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Supreme Court No. 201,073-3

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE DISCIPLINARY PROCEEDING AGAINST

MARJA STARCZEWSKI,

Lawyer (Bar No. 26111).

**ANSWERING BRIEF OF THE
WASHINGTON STATE BAR ASSOCIATION**

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 ORIGINAL

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I. COUNTERSTATEMENT OF THE ISSUE

1. Respondent Marja M. Starczewski failed to diligently pursue her client's case causing it to be twice dismissed, failed to communicate with her client about the matter, and, when the client asked what happened, lied to him to conceal the true reason for the dismissal. The hearing officer and the Disciplinary Board recommended that Respondent be suspended for 24 months and required to pay restitution. Should the Court adopt that recommendation?

II. COUNTERSTATEMENT OF THE CASE

A. PROCEDURAL FACTS

On January 19, 2011, the Washington State Bar Association (Association) filed a three-count Amended Formal Complaint charging Respondent with failing to act with reasonable diligence and promptness in representing her client Rajinder Singh, failing to keep him reasonably informed about the status of his case or to explain it to him so he could make informed decisions, and misrepresenting to him the reasons the court had dismissed his case. BF 9. Respondent answered and the matter was assigned to Hearing Officer David A. Thorner. BF 4, 7.

The hearing officer bifurcated the proceedings under Rule 10.15 of the Rules for Enforcement of Lawyer Conduct (ELC). BF 11. A violation hearing was held on May 24-25, 2011. On July 5, 2011, the hearing

officer filed his Findings of Fact and Conclusions of Law as to RPC Violations. BF 32.10 (FFCLV, attached as Appendix A). The hearing officer found by a clear preponderance of the evidence that Respondent committed the misconduct alleged in Counts 1 through 3. FFCLV at 8-9. Respondent objected to the FFCLV on various grounds. BF 37, 39. After review, the hearing officer reaffirmed the FFCLV as entered. BF 48 at 2.

A sanction hearing was held on October 13, 2011. On November 21, 2011, the hearing officer filed his Findings of Fact and Conclusions of Law Re: Sanctions and Recommendation. BF 78 (FFCLS, attached as Appendix B). The hearing officer applied Standards 4.42(a) and 4.62 of the American Bar Association's Standards for Imposing Lawyer Sanctions (1991 ed. & Feb. 1992 Supp.) (ABA Standards) and found the presumptive sanction was suspension. FFCLS at 2-3. He found six aggravating factors (dishonest or selfish motive, pattern of misconduct, multiple offenses, refusal to acknowledge wrongful nature of the conduct, substantial experience in the practice of law, and indifference to making restitution) and one mitigating factor (personal problems), but gave the mitigating factor minimal weight. Id., ¶¶ 20-28. He recommended that Respondent be suspended from the practice of law for 24 months, her practice be monitored for 18 months after reinstatement, and that she pay Singh restitution in the amount of \$15,000, based on the value of an

uncommunicated settlement offer. Id. ¶¶ 36-44.

The Disciplinary Board reviewed the matter under ELC 11.2(b)(1). It adopted the hearing officer's decision and unanimously recommended a 24-month suspension. BF 100 (attached as Appendix C). Additionally, by a vote of 11-1, the Board increased the time for the practice monitor to 24 months. Id.¹

B. SUBSTANTIVE FACTS

Respondent was admitted to practice law in Washington on October 25, 1996. FFCLV ¶ 1. She moved her office from Lynnwood to East Wenatchee on June 15, 2007. Id. ¶ 23; Transcript (TR) 305-06.

Rajinder Singh was involved in a motor vehicle accident on May 5, 2004, when a commercial vehicle driven by Kelly Reeser swerved to avoid a stalled passenger vehicle driven by Dawn De La Fuente and hit Singh's taxi. FFCLV ¶¶ 2-3. Singh first hired lawyer Harish Bharti to represent him, but Bharti referred the matter to Respondent. Id. ¶¶ 4-5. Respondent began representing Singh in December 2005. Id. ¶ 5. Singh reasonably believed that Respondent was his lawyer. Id. ¶ 17. There is no evidence that Bharti had any professional involvement with the matter after referring it to Respondent. FFCLS ¶ 32.

¹ The dissenting Board member voted to keep the length of practice monitoring at 18 months. BF 100 n.1.

Respondent obtained records and drafted a demand letter to Reeser's employer's insurer dated August 24, 2006, which resulted in the insurer making a settlement offer of \$15,000, which Singh rejected after Respondent told him about it. FFCLV ¶¶ 7-8; Exhibit (EX) A-17, R-34.

On May 3, 2007, the day before the statute of limitations expired, Respondent filed suit in King County Superior Court on behalf of Singh and his brother Surinder Khangura, against Reeser, Reeser's employer, and De La Fuente alleging personal injury and lost wages. FFCLV ¶¶ 9-11; EX A-21. Respondent was the only attorney who signed the complaint and the only attorney of record. FFCLV ¶ 16; EX A-21 at 5.²

The court promptly issued a case scheduling order setting trial for October 20, 2008, and required that a Confirmation of Joinder be filed by the plaintiffs by October 11, 2007. FFCLV ¶¶ 18-19. Under Rule 4.2 of the King County Local Superior Court Rules (LR), the plaintiffs must file a Confirmation of Joinder signed by the plaintiffs' attorney. FFCLV ¶ 20; EX A-26 at 539-41. Respondent knew about the deadlines imposed by the case scheduling order and that she was the only attorney of record. FFCLV ¶¶ 21-22.

On or about June 15, 2007, Respondent moved to East Wenatchee,

² Singh's brother did not testify at the disciplinary hearing. There is no evidence that Respondent had a higher level of communication with the brother or was more diligent on the brother's behalf than she was with Singh.

apparently because of financial difficulties. Id. ¶¶ 23-24. She did not convey her difficulties to Singh or explain to him how those difficulties could affect her ability to prosecute his case. Id. ¶ 24.

Lawyer Julia Kyte appeared for the defendants in September 2007 and communicated to Respondent an offer to settle the matter for \$20,000. Id. ¶¶ 25-26; EX A-6. Respondent did not tell Singh about this new offer and never responded to Kyte. FFCLV ¶¶ 27-29; TR 108. Over the next several months Kyte called and emailed Respondent multiple times, but Respondent never replied. FFCLV ¶¶ 31-32; EX A-11.

Respondent did not serve De La Fuente with the Singh complaint and did not file the Confirmation of Joinder by October 11, 2007, as required. FFCLV ¶¶ 33-34. On November 6, 2007, the court ordered Singh to appear on December 6, 2007, and show cause why the case should not be dismissed for lack of compliance with the court's scheduling order and why sanctions of at least \$250 should not be imposed. Id. ¶¶ 35-36; EX A-9. The order was mailed to Respondent's East Wenatchee address. EX A-9 at 3, R-17.

Respondent did not tell Singh about the show cause order or that his case could be dismissed. FFCLV ¶ 37. Respondent failed to appear at the December 6, 2007 show cause hearing. Id. ¶ 38. The court continued the show cause hearing to January 17, 2008, despite Respondent's failure

to appear, ordered that the hearing would be stricken if a Confirmation of Joinder was filed seven days before the hearing date, and ordered plaintiff to pay sanctions of \$250. Id. ¶¶ 39-40; EX A-10, A-11 at exhibit 2. The court's December 6, 2007 order was also mailed to Respondent's East Wenatchee address. EX A-11 at exhibit 2.

Respondent did not tell Singh that the court had continued the show cause hearing or that it imposed \$250 in sanctions, did not pay the sanctions, and did not file a Confirmation of Joinder. FFCLV ¶¶ 41-43. Respondent failed to appear at the January 17, 2008 hearing and the court dismissed Singh's lawsuit without prejudice. Id. ¶¶ 44-45; EX A-13. The dismissal order was mailed to Respondent's address and this time she moved to vacate it, but did not tell Singh that. FFCLV ¶¶ 46-48.

On March 7, 2008, the court heard argument on Respondent's motion and vacated the order of dismissal on condition that the outstanding \$250 sanctions be paid to defense counsel within 10 days, De La Fuente be served within 20 days, a Confirmation of Joinder be filed no later than April 30, 2008, and the parties comply with all of the other pretrial deadlines set in the original case scheduling order. Id. ¶¶ 50-51; EX A-15. The court expressly stated it was not ruling on the merits and did not order or schedule a second show cause hearing, contrary to Respondent's claims here. TR 74-75, 80-81; EX A-15.

Respondent paid the \$250 sanctions and apparently arranged to have De La Fuente served through the Secretary of State's office. FFCLV ¶ 53; EX R-17, R-18. But she did not inform Singh about the March 7, 2008 order, did not file a Declaration of Service or Confirmation of Joinder or anything else to indicate she had taken any action to comply with the court's March 7, 2008 order, and did none of the things on a to-do list she created at or about the time of the March 7, 2008 hearing. FFCLV ¶¶ 52, 54-55; EX A-28, R-52; TR 275, 349-50.

On May 9, 2008, the court reviewed the matter and dismissed the case again, citing Respondent's failure to accomplish service and file the Confirmation of Joinder. FFCLV ¶ 56; EX A-14. By then, the statute of limitations had run on Singh's case. FFCLV ¶ 58.

Respondent received the second and final dismissal order, but did not then send a copy to Singh, did not inform Singh that his case had been dismissed or of the reason for the dismissal, did not advise him of any options for setting aside the dismissal or appealing the decision, did not refer Singh to another lawyer or back to Bharti, and took no action in court to challenge the dismissal. Id. ¶¶ 57, 59-60; EX A-28.

Singh contacted Respondent in July 2009, 14 months after the court finally dismissed his case, and asked for an update. FFCLV ¶ 64. Respondent wrote Singh a letter that stated that the court had dismissed his

case because defense counsel had convinced the court that the accident had been caused by an emergency on the road and was not anyone's fault. EX A-14; EX A-5; TR 375; FFCLV ¶ 65. Respondent knew this explanation of the reason for the dismissal was false. FFCLV ¶¶ 66-67. In an additional knowing attempt to mislead Singh and conceal her misconduct, Respondent excerpted in her letter portions of opposing counsel's March 3, 2008 Response to the Motion to Vacate, which argued that the defendants were not negligent under the emergency doctrine.³ Id. ¶¶ 68-69; EX A-5, A-24.

Singh was injured by Respondent's actions in that he was not informed as to the true cause of the dismissal of his case, he could not take informed action to pursue his potential remedies within relevant time constraints, and he lost the opportunity to settle or obtain any other redress. FFCLV ¶¶ 63, 74; FFCLS ¶¶ 9-11, 15. Respondent never advised Singh whether she had malpractice insurance coverage or that he might have a claim against her. TR 454.

III. ARGUMENT

A. STANDARD OF REVIEW

The Court gives considerable weight to the hearing officer's

³ There is no evidence that Respondent ever told Singh about the emergency doctrine before writing him this letter.

findings of fact, especially with regard to the credibility and veracity of witnesses, and will uphold those findings so long as they are supported by substantial evidence. In re Disciplinary Proceeding Against Poole (Poole I), 156 Wn.2d 196, 208, 125 P.3d 954 (2006); In re Disciplinary Proceeding Against Poole (Poole II), 164 Wn.2d 710, 724, 193 P.3d 1064 (2008). “Substantial evidence exists if the record contains evidence in sufficient quantum to persuade a fair-minded, rational person of the truth of a declared premise.” Poole I, 156 Wn.2d at 209 n.2 (internal quotation marks omitted). In reviewing the findings, the Court looks at the entire record, but ordinarily will not disturb findings of fact made upon conflicting evidence. Id. at 209.

An attorney challenging findings of fact must present argument as to why the specific findings are unsupported and cite to the record to support that argument. In re Disciplinary Proceeding Against Kronenberg, 155 Wn.2d 184, 191, 117 P.3d 1134 (2005); ELC 11.5(b). The Court should not overturn a hearing officer’s findings “based simply on an alternative explanation or versions of the facts previously rejected by the hearing officer.” In re Disciplinary Proceeding Against Marshall, 160 Wn.2d 317, 331, 157 P.3d 859 (2007).

The Court reviews conclusions of law de novo. Poole I, 156 Wn.2d at 209. It should uphold the conclusions of law if they are

supported by the findings of fact. In re Disciplinary Proceeding Against Haley, 157 Wn.2d 398, 406, 138 P.3d 1044 (2006).

The Court gives serious consideration to the Board's recommended sanction and will generally affirm it unless the Court can articulate a specific reason to reject it. Poole I, 156 Wn.2d at 209-210.

B. THE RECORD SUPPORTS THE HEARING OFFICER'S CONCLUSIONS THAT RESPONDENT COMMITTED THE MISCONDUCT CHARGED IN COUNTS 1-3.

1. The record supports the hearing officer's conclusion that Respondent failed to diligently represent Singh (as charged in Count 1).

The hearing officer concluded that Respondent failed to act with reasonable diligence and promptness in representing Singh and to make reasonable efforts to expedite his case in violation of Rules 1.3 and 3.2 of the Rules of Professional Conduct (RPC), as charged in Count 1. FFCLV

¶ 75. This conclusion is supported by the following findings of fact:⁴

- Respondent did not try to serve De La Fuente until ordered to do so by the court on March 7, 2008, 11 months after filing the suit. FFCLV ¶¶ 9 (unchallenged), 33, 51;
- Respondent did not file a Confirmation of Joinder by October 11, 2007 as required by the court's case scheduling order. Id., ¶ 34 (unchallenged);
- Despite knowing that she was the only attorney of

⁴ Respondent does not challenge FFCLV ¶¶ 9, 16, 21-22, 24, 34, 39-41, 45, 50, 59-60. Those findings of fact are, therefore, verities on appeal. Poole II, 164 Wn.2d at 722.

record in the Singh matter and knowing of the deadlines set in the case scheduling order, Respondent claimed she was not responsible for taking action to meet the deadlines. Id. ¶¶ 16, 21-22 (all unchallenged);

- While Respondent claimed she had financial difficulties that affected her ability to finance the representation, she did not advise Singh of those difficulties or the adverse effect they would have on his case. Id. ¶ 24 (unchallenged);
- Respondent did not appear at the December 6, 2007 show cause hearing. Id. ¶ 38;
- Respondent did not file a Confirmation of Joinder or pay the \$250 sanctions as ordered by the court on December 6, 2007. Id. ¶¶ 39-43 (¶¶ 39-41 are unchallenged);
- Respondent did not appear at the January 17, 2008 show cause hearing. Id. ¶ 44;
- Singh's case was dismissed on January 17, 2008 because of Respondent's failure to comply with the case scheduling order. Id. ¶ 45 (unchallenged);
- After the court vacated the order of dismissal conditioned on Respondent proving service on De La Fuente, filing of a Confirmation of Joinder, and compliance with all of the pre-trial deadlines, Respondent did not file proof of service or a Confirmation of Joinder or do anything else to notify the court that she was complying with its order. Id. ¶¶ 50-51, 54-55 (¶ 50 is unchallenged); and
- Respondent did not inform Singh of the final dismissal order, did not advise him of any action he could take to try and vacate the order, and took no such action on her own. Id. ¶¶ 59-60 (unchallenged).

Respondent makes no specific argument against the conclusion

that she committed the misconduct charged in Count 1. She instead challenges discrete findings of fact supporting the conclusion, those being FFCLV ¶¶ 33, 38, 44, 51, 54-55, on the grounds that they are either irrelevant, incomplete, or unsupported by the evidence. Respondent's Brief (RB) at 11-12. But the findings are both relevant and supported by substantial evidence.

FFCLV ¶ 33 – Respondent argues that finding 33, that she did not serve De La Fuente, is not supported by the evidence because “De La Fuente was eventually served.” RB at 11. But when finding 33 is taken in context, what the hearing officer found is that Respondent did not try to serve De La Fuente prior to the deadlines set in the court's May 3, 2007 scheduling order, which is unchallenged. See FFCLV ¶¶ 18-22, 33-35. In fact, Respondent made no attempt to serve De La Fuente from the time she filed Singh's lawsuit on May 3, 2007 until after the court ordered her to do so on March 7, 2008, 10 months later. EX R-18. Finding 33 is supported by substantial evidence.

FFCLV ¶¶ 38 and 44 – Respondent argues that findings 38 and 44, that she did not appear at the December 6, 2007 and January 17, 2008 show cause hearings in Singh's matter, are irrelevant because there is no evidence that she was aware of the court's orders setting those dates. RB at 11, 12. First, the findings are true; she did not appear. Second, they are

relevant because notice of the hearings was mailed to Respondent's current address in East Wenatchee, as was the court's first order dismissing Singh's case. EX A-9, A-11 at exhibit 2, A-13 at 2. Whether Respondent failed to appear at the hearings despite knowing of them or because she failed to timely check her mail, her failure is relevant to deciding if her representation of Singh lacked diligence.

FFCLV ¶ 51 – Respondent argues that finding 51 is incomplete because it fails to note that the trial court had promised a second show cause hearing after its March 7, 2008 hearing on Respondent's motion to vacate the first order dismissing Singh's case. RB at 12, 20-21. But Respondent is wrong. The court did not promise or set a second show cause hearing. While the court initially mentioned another hearing on the record, it went on to say that it was setting a deadline instead and entered a written order to that effect. TR at 80-81; EX A-12, A-15. The second show cause hearing is a figment of Respondent's imagination.

FFCLV ¶ 54 – Respondent argues that finding 54, that she did not file a Confirmation of Joinder as required by the trial court, is irrelevant because the Confirmation "could not legally be filed . . . until 60 days passed and a default was taken against a recently-served party." RB at 12. But Respondent neglects to note that a Confirmation of Joinder with boxes in Section II checked (which notify the court of problems in complying

with the case scheduling order) can be filed at any time and could have been filed after she arranged for service on De La Fuente on March 28, 2008.⁵ EX A-26 at 540; EX R-18. Instead, after arranging for service on De La Fuente she did nothing but sit and wait to see if the court would set another show cause hearing. And when the court did not, but instead dismissed Singh's matter when it appeared to the court that its order had been disobeyed, Respondent made no further attempt to argue or vacate the dismissal. FFCLV ¶ 60; TR 353-54. Finding 54 is relevant.

FFCLV ¶ 55 – Respondent argues that finding 55, that she filed nothing with the court to reflect any action taken by her to comply with its March 7, 2008 order, is irrelevant as there was “no requirement, or provision, for interim filings of indications of efforts to comply.” RB at 12. Respondent ignores the plain language of the court's order, which required filing of a Confirmation of Joinder “not later than April 30, 2008.” EX A-15. The court ordered Respondent to take certain action, but she did not. FFCLV ¶ 55 is also relevant.

Respondent was responsible for diligently representing Singh and pursuing his matter so long as she was his lawyer. RPC 1.3, 3.2. “A lawyer has a duty to carry through to conclusion all matters undertaken for

⁵ Checking the first box on the King County Confirmation of Joinder form indicates that everything has been done; checking the second box notifies the court that there are problems or issues. LR 4.2(a).

a client, unless the lawyer withdraws.” State v. Jordan, 146 Wn. App. 395, 399 n.2, 190 P.3d 516 (2008) (citing In re Disciplinary Proceeding Against Miller, 99 Wn.2d 695, 699-700, 663 P.2d 1342 (1983)). She had a choice – either properly represent Singh or withdraw as attorney of record. Miller, 99 Wn.2d at 700. She did neither, causing Singh irreparable harm.

In response, Respondent argues that she was not responsible for diligently representing Singh because he had alternate counsel, Harish Bharti. RB at 17. But the hearing officer rejected this claim. FFCLV ¶¶ 16, 17 (finding that Respondent was the only attorney of record for Singh and that he reasonably believed she was his lawyer). As the hearing officer found, there is no evidence that Bharti had anything to do with the case after referring it to Respondent. FFCLV ¶¶ 4, 16; FFCLS ¶ 32.

What really happened is that Respondent “basically gave up on a case that [she] couldn’t go on with any longer,” TR 424, stopped communicating with Singh, and let his case get dismissed. The conclusion of the hearing officer and the unanimous Disciplinary Board that Respondent violated RPC 1.3 and RPC 3.2 as charged in Count 1 is supported by the record and should not be disturbed.

2. The record supports the hearing officer's conclusion that Respondent failed to communicate critical information to Singh (as charged in Count 2).

The hearing officer concluded that Respondent failed to keep Singh reasonably informed about the status of his case and to explain the matter to the extent reasonably necessary to allow him to make informed decisions about the representation in violation of RPC 1.4(a) and 1.4(b). FFCLV ¶ 76. This conclusion is supported by the following findings:⁶

- Respondent did not explain to Singh how conflicts could arise from representing his brother in the same suit when they had overlapping claims, and did not obtain Singh's informed consent to the joint representation. FFCLV ¶ 15;
- Respondent did not inform Singh that she had financial difficulties or explain to him how those difficulties would affect her handling of the case. Id. ¶ 24 (unchallenged);
- Respondent did not communicate the \$20,000 settlement offer to Singh. Id. ¶ 27;
- Respondent did not explain the matter to Singh to enable him to make an informed decision regarding the \$20,000 offer. Id. ¶ 28;
- Respondent did not inform Singh that the court had ordered a show cause hearing regarding his case or that his case could be dismissed. Id. ¶ 37;
- Respondent did not inform Singh that the court had continued the show cause hearing. Id. ¶ 41 (unchallenged);

⁶ Respondent does not challenge FFCLV ¶¶ 24, 41, 46, 48, 52, 59, and 60. Those findings of fact are, therefore, verities on appeal. Poole II, 164 Wn.2d at 722.

- Respondent did not inform Singh that the court had ordered payment of \$250 in sanctions to defense counsel. Id. ¶ 42;
- Respondent did not inform Singh that his lawsuit had been dismissed. Id. ¶ 46 (unchallenged);
- Respondent did not inform Singh that she filed a motion to vacate the court's first order dismissing his lawsuit. Id. ¶ 48 (unchallenged);
- Respondent did not inform Singh about the court's March 7, 2008 order which required her to file a confirmation of joinder, serve one defendant, comply with all of the pre-trial deadlines set in the case schedule order, and pay the \$250 sanctions. Id. ¶¶ 50-52 (unchallenged);
- Respondent did not timely inform Singh that the case had been dismissed a second time, the reasons for that dismissal or of his options for setting aside the dismissal or appealing the decision within the time frame for taking such action. Id. ¶¶ 59-60 (unchallenged); and
- Respondent's testimony that she had notified Singh of the second and final dismissal order before July 2009 was not credible given her failure to recall any action taken to advise Singh of the dismissal and the lack of any supporting evidence in her file. Id. ¶ 61.

Respondent argues that the findings of fact that support this conclusion are not supported by substantial evidence because there was evidence of communication with Singh and because absence of documentary evidence of communication in her file "is not evidence." RB at 33-40. Respondent's arguments fail.

The unchallenged findings of fact, standing alone, are sufficient to

sustain the conclusion that Respondent violated RPC 1.4(a) and 1.4(b) by not communicating to Singh the status of his matter and sufficient information to allow him to make informed decisions about the representation. Those findings are FFCLV ¶¶ 24, 41, 46, 48, 52, 59-60.

The findings that Respondent does challenge, FFCLV ¶¶ 15, 27, 28, 37, 42, and 61, were supported by Singh, who testified that he had no communication with Respondent between March 2008 and July 2009 and was unaware of critical events such as the \$20,000 settlement offer made by opposing counsel Julia Kyte and the court's dismissals of his case, and by Kyte, who testified to difficulty communicating with Respondent and the lack of any response to the \$20,000 settlement offer Kyte extended. TR 107-108, 113, 148-50; EX A-11.

In contrast, Respondent testified that she had no independent recollection of communicating critical facts about the representation to Singh. TR 52-53 (no recollection of discussing non-compliance with the scheduling order with Singh); TR 327-328 (no recollection of telling Singh about the \$20,000 settlement offer); TR 340 (no recollection of telling Singh about her financial difficulties); TR 354-355 (no recollection of advising Singh about options for setting aside the dismissal order or advising him to see another attorney); TR 356-357 (no recollection of a discussion telling Singh that his case had been dismissed or why).

Respondent also repeatedly admitted that she had no documentation in her file evidencing such communication even though she maintained physical and electronic files in Singh's matter that contained some other documentation, including information created after Respondent "lost her office" in June 2007. RB at 35; TR 52-53, 340-41, 354-57; EX A-5, A-17, R-21-25, R-42-43, R-45, R-47-48, R-52. The hearing officer was not required to credit Respondent's self-serving, unsupported testimony that her lack of documentation of communication with Singh meant nothing. In re Disciplinary Proceeding Against Whitt, 149 Wn.2d 707, 722, 72 P.3d 173 (2003) ("a hearing officer is not bound by various explanations if he or she is not persuaded by them."). The hearing officer's credibility finding is entitled to great weight. Poole II, 164 Wn.2d at 724.

Respondent argues that the fact that she could produce no documentation showing communication with Singh at critical junctures cannot be used as evidence against her because she did not routinely keep such records as part of her law practice. RB at 34-35. But Respondent did not object to questions eliciting this evidence during hearing and therefore waived the issue. Even if she had objected, the evidence was admissible since documentation kept in client files, or the lack thereof, is the kind of evidence on which reasonably prudent people rely in the conduct of their affairs. ELC 10.14(d)(1). Her reliance on Rule 803(a)(7) of the Rules of

Evidence (ER) is misplaced. See RB at 33-34.

Respondent also argues that the Association misrepresented the testimony of her husband, Martin Hoyer, and that Hoyer's testimony established that Respondent did communicate Kyte's final \$20,000 settlement offer to Singh. RB at 36-38. But what Hoyer said is that 1) Respondent never specifically told Hoyer whether or not she communicated the offer to Singh, TR 240, and 2) she told Hoyer that Singh did not want to be bothered with offers less than \$40,000. TR 238. Hoyer also testified that he was not working in Respondent's office in September 2007 and had no contact with clients then, so he had no personal knowledge. TR 243-244. In the end, Respondent admitted she did not recall communicating the \$20,000 offer to Singh, and did not remember the offer at all until after finding it in her paper file in 2010 or 2011. TR 326-28; RB at 35. The hearing officer was entitled to credit Singh's unequivocal testimony that he never heard of the \$20,000 settlement offer until disciplinary counsel told him about it. TR 107-08.

Respondent appears to argue that a violation of RPC 1.4 cannot be found when the client was not proactively contacting her and seeking information about his case. RB at 12, 18-19. This argument is without merit. RPC 1.4 and comments thereto make clear that a lawyer must affirmatively act to keep the client informed about the status of the matter

and to consult and explain the matter to the client to the extent necessary to permit the client to make informed decisions.

In sum, the hearing officer could reasonably conclude that Respondent's lack of specific recollection and documentation of communication with Singh about the critical events in his case, when contrasted with the testimony of Singh and Kyte, meant there had been no communication. "An essential function of the fact finder is to discount theories which it determines unreasonable because the finder of fact is the sole and exclusive judge of the evidence, the weight to be given thereto, and the credibility of witnesses." State v. Bencivenga, 137 Wn.2d 703, 709, 974 P.2d 832 (1999); see also In re Disciplinary Proceeding Against Cohen (Cohen I), 149 Wn.2d 323, 332-33, 67 P.3d 1086 (2003) (hearing officer is entitled to draw reasonable inferences from the evidence).

3. The record supports the hearing officer's conclusion that Respondent made knowing misrepresentations to her client (as charged in Count 3).

The hearing officer concluded that Respondent knowingly misrepresented to Singh the reason why the court had dismissed his case in her letter to him of July 2009, in violation of RPC 8.4(c). FFCLV ¶¶ 67, 77; EX A-5. This conclusion is supported by the following findings:

- Respondent did not inform Singh that his case had been dismissed until July 2009 when Singh contacted her for an update. FFCLV ¶ 64;

- Respondent wrote back to Singh and told him that the court had dismissed his case because defense counsel had convinced the court that the accident had been caused by an emergency on the road and was not anyone's fault. Id. ¶ 65;
- This statement was false. Id. ¶ 66;
- Respondent knew the statement was false. Id. ¶ 67;
- In her July 2009 letter to Singh, Respondent excerpted portions of opposing counsel's March 3, 2008 Response to the Motion to Vacate, which argued that the defendants were not negligent under the emergency doctrine. Id. ¶ 68 (unchallenged); and
- The inclusion of opposing counsel's argument in her letter was a knowing effort to mislead Singh as to the reasons for the dismissal and to further conceal her misconduct. Id. ¶ 69.

Respondent challenges this conclusion, arguing she acted, at most, negligently, and that the Association failed to meet its burden of proving she acted knowingly because it could not prove exactly what she was thinking when she wrote the July 2009 letter to Singh. RB at 40-46. She admits finding 68, that she excerpted portions of opposing counsel's brief, but challenges the other findings on the grounds that they are not supported by "any evidence" or that they misrepresent a sentence of her July 2009 letter to Singh. RB at 13; EX A-5.

Uncontroverted evidence shows that Singh's case was dismissed because of procedural problems that Respondent created, not because the court considered and ruled on the merits of the matter at its March 7, 2008

hearing. TR 355; EX A-8, A-9, A-12, A-13, A-14, A-15. Respondent was present at the March 7, 2008 hearing and wrote in her notes that the judge was “not judging on its merits.” EX A-12, R-52. She did not tell Singh about entry of either of the dismissal orders at the time they happened nor about the March 7, 2008 hearing; she only told him his case had been finally dismissed 14 months after the fact. FFCLV ¶¶ 46, 52, 59; EX A-5.

After Singh contacted Respondent in July 2009 seeking an update, she wrote back and told him that his case had been dismissed because “the defendant's attorney convinced the court, that we did not have a case, because the accident was just an accident – caused by an emergency on the road, and was not anyone's fault.” EX A-5. But no such thing ever happened – the judge did not rule on the merits of the matter and Respondent knew that. TR 74; EX A-12, R-52. When she wrote the letter to Singh, she had before her both the court’s May 9, 2008 order of dismissal and opposing counsel’s brief; this is known because she excerpted the brief in the letter and enclosed the order with it. FFCLV ¶¶ 68, 72. It was reasonable for the hearing officer, based on that evidence, to conclude that Respondent would have known when writing the letter that her explanation of why the court dismissed Singh’s case was false. Id. ¶ 67; In re Disciplinary Proceeding Against Preszler, 169 Wn.2d 1, 20, 232 P.3d 1118 (2010) (“[a]n attorney's knowledge may be inferred from

the facts”); In re Disciplinary Proceeding Against Longacre, 155 Wn.2d 723, 744, 122 P.3d 710 (2005) (the hearing officer is in the best position to determine the applicable mental state based on the evidence presented).

Respondent testified that she wrote Singh that “the defendants’ attorney convinced the court, that we did not have a case” because she saw an expression on the judge’s face during the March 7, 2008 hearing that made her think the judge felt Singh’s case had no merit. EX A-5; TR 87-91. The hearing officer was entitled to reject this explanation and find instead that Respondent lied and excerpted portions of the defense brief in an attempt to mislead Singh as to the true reason for dismissal of his case. FFCLV ¶¶ 69, 71; Whitt, 149 Wn.2d at 722.

Respondent argues that she cannot be found to have misled Singh because she enclosed a copy of the final May 9, 2008 dismissal order with her letter and there was no evidence that Singh was misled. RB at 13, 41-42. But the hearing officer found that Singh was not a fluent reader of English and was unfamiliar with court proceedings. FFCLV ¶ 72. This finding was supported by Singh’s testimony. TR 101, 104, 110. The hearing officer could then reasonably find that Respondent’s enclosure of the court’s one-paragraph order was insufficient to inform or explain to Singh what had happened to his case, particularly given Respondent’s misrepresentations. FFCLV ¶ 72.

C. RESPONDENT RECEIVED A FAIR HEARING

Respondent argues that her bifurcated disciplinary hearing was plagued with due process errors and should be remanded for a new hearing. RB at 1-5, 14, 23. Respondent's arguments are unfounded and she cannot prove prejudice.

1. **The hearing officer's entry of findings of fact and conclusions of law after the violation hearing did not violate Respondent's right to due process.**

Respondent objects to the manner in which the hearing officer entered his FFCLV, arguing that the FFCLV were "entered without sufficient due process, without any opportunity to rebut the proposed findings." *Id.* at 24. Although the hearing officer did enter the FFCLV before Respondent's deadline for objecting to findings proposed by the Association had expired, Respondent waived this issue by not raising it before the hearing officer, she was given an opportunity to object to the FFCLV, and the FFCLV are supported by substantial evidence.

a. Respondent waived objection to entry of the FFCLV.

At the end of the violation hearing, the hearing officer asked the Association to submit proposed findings of fact and conclusions of law by July 1, 2011, and asked Respondent to submit any objections or proposed findings and conclusions within five days of service of the Association's proposed findings. TR 403. Neither party objected to this procedure. *Id.*

The Association filed proposed findings on June 30, 2011. BF 31. The hearing officer then entered the FFCLV on July 1, 2011. BF 32. But they were not yet final because Respondent still had time to file objections. She did so on July 8, 2011, and again on July 18, 2011, but notably failed to object to the hearing officer having entered the FFCLV before reviewing her objections. BF 37, 39. The hearing officer then reviewed Respondent's objections to the FFCLV, found them wanting, and reaffirmed the FFCLV as originally entered. BF 48 at 2.

By failing to object then to the manner in which the hearing officer entered his FFCLV, Respondent waived this issue. In re Disciplinary Proceeding Against Diamondstone, 153 Wn.2d 430, 441-42, 105 P.3d 1 (2005) (court may refuse to review a claim of error not raised at hearing).

b. Respondent was given an opportunity to present her own proposed findings.

As noted above, Respondent was given the opportunity to file objections to the FFCLV, and did so on July 8 and 18, 2011. BF 37, 39. After reviewing her objections, the hearing officer reaffirmed the FFCLV as entered. BF 48 at 2. While the hearing officer did enter his FFCLV prior to reviewing Respondent's objections, that did not violate her right to due process. In re Disciplinary Proceeding Against Blanchard, 158 Wn.2d 317, 330-31, 144 P.3d 286 (2006) (by being notified of the charges,

receiving a full evidentiary hearing, and having the ability to appeal the decision to the Court, lawyer received all the due process to which he was entitled). Nothing prevented the hearing officer from entering amended FFCLV had he found Respondent's objections persuasive. But he did not. BF 48 at 2. As a result, Respondent cannot show that she was prejudiced by the manner in which the FFCLV were entered. See e.g., State v. Royal, 122 Wn.2d 413, 423, 858 P.2d 259 (1993) (juvenile defendant not prejudiced by late filing of findings of fact and conclusions of law and conviction therefore affirmed).

This case is distinguishable from the cases that Respondent cites, Perlow v. Berg-Perlow, 875 So. 2d 383 (Fla. 2004), and Morgan v. U.S., 304 U.S. 1, 58 S. Ct. 773, 82 L. Ed. 1129 (1937). RB at 24-26. In Perlow, the court placed much emphasis on the facts that the trial court actively discouraged one party from filing a proposed judgment, then adopted the opposing party's proposed judgment within two hours of it being filed without giving the first party any opportunity to object or respond. Bryan v. Bryan, 930 So. 2d 693, 696 (Fla. Dist. Ct. App. 2006) (explaining Perlow). Here, the hearing officer invited Respondent to propose her own findings at the end of the violations hearing, then reviewed her objections to the FFCLV and ruled on them, thereby giving her the opportunity to respond and object. BF 48 at 2. In Morgan, a case about the Secretary of

Agriculture fixing rates to be charged at the Kansas City Stockyards, the finder of fact had ex parte contact with prosecutors, then adopted their proposed findings without affording to the respondents the statutorily required hearing. 304 U.S. at 13, 22. Here, there was no ex parte contact and Respondent was afforded a hearing. BF 48 at 2.

c. The FFCLV are supported by substantial evidence.

The only issue the Court need consider is whether the FFCLV are supported by substantial evidence. If so, they are not suspect and any procedural error in their entry is harmless. Allen v. Seattle Police Officers' Guild, 32 Wn. App. 56, 69, 645 P.2d 1113 (1982) (findings of fact sustained because they were supported by substantial evidence); Anderson v. Bessemer City, N.C., 470 U.S. 564, 572, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985) (“[E]ven when the trial judge adopts proposed findings verbatim, the findings are those of the court and may be reversed only if clearly erroneous.”); Minn. Mining & Mfg. Co. v. Int’l Plastic Corp., 159 F.2d 554, 559 (7th Cir. 1947) (“If a finding of fact is supported by the evidence and given by the court, it thereby becomes the finding of the court, regardless of its author . . .”). As argued above, all the findings are supported by substantial evidence. Thus, any procedural error in the hearing officer having entered the FFCLV prior to reviewing Respondent’s objections is harmless.

2. The Association did not enforce a properly-issued ELC 10.13(c) demand for documents, thereby mooting any argument over the demand.

Respondent argues that she was prejudiced during the sanctions hearing because the Association improperly issued an ELC 10.13(c) demand for documents that circumvented orderly discovery.⁷ BF 52; RB at 1-2, 26-28. But Respondent cites no authority for the proposition that issuing such a demand is improper. Her reliance on In re Disciplinary Proceeding Against Scannell, 169 Wn.2d 723, 239 P.3d 332 (2010), is misplaced. RB at 28. Scannell does not address ELC 10.13(c) at all. That case merely held that a hearing officer's authorization of disciplinary counsel's request for discovery under ELC 10.11(d) was reasonable. Scannell, 169 Wn.2d at 741-42. Since Respondent's argument is not supported by citation to authority, the Court need not consider it on appeal. DeHeer v. Seattle Post-Intelligencer, 60 Wn.2d 122, 126, 372 P.2d 193 (1962) ("Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none.").

Further, while Respondent argues that the Association misuses

⁷ ELC 10.13(c) states that "Disciplinary counsel may request in writing, served on the respondent at least three days before the hearing, that the respondent bring to the hearing any documents, files, records, or other written materials or things. The respondent must comply with this request and failure to bring requested materials, without good cause, may be grounds for discipline."

ELC 10.13(c) demands, RB at 27, the Association exceeded the requirements of the rule. ELC 10.13(c) allows the Association to serve demands for documents on respondent lawyers as late as three days prior to hearing, but this demand was served 23 days prior to hearing. BF 52.

In any event, disciplinary counsel did not seek to enforce the ELC 10.13(c) demand or require Respondent to produce the documents sought by it, nor did she produce them, thereby mooting any further argument.⁸

3. Respondent was given notice that the Association was seeking to prove aggravating factors at the sanctions hearing.

Respondent argues that the Association's admission of evidence in an attempt to prove the pattern-of-misconduct aggravating factor at the sanctions hearing violated her due process right to notice because the factor was not pled in the Formal Complaint, and she was therefore ambushed and deprived of the opportunity to prepare a defense. RB at 2-3, 23, 26-27. Her arguments fail.

First, the Association may admit evidence at hearing to prove aggravating factors despite not charging or mentioning those factors in the formal complaint. In re Disciplinary Proceeding Against Burtch, 162 Wn.2d 873, 889, 175 P.3d 1070 (2008) (aggravating factors, including

⁸ Respondent objected to the 10.13(c) demand, and, after review, the hearing officer ordered her to attempt to comply with the demand one week before hearing, BF 60 at 2, but no further attempt was made to compel compliance.

pattern of misconduct, need not be charged in the formal complaint to be considered by the hearing officer).

Second, despite not being required to plead aggravating factors, the Association gave Respondent ample notice that it would be seeking to prove aggravating factors at the sanctions hearing. On September 7, 2011, five weeks before the hearing, the Association filed and served a disclosure of the sanction it sought, therein giving notice that it intended to prove the aggravating factors of prior discipline, dishonest or selfish motive, multiple offenses, refusal to acknowledge wrongful nature, substantial experience, and indifference to making restitution. BF 50 at 4. On September 26, 2011, over two weeks before the hearing, the Association responded to Respondent's brief on sanctions and conceded that the prior discipline aggravating factor did not apply, but gave notice that it believed evidence of Respondent's prior conduct was admissible to prove the pattern of misconduct aggravating factor. BF 55. Respondent had plenty of time to marshal a defense.

4. The hearing officer properly exercised his discretion in excluding Respondent's evidence after she failed to comply with a scheduling order.

Respondent argues that the hearing officer improperly prevented her from admitting rebuttal evidence at the sanctions hearing by ignoring a pre-hearing scheduling order. RB at 3-5, 28-29. But the hearing officer

did not ignore the scheduling order, he enforced it.

The scheduling order required Respondent to provide a list of witnesses and proposed exhibits by September 16, 2011, then serve any information rebutting the Association's proposed witnesses and exhibits by October 3, 2011. BF 48 at 2. Respondent failed to list or identify any witnesses or serve any proposed exhibits by the September 16, 2011 deadline, but instead declared that she wished to call unidentified clients to testify about whether they would be able to secure other counsel. See BF 55 at 3. The Association moved to exclude the testimony of the unidentified witnesses, and to exclude documents Respondent attached to her Brief for Sanctions that had not been identified as exhibits, on the ground that the testimony and exhibits were irrelevant. Id. at 3-4; BF 53. After review, the hearing officer ordered that Respondent could not call witnesses or present exhibits at the sanction hearing because she failed to identify them in compliance with the scheduling order. BF 60 at 2. This was a reasonable exercise of the hearing officer's discretion and should not be overturned. In re Disciplinary Proceeding Against Bonet, 144 Wn.2d 502, 510, 29 P.3d 1242 (2001) (a discretionary act will not be disturbed unless the reviewing court concludes that the denial was a manifest abuse of discretion; abuse of discretion occurs only when no reasonable person would take the view adopted). When a party fails to

obey a scheduling order, the court may enter an order “prohibiting [the non-complying party] from introducing designated matters in evidence.” CR 37(b)(2)(B); see Dempere v. Nelson, 76 Wn. App. 403, 405-06, 886 P. 2d 219 (1994), review denied, 126 Wn.2d 1015 (1995) (upholding trial court’s refusal to permit testimony by an expert witness not disclosed as required by the case schedule and a pretrial order). The hearing officer properly exercised his discretion in excluding Respondent’s alleged, but never disclosed, evidence.⁹ He nevertheless allowed her to introduce numerous rebuttal exhibits on her behalf. TR 411 (list of Respondent’s exhibits admitted at sanction hearing).

5. The hearing officer and special disciplinary counsel did not have disabling conflicts.

Special Disciplinary Counsel John Graffe asked Respondent about a medical malpractice case, Saldivar v. Momah, that he and Respondent had been involved in, in an attempt to prove the pattern-of-misconduct aggravating factor. TR 431. After Respondent admitted a published court of appeals opinion in the Saldivar case into evidence, EX R-72, the hearing officer disclosed that he practiced medical malpractice and had

⁹ Respondent additionally argues that it was error to disallow testimony from current clients regarding the impact her suspension would have on them. RB at 5. But this kind of testimony is irrelevant. See e.g., In re Disciplinary Proceeding Against Hicks, 166 Wn.2d 774, 785 n.2, 214 P.3d 897 (2009) (Court no longer considers Noble factor of effect of sanction on attorney’s practice). And, in any event, the witnesses’ testimony was not excluded on this ground.

previously seen the opinion. TR 462, 465, 484. Respondent now argues that she was denied due process because Graffe and the hearing officer had interest in and personal knowledge of the Saldivar case. RB at 1-2.

First, as noted, Respondent admitted the Saldivar opinion into evidence and affirmed that she wanted the hearing officer to consider it. TR 462, 465. In fact, when the hearing officer said the opinion did not indicate that Respondent was involved in the misconduct discussed therein and questioned why he should consider it, Respondent admitted that she was involved. TR 492-95. Error, if any, arising from the hearing officer considering the opinion was invited. State v. Momah, 167 Wn.2d 140, 153, 217 P.3d 321 (2009) (explaining that under the invited error doctrine, a party who sets up an error at trial cannot claim that very action as error on appeal and receive a new trial).

Second, the hearing officer's prior knowledge of a published opinion that does not mention Respondent and the fact that the opinion involved his practice area does not constitute a conflict. A hearing officer should disqualify himself if he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding. ELC 2.6(e)(4)(A)(i). There is no evidence that the hearing officer had any personal bias against Respondent, any personal knowledge of the Saldivar case or Respondent's involvement in it, or any

personal knowledge of the Singh matter. There was, therefore, no ground for disqualification.

And third, as to Respondent's complaint about Graffe, see TR 461-62, a disabling conflict does not exist simply because a prosecutor and a defendant have been adversaries in other legal proceedings, even where the defendant previously prevailed; other evidence of overriding bias must be present to warrant disqualification. People v. Millwee, 18 Cal. 4th 96, 123, 954 P.2d 990 (1998). There is no such evidence here. The standards of neutrality for prosecutors are simply not as demanding as those applied to judicial or quasi-judicial officers. Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787, 810, 107 S. Ct. 2124, 95 L. Ed. 2d 740 (1987); Marshall v. Jerrico, Inc., 446 U.S. 238, 249-50, 100 S. Ct. 1610, 64 L. Ed. 2d 182 (1980).

6. The Disciplinary Board's failure to explain why it increased the probation period after reinstatement did not violate Respondent's due process rights.

Respondent argues that the Disciplinary Board's failure to state its reasons for increasing the recommended period of practice monitoring from 18 to 24 months following reinstatement from suspension violated her due process rights because she is without notice as to why the Board did that. RB at 4, 7, 53; BF 100. While the Board's failure may mean its practice monitoring recommendation is not entitled to the same deference

as the rest of its decision, its failure did not violate Respondent's due process rights because this Court reviews conclusions of law de novo and has inherent power to dispose of individual cases of lawyer discipline. Blanchard, 158 Wn.2d at 330-31. The Court can determine the appropriate length of practice monitoring itself. Id.

D. THE COURT SHOULD ADOPT THE 24-MONTH SUSPENSION RECOMMENDED BY THE HEARING OFFICER AND UNANIMOUS DISCIPLINARY BOARD.

1. The hearing officer correctly concluded that the presumptive sanction is suspension.

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

The hearing officer found that Respondent acted knowingly and her conduct injured Singh. FFCLV ¶¶ 21, 62, 67, 69; FFCLS ¶¶ 4, 8, 14

(mental state); FFCLV ¶¶ 30, 63, 74; FFCLS ¶¶ 5, 9-11, 15 (injury).¹⁰ Based on those findings, the hearing officer correctly applied ABA Standard 4.42(a) to Respondent's failure to act with reasonable diligence in representing Singh (Count 1) and failure to adequately communicate with him (Count 2), and ABA Standard 4.62 to Respondent's making of misrepresentations to Singh (Count 3). FFCLS ¶¶ 3-6, 7-12, 13-16.¹¹ The hearing officer concluded that the presumptive sanction is suspension. Id. ¶¶ 6, 12, 16, 19.

Respondent argues that the hearing officer should have concluded that the presumptive standard was reprimand because her conduct was merely negligent. RB at 7-8 (challenging FFCLS ¶¶ 12, 16, 19). But the evidence showed that Respondent knew about the case scheduling order and deadlines in Singh's matter yet still failed to meet them, knew she was not communicating to Singh relevant information about his matter or consulting with him, and knew her July 2009 letter to Singh misrepresented the reason for dismissal of Singh's case. The hearing officer's determination that Respondent acted knowingly is a factual finding to be given great weight on review. Longacre, 155 Wn.2d at 744.

Respondent also argues that the hearing officer erred in concluding

¹⁰ Respondent does not challenge FFCLV ¶¶ 21, 63 or FFCLS ¶¶ 5, 8, 10. Those findings of fact are, therefore, verities on appeal. Poole II, 164 Wn.2d at 722.

¹¹ Copies of these standards are attached as Appendix D.

that Singh was injured. RB at 8 (challenging FFCLS ¶¶ 9, 11, 15), 11 (challenging FFCLV ¶ 30), 13 (challenging FFCLV ¶ 74). But again, the hearing officer's determination of injury is supported by the findings that Respondent's misconduct caused Singh's case to be dismissed after the statute of limitations had run depriving him of any opportunity for recovery, lost him an opportunity at settlement, and lost him the opportunity to try and reverse the final dismissal. FFCLS ¶¶ 5, 9-11, 15. These findings are consistent with those in similar cases. See e.g., In re Disciplinary Proceeding Against Lopez, 153 Wn.2d 570, 592-93, 106 P.3d 221 (2005) (lawyer's failure to file opening appellate brief caused both actual and potential injury to his client and to the legal system in that it delayed the client's appeal, subjected the appeal to potential dismissal, and required the court to expend resources). The Court should adopt the conclusion of the hearing officer that the presumptive sanction for all counts is suspension.

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

Aggravating and mitigating factors may support deviation from the presumptive sanction. The hearing officer found that the following aggravating factors listed in ABA Standard 9.22 applied in this matter:

- (b) dishonest or selfish motive;
- (c) pattern of misconduct;

- (d) multiple offenses;
- (g) refusal to acknowledge wrongful nature of conduct;
- (i) substantial experience in the practice of law; and
- (j) indifference to making restitution.

FFCLS ¶¶ 21-26. He found that the mitigating factor of personal problems, ABA Standard 9.32(c), applied, but should be given minimal weight, FFCLS ¶ 28.

Respondent challenges all of the aggravating factors except substantial experience. RB at 8-9. She bears the burden of proving mitigating factors. In re Disciplinary Proceeding Against Carpenter, 160 Wn.2d 16, 30, 155 P.3d 937 (2007).

- a. The hearing officer properly applied the aggravating factor of selfish and dishonest motive.

Respondent argues that the hearing officer erred in applying the aggravating factor of dishonest or selfish motive because the lack of communication was caused by Singh's unwillingness to cooperate and because she provided him a copy of the final May 9, 2009 dismissal order. RB at 8. But the hearing officer, cognizant of her claims, found that Respondent acted to conceal her misconduct in failing to diligently prosecute Singh's case. FFCLV ¶¶ 62, 69; FFCLS ¶ 21. In perhaps her most telling statement, Respondent testified that "[i]n the Singh case, I basically gave up on a case that I couldn't go on with any longer. I ran out of fuel, I ran out of steam, and didn't think I could win it anyway." TR

424. But she never gave Singh that information and never withdrew. Instead, she stopped communicating with him, and when he asked for an update she lied to him, concealing the fact that the case was dismissed because of her misconduct. Substantial evidence in the record supports this aggravating factor.

b. The hearing officer properly applied the aggravating factor of pattern of misconduct.

Respondent argues that the hearing officer erred in applying the aggravating factor of pattern of misconduct because there “was no finding of *similar* prior wrongful conduct.” RB at 47 (emphasis in original). But similarity is not a prerequisite to finding a pattern. A pattern of misconduct exists when a lawyer has committed multiple violations involving multiple clients over an extended period. In re Disciplinary Proceeding Against Cohen (Cohen II), 150 Wn.2d 744, 760 n.8, 82 P.3d 224 (2004). Here, the finding of “pattern of misconduct” was based on Respondent’s prior reprimand and warnings from courts and disciplinary counsel about her professional obligations, which she failed to heed. FFCLS ¶ 22; EX A-29-32, R-67.

Respondent, citing In re Disciplinary Proceeding Against Whitney, 155 Wn.2d 451, 120 P.3d 550 (2005), argues that the hearing officer erred in considering the other courts’ warnings because the issue of her violating

the RPC was not before those courts. RB at 48. But Respondent's reliance on Whitney is misplaced. In Whitney, the Court rejected a lawyer's claim that collateral estoppel precluded the Association from disciplining him; it was not considering whether conduct in a court proceeding could be considered as evidence of a pattern of misconduct. 155 Wn.2d at 463-64.

It was proper for the hearing officer to consider the other courts' warnings because they, along with Respondent's prior reprimand, showed that she was on notice regarding ethical problems with her practice. Yet she continued to commit the misconduct found here. Substantial evidence in the record supports this aggravating factor.

c. The hearing officer properly applied the aggravating factor of multiple offenses.

Respondent argues that the hearing officer erred in applying the aggravating factor of multiple offenses because "[t]here is no specific listing of what is considered 'multiple offenses.'" RB at 9. This aggravating factor applies when there are multiple counts of misconduct and/or violation of multiple RPC. Poole I, 156 Wn.2d at 225 (multiple offenses aggravating factor applied when two counts of misconduct upheld). Here, respondent committed misconduct charged in three separate counts and violated five separate RPC. Substantial evidence

supports this factor.

- d. The hearing officer properly applied the aggravating factor of refusal to acknowledge wrongful nature of conduct.

Respondent argues that the hearing officer erred in applying the aggravating factor of refusal to acknowledge the wrongful nature of her conduct because “Respondent must be allowed to represent herself, as pro se, and to argue her case” RB at 9, 47. But the hearing officer properly relied on the evidence, including Respondent’s testimony and statements, in finding this aggravating factor.

Refusal to acknowledge the wrongful nature of conduct is applied when the lawyer tries to rationalize improper conduct as an error or remains unrepentant. In re Disciplinary Proceeding Against Ferguson, 170 Wn.2d 916, 943-44, 246 P.3d 1236 (2011); see also Lopez, 153 Wn.2d at 580 (ABA Standard 9.22(g) applied when attorney “did not accept responsibility but sought to justify his conduct with explanations that were insufficient.”). This factor is primarily based on a lawyer’s credibility as a witness, and great weight is given to the hearing officer’s finding on it. In re Disciplinary Proceeding Against Behrman, 165 Wn.2d 414, 423, 197 P.3d 1177 (2008). It may be based on a respondent lawyer’s statements at hearing. See United States v. Blackman, 66 F.3d 1572, 1578 (11th Cir. 1995), cert. denied, 517 U.S. 1126 (1996) (holding

the district court did not abuse its discretion when it considered statements that defendant made at sentencing hearing that reflected his lack of remorse and refusal to accept responsibility for his actions).

Here, Respondent claims that she was not required to communicate with Singh because he had her phone number and never called her, even though it was her duty to communicate with and consult with him. RB at 12, 18-19; RPC 1.4. She testified that she was not required to diligently pursue Singh's case or prepare for trial because she was only hired to settle the case, not try it, even though she was the only attorney of record, and she never referred Singh back to Bharti or contacted Bharti after receiving orders from the trial court that were only mailed to her. TR 38-39; FFCLV ¶ 16; EX A-9, A-11 at exhibit 2, A-13 at 2. She testified that Bharti was 60 percent responsible for the case, TR 38-39, 51, even though there is no evidence that Bharti had anything to do with it after referring it to her. FFCLS ¶ 32. Despite admitting that she "basically gave up on a case that [she] couldn't go on with any longer," TR 424, Respondent refused to admit fault and, instead, blamed her client and the court. TR 293-94, 542.

Respondent's duties in the matter were to consult with Singh, advise him of her circumstances and his options, take action in accordance with his wishes, and try to comply with the court's order or seek to revise

it, not just abandon all effort. Her unwillingness to acknowledge that her conduct violated the RPC speaks to the likelihood of future harm to the public. Marshall, 160 Wn.2d at 347; Poole I, 156 Wn.2d at 224. Substantial evidence supports this aggravating factor.

e. The hearing officer properly applied the aggravating factor of indifference to making restitution.

Respondent argues that the hearing officer erred in applying the aggravating factor of indifference to making restitution because “[a]ny finding as to restitution is not appropriate, as there is no prior WSBA decision on restitution in similar circumstances.” RB at 9.

Respondent failed to communicate the \$20,000 settlement offer to Singh, then did not advise him that his case was dismissed due to her misconduct, failed to do anything to help him after that, and failed to advise him that he might have a malpractice claim against her. TR 454; FFCLS ¶ 26. She argues that there is no evidence that Singh would have accepted the settlement offer even had she told him about it, RB at 30-32, but as addressed below on page 47-48, the evidence showed that Singh would have done so had Respondent properly advised him about the merit of his case. EX A-20 at 1; TR 111-12. The hearing officer properly concluded that this aggravating factor applied.

f. Personal financial problems are not a mitigating factor.

The hearing officer found that Respondent proved the mitigating

factor of personal problems because of her “difficult financial circumstances during the time that she committed the misconduct,” but gave this factor minimal weight. FFCLS ¶ 28. He should have given it no weight. In re Disciplinary Proceeding Against Curran, 115 Wn.2d 747, 774, 801 P.2d 962 (1990) (personal financial problems are not a mitigating factor). The Court should strike this mitigating factor.

g. On balance, the aggravating and mitigating factors support the Disciplinary Board’s recommended suspension.

The mitigating and aggravating factors are examined to determine the specific length of the suspension. Halverson, 140 Wn.2d at 493. Generally, the minimum suspension is six months. Id. at 495; Cohen I, 149 Wn.2d at 339. The minimum suspension is only warranted “where there are either no aggravating factors and at least some mitigating factors, or where the mitigating factors clearly outweigh any aggravating factors.” Halverson, 140 Wn.2d at 497. Here, the hearing officer correctly concluded that the aggravating factors outweighed the one questionable mitigating factor and recommended that Respondent be suspended for 24 months. FFCLS ¶ 36. The Disciplinary Board unanimously approved. BF 100 n.1. The Court should concur.

3. Respondent fails to meet her burden of proving that the recommended sanction of suspension is disproportionate.

In proportionality review, the Court compares the case at hand

with “similarly situated cases in which the same sanction was approved or disapproved.” In re Disciplinary Proceeding Against VanDerbeek, 153 Wn.2d 64, 97, 101 P.3d 88 (2004) (quotation omitted). The lawyer bears the burden of proving that the recommended sanction is disproportionate. Id.

Respondent cites one case, In re Disciplinary Proceeding Against Haskell, 136 Wn.2d 300, 962 P.2d 813 (1998), in an attempt to prove the recommended 24-month suspension is disproportionate, claiming the case is “telling” because the Court found disbarment was “too extreme” and lowered the penalty to a two-year suspension. RB at 50. But Haskell is dissimilar. Haskell switched initials on client bills and billed for personal expenses. Haskell, 136 Wn.2d at 305-10. That case is therefore inappropriate for proportionality review. Preszler, 169 Wn.2d at 38 (Court declined to consider for proportionality cases cited by lawyer that dealt with different presumptive sanctions and different charges of misconduct).

A similar case is Cohen II. Like Respondent, Cohen was found to have violated RPC 1.3, 1.4, and 3.2 by knowingly failing to diligently represent or communicate with his client, and failing to expedite litigation. Cohen II, 150 Wn.2d at 754-55, 757. Unlike Respondent, Cohen was not found to have engaged in dishonest behavior in violation of RPC 8.4(c). See generally id. After weighing eight aggravating factors against one

mitigating factor, which factors were similar to those here, the Court suspended Cohen for one year and ordered him to pay restitution of \$1,846.32. Id. at 764. The 24-month suspension recommended here is proportional to Cohen's in light of Respondent's commission of additional misconduct and her infliction of greater harm on Singh.

E. THE COURT SHOULD ADOPT THE RECOMMENDATION THAT RESPONDENT BE ORDERED TO PAY RESTITUTION.

Respondent argues that the hearing officer erred in recommending that she be ordered to pay restitution of \$15,000 to Singh because there is no precedent for a restitution order in such circumstances. RB at 29. But restitution is authorized by rule and is appropriate in this matter because Respondent's conduct financially injured Singh. ELC 13.7(a); Marshall, 160 Wn.2d at 350; FFCLV ¶ 30; FFCLS ¶¶ 11, 30.

Respondent argues it was error to order restitution because there is no evidence that Singh would have accepted the \$20,000 settlement offer had she communicated it. RB at 29-32. But she is wrong. Besides testifying that he and his family could have used the money, TR 113, Singh stated in his January 2010 letter to the Association that had Respondent advised him that his case was "not that strong," as she now claims, "I would happily accepted [sic] the [original \$15,000 settlement] offer." EX A-20 at 1. Respondent claims that the January 2010 letter was

written by Singh's daughter and "cannot be taken as evidence of what Mr. Singh would have done." RB at 32. But Singh testified that while his daughter helped prepare the letter, EX A-20, it was his own true statement. TR 112. The hearing officer properly credited the statement in the letter as well as Singh's other testimony. FFCLS ¶ 30.

Respondent also argues that restitution is not appropriate because it was ordered before costs were assessed. RB at 33. Apparently she believes the issue of costs should have been raised before either the hearing officer or the full Disciplinary Board on review, or both, because that may have affected the decision to order restitution. *Id.* at 29-30, 33. But the ELC control the assessment of costs and expenses against a respondent lawyer; Respondent had no right to have the issue considered prior to filing her notice of appeal to this Court. ELC 13.9(d)(1) (disciplinary counsel must file a statement of costs and expenses within 20 days of the filing and service of a notice of appeal from a Board decision). Here, Respondent filed her Notice of Appeal to Supreme Court on May 11, 2012. BF 101. The Association filed its Statement of Costs and Expenses on May 21, 2012, BF 103, in compliance with the rule. BF 106. The fact that costs were properly assessed under ELC 13.9 is not a ground for altering the restitution order.

In sum, Respondent failed to communicate to Singh the \$20,000

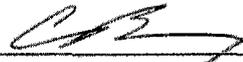
settlement offer and her assessment that his case had limited merit costing him an opportunity to accept the offer, failed to advise him that his case was dismissed due to her misconduct or to do anything to help him after that, and failed to advise him that he could make a malpractice claim with her insurer. The hearing officer properly found that Respondent's conduct financially injured Singh and ordered restitution under ELC 13.7(a). The Court should do so too.

IV. CONCLUSION

The Court should adopt the recommendation of the hearing officer and unanimous Disciplinary Board that Respondent be suspended from the practice of law for 24 months and be ordered to pay restitution to Singh. It also should order that her practice be monitored for 24 months after reinstatement.

RESPECTFULLY SUBMITTED this 5/6 day of November, 2012.

WASHINGTON STATE BAR ASSOCIATION



M Craig Bray, Bar No. 20821
Disciplinary Counsel

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Nov 08, 2012, 3:16 pm
BY RONALD R. CARPENTER
CLERK

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APPENDIX A

FILED

JUL 01 2011

DISCIPLINARY BOARD

BEFORE THE
DISCIPLINARY BOARD
OF THE
WASHINGTON STATE BAR ASSOCIATION

In re

MARJA M. STARCZEWSKI,
Lawyer (Bar No. 26111).

Proceeding No. 10#00086

FINDINGS OF FACT AND CONCLUSIONS
OF LAW AS TO RPC VIOLATIONS

In accordance with Rule 10.13 of the Rules for Enforcement of Lawyer Conduct (ELC), the undersigned Hearing Officer held the hearing on May 24-25, 2011. Respondent Marja M. Starczewski appeared personally pro se at the hearing. Special Disciplinary Counsel John C. Graffe and Disciplinary Counsel Francesca D'Angelo appeared for the Washington State Bar Association (the Association).

FORMAL COMPLAINT FILED BY DISCIPLINARY COUNSEL

The First Amended Formal Complaint filed by Disciplinary Counsel charged Respondent with the following counts of misconduct:

Count I -- Failing to act with reasonable diligence and promptness in representing Mr. Singh and failing to make reasonable efforts to expedite the litigation in Mr. Singh's case, in violation of Rule 1.3 of the Rules of Professional Conduct (RPC) and RPC 3.2.

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1 Count II – Failing to keep Mr. Singh reasonably informed about the status of his case
2 and failing to explain the matter to the extent reasonably necessary to allow Mr. Singh to make
3 informed decisions about the representation, in violation of RPC 1.4(a) and RPC 1.4(b).

4 Count III – Making misrepresentations to Mr. Singh regarding the reason why the court
5 had dismissed his case, in violation of RPC 8.4(c).

6 Based on the pleadings in the case, the testimony and exhibits at the hearing, the Hearing
7 Officer makes the following:

8 FINDINGS OF FACT

9 1. Respondent was admitted to the practice of law in the State of Washington on
10 October 25, 1996.

11 2. On May 5, 2004, the taxi driven by Rajinder Singh was struck on I-5 in King
12 County by a commercial vehicle driven by Kelly Reeser, an employee of Walters & Wolf
13 Curtain and Wall, LLC [“Walters & Wolf”].

14 3. Mr. Reeser had swerved to avoid hitting a stalled passenger vehicle driven by
15 Dawn De La Fuente.

16 4. Mr. Singh initially hired lawyer Harish Bharti, who then referred the matter to
17 Respondent under a fee sharing arrangement.

18 5. Respondent began representing Mr. Singh in December 2005.

19 6. At all material times, Respondent and Mr. Singh had an attorney client
20 relationship.

21 7. Respondent obtained records and documents and drafted a demand letter to
22 Reeser’s insurer.

23 8. Respondent’s efforts resulted in a settlement offer of \$15,000, which Respondent
24

1 communicated to Mr. Singh and which he rejected.

2 9. On May 3, 2007, Respondent filed suit in King County Superior Court against Mr.
3 Reeser, Walters & Wolf, and Ms. De La Fuente alleging personal injury and lost wages.

4 10. Respondent named Mr. Singh and his brother, Surinder Khangura, as plaintiffs in
5 the suit.

6 11. This lawsuit was filed on the last day before the statute of limitations expired.

7 12. At that point, Respondent had represented Mr. Singh for seventeen months.

8 13. On the same day that Respondent filed the lawsuit, Respondent had Mr. Khangura
9 sign a contingent fee agreement, employing her to represent him on a lost wages claim arising
10 from the damages to the taxi that he shared with Mr. Singh.

11 14. Respondent testified that Mr. Singh and Mr. Khangura's wage claims overlapped.

12 15. However, Respondent did not inform or explain the potential conflicts to Mr.
13 Singh or obtain Mr. Singh's or Mr. Khangura's informed consent to the representation.

14 16. Respondent was the only attorney of record for Mr. Singh in the lawsuit.

15 17. Mr. Singh believed that Respondent was his attorney, and his belief was reasonable
16 under the circumstances.

17 18. On May 3, 2007, the court issued a scheduling order, setting the trial date for
18 October 20, 2008.

19 19. The scheduling order provided a deadline of October 11, 2007, for filing a
20 Confirmation of Joinder.

21 20. Under King County Local Superior Court Rule 4.2, the plaintiff is responsible for
22 filing a Confirmation of Joinder. The attorney for a plaintiff is to sign the Confirmation of
23 Joinder.

1 21. Respondent knew about the deadlines imposed by the case scheduling order and
2 her responsibilities to meet those deadlines.

3 22. Respondent's testimony that she did not believe that she had the responsibility to
4 take action under the case scheduling order is not credible.

5 23. On or about June 15, 2007, Respondent moved to East Wenatchee.

6 24. Respondent testified that she was having financial difficulties at this time.
7 Respondent did not convey these difficulties to Mr. Singh or explain to him how these
8 difficulties would affect her handling of the case.

9 25. Attorney Julia Kyte appeared for the Reeser defendants and Walters & Wolf.

10 26. On September 29, 2007, Ms. Kyte made Respondent an offer of \$20,000 to settle
11 the matter.

12 27. Respondent did not communicate this offer to Mr. Singh.

13 28. Respondent did not properly explain the matter to Mr. Singh to enable him to make
14 informed decisions regarding the offer.

15 29. Respondent did not respond to Ms. Kyte's offer.

16 30. There was substantial injury to Mr. Singh who lost the opportunity to settle the
17 matter for \$20,000.

18 31. Over the next several months, Ms. Kyte called and emailed Respondent multiple
19 times.

20 32. Respondent did not respond to Ms. Kyte's communications.

21 33. Respondent did not serve Ms. De La Fuente with the Complaint.

22 34. Respondent did not file the Confirmation of Joinder by October 11, 2007 as
23 required by the court's scheduling order.

24

1 35. On November 6, 2007, the court issued an order to show cause for non-compliance
2 with the May 3, 2007 scheduling order.

3 36. The show cause order required Mr. Singh or Respondent to appear on December 6,
4 2007 and show cause why the case should not be dismissed for lack of compliance with court
5 rules and why sanctions of at least \$250 should not be ordered.

6 37. Respondent did not inform Mr. Singh about the show cause order or that the case
7 could be dismissed.

8 38. Respondent did not appear at the December 6, 2007 show cause hearing.

9 39. The court entered an order continuing the show cause hearing to January 17, 2008
10 and provided that the hearing would be stricken if the Confirmation of Joinder was filed seven
11 days before the next hearing date.

12 40. The court ordered Respondent to pay \$250 to defense counsel no later than
13 December 27, 2007.

14 41. Respondent did not inform Mr. Singh that the court had continued the show cause
15 hearing.

16 42. Respondent did not inform Mr. Singh that the court had ordered payment of \$250
17 in sanctions to defense counsel.

18 43. Respondent did not file the Confirmation of Joinder.

19 44. Respondent did not appear at the January 17, 2008 hearing.

20 45. On January 17, 2008, the court dismissed Mr. Singh's lawsuit because Respondent
21 had failed to comply with the case scheduling order.

22 46. Respondent did not inform Mr. Singh that his lawsuit had been dismissed.

23 47. On February 19, 2008, Respondent filed a motion to vacate the court's dismissal of
24

1 Mr. Singh's lawsuit.

2 48. Respondent did not inform Mr. Singh that she had filed a motion to vacate the
3 court's dismissal of the lawsuit.

4 49. On March 7, 2008, the court heard argument on the motion to vacate.

5 50. The court vacated the order of dismissal, conditioned on payment of the
6 outstanding \$250 in sanctions to defense counsel within 10 days of the order.

7 51. The order also required that defendant Ms. De La Fuente be served within 20 days
8 of the date of the order, that a Confirmation of Joinder be filed no later than April 30, 2008, and
9 that the parties comply with all of the pretrial deadlines set in the original case scheduling order.

10 52. Respondent did not inform Mr. Singh about the March 7, 2008 order.

11 53. Respondent paid the \$250 in sanctions to defense counsel on March 10, 2008.

12 54. Respondent did not file a Confirmation of Joinder.

13 55. In fact, Respondent filed nothing with the court to reflect any action taken on her
14 part to comply with the court's March 7, 2008 order.

15 56. On May 9, 2008, the court dismissed the case again, citing Respondent's failure to
16 file the Confirmation of Joinder.

17 57. Respondent received notice of this dismissal.

18 58. By May 9, 2008, the statute of limitations had run on Mr. Singh's case.

19 59. Respondent did not timely inform Mr. Singh that the case had been dismissed or
20 the reason for the dismissal.

21 60. Respondent did not advise Mr. Singh of his options for setting aside the dismissal
22 or appealing the decision within the applicable time frame for taking such action.

23 61. Respondent's testimony to the contrary is not credible, given her failure to
24

1 specifically recall any action taken to advise her client of the dismissal and the lack of any
2 supporting evidence in her client file.

3 62. Throughout the representation, Respondent knowingly failed to communicate with
4 Mr. Singh and she did so in an effort to conceal her failure to act diligently.

5 63. Mr. Singh was harmed in that his case was dismissed after the statute of limitations
6 had expired. As a result, Mr. Singh unable to exercise his options for setting aside or appealing
7 the dismissal within the relevant time frames.

8 64. Respondent did not inform Mr. Singh that his case had been dismissed until on or
9 about July 2009 when Mr. Singh contacted her for an update.

10 65. In July 2009, Respondent wrote to Mr. Singh and told him that the court had
11 dismissed his case because defense counsel had convinced the court that the accident had been
12 caused by an emergency on the road and was not anyone's fault.

13 66. This statement was false.

14 67. Respondent knew the statement was false.

15 68. In her July 2009 letter to Mr. Singh, Respondent excerpted portions of opposing
16 counsel's March 3, 2008 Response to the Motion to Vacate, which argued that the defendants
17 were not negligent under the emergency doctrine.

18 69. The inclusion of opposing counsel's argument in her letter was a knowing effort to
19 mislead Mr. Singh as to the reasons for the dismissal and to further conceal her misconduct.

20 70. Respondent did not tell Mr. Singh that the court had dismissed his action due to her
21 failure to comply with its March 7, 2008 order.

22 71. Respondent's testimony that the judge's expression and demeanor at the March 7,
23 2008 hearing convinced her that Mr. Singh's case did not have merit was not credible.

1 misrepresentations to Mr. Singh regarding the reason why the court had dismissed his case,
2 Respondent violated RPC 8.4(c) (duty to avoid dishonesty/deception).

3 SANCTION HEARING

4 78. Given the Hearing Officer's findings that the Respondent committed violations of
5 the RPC, the Hearing Officer hereby orders a sanction hearing to be held at the offices of the
6 Washington State Bar Association to determine the appropriate sanction under the ABA
7 Standards.

8 Dated this 1st day of July, 2011.

9
10 David A. Thorner
11 David A. Thorner, WSBA No. 4783
12 Hearing Officer
13
14
15
16

17 CERTIFICATE OF SERVICE

18 I certify that I caused a copy of the FOF, CDL as to RPC Violations
19 to be delivered to the Office of Disciplinary Counsel and to be mailed
20 to MARY STANFORD Respondent/Respondent's Counsel
21 at 1000 1st Ave S, Ste 200, WA 98101 by Certified / first class mail
22 postage prepaid on the 1st day of July, 2011

23 [Signature]
24 Clerk/Counsel to the Disciplinary Board

APPENDIX B

FILED

NOV 21 2011

DISCIPLINARY BOARD

BEFORE THE
DISCIPLINARY BOARD
OF THE
WASHINGTON STATE BAR ASSOCIATION

In re

MARJA M. STARCZEWSKI,

Lawyer (Bar No. 26111).

Proceeding No. 10#00086

FINDINGS OF FACT AND CONCLUSIONS
OF LAW RE: SANCTIONS AND
RECOMMENDATION

The undersigned Hearing Officer held a hearing on sanctions on October 13, 2011 in accordance with Rule 10.15(b)(2) of the Rules for Enforcement of Lawyer Conduct (ELC). Respondent Marja M. Starczewski appeared at the hearing. Special Disciplinary Counsel John C. Graffe appeared for the Washington State Bar Association (the Association).

I. ANALYSIS

A. Presumptive Sanction Under the ABA Standards

1. A presumptive sanction must be determined for each ethical violation. In re Anschell, 149 Wn.2d 484, 501, 69 P.2d 844 (2003).

2. The following standards of the American Bar Association's Standards for Imposing Lawyer Sanctions ("ABA Standards") (1991 ed. & Feb. 1992 Supp.) are

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1 presumptively applicable in this case:

2 *Count 1*

3 3. ABA Standard 4.4 applies to a lawyer's failure to act with reasonable diligence in
4 representing a client:

5 4.42 **Suspension** is generally appropriate when:

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

9 4. Respondent's conduct was knowing.

10 5. There was injury to Mr. Singh, whose claim was dismissed after the statute of
11 limitation had run.

12 6. The presumptive sanction for Count 1 is suspension under ABA Standards 4.42(a).

13 *Count 2*

14 7. ABA Standard 4.42(a) also applies to Count 2.

15 8. Respondent's conduct was knowing.

16 9. There was injury to Mr. Singh, who never received current, complete and accurate
17 information from the Respondent during the course of the auto accident litigation because the
18 information was never communicated to him on a timely basis.

19 10. Because he never received timely communication from the Respondent, Mr. Singh
20 did not have the opportunity to request that the trial court reconsider the dismissal of the case,
21 to take action through another attorney, or to file an appeal in an effort to set aside the
22 dismissal and reinstate the lawsuit.

23 11. In addition, because Respondent never told Mr. Singh about the settlement offer,
24 Mr. Singh never had the opportunity to accept or reject the \$20,000 offer of settlement.

1 12. The presumptive sanction for Count 2 is suspension under ABA Standard 4.42(a).

2 *Count 3*

3 13. ABA Standard 4.62 applies to Count 3:

4 4.62 **Suspension** is generally appropriate when a lawyer knowingly
5 deceives a client, and causes injury or potential injury to the client.

6 14. Respondent's conduct was knowing.

7 15. There was injury to Mr. Singh who was not informed as to the true cause of the
8 dismissal and so was not able to take informed action.

9 16. The presumptive sanction for Count 3 is suspension under ABA Standard 4.62.

10 17. When multiple ethical violations are found, the "ultimate sanction imposed should
11 at least be consistent with the sanction for the most serious instance of misconduct among a
12 number of violations." In re Petersen, 120 Wn.2d 833, 854, 846 P.2d 1330 (1993).]

13 18. "A period of six months is generally the accepted minimum term of suspension."
14 In re Cohen, 149 Wn.2d 323, 339, 67 P.3d 1086 (2003).

15 19. The appropriate presumptive sanction for Counts 1-3 is suspension.

16 **B. Aggravating and Mitigating Factors**

17 20. The following aggravating factors set forth in Section 9.22 of the ABA Standards
18 are applicable in this case.

19 21. Dishonest or selfish motive. ABA Standard 9.22(b). Respondent failed to
20 communicate and made misrepresentations to Mr. Singh to conceal her own misconduct.

21 Findings of Fact and Conclusions of Law As To RPC Violations filed July 5, 2011 (FFCL), ¶¶
22 62 and 69.

23 22. Pattern of misconduct. ABA Standard 9.22(c). Respondent received a reprimand
24 in 2010 for filing frivolous claims in a 2006 lawsuit. The grievance underlying that

1 Reprimand was not filed until 2009. Respondent's misconduct in Mr. Singh's case occurred
2 primarily in 2007 and 2008. Respondent therefore did not know that she would be under
3 investigation by the Association at the time of her actions in Mr. Singh's case, and her
4 reprimand is therefore not a "prior disciplinary offense" under ABA Standard 9.22(a). In re
5 Disciplinary Proceeding Against Brothers, 149 Wn.2d 575, 586, 70 P.3d 940 (2003).
6 However, the conduct underlying the reprimand as well as the evidence of her disregard of
7 repeated warnings from judicial officers and disciplinary counsel about her professional
8 obligations in other cases are indicative a pattern of misconduct and justify the application of
9 this aggravating factor. In re Disciplinary Proceeding Against Burtch, 162 Wn.2d 873, 889,
10 175 P.3d 1070 (2008).

11 23. Multiple offenses. ABA Standard 9.22(d).

12 24. Refusal to acknowledge wrongful nature of conduct. ABA Standard 9.22(g).

13 Throughout this hearing Respondent has attempted to blame Mr. Singh and other persons for
14 her failure to communicate with him regarding important events in his case, arguing that he
15 had a duty to keep in contact with her. While she has admitted that the dismissal of Mr.
16 Singh's case was due to her own inaction, she testified that because she was to receive only 40
17 percent of the contingency fee, she had only 40 percent of the responsibility for the case.
18 Respondent has evidenced a complete failure to acknowledge that she has did not meet her
19 professional obligations and responsibilities as an officer of the court and as an attorney at law
20 representing a client.

21 25. Substantial experience in the practice of law. ABA Standard 9.22(i). Respondent
22 was admitted to practice in October 1996.

23 26. Indifference to making restitution. ABA Standard 9.22(j). Respondent has made
24

1 no attempt to make restitution to Mr. Singh. In addition, she never told Mr. Singh that he had
2 a potential claim against her or that he could seek redress through her professional liability
3 coverage.

4 27. The following mitigating factors set forth in Section 9.32 of the ABA Standards
5 are applicable to this case.

6 28. Personal problems. ABA Standard 9.32(c). Respondent testified as to her
7 difficult financial circumstances during the time that she committed the misconduct. However
8 such personal problems do not justify her conduct in handling Mr. Singh's case and are given
9 minimal weight as a mitigating factor.

10 **C. Restitution**

11 29. The Associations' recommendation that Respondent be required to pay restitution
12 in the amount of \$15,000 is reasonable and appropriate.

13 30. Respondent failed to communicate a \$20,000 settlement offer to Mr. Singh. The
14 evidence that Mr. Singh would have settled the case if Respondent had explained her
15 assessment of the case to him is credible.

16 31. There were approximately \$5,000 in liens and/or unpaid bills that would have
17 reduced the \$20,000 settlement amount.

18 32. Respondent testified that she would have waived her portion of the contingency
19 fee, but argues that Mr. Bharti would still have received 60 percent of the fee and that this
20 would have reduced Mr. Singh's net recovery. However, it is improbable that Mr. Bharti
21 would have been entitled to any compensation from Mr. Singh's settlement because of his
22 lack of participation in the lawsuit.

23 33. Respondent is directed to pay restitution to Mr. Singh in the amount of \$15,000.
24

1 **D. Practice Monitor**

2 34. Respondent suggests, and the Association agrees, that a practice monitor be named
3 to monitor Respondent's practice.

4 35. It is appropriate that a practice monitor be appointed to monitor the Respondent's
5 practice at the conclusion of her suspension to help insure that Respondent properly meets her
6 duties and responsibilities to clients.

7 **II. RECOMMENDATION**

8 36. Based on the ABA Standards and the applicable aggravating and mitigating
9 factors, the Hearing Officer recommends that Respondent be suspended for twenty-four (24)
10 months.

11 37. Respondent must pay Mr. Singh \$15,000, together with statutory interest from the
12 date of this document until paid in full, in restitution prior to reinstatement in accordance with
13 ELC 13.7(b).

14 38. Respondent's practice should be monitored by a practice monitor for a period of
15 eighteen (18) months following reinstatement.

16 39. Respondent must propose to disciplinary counsel, in writing, the name of a practice
17 monitor not less than sixty (60) days prior to her reinstatement to the practice of law. The
18 monitor must be a WSBA member who has no record of public discipline and no public
19 disciplinary proceedings pending. If Respondent and disciplinary counsel are unable to agree
20 on a practice monitor, Respondent and/or disciplinary counsel may ask the Chair of the
21 Disciplinary Board to resolve the dispute.

22 40. The practice monitor shall be in place prior to Respondent's reinstatement.

23 41. Respondent must meet in person at least once a month with her practice monitor.
24

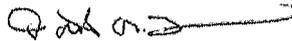
1 At each meeting, the monitor should discuss with Respondent each of Respondent's client
2 matters, the status of each client's case, and Respondent's intended course of action.

3 42. The monitor should give disciplinary counsel reports as to Respondent's
4 performance on a quarterly basis, or as otherwise requested by disciplinary counsel.

5 43. If the monitor believes that Respondent is not complying with any of her ethical
6 duties under the RPC, the monitor should promptly report that to the disciplinary counsel.

7 44. Respondent is responsible for paying any fees and expenses charged by the
8 practice monitor for supervision.

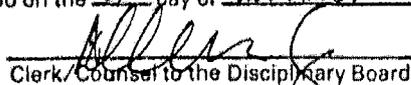
9 Dated this 18th day of November, 2011.

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11 

12 David A. Thorner, WSBA No. 4783
13 Hearing Officer

14 CERTIFICATE OF SERVICE

15 I certify that I caused a copy of the FOI, Vol. re: Sanctions & Recommendation
16 to be delivered to the Office of Disciplinary Counsel and to be mailed
to MARJA SZCZEPANSKI, Respondent/Respondent's Counsel
at 10 CONNOR BLVD, S. 425 NW BOSTON, WA 98107, by certified first class mail,
17 postage prepaid on the 21st day of NOVEMBER, 2011.

18 
19 Clerk/Counsel to the Disciplinary Board

20
21
22
23
24
SDC:
John Graffe
925 W 4th Ave. #2100
Seattle, WA 98104

1
2
3 **Certificate of Service**

4 I certify that I caused a copy of the foregoing Proposed Findings of Fact and Conclusions Re: Sanctions dated November 18, 2011 to be mailed to:

5 Marja M. Starczewski VIA Certified Mail, postage prepaid
6 10 Cove Ave S # 28
Wenatchee, WA 98801-2578

7 Ms. Francesca D'Angelo VIA Regular Mail, postage prepaid
8 Disciplinary Counsel
9 Washington State Bar Association
1325 - 4th Avenue, Ste. 600
Seattle, WA 98101-2539

10 Mr. John C. Graffe VIA Regular Mail, postage prepaid
11 Johnson, Graffe, Keay, Moniz & Wick, LLP
925 Fourth Ave., Suite 2300
12 Seattle, WA 98104-1157

13 Dated this 18th day of November, 2011.

14 
15 Melinda Solly-Bryan
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APPENDIX C

FILED

MAY 09 2012

BEFORE THE **DISCIPLINARY BOARD**
DISCIPLINARY BOARD
OF THE
WASHINGTON STATE BAR ASSOCIATION

In re

MARJA M. STARCZEWSKI,

Lawyer (WSBA No. 26111)

Proceeding No. 10#00086

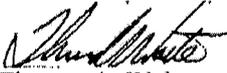
DISCIPLINARY BOARD ORDER
AMENDING HEARING OFFICER'S
DECISION

This matter came before the Disciplinary Board at its May 4, 2012 meeting, on automatic review of Hearing Officer David A. Thorner's July 1, 2011 Findings of Fact and Conclusions of Law as to RPC Violations and November 18, 2011 Findings of Fact and Conclusions of Law Re: Sanctions and Recommendation, following a bifurcated hearing.

Having reviewed the materials submitted by the parties, heard oral argument, and considered the applicable case law and rules;

IT IS HEREBY ORDERED THAT the Hearing Officer's decision is adopted with the following amendment: The length of time for the practice monitor is increased from 18 months to 24 months following reinstatement.¹

Dated this 9th day of May, 2012.

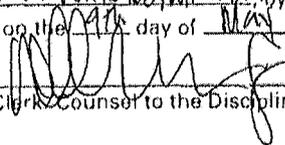

Thomas A. Waite
Disciplinary Board Chair

¹ The vote on this matter was 11-1 with one recusal. Those voting in the majority were Broom, Butterworth, Coy, Evans, Ivarinen, Kaba, Lombardi, Neiland, Ogura, Trippett and Waite. Wilson would have approved the Hearing Officer's decision. Carrington recused from participation in this matter, was not present for deliberations and did not vote.

100

CERTIFICATE OF SERVICE

I certify that I caused a copy of the DB Order Amending HO's Decision
to be delivered to the Office of Disciplinary Counsel and to be mailed
to Maria Spatzenberg, Respondent/Respondent's Counsel
10 Cove Ave. S. #28 Westchester MA 01891, by Certified first class mail
 postage prepaid on the 19th day of May, 2012


Clerk/Counsel to the Disciplinary Board

APPENDIX D

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

Standards Applied by the Hearing Officer:

4.4 *Lack of Diligence*

Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving a failure to act with reasonable diligence and promptness in representing a client:

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

4.6 *Lack of Candor*

Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases where the lawyer engages in fraud, deceit, or misrepresentation directed toward a client:

- 4.61 Disbarment is generally appropriate when a lawyer knowingly deceives a client with the intent to benefit the lawyer or another, and causes serious injury or potential serious injury to a client.
- 4.62 Suspension is generally appropriate when a lawyer knowingly deceives a client, and causes injury or potential injury to the client.
- 4.63 Reprimand is generally appropriate when a lawyer negligently fails to provide a client with accurate or complete information, and causes injury or potential injury to the client.
- 4.64 Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence in failing to provide a client with accurate or complete information, and causes little or no actual or potential injury to the client.

OFFICE RECEPTIONIST, CLERK

To: Craig Bray
Subject: RE: In re Starczewski, Supreme Court No. 201,073-3

Rec'd 11/8/12

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

From: Craig Bray [<mailto:craigb@wsba.org>]
Sent: Thursday, November 08, 2012 3:14 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Marja Starczewski
Subject: In re Starczewski, Supreme Court No. 201,073-3

Dear Clerk:

Attached for filing in this matter are the Answering Brief of the Washington State Bar Association, Appendices A-D (totaling 24 pages), and a Declaration of Service by Mail. Thank you.

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

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