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SUPREME COURT OF THE STATE OF WASHINGTON

Bar No. 32347
Supreme Ct. Case No. 201,049-1

In re

FREDRIC SANAI

Lawyer (WSBA No. 32347)

OPENING BRIEF ON APPEAL

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ORIGINAL

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I. INTRODUCTION

Respondent Fredric Sanai previously prevailed in his appeal of the recommendation of the Disciplinary Board of the Washington State Bar Association to disbar him due to the failure of the Association to grant a medically necessary extension.

In this case, the Disciplinary Board reached the same conclusion after a trial in which the Association failed to grant Fredric the manifold due process protections to which he is entitled under the law. These are, with one narrow exception, the same protections accorded to a criminal defendant, and precisely the same accorded to a Washington State jurist in disciplinary proceedings. The Association not only failed to grant these protections, they openly dispute that they apply. Moreover, the underlying wrong done in the Sanai divorce litigation have not been remedied, namely the now-obvious fraud committed by Sassan Sanai through the creation of a sole proprietorship with the same name as his medical corporation, through which he passed the checks and payments from his medical practice; the sale of the community assets and payment of taxes in violation of fundamental due process; and repeated punishment doled out to Respondent, his client and his family for daring to prove the existence of the fraud aided and abetted by a part-time judicial officer.

II. ASSIGNMENTS OF ERROR

1. The Washington State attorney disciplinary process (the “Process”) facially and as applied to Respondent violated state and federal due process

because the Association fails to acknowledge that the same protection due a criminal defendant or a judge facing judicial discipline apply to attorney disciplinary proceedings, and Respondent was denied such rights.

2. The Process facially and as applied to Respondent did not apply the correct burden of proof and violated the due process standards applicable to quasi-criminal proceedings, because the burden of proof employed, though nominally higher than a civil case, is *effectively* lower.

3. The Process, and the hearing officer's conduct of the hearing, is constitutionally improper because the hearing officer disregarded undisputed exculpatory evidence without reconciling it with the facts he did elect to recognize.

4. The Washington State courts, including this Court, relegated Respondent to a "class of one" in violation of the Fourteenth Amendment by applying manifestly different procedural and substantive rules of law than in the published Washington State law in respect of the protection of Respondent's right to practice as an attorney, so none of those decisions can be utilized against Respondent.

5. All of the underlying legal decisions which were relied upon by the Association and the hearing officer were a violation of the appearance of fairness doctrine and Respondent's confrontation clause rights.

6. The hearing officer erred in quashing, and lacked the authority under the ELC to quash Respondent's subpoenas.

7. The hearing officer violated the constitutional guarantee of advance notice of charges.

8. The hearing officer and the Board erred in not ordering additional proceedings and in the case of the former in not granting the motion to amend the Findings of Fact and Conclusions of Law.

9. Error is explicitly assigned to the following paragraphs of the hearing officer's findings of fact and conclusions of law and recommendation based on the above-referenced deficiencies: 2, 7, 8, 12-18, 20, 24- 26, 32, 35, 36, 41, 43, 46-52, 55-59, 65, 67-80, 88-89, 92-93, 99-100, 104-229. CP 294 at 1-57.

III. STATEMENT OF THE CASE

A. OVERVIEW OF THE SYSTEM

The Washington State Bar Association administers the disciplinary process (the "Process") as delegated by this Court. It is an administrative hearing system, in that the prosecutors, the hearing officers and the Board are all part of the same organization.

Because it is an administrative hearing system, the normal separation of powers present in the judicial system is absent. This is ameliorated in Washington State by the "appearance of fairness doctrine" that applies to every step of a quasi-judicial administrative process. The greater protections available under the doctrine in professional discipline matters have been described by this Court as follows:

[T]he appearance of fairness doctrine already provides procedural protections beyond the minimum requirements of the federal due process clauses....

Under the appearance of fairness doctrine, proceedings before a quasi-judicial tribunal are valid only if a reasonably prudent and

disinterested observer would conclude that all parties obtained a fair, impartial, and neutral hearing. *Swift v. Island Cy.*, 87 Wn.2d 348, 361, 552 P.2d 175 (1976). Although this doctrine originated in the land use area, see *Smith v. Skagit Cy.*, 75 Wn.2d 715, 453 P.2d 832 (1969), it has been extended to other types of quasi-judicial administrative proceedings, see *Chicago, M., St. P. & Pac. R.R. v. State Human Rights Comm'n*, 87 Wn.2d 802, 557 P.2d 307 (1976).

Medical Disc. Bd. v. Johnston, 99 Wn.2d 466, 476, 663 P.2d 457 (1983).

The positions taken by the disciplinary counsel as to procedural matters, standards of proof and rules are, by necessity, the position of the Association as a whole. This means that if disciplinary counsel states that the its hearings do not accord and do not have to accord with the due process rights accorded to criminal defendants, then that is the final word on the topic. However, as the Association is not a court or an arm of the state, but rather an agent of the Supreme Court, nothing it does has the force of law.

As this Court stated:

This court has expressly held medical disciplinary proceedings are indeed "quasi-criminal."

....We recently reiterated medical discipline is quasi-criminal in *Johnston*, 99 Wn.2d 466.

Johnston and *Kindschi* are unquestionably the law of this jurisdiction.

These two cases use the term "quasi-criminal" in exactly the same sense the United States Supreme Court used the term when it characterized disbarment proceedings "quasi-criminal." *In re Ruffalo*, 390 U.S. 544, 551, 88 S. Ct. 1222, 20 L. Ed. 2d 117 (1968). If disbarment is quasi-criminal, so must be medical de-licensure. There is no distinction in principle. Other jurisdictions are in accord. Because of their quasi-criminal nature "the charges [against an attorney] must be sustained by convincing proof to a reasonable certainty, and any reasonable doubts should be resolved in favor of the accused." *Golden*

v. State Bar of Cal., 213 Cal. 237, 2 P.2d 325, 329 (1931). The same standard applies to professional discipline for judges. CJCRP 7.

Bang Nguyen v. Dep't. of Health, 144 Wn.2d 516, 528-529, 29 P.2d 689 (2001),

This Court spelled out the full force of the due process protections in the judicial disciplinary proceedings, and the equivalence of such proceedings in due process respects to attorney disbarment proceedings, as follows:

Every judge charged by the Commission is entitled to: ... (5) the opportunity to confront witnesses face to face; (6) subpoena witnesses in his own behalf... (9) prepare and present a defense; (10) a hearing within a reasonable time; (11) the right to appeal.

We hold that a judge accused of misconduct is entitled to no less procedural due process than one accused of crime. *See* U.S. Const. amends. 5, 6, 14; Const. arts. 1, § 22 (amend. 10), 4, § 31 (amend. 71). The lawyer charged with misconduct in a disbarment proceeding is entitled to procedural due process. *In re Ruffalo*, 390 U.S. 544, 550, 20 L.Ed.2d 117, 88 S.Ct. 1222 (1968). As stated therein:

Disbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer.... He is accordingly entitled to procedural due process, which includes fair notice of the charge.... Therefore, one of the conditions this Court considers in determining whether disbarment by a State should be followed by disbarment here is whether "the state procedure from want of notice or opportunity to be heard was wanting in due process."

A judge is entitled to the same procedural due process protection when facing disqualification as a lawyer facing disbarment.

Justice William O. Douglas, concurring in *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 177-80, 95 L.Ed. 817, 71 S.Ct. 624 (1951), stated:

It is not enough to know that the men applying the standard are honorable and devoted men. This is a government of laws, not of men. The powers being used are the powers of government over the reputations and fortunes of citizens. In situations far less severe or important than these a party is told the nature of the charge against him.... When the Government becomes the moving party and levels its great powers against the citizen, it

should be held to the same standards of fair dealing as we prescribe for other legal contests. To let the Government adopt such lesser ones as suits the convenience of its officers is to start down the totalitarian path.

...

The accused has no opportunity to show that the witness lied or was prejudiced or venal.....

(Footnotes and citations omitted.) **The sentiments expressed by Justice Douglas apply with equal force here.**

In re Discipline of Deming, 108 Wn.2d 82, 102-104, 736 P.2d 639 (1987) (bold emphasis added, footnotes omitted).

It is thus crystal clear from *Deming*, *Nguyen* and the cases cited therein that under Washington State law, an attorney, judge, or medical professional facing termination of his right to practice his profession must be granted the same due process protections as a criminal defendant, as well as the protections of the appearance of fairness doctrine.

B. THE UNDERLYING PROCEEDINGS.

1. Introduction

The fury of the courts was directed at Respondent's efforts to judicially challenge the appointment of special purpose judicial officers who are either employees or servants of a litigant to effectuate a fraud on the court, and in particular, for repeatedly seeking to either stay the sale of certain real property or, pursuant to absolute statutory rights, file a lis pendens notice on the property, in a divorce case where the judgment had been procured by fraudulent concealment of assets and the assets were to be sold by the accountant who provided the inaccurate testimony concerning his client's finances.

In January of 2001, soon after the divorce proceedings were initiated by Viveca, Sanai's first lawyer submitted a declaration of Sassan Sanai dated January 15, 2001 in which he stated that

I am presently working a very limited part-time schedule and for all practical purposes am in the process of winding down and closing my practice....

My earnings from my practice for the past four years can be summarized as

1997 \$31,424.00

1998- \$27,245.00

1999- \$0.00

2000- \$0.00 (W-2 earnings)

EX 584(b) Subexh. Q at 3 ¶3

One month later, in February of 2001, approximately three months after being evicted from the home by law enforcement and two months after the filing of a petition for marital separation, Sassan made an application with a US Bank branch in King County to open an account on behalf a sole proprietorship, claiming that the sole proprietorship—that is to say Sassan—had taxable earning of \$265,000 in 2000. EX 601(b). This is \$265,000 more in taxable income than Sassan revealed in his declaration submitted to the Court the previous month. US Bank already had accounts for the parties at the date of separation with minor amounts in them. See EX 4A at 9:9-21. During the divorce trial in December of 2001, Maxeiner gave testimony elicited by Sassan's attorney that Sassan's medical practice, conducted through his medical corporation, was worthless, as its income had, in the prior four years, dropped from six figures to amounts varying from thirty thousand dollars to zero. EX. 618; TR Vol XI at 2040:11-2042:1

Philip Maxeiner, the accountant for the medical corporation and Sassan's personal affairs, prepared a statement of income from the medical incorporation for use in the divorce proceedings which illustrated the sharp fall in income. EX 619; TR Vol XI at 2025-2026. Maxeiner claims he did not know of the existence of this bank account. TR Vol. XI at 2026. Maxeiner prepared a statement of Sassan's earning from his medical practice which showed earnings of between zero and 40,000 for years 1997 to 2000. EX 619. Maxeiner testified at the divorce trial, held before Snohomish Superior Court Judge Joseph Thibodeau, that Sassan's medical practice had zero value and no material earnings; that Sassan had not drawn a salary since 1996 and that the "value of the medical practice is zero." TR Vol. XI; EX 618 at 281:8-283:9; 285:13-286:15. Maxeiner did not reveal the existence of the sole proprietorship or his bank accounts.

At the divorce trial Viveca stipulated that Sassan's secretary, could be awarded two pistols; she withdrew the stipulation when she discovered that the documents provided by Sassan at the trial demonstrated that Sassan had in fact purchased them. *See* Exh. 620, 621, 622. Believing Maxeiner to be more honest than Sassan, she agreed that Maxeiner could take over certain accounts in place of Sassan and supervise the sale of real property as a "special master", that is, an advisor to the parties and the Court. The trial court in its oral decision explicitly acknowledged this role as Viveca envisioned it:

And I'm going to appoint Mr. Maxeiner to monitor both sales. That all the money is to be placed in an escrow account. I don't know the tax consequences that he testified to as it relates to the clinic and all those

things that may have to be paid. So my goal is to place all the money in an escrow account, have him pay the debts, which everybody agrees should be paid.

EX. 600 at 14:6-11.

Even though Viveca's trial attorney, Robert Prince, explicitly requested that Maxeiner be limited to the powers of a "special master", the Court expanded the powers of Maxeiner in its final order, and then further expanded it during the course of events. EX 4. This appears to be because the trial court did not understand that the term "special master" meant an advisor or monitor; there was never any intention to give Maxeiner independent authority. The final order was to dispose of all of the property before the trial court. It also awarded Viveca no spousal maintenance based on its finding that neither Sassan nor Viveca had any prospect of making significant earnings. EX 5 at 4:13-16. The trial court also found that Sassan had made numerous illegal distributions from an ERISA plan held in Morgan Stanley accounts, the assets of which the Court split evenly between Sassan and Viveca. *Id.* at 5:8-6:10.

Sassan's second attorney, William Sullivan, a pro-tem judge and commissioner on the Snohomish County Superior Court, submitted a financial declaration dated July 17, 2002 of Sassan showing \$501 in monthly net income and \$23,470 in monthly expenses; however, there were no vehicle expenses. EX. 601. In fact, two months prior to issuing the financial declaration Sassan purchased in his own name a new Lexus RX300 luxury SUV; a copy of the registration, issued on May, 2002 is found at EX 586 Subexh. 2; the purchase receipt from Lexus of Bellevue at

EX 586 Subexh B demonstrates that Sassan had sufficient financial resources to finance \$26,298.91 of the purchase price, which means that his declaration of no monthly vehicle expenses was perjury.

Viveca filed a pro se appeal of the final judgment and decree. EX 11. Respondent, an attorney working for Yamhill County, Oregon, took on her appellate work shortly thereafter. He filed a motion to reopen the case based on new evidence, namely newly discovered wiretap tapes made by Sassan, which was augmented by the later discovery of the new Lexus SUV. EX 24. After successfully convincing Judge Thibodeau to stay the sale of one of the two pieces of property he filed a lis pendens on the other based on the illegal appointment of Maxeiner as a de facto judicial referee. EX 22. Sullivan filed a motion to remove the lis pendens, explicitly representing to the trial court that Sassan would be injured by the delay in the sale because he had no earnings to pay for Sullivan's services. Sullivan represented that Sassan had no earnings to pay for legal services on June 13, 2002 and again on June 25, 2002, ONE MONTH after Sassan purchased, in his own name, the Lexus RX300 luxury SUV. EX 587, Subexh F at 12 & Subexh. G at 15.

Washington's lis pendens statute explicitly limits the authority of a judge to cancel a lis pendens until after the complete conclusion of an action, as follows:

At any time after an action affecting title to real property has been commenced, ... the plaintiff, the defendant, or such a receiver may file with the auditor of each county in which the property is situated a notice of the pendency of the action, **And the court in which the said action was commenced may, at its discretion, at any time after**

the action shall be settled, discontinued or abated, on application of any person aggrieved and on good cause shown and on such notice as shall be directed or approved by the court, order the notice authorized in this section to be canceled of record, in whole or in part, by the county auditor of any county in whose office the same may have been filed or recorded, and such cancellation shall be evidenced by the recording of the court order.

RCW 3.28.320.

To put it simply, a trial court may not cancel a lis pendens until **at any time after the action shall be settled, discontinued or abated**; however, none of the courts concerned ever respected this language in the statute for state court actions, *id.* or federal court actions, RCW 3.28.325.

Notwithstanding the manifest language of the statute, which prohibits a judge from canceling a lis pendens until “any time after the action shall be settled, discontinued or abated,” Judge Thibodeau illegally ordered the lis pendens canceled, simultaneously denying the motion for a new trial and disqualifying Fredric from representing Viveca because (a) he was simultaneously suing Sassan, alongside Viveca, which Thibodeau thought a “conflict of interest”, and (b) because Fredric was bring “more heat than light” by showing evidence of Sassan’s fraud on the court. Exh. 613 Subexh. 14.

Judge Thibodeau explicitly authorized Fredric to make an appellate challenge of his orders, starting on the record that “Obviously it is effective immediately, but I suspect it will be subject to review by the Court of Appeals. So he has “X” number of days to bring his petition for discretionary review of that particular ruling.” *Id.* Respondent filed a

notice of appeal of all of the orders and then a motion with the Court of Appeals to determine which of the orders were appealable and which were not. The Court of Appeals acknowledged that the disqualification order applied only to the trial court, but found that none of the orders were appealable and refused to grant discretionary review. Exh 613 Subexh. 16. This order was manifestly wrong as to the order denying the motion for a new trial or to vacate the judgment, which is explicitly appealable under RAP 2.2(a)(10), and as to the motion disqualifying him, which was appealable under RAP 2.2.(a)(13).

Fredric brought the issue to this Court, focusing his argument on the procedural issue that the orders were appealable and citing *Hallmann v. Sturm Ruger & Co.*, 31 Wn. App. 50, 55, 639 P.2d 805 (1982) as grounds for reversal on a discretionary review basis. Former Commissioner Crooks dismissed the motion for review based on his finding that Fredric did not have authority to challenge his disqualification in the appellate courts absent a stay and five justices, including Justices Chambers and Fairhurst, affirmed, imposing a sanction of \$1000 without explanation. *See* EX 533 Subexh 6; Exh. 613 Subexh. 17-18. This ruling is not only contrary to the published law before and after the case, where attorneys have challenged their own disqualifications, but is a manifest violation of due process, as Fredric never had the opportunity to challenge his disqualification on the merits and the ruling effectively gives trial court judges unlimited power to control a party's choice of counsel at all levels of the case so long as the disqualification order is entered immediately. *See e.g. State v. Schmitt*, 124

Wn. App. 662, 102 P.3d 856 (2004); *Hoquiam v. PERC*, 97 Wn.2d 481, 646 P.2d 129 (1982).

Respondent, on behalf of Viveca Sanai, filed a separate action for partition as established under *Seals v. Seals*, 22 Wn. App. 652, 590 P.2d 1301 (1979). After filing the action, he obtained incontrovertible proof that Sassan had concealed his income and assets by creating a sole proprietorship with the same name as his medical corporation which drained off \$265,000 in earnings in the year 2000, and unknown amounts before then. EX. 595; a copy is attached hereto after the declaration of Respondent. The evidence consisted of the application to open an account and overdraft facility for the sole proprietorship made ten months before the trial in the marital dissolution. EX 595; *see also* EX 601a, 601b. The application was approved and an account opened in the Bellevue branch of U.S. Bank. EX 601(b). The borrower was identified as SASSAN SANAI DBA INTERNAL MEDICINE & CARDIOLOGY. There is no reference whatsoever to either of these assets in the Findings of Fact and Conclusion of Law entered by the trial court handling the original dissolution. EX 4-6.

Despite this written proof of two assets of Sassan physically located in King County, Sassan obtained transfer of the action to Snohomish County (and then dismissal) through a gross abuse of judicial authority. Sassan's lawyer, Sullivan, submitted a declaration and resumé that showed he was a pro-tem judge and commissioner with the Snohomish County Superior Court and his billing rate. EX 594 at 2:6-7, Subexh. A (Declaration of William Sullivan). No facts concerning the disclosures made in the

dissolution action or the trial itself were set forth in the declaration. *Id.* In his motion, he asserted that the all documents concerning Sassan's medical practice had been furnished by Sassan and his accountant, Philip Maxeiner. EX 594 at 2 et seq.

Based solely on these written assertions and without any other relevant evidence before it, the King County Superior Court found that Fredric, on behalf of Viveca, had failed to identify any assets in King County, and transferred the case to Snohomish County, where the judge dismissed the case on the grounds asserted, with no evidentiary support whatsoever, by Sullivan: namely, that the existence of assets identified by Fredric, the sole proprietorship and its bank account, had been fully disclosed and litigated in the divorce action. *See* EX 154; 159. The Court of Appeals affirmed this finding based on the evidentiary determination made by the King County and Snohomish County Superior Courts without discussion, or even recognition, of the new evidence. EX 165.

The hearing officer refused to allow Respondent Fredric to put on most of the witnesses he subpoenaed. The only third-party discovery he did permit was certain documents that Maxeiner agreed to produce, and allowing Maxeiner to testify. Among the documents that the Hearing officer refused to order Maxeiner to produce were the financial records for Sassan's medical corporation from 2002 to 2010. Nonetheless, Maxeiner chose to provide the 2006 and 2007 financial records, which demonstrated that Sassan's income from the medical corporation rebounded to the level last seen in the early 1990's, i.e. \$76,687.64 in 2006 and \$123,433.73 in

2007. *See* Exh. 622, 623. This fact was completely ignored by the Hearing officer. When confronted with this evidence, Maxeiner admitted that he did not know about the sole proprietorship, and the documents he prepared for trial and testimony at the trial did not account for it. TR VOL XI at 2031:18-21. Maxeiner did admit, however, that while acting as special master he learned that the testimony he gave concerning the Sassan's medical practice earnings after the trial were false, but that he said nothing because no one asked him. *Id.* at 2041:3-2045:10. At the sole deposition permitted of Maxeiner after his appointment, he took instructions from Sassan's attorney not to answer questions he disliked. EX 627 at 58-60.

The hearing officer refused to acknowledge the existence of the bank account Sassan opened, even though a statement from the account was furnished as an exhibit and admitted. EX 1 at 50:5-11. The hearing officer also refused to recognize that Sassan's account application demonstrated the existence of over \$200,000 per year in hidden earnings. *Id.*

The fraud committed by Sassan, maintained by Sullivan through invocation of his status as a Washington State judicial officer, and executed through the appointment of Sassan's accountant as a *de facto* judicial referee or receiver when he was disqualified by statute from holding either position, is the core wrong which Fredric sought to combat. However multiple collateral issues were added to the case because of Sassan's efforts to hide his fraud and punish Fredric, Viveca and her other children from supporting her, and as the truth came out, the increasingly baroque efforts of Sassan and the judicial officers concerned to prevent the truth from

coming out. This attitude was best articulated by the hearing officer himself, who wrote in response to Fredric's motion to reopen the hearing as follows:

Respondent's request to reopen the hearing for the purpose of further exploring the alleged fraud perpetrated upon his other and to elicit testimony from the judges who made rulings in his parents' dissolution and multiple collateral attacks thereon, might satisfy the Respondent's quest for truth regarding those matters, but it would make no substantial contribution at to this tribunal's necessary inquiries. Hearing officer Order of June 21, 2011, at 2.

2. The Underlying Cases

This Court refused to permit Respondent sufficient space to cover the history of the underlying *Sanai* litigation. Addressing the underlying cases is not a mandatory requirement of a brief, but it is helpful to understand the full story. A fuller exegesis is set forth in the record at CP 1531-1599.

3. The First Round of Disciplinary Proceedings.

This Court's majority opinion in *In Re Fredric Sanai*, 167 Wash.2d 740, 225 P.3d 203 (2009) sets forth the procedural history of the case in a manner that is mostly accurate. The primary error was in Justice Madsen's statement concerning the pre-trial discovery sought of three judicial officers.

Justice Madsen opinion correctly treated the orders as "pretrial discovery orders; reviewed under the standard of "manifest abuse of discretion." *Id.* at 752. The right to take pre-trial deposition has never been a component of the due process rights of criminal defendants, which

provides the basis for the rights of respondents in disciplinary cases. *Weatherford v. Bursey*, 429 U.S. 545, 559, 97 S.Ct. 837, 51 L.Ed.2d 30 (1977). Respondent did not assert a right to take judicial depositions under the Confrontation Clause or under the appearance of fairness doctrine, as neither compel pre-trial depositions. However, Justice Madsen wrongly asserted that “the judges were not involved in the litigation for which Fredric is being sanctioned, they are not even located in the state of Washington, and the relevance of their testimony is doubtful.” That was manifestly not true of Judge Johnnie Rawlinson, and Senior Judge William Canby, Jr. *See* EX 143. Accordingly, Justice Madsen’s opinion is factually unreliable on an important issue.

The dissent is significantly worse in this regard:

But Fredric has an unprecedented record of engaging in abusive and vexatious practices by filing baseless lawsuits and endless motions and appeals (often in direct violation of court orders) in courts up and down the West Coast.... Judge Zilly's comments are echoed by Los Angeles County Superior Court Judge Elizabeth A. Grimes:

"Plaintiff has proliferated needless, baseless pleadings that now occupy about 15 volumes of Superior Court files, not to mention the numerous briefs submitted in the course of the forays into the Court of Appeals and attempts to get before the Supreme Court, and not one pleading appears to have had substantial merit. The genesis of this lawsuit, and the unwarranted grief and expense it has spawned, are an outrage."

Ex. 252, at 2 n.1 (quoting *Sanai v. U.D. Registry, Inc.*, No. BC235671, 2005 WL 361327, at *15 n.36 (L.A. County Super. Ct. Feb. 16, 2005)). *Sanai*, 167 Wn.2d at 756.

Everything in the above-quoted passage is a falsehood, starting with the citation. The February 16, 2005 opinion cited is a decision of Division 7 of

the California Court of Appeals, Second Appellate District, case no. B170618. Westlaw does not provide decisions of California trial courts. Had the dissenting justices actually bothered to read the February 16, 2005 *Sanai v. Saltz* opinion, they would have discovered that *Sanai v. Saltz* does not demonstrate that Respondent did anything improper “in courts up and down the West Coast”. *Sanai v. Saltz* has nothing to do with Respondent; Fredric Sanai is not a party, has not appeared in the case, and not filed anything. Second, this is a case in which the author of the sentiment endorsed by the Dissenting Justices, Judge Grimes, was REVERSED on every decision she made against the actual litigant, counsel Cyrus Sanai. In the subsequent opinion in that case, the specific words endorsed by the dissenting justices were so outrageous that they caused the Court of Appeal to remove Judge Grimes from the case at the request of Cyrus. *Sanai v. Saltz* B174924 2005 WL 1515401, *9 (Cal.App. 2 Dist.). The dissenting justices appear to be citing as their exhibit that same language quoted and more accurately cited, in an order of Judge Zilly. Thus *In re Sanai* demonstrates two constant truths: that the relevant judicial opinions are riven with material errors as to what actually happened in judicial proceedings; and that the judges who castigated Fredric were either intentionally dishonest, or utterly reckless, about the factual and legal underpinnings of their legal opinions.

4. The Second Round of Disciplinary Proceedings.

The Association's chief hearing officer issued an order to show cause as to whether the case should be reassigned and ruled in favor of Respondent as follows:

Under the appearance of fairness doctrine, when the law requires a hearing, "it means a fair hearing, a hearing not only fair in substance, but fair in appearance as well." *Smith v. Skagit County*, 75 Wn.2d 715, 739,453 P.2d 832 (1969). The critical concern in determining whether a proceeding appears to be fair is how it would appear to a reasonably prudent and disinterested person. *State v. Dugan*, 96 Wn. App. 346, 354, 979 P.2d 885 (1999). An appearance of fairness claim requires "evidence of the judge's or decisionmaker's [sic] actual or potential bias." *State v. Post*, 118 Wn.2d 596, 619 n.9, 826 P.2d 172, 837 P.2d 599 (1992).

There is evidence of potential bias in the case at hand....

In essence, the hearing officer expressed his belief that Respondent had been dishonest when describing his medical condition. Such a belief creates the potential for bias in a new hearing before the same hearing officer, in that Respondent's credibility has already been questioned by the hearing officer. For this reason, the undersigned believes the hearing would appear unfair to a reasonably prudent and disinterested person. To avoid the appearance of unfairness, Respondent is entitled to a hearing before a different hearing officer.

BF 185 at 731-732

During the hearing, counsel objected to entry and consideration of every single order, opinion or other judge entered by the Defendants document under the "alternate use" or "alternative use" objection" TR Vol 1 193:10-18 et seq. Though he phrased it as a standing objection, he made it, as far as he can tell, in every single instance as to every single judicially created document. This objection stated that other than to identify a particular opinion or order as having been entered (i.e. that an order was entered on

such and such a date), objection was made to any “alternate use” or “alternative use”, which of course includes use to prove any of the charges against Respondent.

The purpose of this objection, which was specifically limited to deal with a century-old US Supreme Court case, is and was to bar the use of the orders, opinions, etc. without the opportunity to confront the author. The specific application of this objection to the judicial opinions was argued to the hearing officer both orally and in writing, and rejected by the hearing officer. *See* TR Vol. 7 at 1366:4-1368:8 (oral argument concerning objection); CP 276 (960-963) (ruling on motion to dismiss and confrontation clause arguments).

Judicial opinions and orders can meet the definition of testimony as “[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.” *Crawford, supra*, at 51 (quoting 2 N. Webster, An American Dictionary of the English Language (1828)). Indeed, as discussed in *Crawford*, the core purpose of the Confrontation Clause was to prevent judicial travesties such as the trial of Sir Walter Raleigh, who was convicted based on a written confession and judicial summaries of the statements made by Lord Cobham. 1 Criminal Trials 389-520 (David Jardine ed., 1850); *Crawford v. Washington, supra* at 43-44. The “examinations” entered against Raleigh were not transcripts, but rather summaries of the supposed statements of the witnesses and the conclusions of the examining justice or judge; in other words, judicial opinions. The conclusions of the investigating judges would then be presented to the fact-finder, either a jury,

another judge, or as in Raleigh's case, the same judge as was presiding over the trial. This system was taken from the France, which still employs investigating judges who take evidence and present their conclusions to other trial judges as proof.

Not every judicial order is testimonial. But any order which states a fact, or implies the existence of a fact, is testimony, as it meets the literal definition of "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact," and all reasoned opinions are testimonial by virtue of their reasoning.

Respondent issued various subpoenas of the authors of judicial opinions which the Association chose to enter into this case, as well as Philip Mazeiner. Judge Zilly sent the U.S. Attorney's office to object; Judge Thibodeau sent a letter objecting but made no motion; and Circuit Judge Robert Beezer appeared. CP 265. Maxeiner refused to appear on the grounds it was tax-return preparation season and he was too busy. CP 269, 273. The hearing officer quashed the subpoenas of everyone but Maxeiner. Respondent fiercely objected, arguing that unlike pre-trial discovery, where the authority to govern its conduct is explicitly set out in the ELC, the ELC explicitly reserves the authority to decide whether or not to enforce a subpoena to the Superior Court, and thus the orders to quash were void.

Thus even a judge who was willing to testify was barred from doing so by the hearing officer. The hearing officer continued the hearing to allow the Respondents the opportunity to obtain the information from Maxeiner. However, the hearing officer ORDERED the Respondent to attempt to

obtain Maxeiner's compliance. CP 276. In addition, CR 41 required Respondent to minimize the cost and inconvenience to Mr. Maxeiner.

After negotiation, Maxeiner's attorneys stated that he could be available for one day of testimony, and that he could provide certain documents but others would require a court order. The combination of the order to seek a compromise with Maxeiner and the CR's command to minimize inconvenience both required scheduling the hearing on the morning when the hearing was required, as that minimized the inconvenience to Maxeiner in appearing at the hearing and the cost of his attorneys.

Respondent's counsel duly filed a motion to continue the hearing until 1:00 pm and Respondents' scheduled the subpoena hearing. CP 964-970. The hearing officer denied the motion to continue. CP 1277-1280 Accordingly, counsel went to the hearing while Respondent went to the Superior Court. The Commissioner granted the order, but stated, erroneously, that it would be the hearing officer and not him who determined relevance. Maxeiner, his attorneys and Respondent then returned to the hearing officer. The hearing officer ordered, as punishment to the Respondent for taking what turned out to be the necessary step of scheduling everything on the same day, that Maxeiner was not required to release the disputed documents.

However, under cover of the court order, Maxeiner did release two years of Sassan's post-dissolution tax information. EX 619, 622-24. These tax documents demonstrated, along with the previously obtained U.S. Bank applications, that Sassan had committed fraud on the court by shifting the

income from his medical practice from the corporation to the sole proprietorship, then at least in part back to the medical corporation after the marriage was dissolved. More important, Maxeiner, who testified about the precipitous decline in the income and value of Sassan's medical corporation, also testified that he KNEW about the miraculous recovery in the income from the medical corporation, but said nothing because no one asked him. TR Vol. 11 2019-2096.

After Maxeiner was dismissed, Respondent called Viveca Sanai to testify briefly, then closing arguments were made. TR Vol. 12.

Respondent filed a motion to re-open the hearing, which was denied in an order not docketed. After Findings of Fact and Conclusions of Law were submitted, he filed a motion to amend, which was again denied. CP 1428-1431. The Board granted a motion to file an overlength opening brief, which because of the refusal to allow additional time focused on only certain issues. Within the brief was a request to reopen proceedings. CP 1517-1633. The Board denied the motion and voted to affirm the hearing officer's recommendations, just as in the case before. CP 97-98. A timely appeal was filed. CP 99.

IV. ARGUMENT AND AUTHORITY

A. THE DISCIPLINARY PROCESS

The Process violated the state and federal due process guarantee because the Association refuses to acknowledge that an attorney has the same due process rights as a criminal defendant. The Association openly contended

that the due process protections available to defendants in criminal cases do not apply in disciplinary matters, where this Court held explicitly that the same due process protections as in criminal cases apply to attorney disbarment proceedings. *In re Deming, supra*, 102-104 (bold emphasis added).

What is the rationale for rejecting the majority opinion in *Deming*? The Association has no case law to cite, so it argues that:

...while professionals facing disciplinary proceedings must be afforded certain due process protections as set out in the cases Fredric cites, those cases do not support his argument that such professionals get all the protections afforded criminal defendants. For example, a criminal defendant has a right to a jury trial; a lawyer facing discipline does not. A criminal defendant has a right to appointed counsel if he cannot afford a lawyer; a lawyer facing discipline does not. *See e.g., In re Conduct of Hariss*, 334 Or. 353, 49 P.3d 778 (no right to appointed counsel for indigent lawyer facing disbarment under either federal or state constitution).

BF 334 At 26.

The right to a jury trial in criminal proceedings under federal law is in fact **the same** as the right in disciplinary proceedings. In a criminal proceeding, a jury trial is required if, and only if, the penalties that could be imposed involve an imprisonment of more than six months. *Baldwin v. New York*, 399 U.S. 66 (1970). If the disciplinary proceedings in Washington met the requirements of *Baldwin*, a jury WOULD be required. However, because there is no authority to impose imprisonment under the disciplinary rules, no jury is required. Thus, with respect to the Sixth Amendment right to a jury, a respondent has “no less” right to a jury than in

a criminal proceeding where imprisonment is not an option. Likewise, the federal constitutional right to appointment of counsel in bar disciplinary cases is NO LESS than that of criminal cases. The right to appointed counsel under the Sixth Amendment applies solely to crimes involving incarceration penalties.

The pre-eminent generalization that emerges from this Court's precedents on an indigent's right to appointed counsel is that such a right has been recognized to exist only where the litigant may lose his physical liberty if he loses the litigation....

Lassiter v. Dept. of Social Services, 452 U.S. 18, 25, 101 S.Ct. 2153, 68 L. Ed.2d 640 (1981).

Because the penalty of losing this litigation does not get Respondent thrown in jail, he does not get counsel paid by the state. Thus on this issue as well, Respondent has exactly the same due process rights as if he were charged with a crime which did not involve a penalty for incarceration.

As to the last contention—that the difference between the standard of proof in a criminal case versus a civil case demonstrates that there is no constitutional right at issue here—the Association has misunderstood the nature of the constitutional guarantee. There is no requirement that all criminal cases and quasi-criminal cases have the same, higher standard. See *Nguyen, supra* at 529 (2001) and citations therein.

The due process requirement is that the standard of proof be **higher** than a civil case—the exact standard is a product of the rights threatened. *Bang Nguyen, supra*. However, there is no sliding scale on the Sixth Amendment right of confrontation—it applies to **all** instances where criminal or quasi-

criminal due process is in force and all the cases to the contrary pre-date *Crawford, supra*.

The position of the Association is that Respondent was not entitled to the procedural protections which a judge is entitled to, which are “the *same procedural due process protection when facing disqualification as a lawyer facing disbarment*,” namely “no less procedural due process than one accused of crime.” *In re Deming, supra*. While the specific issue was the denial of the Sixth Amendment confrontation clause rights, the repudiation of the basis standard of due process applicable to the case infected the entire proceedings, rendering it structurally unsound from start to finish. *See, e.g. United States v. Gonzalez-Lopez*, 548 US 140, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006) (denial of counsel of choice, like violation of confrontation rights, infected case from start to finish, requiring automatic reversal). Thus the refusal of the Association to acknowledge this Court’s clear statement of the applicability of full criminal protections to a bar disciplinary case destroys any confidence in the reliability of the proceedings.

In re Deming, like the “appearance of fairness” doctrine applicable to quasi-judicial administrative proceedings, is an application of this state’s due process guarantee. In the attorney disciplinary area, other states have taken somewhat different approaches. But the basic rejection for Respondent of a general standard set out in this Court’s law implicates federal constitutional guarantees. “[T]his Court had upheld a class-of-one

equal protection challenge to state legislative and regulatory action in *Village of Willowbrook v. Olech*, 528 U.S. 562, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000) (per curiam).” See *Engquist v. Or. Dept. Of Agr.*, 553 U.S. 591, 128 S.Ct. 2146, 2150, 170 L.Ed.2d 975 (2008). In *Engquist*, the United States Supreme Court reaffirmed the class of one equal protection analysis in cases of state legislative and regulatory action, but rejected its application to employment. Under class of one analysis, a plaintiff’s federal rights are violated where a state agency, in a legislative or regulatory context involving matters such as property, arbitrarily and irrationally treats one person different from another. There is nothing requiring the injured party to claim membership of a disfavored or discriminated against class.

Here, this Court laid down a basic due process standard for judicial and attorney disciplinary cases that is fair, workable and easily understood. The Association rejects the application in toto to Respondent.

B. UNCONSTITUTIONALLY LOW LEVEL OF PROOF

This Court acknowledged in *Nguyen, supra*, that the standard of proof in professional disciplinary cases under a federal constitutional analysis must be higher than in civil cases. However, the burden of proof is actually LOWER, due to the fact that the ELC suspends the normal rules of evidence. ELC 10.14. Thus objections such as hearsay cannot even be validly articulated, as they are categorically excluded from being made. Indeed, it is less than the loosened standards of the Washington Administrative Procedures Act, RCW 34.05. While that Act mandates that

“[t]he presiding officer shall exclude evidence that is excludable on constitutional or statutory grounds or on the basis of evidentiary privilege recognized in the courts of this state”, there is no such mandatory requirement under the ELC. RCW 34.05.452.

In this case, much of evidence was hearsay, but no evidentiary objection on such grounds was allowed. TR Vol I 10:19-25. Respondent essayed a hearsay objection during the first day to ensure that this point was not waived and was rejected by the hearing officer. TR Vol I 201:17 to 204:16. Further objections were not made, and did not need to be made, as the hearing officer applied the ELC to reject them. Indeed, as the Association did not write the ELC, the hearing officer had no choice but to reject the hearsay objection and any further hearsay objections raised during the hearing would have been a waste of time.

The declaration which was admitted over objection is exactly the kind of out-of-court statement that must be excluded under both the hearsay rule and the confrontation clause (which, while not explicitly raised in that objection, may be considered via RAP 2.5(a)). The ELC allows an entire case to be based on documentary or hearsay evidence, an impossibility in a civil case. The standard of proof is thus LOWER than a civil case, because evidence that would never be admitted in a civil case over the objections of a defendant could comprise the entire case in a disciplinary case. The ELC in its current form violates the constitutional guarantee of a burden of proof higher than that of civil case. Accordingly, the decision of the Board must

be reversed without reference to any specific showing of prejudice, as the error was structural. *See Nguyen, supra*.

C. IGNORING UNDISPUTED EVIDENCE.

One of the two key holdings in *In Re Sanai, supra*. This was the holding that a hearing officer could not reject an undisputed documentary statement of a physician certifying that Respondent was unable to participate in the hearing. At oral argument before this Court, Ms. Eide was explicitly asked whether the Association disputed the truth of the document, and she stated that it did not. However, precisely the same due process shenanigans occurred on the retrial. The Association simply refused to contest or dispute the exculpatory facts presented by Respondent, and the hearing officer refused to acknowledge their existence.

Perhaps the best example is the U.S. Bank application, EX 601 and 601(b). It first must be noted that those items were not, as the hearing officer contended, used in violation of any existing order. The entire set of documents was filed in the state courts in support of various motions prior to any order of Judge Zilly barring their use. Once those documents were filed, no one sought a motion to seal them. All interlocutory orders made by Judge Zilly or the magistrate judge ceased to have any effect when Judge Zilly closed the case and, in addition, ordered that no more motions could be brought by anyone. The documents were then retrieved from the files of the relevant courts. Exhibit 595 subexh 1 shows the U.S. Bank application as it was filed in one instance.

So what was the hearing officer's response to the fraud? He simply ignored the evidence, writing "Sufficient proof has and continues to be lacking." CP 294 at 1331:8-9. He further stated:

Based on a US Bank account application, EX 601, Fredric claims to have finally proven that his father hid assets during his parents' dissolution because Maxeiner testified he had no knowledge of a sole proprietorship account for Sassan. But an account application checking the box "sole proprietorship" does not establish that any such account existed or that any assets were "hidden" in it. Even if it did, such information, if relevant, should have been developed and used ten year ago rather than being asserted now as a basis to delay these proceedings.....

CP 294 at 1331:5-11.

The hearing officer's analysis is willful blindness. EX 601(b) shows that the application was **approved on February 22, 2001 and the account opened.** It also shows a statement for that account documenting deposits beginning in August of 2001. The key statement of Sassan about his sole proprietorship is that it made \$265,000 in taxable income in the year 2000, while Sassan claimed that his medical corporation made nothing. Moreover information WAS developed and put in front of the state courts as soon as it was obtained, in 2003. So Respondent wrote, for example, that

Based on the discovery Viveca recently received, she has been able to identify a number of items of personal property that were left undistributed: (a) the Sole Proprietorship (as defined in the First Amended Complaint); (b) the Sole Proprietorship's Bank Account at US Bank in Bellevue, Washington; (c) the Lexus RX 300....

EX 595 at 2:18-23; *see* EX 595 subexh. 1

The hearing officer borrowed the equally erroneous analysis of the judges in the partition action without making a considered, independent

review. Judges Alsdorf and Wynne both ruled that there was no evidence of assets in King County, when the documentary evidence, indisputably from Sassan, showed that there was. In doing so they made no actual review of the evidence put forward by Respondent, instead relying on the assertions of William Sullivan that, as a fellow judicial officer, he could assure them that all assets had been disclosed. Indeed, the hearing officer admitted that he would not look at the facts or arguments presented impartially or independently, stating:

Many of Fredric's pleadings are well written and, at first glance, may have the look of legitimacy, but when examined critically and in context, they reveal themselves for what every justice, judge, commissioner and clerk has found them to be. In his tortured pursuit of his illusive goal, Fredric has attempted to turn each collateral proceeding, including the instant disciplinary hearing, into either a *de facto* appellate review or virtual *trial de novo* of his parents' dissolution.

CP 294 at 1332:13-20.

The hearing officer thus openly declared that undisputed exculpatory evidence would not be considered; instead it would be viewed in the “context” of the adverse court decision against Fredric. This violates due process. Judicial officers in their fact-finding role do not have the discretion to ignore undisputed evidence, or even disputed evidence, or pretend that the evidence is something other than it is. Where evidence on material points is disputed, the fact-finder must address the weight of each; and where the evidence is not disputed, the fact-finder must accept the evidence. These are mandatory features of due process. As the current

Chief Judge of the Ninth Circuit wrote:

What goes for juries goes no less for judges. In making findings, a judge must acknowledge significant portions of the record, particularly where they are inconsistent with the judge's findings. The process of explaining and reconciling seemingly inconsistent parts of the record lays bare the judicial thinking process, enabling a reviewing court to judge the rationality of the fact-finder's reasoning. On occasion, an effort to explain what turns out to be unexplainable will cause the finder of fact to change his mind. By contrast, failure to take into account and reconcile key parts of the record casts doubt on the process by which the finding was reached, and hence on the correctness of the finding. *See, e.g., Gui v. INS*, 280 F.3d 1217, 1228 (9th Cir. 2002) (failure of immigration judge to support adverse credibility finding with specific, cogent reasons constituted grounds for reversal). . . . **The state courts might have disbelieved [a witness], or perhaps discounted his testimony, but they were not entitled to act as if it didn't exist. Failure to consider key aspects of the record is a defect in the fact-finding process.**

Taylor v. Maddox, 366 F.3d 992, 1007-1008 (9th Cir. 2004).

The fact-finding process in the Washington State attorney disciplinary process facially and in this case does not meet minimum constitutional standards considering the stakes at risk facially and as applied to Respondent. The deficiencies are multifold.

First, unlike the civil litigation process, which has the summary judgment and partial summary judgment process, and criminal prosecutions, which have the *Knapstad* hearing process, there is no means to force a tribunal to explicitly acknowledge what is or is not disputed in a case. This means at trial it is impossible to tie the Association to what is or is not disputed. This came to the fore in *In re Sanai*, where the Association did not challenge the veracity of the medical declaration provided by Respondent, but instead urged that the hearing officer was free to arbitrarily

credit or discredit evidence.

Such a procedure may be appropriate in expedited, low stakes proceedings such as small claims court, but disciplinary hearings must offer due process protections greater than in civil cases and equal to that of criminal cases. The ELC provides for no method of forcing the Association or the tribunal to state undisputed facts or law, and the use of requests for admission to accomplish this purpose was ruled out by the this Court. The absence of any method to force acknowledgement of undisputed facts or law prior to trial is a manifestly deficient process. It allows the hearing officer to find against a Respondent with mushy generalization or gross mischaracterizations of the evidence as discussed above.

The decisions made against Respondent in the underlying litigation were all premised on “the big lie” that Respondent sought to “delay proceedings” for the “illusiv e goal” of proving non-existent fraud. However, when the undisputed evidence was discovered, it was ignored. Thus the hearing officer’s refusal to acknowledge the evidence in front of his eyes concerning the fraud is the core illustration of this due process failure. The factual summary in Section II lays out other undisputed material facts which the hearing officer refused to acknowledge.

While there is no way to describe the amount of evidence necessary to prevail on a “clear and convincing” basis as opposed to a “beyond a reasonable doubt” basis, at a minimum a “clear and convincing” burden of proof requires that “a judge must acknowledge significant portions of the record, particularly where they are inconsistent with the judge’s findings.”

Taylor v. Maddox, supra. On what even the hearing officer acknowledges was a principal piece of evidence, the hearing officer pretended that the evidence undisputed documentary evidence did not show that the account was opened, when in fact it did so show, and contended that the sole proprietorship was never “developed” before the state courts, when in fact it was filed and its nature pointed out.

It should be noted that the refusal of the hearing officer to recognize the contents of exhibits was echoed by his falsification of the record and arguments before him. The hearing officer’s Order Denying the Motion to Amend demonstrates that he did not understand the issues raised and show him falsifying the record as to what happened during the hearing. CP 135. As discussed herein, the hearing officer’s general approach to evidence or argument that disproved his pre-set conclusions was to pretend that the evidence does not exist or the argument was never made.

In the Motion, Respondent wrote as follows:

Separate and apart from the quasi-criminal rights, under Washington law, in administrative proceedings the appearance of fairness doctrine requires that the author of any document the facts or conclusions of law of which are entered in the proceeding may be called to testify about the contents therein. *Weyerhaeuser v. Pierce County*, 124 Wn.2d 26 (1994). In that case the Supreme Court held that persons whose written conclusions of law and fact would be relied upon in an administrative hearing were witnesses who could be called and cross-examined under the principles of fairness under PCC 2.36.090 CP 301 at 1399.

Rather than dealing with the substance of Respondent’s argument that the Hearing officer violated his confrontation right deriving from the appearance of fairness doctrine under *Weyerhauser*, the Hearing officer

maintained that it was never raised during the hearing. He wrote that “the Respondent’s “appearance of fairness argument”, which was raised for the first time in the motion to amend, is without merit.” CP 135 at 1429:13-14. The inclusion of this comment is meant to suggest to a reviewing body that the argument was made too late, and thus waived.

In fact, the argument based on *Weyerhaeuser* was not only made orally before the Hearing officer twice, the case was cited into the record.

The two critical cases that were decided in this matter did not deal with Bar matters but rather dealt in one case with an effort to revoke a license and in another case to the efforts to put restrictions on the ability of the company Weyerhaeuser to develop land that it owned. The former case is called *Department of Licensing v. Flory*, and the latter case is called *Weyerhaeuser v. Pierce County*. In both cases the Washington State Supreme Court held, relying on *Goldberg v. Kelly*, that in the case of administrative hearings of this nature i.e., where there are important property interests at stake, there is a right to cross-examine witnesses. The general principle is held out in *Flory*.

TR Vol. 8 1409:16-1410

Now, the issue of whether or not Fredric Sanai has a right to cross-examine persons whose written documents are being used to prove something was decided by the Washington State Supreme Court ... in the case of *Weyerhaeuser v. Pierce County* it's a 1994 case, 124 Wn.2d 26. It ruled that an ordinance permitting cross-examinations of witness in a proceeding required. The persons who prepare documents relied on in the hearing must also be cross-examined because they are de facto witnesses. You are relying on the truth of the matter asserted in those documents; therefore, one has the ability to cross-examine them.

TR Vol. 12 at 2254:4-16

One might cavil as to whether *Weyerhaeuser* is a classic appearance of fairness case as it relies on a principles of fairness approach arising from a statutory interpretation. However, the argument was made twice before the

hearing officer, citing the case by name, so there can be no doubt that the argument was the same.

D. “CLASS OF ONE”

In the underlying cases and this case, this Court, the underlying courts, the federal courts and the Association imposed on Respondent arbitrary and disparate treatment of his property rights, creating an illegal “class of one” in violation of the Equal Protection Clause of the Fourteenth Amendment. The illegal “class of one” in the case of Respondent arose in the context of the disqualification of Respondent from acting as Viveca’s attorney.

Judge Thibodeau disqualified Respondent for two, and only two, reasons that were stated in a single sentence and never reduced to writing. The refusal to articulate a legal analysis violated *Hallmann, supra*.

The first ground was the Respondent had a conflict of interest because he was simultaneously suing Sassan. This argument is gibberish. One can only have a conflict of interest between either existing clients, under RPC 1.7, between an existing client and the lawyer in a business or gift transaction under RPC 1.8, or between an existing and former client under RPC 1.9. Likewise, finding that Respondent was bring more “heat than light” to the litigation was nothing more than an expression of Judge Thibodeau’s correct antipication that Respondent’s conduct would “burn” his judicial colleague, William Sullivan. None of this was grounds for disqualification. Respondent was thus deprived of an opportunity to exercise his property right, namely his right to practice as an attorney, on

arbitrary grounds inapplicable to any other attorney.

Judge Thibodeau illegally ordered the *lis pendens* canceled, simultaneously denying the motion for a new trial and disqualifying Fredric from representing Viveca because (a) he was simultaneously suing Sassan, alongside Viveca, which Thibodeau thought a “conflict of interest”, and (b) because Fredric was bring “more heat than light” by showing evidence of Sassan’s fraud on the court. Exh. 613 Subexh. 14.

Judge Thibodeau explicitly authorized Fredric to make an appellate challenge of his orders, starting on the record that “Obviously it is effective immediately, but I suspect it will be subject to review by the Court of Appeals. So he has “X” number of days to bring his petition for discretionary review of that particular ruling.” *Id.* Fredric filed a notice of appeal of all of the orders and then a motion with the Court of Appeals to determine which of the orders were appealable and which were not. The Court of Appeals acknowledged that the disqualification order applied only to the trial court, but found that none of the orders were appealable and refused to grant discretionary review. Exh 613 Subexh. 16. This order was manifestly wrong as to the order denying the motion for a new trial or to vacate the judgment, which is explicitly appealable under RAP 2.2(a)(10), and as to the motion disqualifying Fredric, which was appealable under RAP 2.2.(a)(13).

Fredric brought the issue to this Court, focusing his argument on the procedural issue that the orders were appealable and citing *Hallmann, supra* as grounds for reversal on a discretionary review basis. Former

Commissioner Crooks dismissed the motion for review based on his finding that Fredric did not have authority to challenge his disqualification in the appellate courts absent a stay and five justices, including Justices Chambers and Fairhurst, affirmed, imposing a sanction of \$1000 without explanation. *See* EX 533 Subexh 6; Exh. 613 Subexh. 17-18. This ruling is not only contrary to the published law before and after the case, where attorneys have challenged their own disqualifications, but is a manifest violation of due process, as Fredric never had the opportunity to challenge his disqualification on the merits and the ruling effectively gives trial court judges unlimited power to control a party's choice of counsel at all levels of the case so long as the disqualification order is entered immediately. *See e.g. State v. Schmitt*, *supra* (Kitsap County prosecutor challenged disqualification with entire office with no stay); *Hoquiam supra* (law firm disqualified by Court of Appeals successfully challenged disqualification before Washington State Supreme Court with no stay); *Sherman v. State*, 128 Wn.2d 164, 168, 905 P.2d 355 (1995) (“[i]n addition, the Attorney General appeals from the trial court's order disqualifying the entire Office of the Attorney General from representing Appellants.”)

No court, in Washington or anywhere else in the United States has ever in a published case barred an attorney from filing an appeal of an order disqualifying the attorney and related orders. The reason is simple—it would create a monstrous power on trial courts to repeatedly strip a party of counsel if the trial court was intent on insuring that the opposing side won the litigation.

Here, Judge Thibodeau removed Respondent from the litigation because he had found some evidence of Sassan's fraud, namely the Lexus RX300, and because he sought to ensure that if the real property was sold, the purchasers were aware that Philip Maxeiner had no authority to sell the property.

Judge Thibodeau called Fredric's lis pendens filing "a misuse of that statutory scheme, because you have an adequate remedy at law." EX 37 (transcript). However, the phrase "adequate remedy at law" does not arise in any decision involving lis pendens, but rather arises in the context of injunctive relief. Thibodeau cited no law in support of his order and it directly conflicted with both the plain statutory language and unpublished Court of Appeals decisions concerning the use of lis pendens, namely *Western Washington Corporation of Seventh Day Adventists v. Rassmussen* No. 58139-2-I/58386-7-I (August 27, 2007). His rationale, therefore, lacked any basis in law. Judge Thibodeau's order on this issue required Viveca to lift the lis pendens unless the Court of Appeals issued a stay. It prohibited Viveca or Fredric from filing another lis pendens "in this lawsuit related to the undeveloped lot." It also prohibited Viveca or Fredric from "taking any further action to delay or obstruct the sale of the vacant lot." EX 35. There is no statutory authority for such an order.

Respondent's use of the lis pendens statute was completely appropriate. A marriage dissolution case is an action that manifestly concerns the title of real property that is owned by either or both of the spouses. The Association argued dishonestly to the Board that a dissolution action does

not affect title to real estate. *See* TR of Oral Argument to Board at 30:6-10 where Ms. Eide stated that “ the very first sentence of the lis pendens statute says that it only applies in an action affecting title to real property, which simply wasn't the case where respondent used it.”

This Court held otherwise, holding “a Washington decree awarding property situated within the state has the operative effect of transferring title” and that as to property outside Washington, “a court may indirectly affect title by means of an in personam decree operating on the person over whom it has jurisdiction.” *Marriage of Kowalewski*, 163 Wn.2d 542, 548, 182 P.3d 959 (2008).

The lis pendens statute forbids a judge from erasing or canceling a lis pendens until the entire action is fully completed.

At any time after an action affecting title to real property has been commenced, or after a writ of attachment with respect to real property has been issued in an action, or after a receiver has been appointed with respect to any real property, the plaintiff, the defendant, or such a receiver may file with the auditor of each county in which the property is situated a notice of the pendency of the action...*And the court in which the said action was commenced may, at its discretion, at any time after the action shall be settled, discontinued or abated, on application of any person aggrieved and on good cause shown and on such notice as shall be directed or approved by the court, order the notice authorized in this section to be canceled of record, in whole or in part, by the county auditor of any county in whose office the same may have been filed or recorded, and such cancellation shall be evidenced by the recording of the court order.*

RCW 3.28.320(emphasis added)

The relevant language in the lis pendens statute was created in the 1893 session laws chapter 127 at page 413, and so is drafted in a somewhat

antique style. Nonetheless, the plain language of both lis pendens statutes allows a party to file a lis pendens at any time “after an action ...has been commenced” and does not allow cancelation of the lis pendens except as follows:

And the court in which the said action was commenced may, at its discretion, at any time after the action shall be settled, discontinued or abated, on application of any person aggrieved and on good cause shown and on such notice as shall be directed or approved by the court, order the notice authorized in this section to be canceled....
RCW 3.28.320, RCW 3.28.325 (emphasis added).

Notwithstanding the clear language of the statute, none of the judges concerned chose to recognize the two limitations: first, that only the court “in which the said was commenced” may cancel the lis pendens, and second, that it may only be canceled “at any time after the action shall be settled, discontinued or abated.” “Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.” *Whatcom Cty. v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P. 2d 1303 (1996) *and cases cited therein*.

None of these established legal principles made a difference to either the courts in the underlying case or or the hearing officer. In a decision which Respondent was barred from participating in, the “Court of Appeals rejected her argument that only the court in which the underlying action is filed may release the lis pendens. It noted that RCW 4.28.320 does not so state...” CP 294 at 1295:19-1296:4. Of course, RCW 4.28.320 DOES SO STATE. It reads that “*the court in which the said action was commenced may, at its*

discretion, *at any time after the action shall be settled, discontinued or abated*, on application of any person aggrieved and on good cause shown and on such notice as shall be directed or approved by the court, order the notice authorized in this section to be canceled”. Under the no superfluous words canon of statutory interpretation, the words “the court in which the said action was commenced” would be superfluous, i.e. meaningless and irrelevant, if the any other court could cancel the lis pendens. Likewise, the words “*after the action shall be settled, discontinued or abated*” become superfluous if a trial court could cancel the lis pendens at any time. The words put in by the Legislature are manifest limitations on the authority of trial courts that they simply refused to recognize.

The orders canceling the lis pendens, the injunctions designed to prevent the filing of additional lis pendens as well as the appellate decisions refusing to overturn them were transparently void and did not have to be followed, as there was an “absence of authority to issue the type of order”, namely an order canceling a lis pendens prior to completion of the litigation. *State v. Coe*, 101 Wn.2d 364, 370, 679 P.2d 353 (1984). In that case the patently illegal order was a protection order barring public disclosure of matters or testimony that the trial court had ruled inadmissible. *Coe, supra* at 370. Any such injunction or order punishing Respondent for purporting to violate a void order was itself void. *See, e.g., Ex parte Fisk*, 113 US 713 (1885); *Moore v. Kaufman*, 189 Cal.App.4th 604, 616, 117 Cal. Rptr. 3d 196 (2010); *State ex. rel Sowers v. Olwell*, 64 Wn.2d 828, 394 P.2d 681 (1964) (subpoena which violated attorney-client

privilege and subsequent contempt judgment against subpoenaed attorney.)

The rule set out by Commissioner Crooks was nothing more than an open invitation to a trial court to steer litigation in the manner it desired by allowing the arbitrary, unappealable removal of attorneys who offended the trial court judge by, say, taking legitimate legal steps to stop fraud committed by part-time judicial officers. Respondent was thus acting in the public interest by filing his lawsuit in federal court challenging his disqualification. However, Judge Coughenour, falling into the same pattern as Judge Zilly and Justice Chambers when they misleadingly relied upon Judge Grimes' overturned defamation in their respective opinions discussed above, falsified the record by holding that this Court had ruled that Respondent was entitled to appeal his disqualification when this Court ruled the precise opposite.

The disqualification of Respondent was one of the key events behind this litigation morass, because it signaled to the lower courts to continue disregarding established procedure and published case law. Having declared open season on Respondent in violation of equal protection of the law, it cannot punish Respondent based on legal opinions and court actions which took their cue from Commissioner Crook's classification of Respondent into a class of one. The Association's placement of Respondent in a class of one is obvious when his treatment is compared to attorney Karen Unger, who prevailed in bad faith disciplinary proceedings brought by the bar using testimony of a federal court judge AND a member of this Court, Justice Owens (judicial notice to be requested).

E. CONFRONTATION RIGHTS

There is no due process right in civil or criminal cases to pre-hearing, third party discovery, so it was never argued or considered in *In Re Sanai, supra*. When Respondent and his counsel arrived in Seattle and got a sense of the schedule, they issued subpoenas to various judges who had written opinions in the case. A number were served and one, Circuit Judge Robert Beezer (since deceased), actually appeared at the hearing. The hearing officer quashed these subpoenas while refusing to exclude the opinions of the relevant judges, ruling categorically that he would not allow testimony of judicial officers even if, like Circuit Judge Beezer, they appeared to testify. CP 276 at 960-963; CP 305 1428-1431.

The hearing officer lacked the authority to quash the subpoenas and should have permitted them under the principles articulated in *Weyerhauser, supra*. However, if there is some overarching right of judges to avoid questions about their falsification of the record of the cases before them and in other courts, then the Sixth Amendment's confrontation clause, which applies to this case due to its quasi-criminal nature, categorically barred consideration of these orders.

The ELC reflects the distinction between pre-hearing discovery, which is not protected by due process, and the right to call witnesses at the hearing, which is a protected due process right and covered by the appearance of fairness doctrine. Under ELC 10.11, entitled "Discovery and Pre-Hearing Procedure", a hearing officer has broad discretion to control

and limit discovery. However, these rights are completely absent under ELC 10.13. Indeed, ELC 10.13 gives the Respondent unlimited rights to call witnesses and issue subpoenas for their attendance. Enforcement of the subpoena is explicitly stated as occurring “under Rule 4.7”. The ELC provides that only Superior Court judges can enforce subpoenas for attendance at the hearing. ELC 4.7. While the hearing officer had discretion to control pre-hearing discovery under ELC 10.11, the Hearing officer had **no** authority to interfere with, quash, or limit the witnesses a Respondent seeks to have appear. Likewise, the hearing officer has no authority to completely bar a subpoena of a witness when documents authored by the witness have been submitted by other side in the proceeding. All questions about the enforceability of the subpoena had to be addressed by the Superior Court.

The hearing officer contended that it was proper to quash the subpoenas because the Washington State Supreme Court held that such subpoenas have, in the past, been “disfavored, if not outright barred by case law”. CP 294 at 48. However, the case law cited by this Court did not involve issues of the state “appearance of fairness” doctrine.

Weyerhaeuser does present an “appearance of fairness” related analysis Relying on the seminal due process case of *Goldberg v. Kelly*, 397 U.S. 254, 25 L. Ed. 2d 287, 90 S. Ct. 1011 (1970), this Court held authors of relevant documents are witnesses and **must** testify for the proceedings to meet basic “principles of fairness”. While the decision was decided on

whether the authors of the documents are “witnesses” under Pierce County’s ordinances, the seven member majority explicitly cited to due process principles in making its determination. *Weyerhaeuser, supra*, at 32-34.

In her partial dissent, Justice Madsen contended that this decision was a serious expansion of due process rights beyond those previously accorded to public hearings, let alone civil trials, and she disagreed with the expansion. Justice Madsen was entirely correct in identifying this right as beyond that available in civil trials, and indeed in some cases beyond the right available in criminal trials. The “appearance of fairness” required by Pierce County’s statutory appearance of fairness doctrine required a **greater** degree of due process protection than a criminal trial. Like the PCC, the ELC explicitly provides that “parties have the right to cross-examine witnesses...” ECL 10.13(d). Is there, then, an equivalent principle in disciplinary hearings to “ensure and expand the principles of fairness and due process” as under the PCC? The answer, of course, is yes. These principles are the ones articulated in *In re Deming, supra* and apply to judicial, medical and other professional disciplinary matters. In *Deming* this Court stated that “[w]e hold a judge accused of misconduct is entitled to no less procedural due process than one accused of crime...[a] judge is entitled to the same procedural due process protection when facing disqualification as a lawyer facing disbarment.” This Court held that the due process accorded a criminal defendant was the MINIMUM; this statement has the same expansionary means as the PCC’s statement that it “expands” due

process protection. Moreover, the rights at issue in a disciplinary hearing are at least as great as those before a Pierce County land use board.

Accordingly, the principles of *Weyerhaeuser* dictate that the judicial officers should have been required to testify. However, if this Court decides that there are overarching barriers to compelling their testimony, then the Sixth Amendment's Confrontation Clause comes into effect. The Confrontation Clause is an exclusionary rule. It does not compel any witnesses to testify. Instead, it provides that if there is some factual or legal barrier to the cross-examination of a person whose words are sought to be introduced to prove charges against a defendant, the evidence MUST be excluded. In *Crawford, supra* the United States Supreme Court held that the right to confront witnesses was not subject to a reliability test, but absolute where required by the purposes of the confrontation clause. Two subsequent cases, *Davis v. Washington*, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006), and *Michigan v. Bryant*, 131 S.Ct. 1143 (2011), have created an exception for informal statements by a victim taken during commission of the crime made during 911 calls or to assist the police in apprehending the criminal. In creating this exception, the Supreme Court focused on the wrong that the Confrontation Clause sought to bar, the re-use of statements made in prior judicial proceedings:

We noted that in England, pretrial examinations of suspects and witnesses by government officials "were sometimes read in court in lieu of live testimony." *Id.*, at 43, 124 S.Ct. 1354. In light of this history, we emphasized the word "witnesses" in the Sixth Amendment, defining it as "those who 'bear testimony.'" *Id.*, at 51, 124 S.Ct. 1354 (quoting 2 N. Webster, *An American Dictionary of the English*

Language (1828)). We defined "testimony" as "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." 541 U.S., at 51, 124 S.Ct. 1354 (quoting Webster). ...Although "leav[ing] for another day any effort to spell out a comprehensive definition of `testimonial,'" *Crawford* noted that "at a minimum" it includes "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and . . . police interrogations."

.....

The basic purpose of the Confrontation Clause was to "targe[t]" the sort of "abuses" exemplified at the notorious treason trial of Sir Walter Raleigh. *Crawford*, 541 U.S., at 51, 124 S.Ct. 1354.

Michigan v. Bryant, 131 S.Ct. 1143 at 1152 to 1153, 1155 (2011).

As discussed above, not all judicial orders have a testimonial character, but all reasoned opinions and all orders which imply a fact about what happened before the judicial officer do bear such a testimonial character. Taking the example of *In re Sanai*, Justice Chambers quoted Judge Zilly and Judge Grimes to prove that Respondent was committing attorney misconduct "up and down the West Coast." The relevant orders and opinions of these two judges are therefore testimonial, as they seek to prove certain facts to the public and to higher courts on appellate review. The judicial decisions entered into the case made, in every instance, factual assertions about what did or did not occur, or what should or should not have occurred, or what Respondent's motivation or purpose was. In addition to falsely characterizing the record concerning Respondent's assertion of *Weyerhaeuser*, the hearing officer provided ignored the appearance of fairness based right to confront witnesses. The first first justification for this, that the court rulings are not the exclusive evidence relied upon, is irrelevant, and indeed this was the losing argument in

Crawford v. Washington, supra. The second defense, that the hearing officer “liberally” allowed other evidence is not a legal argument, as there is not now, and has never been, a legal doctrine stating that an unavailable witness may have testimonial statements entered because lots of OTHER evidence on OTHER issues was admitted. The hearing officer’s contention that he did not rely upon the factual and legal determinations of the judges in the underlying cases is obviously false, as the hearing officer made no legal analysis whatsoever of the positions taken by Respondent in his findings of fact and conclusions of law other than to quote or repeat the decisions in the underlying cases. He simply quoted and cited these decisions.

F. NEW CHARGES

In a bar disciplinary hearing the charges may not be amended or supplemented on the fly. *In re Ruffalo*, 390 U.S. 544, 551, 88 S. Ct. 1222, 20 L. Ed. 2d 117 (1968). In paragraphs 205 through 207 and 213, CP 294 at 49-52, the hearing officer purports to find that the request for continuance made by Respondent, based on the need to minimize the inconvenience of the witness, was misconduct. This flatly violates *Ruffalo*.

G. RE-OPENING

To ensure that there was no waiver of any argument or contention, Respondent filed a motion for a supplemental hearing session. CP 283 at 964-970. This was denied. CP 293 at 1277-1280. Once proceedings were

closed, he filed a motion to reopen proceedings, CP 289. The order denying the motion was never docketed, but has subsequently been provided to this Court. He filed a motion to amend the findings of fact and conclusions of law, CP 301 at 58-92, which was denied, CP 305 at 93-96. His brief to the Board also requested a supplemental hearing, which was denied. CP 331; CP 37. Respondent fully set forth the grounds for additional hearings.

H. INFIRM FINDINGS

Though Respondent has raised numerous procedural and constitutional deficiencies meriting reversal, error is explicitly assigned to the following paragraphs of the hearing officer's findings of fact based on the above-referenced deficiencies: 2, 7, 8, 12, 13, 14, 15, 16, 17, 18, 20, 24, 25, 26, 32, 35, 36, 41, 43, 46, 47, 48, 49, 50, 51, 52, 55, 56, 57, 58, 59, 65, 67-80, 88-89, 92-93, 99-100, 104-215. CP 294 at 1-53. Error is explicitly assigned to all of the hearing officer's conclusions of law and recommendations for the reasons set forth above, i.e. paragraphs 216-229. CP 294 at 53-57.

V. CONCLUSION.

For the reasons set forth above, the decision of the Disciplinary Board should be reversed, and the matter remanded to a new hearing officer with instruction to allow additional discovery against Philip Maxeiner and to order the appearance or testimony of judicial officers whose orders are offered by the Association in evidence or if the judicial officer is not available to testify to exclude such orders.

Submitted this July 24, 2012
Cyrus Samra
Council political vice

OFFICE RECEPTIONIST, CLERK

To: Cyrus Sanai
Subject: RE: Please file the attached Opening Brief No. 201, 046-6 / 201,049-1 In Re Fredric Sanai

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From: Cyrus Sanai [<mailto:csanai@roadrunner.com>]
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To: OFFICE RECEPTIONIST, CLERK
Cc: Linda Eide; Allison Sato; Scott Busby
Subject: Please file the attached Opening Brief No. 201, 046-6 / 201,049-1 In Re Fredric Sanai

Please file the attached opening brief in the above referenced matter.

The Association has consented to service of documents by email in writing.

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