a printout of “Expenses by Vender Detail” for “Anna  
10 Ortiz-Segura.” EX 432. The total paid to the client in 2004 was \$1,643.00. EX  
11 432. The total paid to the client in 2005 was \$2,050.00. EX 432. The total paid  
12 to the client in 2006 was \$2,546.71. EX 432. The total paid to the client in 2007  
13 was \$1,500.00. EX 432. The printout does not show any deductions from the  
14 amount paid and shows no single check in the amount of \$500.00. EX 432.

15 Pfefer asked Miller to explain these apparent inconsistencies. EX 821.  
16 Miller’s response was that Miller often “paid for gas, groceries, rent, phone bill,  
17 power etc” for the client which Miller did not deduct “for tax reasons.” EX 822.  
18 Miller says that she “would say on average” that Miller has paid the client  
19 “about \$4,000 per year for working for me” and that this “is the monetary loss  
20 she [the client] has experienced.” EX 822. Miller then asked, “How would you

1 like me to state this?" EX 822. Miller concluded that the client's inability to "do  
2 any of the lifting she previously did for me while working on inventory in our  
3 chart area" led Miller to hire someone else to do the client's job. EX 822.

4 Pfefer sent a motion in limine to the defense on March 8, 2011. EX 526.  
5 Among other things, the motion cited Salas v. Hi-Tech Erectors, 168 Wn.2d  
6 665 (2010) for the argument that the client's "alleged possible undocumented  
7 status" should be excluded. EX 526 at 4.

8 Pfefer filed a second case for the client from an accident in October of  
9 2007. EX 819. This occurred in October of 2010. EX 819. Counsel timely  
10 accomplished the service on the corporate defendant in this second case for the  
11 client in late January 2010. EX 820.

12 With Ms. Miller present, the client stated on May 4, 2011 that her  
13 chiropractor had told her that counsel told him not to treat the client. With Ms.  
14 Miller present, the client also stated that Pfefer told her, "Don't go to the chiro  
15 any more." Pfefer denies both of these statements of the client.

16 On May 4, 2011, the chiropractor told Mr. Caruso and Pfefer that Pfefer  
17 never made this statement to him. The chiropractor followed up with a chart  
18 note stating that no attorney told him to stop treating the client. EX 823. When  
19 confronted with this statement, Ms. Miller advised "that the person Matthew  
20 spoke with is [the chiropractor's] insurance coordinator, Dana." EX 446.

1           When Mr. Caruso and Pfefer talked with Dana Verghetti-Ebersole on May  
2   5, 2011, she stated that they would continue to treat the client but would not  
3   relate any more treatment to the 2006 accident. Ms. Ebersole stated that “no  
4   one walks out of my door of my clinic who needs care” without being treated.  
5   Ms. Ebersole explicitly denied that anyone at Pfefer’s office ever told them to  
6   stop seeing or treating the client. EX 770. What the chiropractor told Mr.  
7   Caruso and Pfefer and what his insurance coordinator told Mr. Caruso and  
8   Pfefer are completely inconsistent with what the client and Ms. Miller stated.

9           The trial court dismissed Ortiz’ case on May 19, 2011. EX 138. Ortiz’  
10   claim accrued on or about February 16, 2006. BF 63 (FF 2). Pfefer filed Ortiz’  
11   suit on February 10, 2009. FF 8. Ortiz has three years to commence her suit.  
12   RCW 4.16.080. For the entire pendency of her lawsuit as well as between the  
13   first dismissal and the reinstatement, the statute of limitations was tolled. See  
14   RCW 4.16.170. Upon dismissal, she had almost a full calendar week to re-file  
15   her complaint. At that time, Miller had a copy of Ortiz’ complaint. EX 409; TR  
16   661-2. Based on the above, Ortiz could have pursued her claims against the  
17   defendant even after dismissal.

18           At the hearing, two witnesses raised concerns about their obligations under  
19   HIPAA. TR 434, 447-8, 504. The Hearing Officer assumed that someone  
20   issued a subpoena to these witnesses. TR 434, 504. With that assumption, the

1 Hearing Officer rendered legal advice to the concerned witnesses that their  
2 testifying would not violate HIPAA. TR 447-8, 504.

3 **III. Argument**

4 In a criminal case, the prosecution “may prosecute with earnestness and  
5 vigor—indeed, he should do so. But, while he may strike hard blows, he is not  
6 at liberty to strike foul ones.” Berger v. United States, 295 U.S. 78, 88 (1935).  
7 Lawyer discipline proceedings “are adversary proceedings of a quasi-  
8 criminal nature.” In re Ruffalo, 390 U.S. 544, 551 (1968). Among other  
9 things, this implies that the duties of a prosecutor in a criminal case as outlined  
10 above also apply to disciplinary counsel.

11 **A. The Hearing Officer’s Procedural Errors Before and During Hearing**

12 1. Pfefer IS ENTITLED TO DISCOVER THE BAR’S EXPERTS AND EXHIBITS  
13 BEFORE THE COMPLETION OF DISCOVERY. AE 1.

14 “After a formal complaint is filed, the parties have the right to other  
15 discovery under the Superior Court Civil Rules.” ELC 10.11(c). “The parties  
16 should cooperate in mutual informal exchange of relevant non-privileged  
17 information to facilitate expeditious, economical, and fair resolution of the  
18 case.” ELC 10.11(a).

19 The Bar designated witnesses on March 11, March 21, and May 9, 2013.  
20 BF 38:2. None of these designations stated whether any of the witnesses were  
21 lay witnesses or experts. BF 42:3:1-3. Neither the rule nor the scheduling order

1 required that a party designate whether the witnesses were lay witnesses or  
2 experts. ELC 10.12(c)1; BF 42:2:15-22.

3 On April 22, 2013, Pfefer requested information about the Bar's experts.  
4 BF 38:2-3. On May 9, 2013, the Bar declined to answer regarding its experts  
5 entirely. BF 38:2:13 (date), 38:3:9-11. In declining, the Bar stated, Pfefer was  
6 not entitled to answers until the deadline in the schedule order. BF 38:3:9-11.

7 On the same day, the Bar provided its third witness list, still hiding whether  
8 any witnesses were lay or expert witnesses. BF 38:2; 42:3:1-3. Based on this,  
9 the Bar's evident position is that it can hide its expert witnesses until witness  
10 summaries are due under ELC 10.12(c)5, often 2 weeks before the hearing!  
11 Nearly 3 weeks later, the Bar states that it does not intend to "call any expert  
12 witnesses at hearing." BF 39:4:21-22.

13 The deadlines under the ELC/Scheduling Order and under the King County  
14 Local Rules serve similar purposes. The King County Local Rules mandate a  
15 case schedule to set a deadline for witness disclosure. LCR 26(b). This rule and  
16 the case schedule do "not modify a party's responsibility . . . to comply with  
17 discovery before the deadlines set by this rule." LCR 26(e): see also BF 42:2.

18 Not only did the Bar delay stating whether its witnesses were lay or expert,  
19 but the Bar also delayed providing its documentary evidence. On April 22,  
20 2013, Pfefer requested information about the Bar's documents. BF 38:14-16.

1 On May 9, 2013, the Bar declined to answer regarding its documents entirely.  
2 BF 38:2:13 (date), 38:2:17-3:3. The Bar's evident position is that it can delay  
3 providing its documents until exchanging exhibits in ELC 10.12(c)5.

4 The Bar did not actually disclose its documents until the exhibits exchange.  
5 BF 58. Pfefer received these documents after August 12, 2013 (BF 58), 4  
6 weeks after discovery closed (BF 40). Pfefer suffers the heavy prejudice of  
7 being prevented from conducting any discovery on documents therein that he  
8 had never seen before! This allowed the Bar to ambush Pfefer.

9 The Hearing Officer denied Pfefer's motion for clarification. BF 41. This  
10 denial implies that the Hearing Officer reads the relationship between the  
11 ELC/Scheduling Order and discovery as different from the relationship  
12 between the King County Local Rules/Scheduling Order and discovery.  
13 Neither the Bar nor the Hearing Officer has given any reason to read these  
14 relationships differently. This Court should interpret the ELCs and Scheduling  
15 Order consistent with the King County Local Rules, recognize that the Hearing  
16 Officer's denial of Pfefer's motion for clarification is error, and find that Pfefer  
17 suffers serious prejudice from the Hearing Officer's erroneous ruling.

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

3 Pfefer moved to protect himself from improper lay opinion and from  
4 argument that requires expert opinion testimony. BF 49. The Bar represented  
5 that it does not intend to “call any expert witnesses at hearing.” BF 39:4:21-22.  
6 For this reason, the Hearing Officer should have held the Bar to its own  
7 representation by excluding any expert opinion testimony for the Bar.

8 Rather than agreeing to the motion or even addressing the numerous  
9 specific concerns (BF 49:2:13-3:5), the Bar kept trying to confuse the real issue  
10 (BF 53). The Bar falsely states that the respondent’s objections are “general.”  
11 BF 53:2:22-3:3. The Bar rewrites Pfefer’s argument as saying that its witnesses  
12 have a “supposed lack of qualification” (BF 53:3:8) to be experts, as if the Bar  
13 now intends to call an expert witness! The Bar also pretends that the concern is  
14 basically for “questions *he* anticipates.” BF 53:3:8-9 (emphasis in original).  
15 Instead, Pfefer’s concern is basically that the Bar has to have expert opinion  
16 testimony to support many of its specific charges but has inexplicably failed to  
17 provide any experts!

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

1 3. COUNSEL AT A DISCIPLINARY HEARING MAY ALSO TESTIFY. AE 3.

2 At the hearing, Pfefer appears with Robert Caruso as co-counsel. TR  
3 26:19-21. Mr. Caruso raises concerns about witnesses' incriminating  
4 themselves. TR 26:21-27:15. The Hearing Officer delivers his opening script.  
5 TR 27:19-30:7. The Bar discusses exhibits, dismisses part of Count 3, and then  
6 objects to "Mr. Caruso serving as co-counsel" (TR 36:23-25) on the basis that  
7 Mr. Caruso cannot be a witness and "also be co-counsel" (TR 37:3-4). Pfefer  
8 begins to address the objection by stating that it raises "three issues." TR 37:7-  
9 8. Pfefer states his first point and is unable to proceed to explain why it applies  
10 in this situation before the Hearing Officer "interrupt[s]" him. TR 37:10-17.

11 "A lawyer shall not act as advocate at a trial in which the lawyer is likely to  
12 be a necessary witness unless: (1) the testimony relates to an uncontested issue;  
13 [or] (2) the testimony relates to the nature and value of legal services rendered  
14 in the case [.]" RPC 3.7(a) (referred to at TR 37:20-38:1).

15 In California, a lawyer is prohibited from acting "as an advocate before a  
16 jury which will hear testimony" from the lawyer unless an exception is met.  
17 California RPC 5-210 (emphasis added). That rule does not apply to a bench  
18 hearing or to a bench trial. In Texas, the similar rule involves "a contemplated  
19 or pending adjudicatory proceeding." Texas RPC 3.08 (applying also to motion  
20 practice and briefing). With these contrasts as context, analysis under RPC 3.7

1 raises two distinct questions: 1) Is the lawyer-witness advocating at an **actual**  
2 **trial**? 2) How many exceptions apply?

3 Although the ELCs nowhere call the disciplinary hearing a “trial,” the  
4 Hearing Officer states unqualifiedly that the hearing “is a trial.” TR 37:11. **The**  
5 **Hearing Officer is flat wrong.**

6 First, with few exceptions, the rules of evidence govern an actual trial. A  
7 small claims trial is an exception. ER 1101(c)(3); Chapter 12.40 RCW  
8 (referring to a small claims hearing as a trial). Because a party may not have  
9 counsel in a small claims trial, RCW 12.40.080(1), RPC 3.7 is not a concern.  
10 The ERs do not control a disciplinary proceeding. ELC 10.14(d)(2) (requiring  
11 reference to the ERs as mere guidelines); TR 29:14-17 (Hearing Officer); BR  
12 53:1:19-2:9. Because the ERs govern actual trials and do not control  
13 disciplinary proceedings, the disciplinary hearing is not an actual trial.

14 Second, the ELCs nowhere call the disciplinary hearing a trial. ELC 10.13,  
15 titled “Disciplinary Hearing,” omits the word “trial.” Similarly, ELC 10.14,  
16 titled “Evidence and Burden of Proof,” also does not use the word “trial.”

17 If the ELC’s drafters intended the participants to consider a disciplinary  
18 hearing as a trial, the ELC’s drafters could have stated so. Additionally, the  
19 Hearing Officer stated that he “would expect the ordinary and usual  
20 cooperation of counsel that would be given if a Superior Court were conducting

1 this hearing,” TR 28:22-24, tacitly conceding the hearing is not an actual trial.

2 A disciplinary hearing is not an actual trial. Thus, RPC 3.7 does not apply.

3 If the disciplinary hearing is somehow an actual trial [*arguendo*], Mr.  
4 Caruso may advocate for the respondent if “the testimony relates to an  
5 uncontested issue.” RPC 3.7(a)(1). To exclude this exception, the Bar would  
6 have to identify which matter(s) in the testimony of Mr. Caruso the Bar  
7 contests. The Bar has not identified any such matters.

8 If the disciplinary hearing is somehow an actual trial [*arguendo*], under  
9 RPC 3.7(a)(2) Mr. Caruso may advocate if “the testimony relates to the nature  
10 and value of legal services rendered.” Mr. Caruso’s testimony centrally  
11 concerned the nature of the legal services he and the respondent rendered for  
12 the client. This exception also allows Mr. Caruso to testify and advocate.

13 The rationale of RPC 3.7 is evidently a concern for a lawyer’s arguing a  
14 matter when the lawyer’s testifying puts the lawyer’s credibility at issue. See  
15 Informal Op. 1529 from the ABA Commission on Ethics and Professional  
16 Responsibility. This rationale does not apply to our situation. Instead, the  
17 record only shows Mr. Caruso’s concern regarding Pfefer’s testimony (TR 38-  
18 39) and Mr. Caruso’s dialogue with Pfefer regarding his examination of Miller  
19 (TR 427). Indeed, Pfefer only wanted Mr. Caruso to examine witnesses and  
20 state related objections. Mr. Caruso simply would not be arguing his own

1 credibility. This does not raise the concerns that inform Informal Op. 1529.

2 To disqualify an attorney under RPC 3.7, the moving party must show

3 1) “that the attorney will give evidence material to the determination of the  
4 issues being litigated,”

5 2) “that the evidence is unobtainable elsewhere, and”

6 3) “that the testimony is or may be prejudicial to the testifying attorney’s  
7 client.”<sup>1</sup>

8 Disqualification of an attorney under RPC 3.7 requires application of the  
9 above standard and the entry of “appropriate findings.”<sup>2</sup> Additionally, the Bar  
10 neglected to identify any prejudice (possible or actual) to Pfefer from Mr.  
11 Caruso’s testimony, which is the third element of the test.

12 The Bar argues that the Hearing Officer did not state his forcing the choice  
13 between Mr. Caruso’s advocacy and his testimony as a disqualification. BF  
14 66:2:19-3:3. But the Hearing Officer’s framing his disqualification as Pfefer’s  
15 choice does not somehow undisqualify Mr. Caruso. The timing of Mr.  
16 Caruso’s testimony helps clarify this point.

17 After Mr. Caruso’s testimony, Pfefer resumed the stand. TR 471-489  
18 (Caruso testimony), 506-562 (same), 563. During the Bar’s cross-examination  
19 of Pfefer (after Mr. Caruso testified), objection by Mr. Caruso to any inquiry  
20 would provoke an explicit ruling on disqualification. TR 595. In the colloquy

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<sup>1</sup> PUD 1 v. International Insurance Co., 124 Wn.2d 789, 812 (1994) (quoting Cottonwood Estates, Inc. v. Paradise Builders, Inc., 128 Ariz. 99, 105 (1981)) (emphasis added).

<sup>2</sup> Am. States Ins. Co. v. Nammathao, 153 Wn.App. 461, 467 (¶12) (2009).

1 about exhibits with Pfefer still at the witness table, Mr. Caruso could have  
2 argued objections to the Bar's exhibits, which would also provoke an explicit  
3 ruling on disqualification. TR 614. As the Hearing Officer had already stated  
4 his position, such objection or argument by Mr. Caruso would have been futile.  
5 One is not required to engage in a futile act.

6 The Hearing Officer disqualified Mr. Caruso from representing Pfefer as  
7 Pfefer's chosen co-counsel by forcing Pfefer to elect between Mr. Caruso as  
8 advocate and as a witness. BF 63:2:17-3:1. The Hearing Officer's  
9 disqualification of Robert Caruso without the required findings was error.

10 **B. The Hearing Officer's Erroneous Credibility Findings AE 4-6**

11 1. CONFUSION DID NOT PREVENT THE FILING OF ANY DOCUMENT. AE 4.

12 The Bar asked if Pfefer had a telephone call from a "bailiff on February  
13 28th, 2011?" TR 156. The Bar asked why the bailiff called. TR 157. Pfefer  
14 stated that they "discussed the status" of a document. TR 157. The Bar asked  
15 what Pfefer told the bailiff. TR 157. Discussing what Pfefer told the bailiff,  
16 Pfefer mentioned twice that he was "confused" in the context of a specific  
17 phone call. TR 157. When the Bar later tried to broaden the context, Pfefer  
18 emphasized that the Bar "had asked what we talked about." TR 158:11-12.

19 The Hearing Officer added to the testimony when he found that Pfefer  
20 testified that "he did not file" a specific document "because he was 'confused'"

1 and that such testimony “was not credible.” FF 19. Because the finding  
2 misstates the testimony, substantial evidence does not support the finding. For  
3 this reason, this Court should reject this erroneous finding and give no weight  
4 to this credibility determination from an incorrect statement of the testimony.

5 2. FINDING 27 MISSTATES THE TESTIMONY. AE 5.

6 Pfefer testified that he “didn’t discuss the offer letter [with Mr. Caruso]  
7 because the dismissal suggested to [the respondent] that the offer wasn’t  
8 effective.” TR 586:20-23. Pfefer also argued in closing that the offer was  
9 ineffective. TR 647:14, 651:18-19. The Hearing Officer correctly found that the  
10 “Respondent did not communicate Ms. Cole’s offer to Ortiz.” FF 26. In  
11 context, the Hearing Officer’s next finding talks about why Pfefer did not  
12 communicate the offer to the client. The Hearing Officer found that Pfefer  
13 testified “that he did not communicate the offer [to the client] because he  
14 thought it was ‘ineffective’ given the dismissal of the case” and that such  
15 testimony “was not credible.” FF 27.

16 Pfefer’s testimony explained why he did not discuss the offer with Mr.  
17 Caruso. The testimony is silent about why Pfefer did not communicate the offer  
18 to the client. For this reason, Finding 27 misstates the testimony.

19 This finding states Pfefer’s testimony incorrectly and finds that incorrect  
20 statement of the respondent’s testimony to be “not credible.” As this credibility

1 determination is based on an incorrect statement of the testimony, substantial  
2 evidence does not support the finding. This Court should give no weight to this  
3 credibility determination and should reject this erroneous finding that  
4 incorrectly states the testimony.

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

6 Law is a “technical field beyond the knowledge of the ordinary person.”<sup>3</sup>  
7 The rule “now appears to be” “that expert evidence is required in a legal  
8 malpractice case to establish the attorney’s breach of his duty of care.”<sup>4</sup> The  
9 determination of breach of an attorney’s duty of care (or reasonableness) in a  
10 malpractice case is indistinguishable from the determination of the  
11 reasonableness of an attorney’s conduct in a discipline case. The same rule  
12 requiring expert evidence should apply to discipline cases.

13 This rule requiring expert evidence does not apply “where the breach or  
14 lack thereof” “may be determined by the court as a matter of law” or where it  
15 “is within the ordinary knowledge and experience of laymen.”<sup>5</sup> A finder of fact  
16 may find that the issue is within the ordinary knowledge and experience of a

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<sup>3</sup> Walker v. Bangs, 92 Wn.2d 854, 857 (1979) (citing Lynch v. Republic Publishing Co., 40 Wn.2d 379, 389 (1952)).

<sup>4</sup> Admissibility and Necessity of Expert Evidence As To Standards of Practice and Negligence in Malpractice Action Against Attorney, 14 ALR 4<sup>th</sup> 170, 173 § 2[a] (1982).

<sup>5</sup> Id.; accord, Hansen v. Wightman, 14 Wn.App. 78, 93-94 (1975).

1 lay person.<sup>6</sup> “By its very nature, an action for professional negligence in the  
2 preparation and conduct of specific litigation involves matters calling for  
3 special skill or knowledge—proper subjects for expert testimony.”<sup>7</sup> Even  
4 missing a deadline can require expert opinion.<sup>8</sup>

5 1. THE VIOLATION ALLEGED IN COUNT 1 SHOULD REQUIRE EXPERT  
6 TESTIMONY.

7 An attorney left a case dormant for six years resulting in its dismissal for  
8 failure to prosecute. Lenius v. King, 294 N.W.2d 912, 913 (S.D. 1980). The  
9 court required an expert witness on behalf of his former client in a malpractice  
10 case against him. Id. at 914-5. Pfefer is similarly charged with failure to  
11 prosecute. By analogy, an expert witness should also be required in a discipline  
12 case. Because the Bar failed to produce an expert witness on its charge that  
13 Pfefer failed to prosecute the case, the Hearing Officer’s conclusion that Pfefer  
14 committed the violation alleged in Count One was error. For the same reason,  
15 this Court should dismiss Count One in its entirety.

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<sup>6</sup> Compare Lenius v. King, 294 N.W.2d 912, 914 (S.D. 1980) (where a trial court “concluded that the issue was sufficiently complex so that the applicable standard of care must be established by expert testimony”).

<sup>7</sup> Walker, 92 Wn.2d at 857-858 (citing Lynch; ER 702).

<sup>8</sup> An attorney had thirty days to appeal and appealed on the thirtieth day from the day the order was entered on the docket but the thirty-first day from the day the order was entered by the judge. Brainerd v. Kates, 386 N.E.2d 586, 588, 68 Ill.App.3d 781 (1979). In that case, the appellate court came to the “considered conclusion that the situation before us was such that expert testimony was essential as a part of plaintiff’s case.” Id., 386 N.E.2d at 590.

1 2. THE VIOLATION ALLEGED IN COUNT 2 SHOULD REQUIRE EXPERT  
2 TESTIMONY.

3 An attorney did not “discuss a settlement offer” with plaintiff in “the  
4 amount of \$75,000.00.” Dorf v. Relles, 355 F.2d 488, 490 (7<sup>th</sup> Cir. 1966). The  
5 same attorney also did not “conduct proper negotiations for settlement with  
6 opposing counsel” and did not “keep in communication concerning such  
7 negotiations with plaintiff.” Id. The appellate court reversed for dismissal the  
8 judgment on the jury verdict. Id., at 494 (applying Illinois law). The appellate  
9 court stated that “the rule which requires expert testimony in a suit such as this  
10 is wholesome.” Id. Pfefer is also charged with failure to convey an offer to his  
11 client. By analogy, a similar discipline case should require an expert witness.

12 The Bar claims that Pfefer should inform the client of her case’s dismissal  
13 while the successful motion for reconsideration was pending and after the  
14 client’s agent found the dismissal. This claim is outside the scope of the  
15 knowledge of an ordinary lay person and should require expert testimony.

16 Because the Bar failed to produce an expert witness on its charge that  
17 Pfefer failed to convey an offer to his client and to inform the client of the  
18 dismissal of her case, the Hearing Officer’s conclusion that Pfefer committed  
19 the violation alleged in Count Two was error. For the same reason, this Court  
20 should dismiss Count Two.

1 3. THE VIOLATION ALLEGED IN COUNT 3 SHOULD REQUIRE EXPERT  
2 TESTIMONY.

3 Where a former client in a legal malpractice case for alleged improper  
4 withdrawal provided no expert opinion testimony, the appellate court affirmed  
5 the dismissal of the suit.<sup>9</sup> Pfefer is likewise charged with an improper  
6 withdrawal. By analogy, an expert witness should also be required in a  
7 discipline case on this issue. Without an expert witness to support the Bar's  
8 charge that Pfefer's withdrawal was improper, the Hearing Officer's conclusion  
9 that Pfefer committed the violations alleged in Count Three was error. For the  
10 same reason, this Court should dismiss Count Three.

11 4. THE HEARING OFFICER MAY NOT RELY ON HIS OWN KNOWLEDGE OR  
12 OPINION IN VIOLATION OF THE RULES OF EVIDENCE REGARDING EXPERT  
13 OPINION AND JUDICIAL TESTIMONY.

14 The "hearing officer shall refer to the Washington Rules of Evidence as  
15 guidelines for evidentiary rulings." ELC 10.14(d)(2). The ERs do not apply for  
16 "evidence, including hearsay evidence," that "in the hearing officer's  
17 judgment," is "the kind of evidence on which reasonably prudent persons are  
18 accustomed to rely in the conduct of their affairs." ELC 10.14(d)(1). "The  
19 judge presiding at the trial may not testify in that trial as a witness." ER 605.  
20 ELC 10.14(d)(1) contemplates evidence outside the hearing officer and not

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<sup>9</sup> Patterson v. Flint, 356 S.E.2d 670, 672, 182 Ga.App. 650 (1987) (cert. denied 98 L.Ed.2d 218, 108 S.Ct. 260).

1 internal to him. For this reason, the license granted by ELC 10.14(d)(1) for the  
2 Hearing Officer to exceed the scope of the ERs does not apply to ER 605. ER  
3 605 should apply to disciplinary proceedings.

4 Here is a case that illustrates a violation of ER 605. Judge Ringold signed  
5 an order, signed an affidavit explaining the order, and then heard a motion for  
6 reconsideration of his order where he considered his own affidavit to evaluate  
7 his exercise of discretion. State Ex Rel. Carroll v. Junker, 79 Wn.2d 12, 16, 17-  
8 19, 21 (1971). Determination “of whether that discretion had been soundly  
9 exercised ought not have been made by the same judge who executed the  
10 affidavit.” Id. The court’s retention of jurisdiction of the cause was error, and  
11 another department should have heard the matter. Id. at 21-22.

12 Similarly, the Hearing Officer improperly considered his own knowledge  
13 and experience without any supportive expert testimony in concluding that  
14 Pfefer committed the charged violations. “No objection need be made in order  
15 to preserve the point.” ER 605.

16 The fact-finder should not act “as an expert” because the parties cannot  
17 “test the weight and reliability” of the fact-finder’s opinion.<sup>10</sup> Similarly, if the  
18 fact-finder’s opinion “is based upon its personal experience, its evidentiary  
19 foundation will not be” available for review or “subject to cross examination by

1 counsel.” Id. Allowing a fact-finder to act as an expert is improper. Id.

2 Because the Hearing Officer acted as his own expert in this disciplinary  
3 proceeding, the Hearing Officer violated ER 605, which was error. Due to the  
4 Hearing Officer’s violation of ER 605, this Court should dismiss all of the  
5 counts against Pfefer.

6 5 THE HEARING OFFICER MAY NOT RELY ON HIS OWN KNOWLEDGE OR  
7 OPINION IN VIOLATION OF THE RESPONDENT’S RIGHTS TO DUE PROCESS.

8 “Attorney disciplinary hearings must meet the requirements of due  
9 process.”<sup>11</sup> To determine

10 what process is due, a court weighs (1) the private interest affected by  
11 the official action, (2) the risk of an erroneous deprivation of that  
12 interest through the procedures used, (3) the probable value of  
13 additional procedural safeguards, and (4) the government interest  
14 involved.<sup>12</sup>

15 The Hearing Officer’s applying his knowledge and opinion as an expert  
16 against Pfefer raises various due process problems.

17 First, a respondent generally has a right before the hearing to conduct  
18 discovery about the witnesses against him or her and to ascertain what their  
19 opinions are. ELC 10.11. As with an administrative proceeding for a dangerous

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<sup>10</sup> Cleckner v. Dale, 719 S.W.2d 535, 542 (Tenn.App. 1986) (about a trial judge hearing a legal malpractice case).

<sup>11</sup> In Re Meade, 103 Wn.2d 374, 381 (1985) (citing In Re Ruffalo, 390 U.S. 544, 550, 20 L. Ed. 2d 117, 88 S. Ct. 1222 (1968); In Re Metzenbaum, 22 Wn.2d 75, 79 (1944)).

<sup>12</sup> Mansour v. King County, 131 Wn. App. 255, 263-264, ¶ 10 (2006) (citing Mathews v. Eldridge, 424 U.S. 319, 333, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)).

1 dog, the respondent is entitled to conduct discovery of the case against him.<sup>13</sup>  
2 Pfefer has a right to conduct discovery of the knowledge and opinion of the  
3 Hearing Officer in the case against him.

4 If the hearing officer is becoming a witness against Pfefer or providing an  
5 opinion against Pfefer, how is Pfefer supposed to be able to conduct discovery  
6 of the hearing officer's opinion? The situation prevented Pfefer from doing so.

7 Second, a respondent generally has a right to cross-examine witnesses  
8 against him at the hearing and question them about their opinion. ELC  
9 10.13(d). When the hearing officer was a witness against Pfefer at the hearing,  
10 how was Pfefer supposed to be able to examine the hearing officer?

11 "A determination made by the trial judge based upon a private investigation  
12 by the court or based upon private knowledge of the court, untested by cross-  
13 examination, or any of the rules of evidence constitutes a denial of due process  
14 of law." People v. Wallenberg, 181 N.E.2d 143, 145 (Ill. 1962) (citations  
15 omitted). The Bar and the Hearing Officer identify no basis to distinguish a  
16 judge as in Wallenberg from a hearing officer in a disciplinary proceeding. The  
17 same rule applies.

18 Third, Pfefer has a right to know the evidence used against him. The  
19 Hearing Officer used against Pfefer the evidence of the Hearing Officer's own

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<sup>13</sup> See Mansour v. King County, 131 Wn. App. 255, 263-264, ¶¶ 21 & 22 (2006);

1 secret opinion that he had “secretly collected and never disclosed.” Ohio Bell  
2 Telephone Co. v. Public Utilities Comm’n of Ohio, 301 U.S. 292, 300 (1937).  
3 Pfefer does not know the basis of the Hearing Officer’s opinion today. Pfefer  
4 certainly has received no disclosure of any related specifics. “The requirement  
5 that . . . specific reference be made is essential to the preservation of the  
6 substantial rights of the parties.” United States v. Abilene & Southern Rwy Co.,  
7 265 U.S. 274, 289 (1924). “This is not a fair hearing essential to due process. It  
8 is condemnation without trial.” Ohio Bell, 301 U.S. at 300.

9 Fourth, Pfefer has a right to know the basis of the decision against him.  
10 Even now we do not know “the particular or evidential facts” on which the  
11 Hearing Officer based his secret opinion. Ohio Bell, at 302. “Not only are the  
12 fact unknown; there is no way to find them out.” Id. The Hearing Officer  
13 withheld “from the record the evidential facts [he] has gathered here and there.”  
14 Id. at 303. His secret opinion arises as if he said that he has reviewed the  
15 lessons of his legal experience, “and they teach him thus and so.” Id. “This will  
16 never do if hearings and appeals are to be more than empty forms.” Id.

17 In reviewing this matter, the Disciplinary Board committed the same error.  
18 The Board took the word of the Hearing Officer “as to the outcome of a secret  
19 investigation, and let it go at that.” Ohio Bell, at 304. Like the Hearing Officer

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compare Id., at ¶ 7.

1 and the Disciplinary Board, “Regulatory commissions have been invested with  
2 broad powers within the sphere of duty assigned to them by law. Even in quasi-  
3 judicial proceedings, their informed and expert judgment exacts and receives a  
4 proper deference from courts when it has been reached with due submission to  
5 constitutional restraints.” Id. (citations omitted).

6 The hearing officer’s reliance on his own expert opinion violated Pfefer’s  
7 due process rights to conduct pre-hearing discovery, to examine witnesses  
8 against him during the hearing, to know the evidence used against him, and to  
9 know the basis of the decision against him.

10 Because the Hearing Officer acted as his own expert in this disciplinary  
11 proceeding, he violated Pfefer’s due process rights, which violations were error.  
12 Due to the Hearing Officer’s erroneous violation of Pfefer’s due process rights,  
13 this Court should dismiss all of the counts against him.

14 **D. No Reason to Communicate Dismissal due to Client’s Discovery**

15 On April 5, 2011, Ms. Miller asks for records for a meeting with client and  
16 Mr. Ganz that day. EX 439. Ms. Miller later states that they found the dismissal  
17 when they met with Mr. Ganz. EX 824. Ms. Miller discovered the dismissal on  
18 April 5, 2011, less than a week after the motion for reconsideration was filed  
19 and less than two weeks after Pfefer found the dismissal.

20 As the client’s agent and conduit (Miller) discovered the dismissal on her

1 own, Pfefer has no further duty to inform the client or her conduit about the  
2 dismissal, of a fact she already knew.

3 According to the Bar, Pfefer should have informed the client that the trial  
4 court wrongfully dismissed her case. The Bar neglects to provide a reason to  
5 discern when such informing should occur. The initial decision was whether to  
6 pursue reconsideration and reinstatement. The client would want her case  
7 reinstated. For this reason, Pfefer did not need to consult with the client about  
8 whether he should seek reinstatement.

9 Moving for reinstatement did not require informed consent under RPC 1.2,  
10 RPC 1.4(a)(1), RPC 1.4(b), or otherwise and was not subject to consultation  
11 regarding means to achieve the client's objectives under RPC 1.4(a)(2) or  
12 elsewhere. Pfefer does have a duty to "keep the client reasonably informed  
13 about the status of the matter" under RPC 1.4(a)(3) and to "promptly comply  
14 with reasonable requests for information" under RPC 1.4(a)(4).

15 A client's comprehension difficulties and the likelihood of a client reacting  
16 imprudently may limit these duties. A lawyer may limit disclosure to a client  
17 based on the client's comprehension difficulties. RPC 1.4 Cmt 6. The client's  
18 comprehension difficulties and defective memory later led her to fabricate  
19 conversations that did not occur. EX 446, 770, 723. A lawyer may also delay  
20 informing a client "when the client would be likely to react imprudently to an

1 immediate communication." RPC 1.4 Cmt 7. The very next sentence in the  
2 comment gives the example of a lawyer's withholding "a psychiatric diagnosis  
3 of a client when the examining psychiatrist indicates that disclosure would  
4 harm the client." Id. This example is stunning for the absence of a hint as to  
5 how long of a delay is appropriate and would support avoiding harm to the  
6 client by **never** disclosing the diagnosis!

7       If Pfefer had told the client of the dismissal and motion for reconsideration,  
8 such would be nothing more than a source for worrying on the client's part. If  
9 the trial court had improperly chosen not to reinstate the case it had wrongfully  
10 dismissed, the question would have been whether to appeal the trial court's  
11 erroneous decision. Pfefer would have advised for such an appeal. The decision  
12 may have been up to the client, however. After reinstatement, disclosure of the  
13 dismissal would be moot.

14       For these reasons, Pfefer did not violate a duty in RPC 1.2(a) or in RPC 1.4  
15 to advise regarding the trial court's wrongful dismissal of the client's case.  
16 Therefore, the Hearing Officer's conclusion to the contrary was error. This  
17 Court should reject the Hearing Officer's conclusion that the respondent  
18 violated RPC 1.2 or RPC 1.4. This Court should also dismiss Count Two.

1 **E. No Reason to Communicate Settlement Offer AE 6.**

2 1. THE SETTLEMENT OFFER WAS INEFFECTIVE UNDER CONTRACT LAW. AE 6.

3 The trial court dismissed the client's case on March 21, 2011. EX 119. The  
4 order mentions a telephone call from the bailiff. EX 119. The order's footer  
5 does not have the defense's name, address, or telephone number. EX 119. The  
6 order does not state who presented it. EX 119.

7 The order states that the "parties failed to appear in person or by Counsel  
8 for trial." EX 119. These undisputed facts suggest that the defense attorney did  
9 not draft or present the order of dismissal but that the trial court actually signed  
10 the order of dismissal sua sponte instead.

11 The defense made an offer for the client on March 24, 2011. EX 528.

12 Contract principles govern settlement agreements. Sherrod v. Kidd, 138  
13 Wn. App. 73, 75 (2007). An offer to form a contract is only open for a  
14 reasonable time. Id., at 76. A reasonable time for acceptance depends on the  
15 nature of the contract and the character of the business and is a question of fact.  
16 Id. The offeror's purpose in making the offer impacts the time for acceptance.  
17 Id. If the offer is not accepted in a reasonable time there is no contract. Id.

18 At the time, the offeror's purpose appears to have been to avoid further risk  
19 of a possibly greater recovery in the case. The Hearing Officer stated no  
20 findings as to the purpose of the offer and did not imply any either.

1           The Hearing Officer discusses the question of the effectiveness of the  
2 settlement offer. FF 27. In the same finding, the Hearing Officer states correctly  
3 that the settlement offer was dated after the dismissal. FF 27. By this statement,  
4 the Hearing Officer implied that the offer's being dated after the dismissal  
5 somehow disproved Pfefer's position that the offer was ineffective.

6           Pfefer had no reason to believe that the defense attorney knew about the  
7 dismissal when he received the offer. For this reason, the fact that the offer is  
8 dated after the dismissal cannot possibly determine whether the offer was  
9 effective or ineffective. The Hearing Officer's implied finding—that the dates  
10 of the offer and dismissal support the validity of the offer—is error.

11       2. ALTERNATIVELY, THE SETTLEMENT OFFER WAS A SHAM.

12           The Hearing Officer discusses the question of the effectiveness of the  
13 settlement offer. FF 27. In the same finding, the Hearing Officer states correctly  
14 that the settlement offer was dated after the dismissal. FF 27. By this statement,  
15 the Hearing Officer implied that the offer's being dated after the dismissal  
16 somehow disproved the respondent's position that the offer was ineffective.

17           Whether the defense was aware of the dismissal is unclear. On one hand,  
18 the dismissal suggests that the defense was not aware of it (as explained in the  
19 previous section). On the other hand, the trial court stated on May 19, 2011 that

1 the defense submitted the order of dismissal.\* EX 772: 3, ¶ 1.

2 In any event, the Hearing Officer’s statement that the settlement offer was  
3 dated after the dismissal (in the context in which the Hearing Officer made that  
4 statement) implies that the Hearing Officer believed that the defense knew  
5 about the dismissal when it occurred. See FF 27.

6 If the defense extended a settlement offer knowing that the case was  
7 dismissed, the plaintiff’s acceptance of such an offer would have had no  
8 consideration as the dismissal left the plaintiff without anything to give. A  
9 contract must be supported by consideration.<sup>14</sup> “Consideration is ‘any act,  
10 forbearance, creation, modification or destruction of a legal relationship, or  
11 return promise given in exchange.’”<sup>15</sup>

12 As the trial court had tossed the plaintiff’s case, she had nothing to give in  
13 exchange for a settlement. For this reason, the settlement offer lacked any  
14 consideration and was a sham.

15 3. NONETHELESS, THE SETTLEMENT OFFER WAS INADEQUATE.

16 The defense offered \$6,580,006 to settle Ana Ortiz’s claim for the 2006  
17 accident. EX 528. From any settlement Ana Ortiz may receive, she owed the  
18 PIP subrogation, the unpaid medical bills, her attorney’s legal fees, and her

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\* The trial court may have been speaking colloquially. Compare Excelsior Mortg. v. Schroeder, 171 Wn. App. 333, 343, ¶ 21 (2012).

<sup>14</sup> Keystone Land & Dev. Co. v. Xerox Corp., 152 Wn.2d 171, 177 (2004).

1 attorney's costs.

2 The PIP payment log from State Farm Insurance for the February 2006  
3 MVA includes \$1,540.00 for PIP Loss of Income and PIP Medical Expenses of  
4 \$3,430.50. EX 608. These medical expenses include \$2,789.10 to Premier  
5 Chiropractic for Candy Ortiz as well as five separate billings from Highline  
6 Therapy Services for Ana Ortiz that total \$641.40. EX 608. This includes  
7 nothing for Premier Chiropractic for their treatment of Ana Ortiz.

8 The PIP payment log from State Farm Insurance for the October 2007  
9 MVA includes billings from Highline Therapy Services and Midway  
10 Chiropractic. EX 607. This includes no payment to Premier Chiropractic at all,  
11 including anything related to Ana Ortiz. The February 28, 2007 demand letter  
12 to Allstate from the client's prior attorney identifies charges from Premier  
13 Chiropractic of \$3,030.00. EX 705. This was months before the October 2007  
14 MVA. EX 705. In ¶ 9 of the agreement with Ana Ortiz, she authorizes her  
15 lawyers to pay health care providers the unpaid balance due for any services  
16 provided that relate to the accident for which a claim was just settled. Compare  
17 EX 702, 703.

18 Accounting for attorney fees and costs, the offer from the defense would  
19 have left Ana Ortiz with net proceeds as follows.

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<sup>15</sup> Labriola v. Pollard Group, Inc., 152 Wn.2d 828, 834 (2004) (citation omitted).

1 PROJECTED DISTRIBUTION FOR ALLSTATE SETTLEMENT OFFER

| <b>PART ONE</b>   |                    | Declining Balance             |
|---|--------------------|-------------------------------|
| Gross Offer EX 528  |                    | \$6,580.06                    |
| Fees (1/3)  | -\$2,193.34        | \$4,386.72                    |
| Costs for both cases  | <u>-\$1,070.54</u> | \$3,316.18                    |
| Fees (1/3) and Costs  | <u>-\$3,024.86</u> | \$3,555.15                    |
| <b>PART TWO Calculating PIP proportion of Fees and Costs (Mahler)</b>                               |                    |                               |
| Fees (1/3)  |                    | \$2,193.34                    |
| Medical Records in July 2008 EX 805   | \$145.02           |                               |
| Filing Fee EX 806   | \$202.49           |                               |
| Process Service Invoice EX 808  | \$99.00            |                               |
| EX 809 may be for 2007 MVA  | Omitted            |                               |
| Airline Ticket EX 811   | \$139.20           |                               |
| Parking Receipt EX 813  | \$12.00            |                               |
| EX 819 & EX 820 are for 2007 MVA  | Omitted            |                               |
| Total Costs   |                    | \$597.71                      |
| Total Fees and Costs  |                    | \$2,791.05                    |
| Gross Offer   |                    | \$6,580.06                    |
| <u>Fees and Costs</u> divided by <u>Gross Offer</u> = 42% PIP proportion of Fees and Costs (Mahler) |                    |                               |
| <b>PART THREE</b>   |                    | <b>Calculating Net to PIP</b> |
| PIP lost income EX 608  | \$1,540.00 +       |                               |
| PIP medical expenses EX 608   | \$641.40 =         |                               |
| Ana Ortiz PIP Lien  | \$2,181.40         |                               |
| Mahler (42%)  | <u>\$916.19</u>    |                               |
| NET to PIP  | \$1,265.21         |                               |
| <b>PART FOUR</b>  |                    | Declining Balance             |
| Gross Offer EX 528  |                    | \$6,580.006                   |
| Fees (1/3)  | -\$2,193.34        | \$4,386.67                    |
| Costs   | -\$1,070.54        | \$3,316.13                    |
| Balance after fees and costs  |                    | \$3,316.13                    |
| Less Net to PIP   | -\$1,265.21        | \$2,050.92                    |
| 2/2007 Balance to Premier Chiro EX 705  | -\$3,030.00        | -\$979.08                     |
| Ortiz Would Pay to Resolve Case   |                    | \$913.64                      |

1           The client told Pfefer the minimum she would accept, which was greater  
2 than zero dollars. Because the offer would have left the client no recovery, the  
3 offer was unacceptable to the client. Pfefer properly declined to inform the  
4 client of an offer the client had already agreed was unacceptable.

5           4. NO DUTY TO COMMUNICATE THE SETTLEMENT OFFER

6           For these reasons, Pfefer did not violate a duty in RPC 1.2(a) or in RPC 1.4  
7 to inform the client of a settlement offer that was invalid and would have  
8 provided her no recovery. For this reason, the conclusion to the contrary was  
9 error. This Court should reject the Hearing Officer's conclusion that Pfefer  
10 violated RPC 1.2 or RPC 1.4. This Court should also dismiss Count Two.

11           **F. RPC 1.16(c) Only Requires Notice to the Tribunal.**

12           On May 5, 2011, Pfefer withdrew from representing the client. EX 132.  
13 The withdrawal was effective immediately. EX 132. "A lawyer must comply  
14 with applicable law requiring notice to or permission of a tribunal when  
15 terminating a representation." RPC 1.16(c).

16           By referring to "a tribunal," the rule's point is to prevent withdrawal  
17 without informing the court. If a lawyer and a client agree that the lawyer does  
18 not represent the client any more and the lawyer does not notify the tribunal,  
19 the lawyer's failure to notify the tribunal would violate RPC 1.16(c). The  
20 essential meaning of RPC 1.16(c) is to prohibit secret or private withdrawals.

1           A lawyer may withdraw by order or by notice of “at least 10 days after the  
2 service” of the notice. CR 71. Pfefer publicly filed a notice of withdrawal. EX  
3 132. Pfefer did not withdraw privately or secretly. For this reason, Pfefer did  
4 not violate RPC 1.16(c).

5           If missing ten-day notice to client somehow impacts notice to “a tribunal”  
6 [*arguendo*], notice to the tribunal was in substantial compliance with CR 71 for  
7 the purpose of RPC 1.16(c). The respondent sent his withdrawal by certified  
8 mail to two addresses. EX 322-323. Pfefer gave reasons for withdrawal in a  
9 letter. EX 323. Telephone conversations also conveyed the withdrawal. FF 34-  
10 35. The client did not receive the withdrawal by certified mail\*\* and also did  
11 not receive mail from the court after Pfefer’s withdrawal. EX 147-148.

12           The trial court struck the client’s objection to Pfefer’s withdrawal. EX 135.  
13 For this reason, a motion for immediate withdrawal would have the same result  
14 as a notice of immediate withdrawal. For the same reason, a notice of intent to  
15 withdraw with ten-day notice would also have the same result as a notice of  
16 immediate withdrawal. For the purpose of RPC 1.16(c), Pfefer’s notice to the  
17 tribunal substantially complied, at a minimum, with CR 71. Moreover, Pfefer’s  
18 immediate withdrawal was “in accordance with a supervisory lawyer’s

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\*\* The client’s non-receipt of the withdrawal at her direct address did not occur because the envelope had the wrong city. For how the envelope to a Tukwila address had Seattle as the intended recipient’s city, see EX 452.

1 reasonable resolution of an arguable question of professional duty” under RPC  
2 5.2 and, therefore, did not violate RPC 1.16.

3 Pfefer’s immediate withdrawal was proper notice to the tribunal under CR  
4 71. Alternatively, Pfefer’s immediate withdrawal was in substantial compliance  
5 with CR 71. For these reasons, Pfefer complied with RPC 1.16(c). This Court  
6 should reject the Hearing Officer’s erroneous conclusion otherwise.

7 **G. The Respondent Complied with RPC 1.16(d)**

8 The Hearing Officer determined that Pfefer violated RPC 1.16(d) by  
9 “making his withdrawal effective immediately.” BF 63:9.

10 1. NO FINDINGS SUPPORT A FAILURE TO PROTECT CLIENT’S INTERESTS  
11 AGAINST RPC 1.16(d).

12 Essentially, the Hearing Officer’s position is that the immediate withdrawal  
13 (without ten-day notice) somehow causes the removal of protection from “a  
14 client’s interests.” The Hearing Officer made no findings that Pfefer’s  
15 representation for ten more days would have made any difference whatsoever  
16 in protecting “a client’s interests.”

17 The Hearing Officer neglected to make any findings that connect the  
18 immediate withdrawal with the time a client has to employ “other counsel.”  
19 Such a finding would state or imply that the immediate withdrawal somehow  
20 shortened the time the client had to employ other counsel.

21 The Hearing Officer again neglected to make any findings that connect the

1 immediate withdrawal with reasonable notice to the client. The Hearing Officer  
2 neglected as well to make any findings that connect the immediate withdrawal  
3 with providing “papers and property” to the client.

4 It is essential, however, that a reviewing court have some basis for  
5 distinguishing between well reasoned conclusions, arrived at after a  
6 comprehensive consideration of all relevant factors, and mere boiler-  
7 plate approval phrased in appropriate language but unsupported by  
8 evaluation of the facts or analysis of the law.<sup>[16]</sup>

9 Explanation produces intellectual discipline; a judge who sets down in  
10 writing (or articulates in court) the reasons pro and con, and his method  
11 of reaching a decision, must work through the factors Before deciding,  
12 and we then may be sure that the conclusion is based on appropriate  
13 considerations even if not necessarily one we would have reached  
14 ourselves.<sup>[17]</sup>

15 This Court has held that a hearing officer’s determinations were not  
16 supported by the record. Discipline of Kagele, 149 Wn.2d 793, 814 (2003).  
17 After listing findings of specific percentages of work completed, this Court  
18 stated that the “record is silent on the method used . . . to calculate these  
19 percentages and contains no time analysis.” Id. at 813. Therefore, this Court  
20 rejected them. Id. at 814.

21 Without findings to link the missing ten-day notice with protecting the  
22 client’s interests and without speculation, the conclusion that the immediate

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<sup>16</sup> 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)).

1 withdrawal violated RPC 1.16(d) was error. For this reason, this Court should  
2 dismiss the second half of Count Three (from RPC 1.16(d)).

3 2. THE EVIDENCE SUPPORTS COMPLIANCE WITH RPC 1.16(d)

4 The Hearing Officer has no explanation for how the difference between an  
5 immediate withdrawal and a withdrawal with ten-day notice allegedly  
6 implicates protecting “a client’s interests.” The record lacks evidence that the  
7 immediate withdrawal somehow reduced the client’s time to employ other  
8 counsel. Similarly, the record is missing evidence that the respondent’s  
9 remaining on the case for a mere ten more days would have been more than a  
10 *de minimis* difference in terms of “reasonable notice to the client.” The record  
11 also has no link between withdrawing immediately and providing papers and  
12 property to the client.

13 The client had adequate time within which she could seek to reopen her  
14 case by a motion for relief under CR 60 after the trial court dismissed it.  
15 Compare Barr v. MacGugan, 119 Wn. App. 43 (2003).

16 Although an attorney was disbarred, the court postponed the effectiveness  
17 of the disbarment for thirty days from the filing of the opinion so the attorney  
18 “can close out his practice and protect the interests of existing clients.” Florida  
19 Bar v. St. Louis, 967 So.2d 108 (2007). Pfefer’s withdrawal occurred over a

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<sup>17</sup> Horn v. Transcon Lines, Inc., 898 F.2d 589, 592 (7<sup>th</sup> Cir. 1990) (cited in Nelbro

1 month before trial and protected his client more than the Florida Supreme  
2 Court protected the clients of Mr. St. Louis. Consequently, the withdrawal  
3 provided adequate time for employment of new counsel.

4 Without evidence to link the missing ten-day notice with protecting the  
5 client's interests and without speculation, the conclusion that the immediate  
6 withdrawal violated RPC 1.16(d) was error. For this reason, this Court should  
7 dismiss the second half of Count Three (from RPC 1.16(d)).

8 **H. The Hearing Officer Erred in his Findings about State of Mind.**  
9 **(Arguendo.) AE 7, 9, & 11.**

10 One acts knowingly if one has “the conscious awareness of the nature and  
11 attendant circumstances of the conduct but without the conscious objective or  
12 purpose to accomplish a particular result.” Discipline of Kagele, 149 Wn.2d  
13 793, 817 (2003) (citations omitted).<sup>&</sup> One acts negligently when one ignores “a  
14 substantial risk that circumstances exist or that a result will follow” and this  
15 conduct “is a deviation from the standard of care that a reasonable lawyer  
16 would exercise in the situation.” Id. (citations omitted).

17 As a preliminary matter, this distinction has two problems. First, referring  
18 to a “standard of care” and “a reasonable lawyer” in the definition of  
19 negligence ordinarily requires supporting expert opinion testimony as

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Packing, 101 Wn. App. at 532).

<sup>&</sup> The attendant circumstances of conduct include the consequences of that conduct.

1 explained above. Second, to act at all, one has to know something about the  
2 nature and the circumstances of one's conduct. Logically, then, one who acts  
3 negligently has to know something about the nature of what one is doing and  
4 the circumstances of one's conduct. For this reason, negligent conduct as  
5 defined here is knowing conduct. Or, at least, one can logically label any  
6 negligent conduct as knowing. This raises the question as to whether the  
7 distinction avoids voidness for vagueness. Where standards are not  
8 ascertainable, the law may be unconstitutionally void.<sup>18</sup>

9 Fifty years ago, two statutes required oaths from professors. Baggett v.  
10 Bullitt, 377 U.S. 350 (1964). The Supreme Court noted that this Court was  
11 reading the mental state of knowledge "into every provision" but asked, "what  
12 is it that the Washington professor must 'know'?" Id. at 369. Holding that the  
13 statutes were too vague, the Supreme Court found them unconstitutional.

14 In this proceeding, the Formal Complaint stated that the statute of  
15 limitations ran on the daughter's claim. BF 5:4:10-11. The Answer denied this.  
16 BF 19:5:8-9. The Hearing Officer initially found that the daughter could no  
17 longer pursue her claim. BF 63:7:19-20. This was incorrect. BF 65:7:4-10  
18 (citing RCW), 66:1, 67. Presupposing that the Hearing Officer has read RCW  
19 4.16.190(1), was his misstatement that the daughter could no longer pursue her

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<sup>18</sup> See Winters v. New York, 333 U.S. 509, 515-516 (1948).

1 claim a knowing error or merely negligent?

2 In any event, the Hearing Officer labels the respondent's conduct as  
3 "knowing." BF 63. In the context of Count One, the label of "conscious  
4 awareness of the nature and attendant circumstances" would appear to relate to  
5 the alleged foreseeability of the resulting dismissal. As discussed regarding  
6 injury below, the resulting dismissal was not foreseeable.

7 In the context of Count Two, the Hearing Officer's evident decision is  
8 that—when Pfefer received the settlement offer—he should not have taken into  
9 account the fact of the dismissal or the impact of the liens, fees, costs, or unpaid  
10 medical bills on the client's recovery, which were Pfefer's bases for not  
11 informing the client of the offer! This position implies a criticism of Pfefer that  
12 he was more conscious and more aware of the "attendant circumstances" than  
13 he ought to have been. The Hearing Officer's evident decision also implies that  
14 Pfefer was ignoring "a substantial risk" that the offer would somehow have  
15 been valid and provided some net recovery for the client. If Pfefer should have  
16 ignored the fact of the dismissal and the impact of the liens, fees, costs, or  
17 unpaid medical bills on the client's recovery, then Pfefer's state of mind would  
18 have been one of negligence.

19 Besides Mr. Caruso's specific directions, Pfefer withdrew based on the  
20 client's flagrant lies to Pfefer and Mr. Caruso in the days before the withdrawal.

1 EX 823, 446, 770. The finding that Pfefer “was aware of the inconsistencies  
2 well before May 5, 2011” is error. FF 33.

3 In the context of Count Three, the Hearing Officer has evidently decided  
4 that Pfefer somehow knew that his immediate withdrawal, without ten-day  
5 notice, would lead the court to dismiss the client’s case. If hypothetically Pfefer  
6 knew that his withdrawal would result in the court’s dismissal of the client’s  
7 case, the withdrawal would presumably have had that result whether it was  
8 immediate or with ten-day notice. As the Hearing Officer only based the  
9 violation related to withdrawal on the difference between ten-day noticed  
10 withdrawal and an immediate withdrawal, a state of mind of knowing is  
11 unsupported.

12 This Court should reject the Hearing Officer’s state-of-mind findings.

13 **I. The Hearing Officer Erred in his Findings of Injury. (Arguendo.)**

14 In analysis under the ABA Standards, a finding of injury or harm is only  
15 appropriate if harm actually occurs or if harm is a reasonably foreseeable result  
16 of the misconduct, even if no harm occurs.<sup>19</sup>

17 1. COUNT ONE CAUSED NO INJURY. (ARGUENDO.) AE 10.

18 The Hearing Officer chose injury to the client and did so without  
19 explanation. BF 63:9. The charged conduct caused no injury and was not

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<sup>19</sup> Discipline of Halverson, 140 Wn.2d 475, 492-93 (2000).

1 reasonably foreseeable to cause injury for at least the following reasons:

2 a. Lack of Constitutional Due Process

3 The dismissal raised constitutional due process issues of notice and  
4 opportunity to be heard, which can be brought up at any time. RAP  
5 2.5(a)(3); State v. WWJ Corp., 138 Wn.2d 595 (1999). A party must have  
6 an opportunity to present its position. Johnson v. Horizon Fisheries, LLC,  
7 148 Wn. App. 628, ¶ 23 (Div. 1, 2009) (citation omitted). In Rivers v.  
8 Conf. Of Mason Contractors, the petitioner raised the issue of due process.  
9 145 Wn.2d 674, 697 (2002). In Rivers, the court noted that “the trial court  
10 considered Petitioner’s memorandum in opposition” before “rendering  
11 judgment on Respondent’s motion to dismiss.” Id. Because the Rivers trial  
12 court considered the petitioner’s argument, the petitioner “was accorded  
13 due process.” Id. In the grievant’s case, the trial court did not allow any  
14 arguments of the plaintiffs before dismissing the case. By failing to  
15 provide the plaintiffs an opportunity to be heard before dismissal, the trial  
16 court’s omission violated the plaintiffs’ rights to due process.

17 In addition to an opportunity to be heard, the plaintiffs are also entitled  
18 to notice as a required element of due process. “An elementary and  
19 fundamental requirement of due process in any proceeding which is to be  
20 accorded finality is notice reasonably calculated, under all the

1 circumstances,” to be meaningful. Mullane v. Central Hanover Tr. Co.,  
2 339 U.S. 306 (1950). Like in Mullane, such notice should advise  
3 “interested parties” that an issue is pending. Id. The proper procedure to  
4 resolve an issue requires a weighing of the interests. For instance, the  
5 interests of a welfare recipient in the uninterrupted receipt of public  
6 assistance and the governmental interests in not erroneously terminating  
7 assistance are weighed against the government's interest in reducing its  
8 fiscal and administrative burdens. Goldberg v. Kelly, 397 U.S. 254 (1970).  
9 Similarly, such a weighing preponderates against dismissal in this case.

10 The trial court's imposition of the severe sanction of dismissal of the  
11 plaintiffs' claims without notice or opportunity to be heard violated the  
12 plaintiffs' due process rights. The trial court correctly reconsidered its  
13 unconstitutional dismissal of the plaintiffs' claims.

14 b. Blair v. TA-Seattle E. No. 176, 171 Wn.2d 342 (2011)

15 In Blair, the defense moved to strike half of the plaintiff's witnesses  
16 for lack of disclosure. Id. at ¶ 8. The trial court granted the motion without  
17 entering any findings in support of such action. Id. (requiring Blair to  
18 choose 7 of her 14 witnesses). Of the witnesses that Blair disclosed, none  
19 were medical providers. Id.

1 Blair later moved for clarification, which motion was denied without  
2 explanation or comment. Id. at ¶ 9. With trial imminent, Blair provided a  
3 trial witness list of 11 witnesses. Id. at ¶ 10. The defense moved to strike  
4 two of the added witnesses (the only medical providers), which motion the  
5 trial court granted. Id. at ¶ 11.

6 Days before trial, the defense moved for summary judgment because  
7 Blair had no witnesses to testify to causation and could not prove  
8 causation by medical records. Id. The trial court granted this motion and  
9 “dismissed Blair’s claims with prejudice.” Id. The court of appeals  
10 affirmed. Id. at ¶ 12.

11 This Court determined that the trial court had erred by failing to  
12 consider and enter appropriate findings. Id. at ¶ 21. For this reason, this  
13 Court reversed the court of appeals. Id. at ¶ 25. A trial court may not  
14 “make after-the-fact findings supporting” its orders. Id. at ¶ 24, footnote 6.  
15 The findings must be contemporaneous with the disputed orders.

16 Similarly, the trial court in this case failed to consider or enter  
17 appropriate findings. The grievant’s case was wrongfully dismissed and  
18 correctly reconsidered.

19 c. Equitable Estoppel

20 The doctrine of equitable estoppel is grounded in the principle  
21 “that a party should be held to a representation made or position

1 assumed where inequitable consequences would otherwise result to  
2 another party who has justifiably and in good faith relied thereon."  
3 Wilson v. Westinghouse Elec. Corp., 85 Wn.2d 78, 81, 530 P.2d  
4 298 (1975). A party seeking the protection of the doctrine must  
5 establish three elements: "(1) an admission, statement, or act  
6 inconsistent with the claim afterwards asserted; (2) action by the  
7 other party on the faith of such admission, statement or act; (3)  
8 injury to such other party resulting from permitting the first party  
9 to contradict or repudiate such admission, statement, or act." Id.  
10 Application of equitable estoppel against the government is  
11 disfavored. Dep't of Ecology v. Theodoratus, 135 Wn.2d 582, 599,  
12 957 P.2d 1241 (1998) (citing Kramarevcky v. Dep't of Soc. &  
13 Health Servs., 122 Wn.2d 738, 743, 863 P.2d 535 (1993)). A party  
14 asserting equitable estoppel against the government must establish,  
15 in addition to the three elements set forth above, that equitable  
16 estoppel (1) is "necessary to prevent a manifest injustice" and (2)  
17 would not "impair[ ]" "the exercise of governmental functions."  
18 Kramarevcky, 122 Wn.2d at 743. A party must prove all required  
19 elements by clear, cogent, and convincing evidence. Id. at 744.

20 State v. Yates, 161 Wn.2d 714, ¶ 16 (2007). The statements of the  
21 trial-court department, of King County Superior Court (in EX 1004, page  
22 32 (§ 19.3)), and of the defense are clearly inconsistent with the later  
23 dismissal. In the grievant's case, the plaintiffs acted in reliance on  
24 statements of the trial-court department and of the King County Superior  
25 Court in addition to the statement of the defense. In the grievant's case,  
26 the grievant would be denied an opportunity to seek compensation for her  
27 injuries (if any). This case met all three elements of equitable estoppel.

28 In addition to the above three elements, the trial court's dismissing the  
29 grievant's case would leave her with no ability to recover for her injuries

1 (if any) and would have been a manifest injustice. Nothing about  
2 reinstating the grievant's claims would impair the exercise of government  
3 functions. For these reasons, this case also met both additional  
4 requirements for proving equitable estoppel against the government.

5 Under the undeniable facts of this case, the trial court was equitably  
6 estopped from dismissing the grievant's claims, correctly reconsidered its  
7 Order of Dismissal, and properly reinstated the grievant's claims.

8 d. Lack of Candor by the Defense, EX 500

9 According to Kira Greenholz at Allstate, the trial court told her that it  
10 would dismiss the case on the Monday of trial. EX 500. In the same entry,  
11 Ms. Greenholz indicates that she left Pfefer a message, "letting him know  
12 that he needed to take care of some things with the court before they  
13 would put it back on the trial calendar." Id.

14 As Ms. Greenholz's own note implies, her message failed to tell Pfefer  
15 that the trial court was ready to dismiss the case of his client. At best, this  
16 was an improper ex parte communication by the defense. At worst, the  
17 defense was deliberately attempting to deceive Pfefer. The defense's  
18 misconduct here also merited the reinstatement of the grievant's case.

19 e. Reinstatement, EX 131

20 The trial court in fact properly reinstated the grievant's case. EX 131.

1 For these reasons, this Court should reject the Hearing Officer's  
2 determination of injury to the client under Count One.

3 2. COUNT TWO CAUSED NO INJURY. (ARGUENDO.) AE 10.

4 The client's ignorance of the settlement offer made her unable to accept it,  
5 which was invalid or would have provided her no net benefit, as explained  
6 above. No actual harm occurred or was reasonably foreseeable from her  
7 ignorance of this offer which was invalid or would have yielded her no net  
8 benefit. Similarly, the client's ignorance of the dismissal—until her own agent  
9 discovered the dismissal herself—has no link with any injury actually or that  
10 was reasonably foreseeable. Based on the preceding, this Court should reject  
11 the Hearing Officer's determination of injury to the client under Count Two.

12 3. COUNT THREE CAUSED NO INJURY. (ARGUENDO.) AE 12.

13 The Hearing Officer inexplicably determined that the immediate  
14 withdrawal deprived the client of "an adequate opportunity to object and/or to  
15 find substituting counsel before her case was dismissed." BF 63:11. The  
16 Hearing Officer presupposes that a withdrawal with ten-day notice would have  
17 provided "an adequate opportunity to object and/or to find substituting  
18 counsel." The Hearing Officer's presupposition has no basis in the evidence  
19 and is contrary to fact. The Hearing Officer's determination that the absence of  
20 ten-day notice somehow injured the client was error.

1       The Hearing Officer also inexplicably determined that the immediate  
2 withdrawal injured the legal system “because of the wasted efforts considering  
3 pro se objections that were not properly served and the consumption of court  
4 time dealing with an unrepresented plaintiff.” BF 63:11. This determination  
5 assumes that a withdrawal with notice would have prevented “pro se  
6 objections” or the court’s “dealing with an unrepresented plaintiff.” The  
7 evidence again has no support for this presupposition. The Hearing Officer’s  
8 contrary-to-fact determination that the immediate withdrawal somehow injured  
9 the legal system was error.

10       The Hearing Officer imagines a world where Pfefer’s providing ten-day  
11 notice of withdrawal would somehow give the client “adequate opportunity”  
12 and somehow keep “an unrepresented plaintiff” from the court. This imaginary  
13 world is simply not real.

14       The Hearing Officer’s determination that the immediate withdrawal injured  
15 the client and legal system was error. For this reason, this Court should reject  
16 the Hearing Officer’s determination of injury to the client and legal system  
17 under Count Three.

18       **J. Reconsideration Mitigates Any Injury in Count One. (Arguendo.) AE 8.**

19       Pfefer timely filed a motion for reconsideration of the order of dismissal.  
20 FF 29. The trial court granted reconsideration and reinstated the case. EX 131.

1 A timely good faith effort to rectify consequences is a mitigating factor.  
2 ABA Standards, § 9.32(d). The concern raised by Count One points to the trial  
3 court's wrongful dismissal of the plaintiff's case. As Pfefer rectified this by  
4 convincing the trial court to reinstate the case, the successful motion for  
5 reconsideration is a model example of this mitigating factor.

6 When the Hearing Officer failed to recognize that the successful motion for  
7 reconsideration was a timely good faith effort to rectify consequences, the  
8 Hearing Officer wrongly failed to apply this conduct as a mitigator. This Court  
9 should apply the successful motion for reconsideration as a timely good faith  
10 effort to rectify consequences, a mitigator in ABA Standards, § 9.32(d).

11 **K. The Hearing Officer Erred in his Sanctions Analysis. (Arguendo.)**

12 The ABA Standards govern all lawyer discipline cases.<sup>20</sup> The ABA  
13 Standards are supposed to summarize the cited cases. As such, analysis and  
14 comparison of the cited cases is analysis of the ABA Standards.<sup>&&</sup>

15 For Counts One and Two, the Hearing Officer chose ABA Standard 4.4,  
16 Lack of Diligence, and noted 4.42 and 4.43. BF 63:9. Under 4.42, suspension is  
17 generally proper. The Commentary to 4.42 refers to a lawyer who was  
18 suspended for neglecting three unrelated cases, a criminal case for Charles  
19 Powers, a divorce case for Madeline Moon, and a civil case for Lazora Corbin.

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<sup>20</sup> Discipline of Halverson, 140 Wn.2d 475, 492 (2000).

1 In re Earl J. Taylor, 666 Ill.2d 567, 363 N.E.2d 845 (1977).

2 The same commentary refers without explanation to another case, where a  
3 lawyer was disciplined for taking a case, never filing it, and lying to the client  
4 and the referrer about the case. Hunt v. Disciplinary Board of the Alabama  
5 State Bar, 381 So2d 52 (1980). Without explanation, the same commentary  
6 also refers to a lawyer who left the state to conduct business elsewhere and did  
7 nothing further for his client. People v. Dixon, 616 P.2d 103 (Colo. 1980).

8 Pfefer's conduct does not include his failure to file and lying to the client  
9 about the filing. Pfefer's conduct does not include his disappearance and  
10 consequent abandonment of the client. Pfefer's conduct does not include three  
11 separate cases with unrelated clients. For these reasons, Pfefer's conduct does  
12 not fall under ABA Standard 4.42.

13 Under 4.43, reprimand is generally proper. The Commentary to 4.43 refers  
14 to an attorney who received a tax return from a client and did not provide it to  
15 the court for 3 months. In re Logan, 358 A.2d 787, 797 (N.J. 1976). The  
16 attorney lied to his client and caused the client to pay fees to his ex-wife's  
17 attorney. The same commentary also refers to an attorney who neglected estate  
18 matter for three years. In re Donohue, 77 A.D.2d 112, 432 N.Y.S.2d 498  
19 (1980). At most, a reprimand is the proper sanction for Pfefer's conduct.

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&& This is not a proportionality analysis.

1 For Count Three, the Hearing Officer chose ABA Standard 7.0, Violation  
2 of Duties Owed to the Profession, and quotes Standard 7.2, where suspension is  
3 generally appropriate and which has a knowing state of mind, Standard 7.3,  
4 where reprimand is generally appropriate and which has a negligent state of  
5 mind. The commentary to Standard 7.2 only cites one case, which involves  
6 solicitation. In re Teichner, 75 Ill.2d 88, 387 N.E.2d 265 (1979). The  
7 commentary to Standard 7.3 refers to three cases of reprimands for improper  
8 fees, one case of reprimand for failure to instruct employees about solicitation,  
9 and a reprimand case where a lawyer did not disclose the other lawyer to whom  
10 were forwarded matters that were neglected.

11 As the Hearing Officer found the offense under this count to be Pfefer's  
12 immediate withdrawal rather than with ten-day notice and (as explained  
13 above), the difference could not possibly have caused any injury. For this  
14 reason, admonition is the appropriate action under 7.4.

15 **L. The Hearing Officer Erred in his Recommendation for Restitution.**  
16 **(Arguendo.) AE 13.**

17 "A lawyer subject to discipline may be ordered to make restitution to  
18 persons financially injured by the lawyer's conduct." Discipline of Marshall,  
19 160 Wn.2d 217, ¶68 (2007); see also ELC 13.7(a). The rule itself and the case  
20 law do not provide a standard for making this determination. The Hearing  
21 Officer and the Bar also neglect to state a standard.

1       Lack of a standard here suggests that ELC 13.7(a) is void for vagueness. In  
2       1966, an 1860 Act was held “invalid under the Due Process Clause because of  
3       vagueness and the absence of any standards sufficient to enable defendants to  
4       protect themselves against arbitrary and discriminatory impositions.” Giaccio v.  
5       Pennsylvania, 382 U.S. 399, 402 (1966) (for costs charged an acquitted  
6       defendant). ELC 13.7 is void for vagueness, at least as applied.

7       Like under Chapter 74.34 RCW, the standard here “is not a tort causation  
8       standard.” Raven v. DSHS, 177 Wn.2d 804, 831 ¶50 (2013). One must,  
9       however, be able to identify and explain “a nexus.” Id. The Bar seeks  
10       restitution in the amount of the defense’s worthless settlement offer. The  
11       Hearing Officer recommended restitution in the same amount as well.

12       The dismissal was reconsidered, the plaintiff’s case reinstated, and the  
13       dismissal did not involve the settlement offer. For these reasons, restitution  
14       does not link with the violation charged in Count One.

15       The client’s agent Miller found the dismissal without being told by the  
16       respondent. Moreover, the client’s ignorance of the dismissal until her agent  
17       Miller discovered it does not involve the offer.

18       **The settlement offer was either a sham or ineffective and—in either**  
19       **case—would produce no net proceeds to the client.** Therefore, restitution  
20       does not link to the violation charged in Count Two.

1 In Count Three, Pfefer is charged with violating two separate provisions of  
2 RPC 1.6 on the basis that Pfefer's withdrawal was immediate and not delayed  
3 for ten days. Restitution does not connect with the difference between an  
4 immediate withdrawal and a delayed withdrawal as concluded under Count  
5 Three. For these reasons, no restitution is appropriate.

6 If restitution is appropriate, it should not be the full amount of the offer. In  
7 Discipline of Starczewski, the gross offer of \$20,000 was more than the  
8 restitution amount of \$15,000.\*\*\* Under RPC 1.5(e)(1), a lawyer who advances  
9 litigation expenses must keep the client "ultimately liable for such expenses."  
10 For these reasons, this Court should apply RPC 1.5(e)(1) to reduce the amount  
11 of the recommended restitution (if any) by the deducting the costs, unpaid  
12 medical bills, PIP lien, and litigation expenses. The costs and litigation  
13 expenses are as follows:

|                         |            |        |
|-------------------------|------------|--------|
| Medical Records         | \$197.16   | EX 805 |
| Filing Fee              | \$202.49   | EX 806 |
| Process Service Invoice | \$ 99.00   | EX 808 |
| Medical Records         | \$ 81.39   | EX 809 |
| Medical Records         | \$ 66.81   | EX 809 |
| Airline Ticket          | \$139.20   | EX 811 |
| Parking Receipt         | \$ 12.00   | EX 813 |
| Filing Fee              | \$232.49   | EX 819 |
| Process Service Fee     | \$ 40.00   | EX 820 |
| Total Listed Costs      | \$1,070.54 |        |

---

\*\*\* 177 Wn.2d 771, ¶¶ 6, 38 (gross offer), ¶¶ 56-57, 59 (restitution) (2013).

1       The Disciplinary Board reduced the amount of restitution by the litigation  
2 expenses that it attributes to one of the client's cases. BF 94. The amount of this  
3 reduction fails to account for all of the appropriate deductions, such as costs,  
4 unpaid medical bills, PIP lien, and litigation expenses. If this Court finds that  
5 restitution is somehow appropriate, this Court should deduct all costs, unpaid  
6 medical bills, PIP lien, and litigation expenses from the amount of restitution.

7       **M. The Disciplinary Board Erred in its Order on Costs. (Arguendo.) AE**  
8       **14-16.**

9       Under ELC 13.9(b), costs must be "reasonably and necessarily  
10 incurred." Pfefer objects to unreasonable or unnecessary charges stated as  
11 costs which are not recoverable.

12       The "ODC Investigator Expense Report" dated April 19, 2012 (for  
13 events from March 1, 2012) seeks recovery for mileage to purchase a  
14 recording of a hearing. Neither the report nor the receipt on the next page  
15 identifies the date of the hearing. The mere fact that a hearing occurred in  
16 the grievant's case does not prove that the purchase of a recording of it is  
17 reasonable or necessary. If one assumes that the purchase of a recording of  
18 this hearing is somehow reasonable or necessary, traveling to accomplish  
19 this purchase is absolutely not necessary as one could simply mail the  
20 payment with a pre-addressed stamped envelope for the CD. For this  
21 reason, the mileage is not necessary. For the same reason, the mileage was

1 not reasonable either. Pfefer objects to all stated costs from this report.

2 On April 30, 2013, counsel and staff could have brought a lunch with  
3 them to a witness meeting or interview. A lunch on April 30, 2013 for  
4 counsel and staff related to the witness meeting/interview was not  
5 necessary. As counsel and staff could have spoken with the witness over  
6 the telephone, the mileage related to the witness interview was not  
7 reasonable or necessary. Counsel would evidently have incurred a charge  
8 for parking whether or not she interviewed a witness. For this reason, she  
9 did not incur at least one of the parking charges as a cost “reasonably and  
10 necessarily incurred” under ELC 13.9(b). Pfefer objects to all stated costs  
11 for the witness meeting/interview on April 30, 2013.

12 Likewise, on the expense report from counsel dated September 26,  
13 2013, the parking charges as well as to the mileage and lunch from  
14 September 11, 2013 were neither reasonably nor necessarily incurred. The  
15 staff’s lunch related to a witness meeting on September 11, 2013 was also  
16 neither reasonably nor necessarily incurred. Pfefer objects to all of them.

17 The rescrivation fee would appear to be for the convenience of the  
18 court reporter and neither reasonably nor necessarily incurred under ELC  
19 13.9(b). Pfefer objects to this rescrivation fee.

20 Pfefer had the vast majority of the superior-court filings and gave them

1 to counsel. For this reason, the Bar's duplicating these documents via ECR  
2 was neither reasonable nor necessary. Pfefer objects to these charges.

3 The Bar conducted a witness meeting with Ms. Miller and Ms.  
4 Schoendorf on March 20, 2103 which the Bar could have conducted  
5 telephonically. For this reason, the charges for mileage and parking were  
6 neither reasonably nor necessarily incurred under ELC 13.9(b). Pfefer  
7 objects to them. The Bar also met with Ms. Miller on June 11, 2013,  
8 which could have occurred telephonically. For this reason, the charges for  
9 mileage and parking were neither reasonably nor necessarily incurred  
10 under ELC 13.9(b). Pfefer objects to them.

11 Although Mr. Heller was reimbursed for 30.0 miles of auto mileage as  
12 well as parking for \$6.00, he did not testify at the hearing. His presence at  
13 the hearing was evidently unnecessary. His office (860 SW 143rd St,  
14 Burien, WA) appears to be 10.8 miles from the hearing location according  
15 to Google Maps. Mr. Heller shockingly overstates his mileage as 30.0  
16 miles. Mr. Heller's mileage and parking were neither reasonably nor  
17 necessarily incurred. Pfefer objects to them.

18 Ms. Miller submits mileage and parking charges for 9/9, 9/16, 9/17,  
19 and 9/ 18 as well as lunch charges for 9/16, 9/17, and 9/18. Ms. Miller  
20 only testified on one day. Also, she could have discussed her testimony

1 with disciplinary counsel and staff telephonically and could have testified  
2 telephonically. Charges related to her presence on 9/16 and 9/17 were  
3 neither reasonably nor necessarily incurred under ELC 13.9(b). Likewise,  
4 charges related to her presence in person on 9/9 and 9/18 were neither  
5 reasonably nor necessarily incurred. Pfefer objects to all these charges.

6 Ms. Schoendorf could have testified telephonically. For this reason,  
7 charges related to her personal presence at the hearing were neither  
8 reasonably nor necessarily incurred under ELC 13.9(b). Similarly, the Bar  
9 evidently delayed ordering her tickets until the week before the hearing. If  
10 her personal presence was somehow necessary and reasonable and the Bar  
11 had exercised a minimal degree of reasonable prudence, the Bar would  
12 have purchased her tickets well in advance for substantially less. These  
13 charges were neither reasonably nor necessarily incurred. Pfefer objects to  
14 all charges related to travel for Ms. Schoendorf.

15 No charges for interpretation should be assessed against Pfefer. First,  
16 ELC 13.9(b) does not specifically list charges for interpretation.  
17 Consequently, one should view them with skepticism. Second, some of  
18 these charges are for pre-hearing interviews. Does the Bar not have any  
19 bilingual staff? One would expect that an organization as abundantly  
20 staffed as the Bar would have staff fluent in both English and in this

1 witness's native language (if her English were truly inadequate). For this  
2 reason, the charges for hiring an outside interpreter for witness interviews  
3 were neither reasonable nor necessarily incurred under ELC 13.9(b).

4 Third, although the interpreter's tardy arrival (over a half hour late)  
5 required everyone else at the hearing to wait for her, her billing evidently  
6 has no credit or adjustment for her extreme tardiness. Transcript, 261:19-  
7 20. A credit or adjustment for her tardiness would have been reasonable  
8 for the Bar to request. Likewise, the Bar's failure to request a credit or  
9 adjustment was unreasonable. On this basis, these charges were neither  
10 reasonably nor necessarily incurred in their entirety under ELC 13.9(b).

11 Fourth, the Bar proffers no proof that the witness actually needed an  
12 interpreter. Without proof of this necessity, charges for interpretation were  
13 neither reasonable nor necessarily incurred under ELC 13.9(b).

14 The Bar chose not to prove that it had no in-house staff to interpret in  
15 pre-hearing interviews, chose not to seek any adjustment for the  
16 interpreter's tardiness at the hearing, and chose not to prove that the  
17 witness actually needed any interpreter at all—for these reasons, Pfefer  
18 objects to these charges for interpretation.

19 The Bar apparently takes the position that ELC 13.9(b) somehow  
20 incorporates the WSBA expense policy. If the drafters of ELC 13.9(b)

1 sought to incorporate the WSBA expense policy, the language of ELC  
2 13.9(b) could certainly reflect that intent. Instead, ELC 13.9(b) does not  
3 include or mention the WSBA expense policy.

4 Additionally, the ELCs impose duties on Pfefer and on the Bar. A  
5 violation of any such duty may subject a lawyer to discipline, whether the  
6 lawyer is the Respondent or works with or for the ODC. ELC 1.5. In filing  
7 a statement of costs and expenses, Disciplinary Counsel “must state with  
8 particularity the nature and amount of the costs claimed.” ELC 13.9(d)(2).

9 Disciplinary Counsel’s “signature constitutes a certification that all  
10 reasonable attempts have been made to insure the statement’s accuracy.”  
11 Id. By Disciplinary Counsel’s own admission, the ODC’s Statement of  
12 Costs and Expenses was incorrect. BF 97, 1:24 (“a duplicative charge”).  
13 By submitting charges it admits were bogus, the Bar failed to comply with  
14 the explicit provisions of ELC 13.9.

15 The Bar stated many charges that were neither reasonably nor  
16 necessarily incurred under ELC 13.9(b). Pfefer objects to all such charges.

17 Finally, if all the charges in the Bar’s Statement of Costs and Expenses  
18 were somehow reasonably and necessarily incurred under ELC 13.9(b),  
19 the Board may deny assessing any or all costs or expenses “if it appears in  
20 the interests of justice to do so.” ELC 13.9(h). The Board clearly ordered

1 costs without exercising its discretion under ELC 13.9(h). BF 101. The  
2 Board's failure to exercise its discretion and its resulting order were error.

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

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

6 A "court shall award a qualified party that prevails in a judicial review  
7 of an agency action fees and other expenses, including reasonable  
8 attorneys' fees." RCW 4.84.350(1). Under certain circumstances, a court  
9 may avoid such an award. Id.

10 "A qualified party shall be considered to have prevailed if the qualified  
11 party obtained relief on a significant issue that achieves some benefit that  
12 the qualified party sought." Id. In a judicial review of an agency action, a  
13 party is a "qualified party" if the party is "an individual whose net worth  
14 did not exceed one million dollars at the time the initial petition for  
15 judicial review was filed." RCW 4.84.340(5)(a).

16 Pfefer is entitled to attorney fees and litigation expenses under the  
17 Washington State Equal Access to Justice Act in Chapter 4.84 RCW.

18 The Bar is attempting to deprive Pfefer of his rights under 42 U.S.C.  
19 1983. Because of such violation, Pfefer is also entitled to attorney fees and  
20 litigation expenses under 42 U.S.C. 1988.

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V. Conclusion

This Court should approach the findings of this Hearing Officer skeptically for a variety of reasons including but not limited to the following:

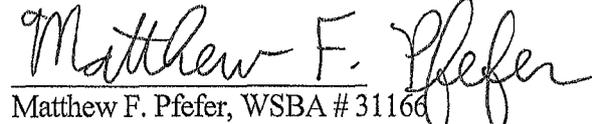
1) Despite the clear contrary rule in RCW 4.16.190(1), the Hearing Officer initially found that the client’s minor daughter could no longer pursue her claim. BF 63:7:19-20. Either the Hearing Officer was not familiar with the controlling statute on this issue or was ignoring it.

2) In Discipline of Kagele, the hearing officer whose findings were not supported by the record and who failed to articulate the method he used also presided at the respondent’s hearing, 149 Wn.2d at 809. What will it take to teach Mr. Danielson to explain his findings and conclusions adequately?

3) Based on the assumption that subpoenas had been issued to two witnesses, the Hearing Officer gave legal advice to them that their testifying would not violate HIPAA. As the witnesses’ presence had been arranged without subpoena, the Hearing Officer rendered incorrect legal advice to them.

On the basis of the facts and the law, this Court should find that the Hearing Officer’s disputed findings were error and dismiss all counts against Pfefer.

Respectfully submitted this 7<sup>th</sup> day of August 2014.

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

1 10417 E 4<sup>th</sup> Ave Apt 10  
2 Spokane Valley Washington 99206  
3 (509) 323-5210 Voice | (206) 350-4756 Digital Fax/Vm  
4 Matthew@MatthewPfefer.com

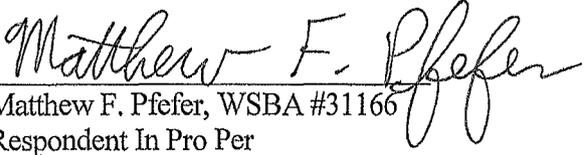
5 DECLARATION OF SERVICE

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

8 1. I am the attorney of record for the Plaintiff, am over the age of 18, am  
9 competent to testify, and make these statements upon my own personal  
10 knowledge.

11 2. I served this document on Craig Bray, at the Washington State Bar  
12 Association, 1325 4<sup>th</sup> Ave #600, Seattle WA 98101, by prepaid postal mail  
13 on the date below.

14 Signed this 7<sup>th</sup> day of August 2014 in Spokane, Washington.

15   
16 \_\_\_\_\_  
17 Matthew F. Pfefer, WSBA #31166  
18 Respondent In Pro Per

## OFFICE RECEPTIONIST, CLERK

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**To:** Matthew F. Pfefer  
**Subject:** RE: Opening Brief & Motion for Over-Length Brief for 201,327-9

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

Regards,  
Matthew F. Pfefer, # 31166  
[matthew@matthewpfefer.com](mailto:matthew@matthewpfefer.com)  
Attorney at Law  
In Pro Per  
10417 E 4th Ave Apt 10  
Spokane Valley WA 99206  
509-323-5210 Telephone  
206-350-4756 Digital Fax/Vm