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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON
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IN RE

MARJA STARCZEWSKI

LAWYER DISCIPLINE (WSBA #26111)

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REPLY BRIEF OF APPELLANT

Appeal from the Disciplinary
Board of the Washington State
Bar Association # 10#00086

Marja Starczewski
WSBA # 26111
10 Cove Ave S. Apt 28
Wenatchee, WA 98801
(509) 884-6545
Fax: (206) 339-4517
marjalaw@gmail.com

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WSBA EFFORT TO DESTROY STARCZEWSKI'S PRACTICE.

The WSBA's proposed sanctions would effectively destroy Ms. Starczewski's practice;

> "A longer suspension (of 2 years, for example) would effectively destroy any reasonable chance for respondent to readily salvage his law practice or maintain his clientele."
> *in re Discipline of Noble*, 100 Wn.2d 88, 98, 667 P.2d 608 (1983).

> "We also recognized Dr. Nguyen has a liberty interest in his license to preserve his professional reputation. Nguyen, 144 Wn.2d at 527. So too does Ms. Ongom. True, Ms. Ongom's employment is probably much less financially rewarding than that of a medical doctor, but it is nevertheless all she has, and she is at least equally dependent upon her professional reputation for employment."
> *Ongom v. Department of Health*, 159 Wn.2d 132, 134, 148 P.3d 1029 (2006) (Overruled as to Home Child Care licenses, in *Hardee v. Dep't of Soc. & Health Servs.*, 172 Wn.2d 1, 256 P.3d 339 (2011)).

In this case, as well, Ms. Starczewski's practice, since losing her law firm in 2007, may be less financially rewarding than that or Mr. Graffe, or members of the Bar or this Court, but nonetheless it is all that Ms. Starczewski has, and the WSBA is too heavy handed in imposing an overly-long suspension, as well as imposing financial terms that are unprecedented, and that Ms. Starczewski cannot meet.

The WSBA had not given any precedents during its arguments for sanctions before the Hearing Officer, to justify suspension.

The WSBA argues, that the effect of a sanction on an attorney's practice is "no longer considered" (WSBA brief, page 33, footnote 5), but this Court had merely found that Noble factor to be superfous, as it is included in the ABA standards;

> "Third, Noble directs that the effect of the sanction on the attorney shall be taken into account. Id. "In some cases, it might be concluded that the recommended sanction is clearly excessive, weighing the nature of the misconduct against the hardships imposed on the attorney." Id. at 96, 667 P.2d 608. However, the Standards now set forth a framework for determining the appropriate sanction for each disciplinary infraction. Standard 1.3 states:
>
> "The Standards constitute a model, setting forth a comprehensive system for determining sanctions, permitting flexibility and creativity in assigning sanctions in particular cases of lawyer misconduct. They are designed to promote: (1) consideration of all factors relevant to imposing the appropriate level of sanction in an individual case; (2) consideration of the appropriate weight of such factors in light of the stated goals of lawyer discipline; (3) consistency in the imposition of disciplinary sanctions for the same or similar offenses within and among jurisdictions.
>
> By following the framework laid out by the Standards, this court will ensure that the sanction imposed on an attorney is not clearly excessive. Thus, this factor is superfluous and shall be discarded."
>
> *In re Disciplinary Proceeding Against Kuvara*, 149 Wn.2d 237, 258, 66 P.3d 1057, (2003)

Discarding a factor as superfluous is the opposite of holding that the factor no longer considered, as argued by the WSBA. The WSBA should have considered "all factors relevant to imposing the appropriate level of sanction in an individual case" – and did not do so.

REVERSAL MANDATORY UNDER *YOUNG v. U.S. ex rel VUITTON ET FILS S.A.*

At page 35 of its Brief to t his Court, the WSBA cites to *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), which makes reversal in this disciplinary action mandatory;

> The next question we must confront is whether the Government should have the opportunity to demonstrate that it was harmless error for the court to appoint counsel for an interested party as contempt prosecutor. See *Chapman v. California*, 386 U.S. 18 (1967). We have held that some errors are so fundamental and pervasive that they require reversal without regard to the facts or circumstances of the particular case. *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986). We find that the appointment of an interested prosecutor is such an error.
> .*Young v Vuitton*, at 810-811

In this case, the WSBA's disciplinary counsel, Mr. Graffe, brought charges of aggravating factors based upon "Saldivar v. Momah", a case where he had appeared, and which he had personally settled with attorney Harish Bharti (See **Exhibit 5**). These additional charges were brought on the third and final day of the disciplinary hearing. Thus, the Prosecutor set up the situation, where he was an "interested party", requiring reversal for error under *Young v Vuitton*.

> MS. STARCZEWSKI: At this point I'd like to object to what seems to be retaliatory action by a counsel of record in the Judge Stolz case; namely, one Mr. John Graffe. I mean, he had a judgment in that case on behalf of his

> clients, U.S. Healthworks. He had improperly garnished some wages in that. There were other issues. And I believe I'm being retaliated against at this time and I'd like to make my objection for the record.
> HEARING OFFICER: Your objection is noted.
> Q. (By Mr. Graffe) Was I an attorney in any way involved in the trial of that case?
> A. I have your appearance, sir, with me."
> (Transcript, Vol. III, pg. 446)

There does not appear to be any decision by the Hearing Officer on the above-noted objection.

The WSBA had taken it upon itself to defend the Momahs, and to represent the Momahs' interests, in these disciplinary proceedings. Similarly, in failed disciplinary proceedings against attorney Harish Bharti, the WSBA attempted to defend the Momahs;

> "The WSBA presented the testimony of Reginald Momah, brother to Dr. Charles Momah and Dr. Dennis Momah, to the effect that Dr. Charles Momah was not guilty and his conviction had been engineered by respondent [Harish Bharti], but to the extent Dr. Charles Momah's guilt is relevant in these proceedings I find that insufficient evidence was presented by the WSBA to question Dr. Charles' Momah's guilt."
> Footnote 7, hearing Officers Findings and Recommendation, in re Harish Bharti, WSBA Disciplinary Case No. 09#00081, dated November 19, 2012, pg. 10.

In the Bharti disciplinary action, the Hearing Officer's recommendation was to dismiss all charges, after 83 pages of detailed findings. In the Starczewski disciplinary action, the Hearing Officer

signed off on the WSBA's proposed findings on the day after receiving them, without giving Respondent a chance to respond. The Findings in this case were therefore written, essentially, by the Momahs' counsel. Under *Young v. Vuitton*, this requires reversal.

The WSBA miss-cites *People v. Millwee*, 18 Cal. 4th 96, 123, 954 P.2d 990 (1998), also on page 35 of its brief, as requiring "other evidence of overriding bias must be present to Warrant disqualification" of a prosecutor. The actual discussion in *People v. Millwee*, is that the prosecutor "testified that there was nothing unusual or upsetting about the outcome of the [prior] case", and that "defendant presented no evidence that District Attorney Lough had formed strong negative feelings towards defendant for any reason." Thus, there was no biased Prosecutor in the Millwee case, and the prior case involving the same prosecutor was not used to bring additional charges. In the current case, Mr. Graffe insisted that Ms. Starczewski had acted improperly in Momah cases – thus bringing Mr. Graffe's own clients into these proceedings.

WSBA Disciplinary Counsel Graafe Used Momah Threat to Shut Down Respondent's Defense.

The WSBA accused Ms. Starczewski of not answering her home phone over a 30-day period. Ms. Starczewski tried to explain, that she had

been in trial, in Seattle, 150 miles from home, and unable to get home to answer her phone. (See Transcript, Vol II, pages 308 – 310, **Exhibit 2**). Ms. Starczewski introduced an email indicating she had tried to limit her participation in the Seattle trial, in order to work on other cases. Mr. Graffe shut down this argument, threatening;

> "MR. GRAFFE: I'm not done. Being busy is not a defense or an excuse to fail to comply with the Rules of Professional Conduct. This may be -- and I don't want to suggest that I necessarily agree that it is a mitigating factor -- but it may be a mitigating factor. It may be something that would be appropriate to consider if there's a second hearing.
>
> But I just don't see the relevance of her busy trial schedule with Mr. Bharti in a month in October for the counts that are alleged. There's a number of documents here that have been proposed as exhibits that relate to that trial. If she wants to open the door to her and Mr. Bharti's conduct in all of the cases involving the Momah litigation, we'll be here for days."
> (Graffe argument, Transcript, Vol II, pg 310-311 (**Exhibit 2**).

Now, the WSBA is misconstruing the testimony of Ms. Kyte, who had testified that she had called Ms. Starczewski's Wenatchee phone number (home phone) 7 or 8 times in a 30-day period, October through November, and found the answering machine busy. The WSBA says, "Over the next several months Kyte called and emailed Respondent multiple times, but Respondent never replied. FFCLV 1111 31-32; EX A-1 1." (WSBA brief, page 5)." Ms. Kyte, however, acknowledged that she did not email (there were prior emails to and from Ms. Kyte), and did not

fax, or use the cell phone, any of which methods of communication would be available to Ms. Starczewski while stuck in Seattle at trial.

Being busy may not be an excuse, but being 150 miles away, and unable to travel, is certainly an excuse to not pick up the home phone.

In any event, Ms. Starczewski had previously emailed Mr. Singh's bottom-line to Ms. Kyte, and Ms. Kyte did not have authority to reach the minimum amount for which Mr. Singh was willing to settle.

MOTION TO REMAND FOR LACK OF INVESTIGATION.

The WSBA makes no response at all regarding the motion to remand due to lack of any investigation by the WSBA

Responding attorney had provided a client list to the WSBA, (see e.g. Ap 16, email of November, 2010, to which there was no response) however, the WSBA did not interview a single client, and did not permit current clients to be brought to the hearing, stating that current clients were not relevant to the proceedings, despite the fact that the client list provided to the WSBA indicated, which current clients were in need of representation and would not be able to get alternate counsel in case Ms. Starczewski's license was suspended. This is a complete failure of investigation by the WSBA.

Not having investigated, or interviewed a single client (despite being provided early on in the proceeding with a client list), WSBA nonetheless makes the wild accusation of "A pattern of misconduct exists when a lawyer has committed multiple violations involving multiple Clients over an extended period." (WSBA Brief, page 40). No such pattern exists. No other clients were investigated.

When this Court indicates, at oral argument in another case, that the Court is concerned about failure to investigate by the WSBA, the WSBA should not completely ignore the issue in its responsive brief.

WSBA also makes no acknowledgment of this Court's often-repeated concern of access to justice. Having received a list of clients in need of access to counsel, the WSBA did nothing. In its responsive brief, the WSBA still does nothing.

The motion to remand due to lack of investigation as to other clients should be granted. In the alternative, all allegations of "pattern" of conduct should be dismissed.

MOTION TO REMAND FOR ERROR IN STARTING POINT OF LENGTH OF SUSPENSION.

WSBA admits that "[g]enerally, the minimum suspension is six months." WSBA brief, page 45. However, WSBA makes no response at all regarding WSBA's failure to properly instruct the Hearing Officer.

During the hearing, WSBA counsel started his argument with a presumptive 21-month suspension.

WSBA UNABLE TO PROVE CHARGES IN CODMAN AND SALDIVAR CASES, WHEN FULLY HEARD.

In this disciplinary action, Mr. Graffe, as WSBA Disciplinary Counsel, brought additional, uncharged, allegations based upon the cases of Codman v. Space Needle, or Saldivar v. Momah, as well as Bharti v. Ford[1]. All three of these cases were involved in the WSBA disciplinary action against Harish Bharti, lead counsel in the *Codman* and *Saldivar* cases, and, where the charges were squarely made in the charging document and Mr. Bharti was given an opportunity to fully defend himself, the charges of misconduct were found to be unproven;

The WSBA expended a great deal of effort to try to prove its charges of misconduct in the cases of Condman, Saldivar, and Bharti v. Ford.

> "At the hearing, 23 witnesses provided sworn testimony either live or by teleconference, and approximately 329 exhibits were admitted into evidence totaling 5,980 pages. The transcript is 2,252 pages long. After the hearing, respondent submitted an additional 1,008 pages of exhibits."
> Hearing Officer Findings *in re Bharti,* WSBA Case no. 09#00081, Nov 19, 2012, pg 1. (**Appendix 1**).

[1] Ms. Starczewski had stipulated to a reprimand in the Bharti v. Ford case. This was determined to not be an instance of "prior discipline" due to the timing of that disciplinary action running concurrently with this current action. Now, given the Findings and testimony of Reginald Momah and Michelle Shaw in the Bharti case, it appears the stipulation may have been a mistake.

On November 19, 2012, after initial briefs were filed in the Starczewski case to this Court, the Hearing Officer in the *Bharti* case issued 83 pages of Findings, conclusions, and a recommendation to dismiss all charges.[2]

Limited Use of the WSBA Findings in the Bharti matter;

The doctrine of collateral estoppel (sometimes known as "issue preclusion") may prevent the relitigation of issues already litigated and decided by a competent tribunal. *Reninger v. State Dept. of Corrections*, 134 Wn.2d 437, 449, 951 P.2d 782 (1998). For collateral estoppel to apply, the following elements must be established: (I) the issue decided in the prior adjudication is identical with the one presented in the second action; (2) the prior adjudication must have ended in a final judgment on the merits; (3) the party against whom the plea is asserted was a party or in privity with the party to the prior adjudication; and (4) the application of the doctrine does not work an injustice. *Nielson v. Spanaway Gen. Med. Clinic*, I35 Wn.2d 255, 263, 956 P .2d 3 I 2 (I998). As a variant of (4), the doctrine applies only if the burden of proof in the first action is at least as high as in the second. *Beckett v. Dep't Soc. & Health Servs.*, 87 Wn.2d I84, 186-88, 550 P.2d 529 (1976), overruled on other grounds, *Dunner v.*

[2] Ms. Starczewski asked for, and received, an extension of the due date for this Reply Brief, specifically to obtain the final set of *Bharti* findings, to present to this Court.

McLaughlin, 100 Wn.2d 832, 843, 676 P.2d 444 (1984). Because lawyer discipline proceedings require an enhanced burden of proof, ELC 10.14(b), most civil proceedings will not quality for potential issue preclusion.

Both state and federal courts have applied collateral estoppel where an issue was adjudicated by an administrative agency in the earlier proceeding. E.g., *Univ. of Tenn. v. Elliott*, 478 U.S. 788, 106 S.Ct. 3220, 92 L.Ed.2d 635 (1986); *Miller v. County of Santa Cruz*, 39 F.3d 1030 (9th Cir.1994); *Reninger*, 134 Wash.2d 437, 951 P.2d 782; *Shoemaker*, 109 Wash.2d 504, 745 P.2d 858; *Luisi Truck Lines*, 72 Wash.2d 887, 435 P.2d 654; see Claim and Issue Preclusion, 60 Wash. L.REV. at 830. The United States Supreme Court has applied issue preclusion to enforce repose where an administrative agency has acted in a judicial capacity and resolved disputed issues of fact:

> Such repose is justified on the sound and obvious principle of judicial policy that a losing litigant deserves no rematch after a defeat fairly suffered, in adversarial proceedings, on an issue identical in substance to the one he subsequently seeks to raise. To hold otherwise would, as a general matter, impose unjustifiably upon those who have already shouldered their burdens, and drain the resources of an adjudicatory system with disputes resisting resolution.
>
> Astoria F. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 107-08, 111 S.Ct. 2166, 115 L.Ed.2d 96 (1991).

Three additional factors must be considered under Washington law before collateral estoppel may be applied to agency findings: (1) whether the agency acted within its competence, (2) the differences between procedures in the administrative proceeding and court procedures, and (3) public policy considerations. *Reninger*, 134 Wash.2d at 450, 951 P.2d 782; *Shoemaker*, 109 Wash.2d at 508, 745 P.2d 858; *State v. Dupard*, 93 Wash.2d 268, 275, 609 P.2d 961 (1980). *Christensen v. Grant County Hosp. Dist. No. 1,* 96 P.3d 957, 152 Wn.2d 299 (Wash. 2004).

In this case, the WSBA was the same party, in both, the administrative proceedings in Bharti, and in the instant action against Ms. Starczewski. The WSBA also was similarly motivated, in both, the Bharti matter and in this case. The WSBA's burden of proof should be the same, whether addressing their allegations as to Mr. Bharti, or whether merely presenting charges for purposes of alleging "aggravating factors" in the Starczewski case.

On the other hand, Ms. Starczewski did not personally participate as a party in the Bharti proceedings, such that the findings from that proceeding cannot be used against Ms. Starczewski in similar fashion. Ms. Starczewski only attended the Bharti proceedings for the brief period of time that she was asked to testify. Therefore no attempt will be made to address any of the findings that actually refer to Ms. Starczewski, in the

Bharti case, as Ms. Starczewski had no motivation to defend herself in the *Bharti* case.

Bharti Findings Comparison Shows Prejudice of Lack of Due Process in These Proceedings.

The WSBA's Answering brief argues that Ms. Starczewski cannot show any prejudice by the way in which the WSBA presented the "aggravating factors" procedurally.

WSBA suggests that Ms. Starczewski failed to follow a scheduling order, which is not true – it was WSBA that failed to include charges, failed to state what issues would be tried pursuant to scheduling orders, and altered the nature of the hearing.

When the same issues were actually litigated, in the *Bharti* matter, and not merely presented as unproven "aggravating factors" as they had done in the *Starczewski* matter, the WSBA was unable to meet its burden on any of their charges. This shows that indeed there was prejudice caused by the WSBA violating its own procedural rules, as well as its own scheduling orders in this matter.

Rather than offer a full hearing on the aggravating factors, the WSBA merely argued that any finding of a CR 11 sanction, whether Ms. Starczewski had participated in the sanctioned conduct or not, would be an

aggravating factor. The same charges, when tried fully, produced different results.

In the *Bharti* disciplinary action, Court 1 pertained to the *Codman v. Space Needle* matter, Counts 2 and 3 pertained to the *Bharti v. Ford* matter, Count 4 pertained to trials in King County in two cases against Momah, and Counts 5 and 6 pertained to *Saldivar v. Momah*, the Pierce County case before Judge Stolz[3], in which Mr. Graffe, the WSBA disciplinary counsel in the Starczewski matter, had filed an Appearance, and personally participated in settlement with Bharti, after Judge Stolz' findings were vacated on appeal, and the case was remanded to a different judge, except for the limited issue of sanctions against Mr. Bharti (Judge Stolz' findings as to Ms. Starczewski were likewise dismissed on appeal, and the Remand did not include any charges as to Ms. Starczewski).

> "182. Because respondent [Bharti] was sanctioned for CR 11 violations in *P.S. v. Momah*, *Codman* and *Bharti v. Ford & Johnson,* Counts 1 and 2 raise the issue of the interplay between RPC 3.1 and CR 11. Both prohibit similar types of conduct,[41] although CR 11 on its face appears to impose a slightly stricter standard. RPC 3.1 requires a factual basis that is not frivolous, and Comment [2] requires that lawyers "inform themselves about the facts . . . ." CR 11 requires that the lawyer make an inquiry that is "reasonable under the circumstances" and requires that the lawyer's allegations be "well grounded in fact." Also, the standard of proof for RPC 3.1 is higher than that under Rule 11.[42]

[3] Judge Stolz became known to this Court in 2006, when this Court wrote the opinion; "Ordinarily, this court would simply deny review of a routine Court of Appeals opinion with which we agree. But here we grant review to emphasize that the criminal presiding judge's remarks were wholly inappropriate." *State v Watson* 159 Wn.2d 162, 165 (2006).

These differences suggest the possibility that a poorly grounded factual allegation resulting from an unreasonably inadequate investigation could constitute a Rule 11 violation, but at the same time be not so devoid of factual support as to be frivolous so as to constitute a violation of RPC 3.1.

"183. Finally, the rationale for RPC 3.1 is stated in Restatement, Law of Lawyering § 110 cmt. c as follows:

> 'Frivolous advocacy inflicts distress, wastes time, and causes increased expense to the tribunal and adversaries and may achieve results for a client that are unjust. Nonetheless, disciplinary enforcement against frivolous litigation is rare. Most bar disciplinary agencies rely on the courts in which litigation occurs to deal with abuse. Tribunals usually sanction only extreme abuse. Administration and interpretation of prohibitions against frivolous litigation should be tempered by concern to avoid overenforcement.'

"As several courts have recognized, RPC 3.1 "should be applied cautiously in light of its potential for chilling legitimate but difficult advocacy. *Brunswick,* 103 Conn. App., at 621. 184.

"Based on these authorities, I conclude that the appropriate legal standard for the type of RPC 3.1 violation alleged here is as follows:

• To be frivolous, a factual allegation asserted in a complaint must be both untrue and must either result from a lawyer's failure to conduct at least a rudimentary investigation,

. . .

186. I conclude, based on the written and oral evidence presented to me, that respondent had a reasonable good faith basis to make two of the three challenged assertions. I conclude that respondent, through Mr. Parker's efforts, Mr. Engan's efforts, and his own efforts, conducted a reasonable pre-suit investigation into the facts of Mr. Codman's claim by interviewing him on multiple occasions. *See* P-65 (Codman declaration detailing investigation).,,,

. . .

192. For all of these reasons, I conclude that the WSBA did not prove Count 1 by a clear preponderance of the evidence."

Findings, *in re Bharti*, <u>*Supra*</u>, pgs 53 – 58 (**Exhibit 1**).

In general, CR 11 sanctions should not translate into aggravating factors for a discipline action. For one thing, CR 11 sanctions pertain only to the specific lawyer involved, not to the entire firm.

The Supreme Court's announced, in *Pavelic & Leflore v. Marvel Entertainment Group*, 493 U.S. 120, 110 S.Ct. 456, 107 L.Ed.2d 438 (1989), that Rule 11 sanctions apply only to individual attorneys. According to Pavelic, only the individual attorneys who signed the counterclaim, and not the entire Littler firm, may be sanctioned.

This issue came up in the Codman case, where Ms. Starczewski's firm (bearing her name) was sanctioned, while Ms. Starczewski did not sign the document for which sanctions were ordered. The WSBA's counsel could not read the signature, and assumed it was Ms. Starczewski's. (Compare page 6, line 4 of the findings in the Bharti matter, **Exhibit 1**, with page 500 of the transcript, Vol II, in this case, (Exhibit 3);

> "Q [MR. GRAFFE]. I can't tell. Your name is on it as is Mr. Engan's, but it looks —— I don't know whether it's your signature or his. It is your ——
> A. Well, I can tell our signatures apart.
> Q. —— law firm?"

That is not the kind of clear, cogent convincing evidence that can make up a "clear preponderance" of the evidence for a disciplinary action.

Unable to justify the aggravating factors to the Board, the WSBA argued that the Board should ignore those factors, that those factors do not

matter. Unfortunately, there are no findings at all by the Board, so we do not know if the Board considered the erroneous factors or not.

Respondent did Not Admit Misconduct in Saldivar v. Momah.

The WSBA assertion that Ms. Starczewski admitted being involved in any "misconduct" in the *Saldivar v. Momah* case (WSBA brief, pg. 34) is in error. Ms. Starczewski admitted her thoughts, words, actions, and involvement, as required of an attorney cooperating with the Bar. However, as the Hearing Officer found in the *Bharti* case, there was no misconduct. In fact, the Court of Appeals had unfortunately relied on the wrong order, an order that was later amended, in deciding that there had been a violation;

> "268. I conclude that the WSBA did not prove by a clear preponderance that the order prohibited respondent from participating in showing the *S.K.* video to P.S. Such use was not prohibited by the language of the order, and the *S.K.* deposition was otherwise usable in the *P.S.* case. Under CR 32(a).
> 269. This conclusion is inconsistent with statements by Judge Stolz and by the Court of Appeals. However, as described above, the Court of Appeals first made its conclusion based on the wrong protective order. *P.S. v. Momah,* 145 Wn. App. at 406.[71]
> The Court later acknowledged this, but denied reconsideration anyway. R-87, pp. 3-4. Similarly, Judge Stolz did not have access to all of the material that was introduced in this hearing.[72]
> (Findings, in re Bharti, **Exhibit 1**, pg 81).

Ms. Starczewski had assisted in writing the order at issue, signed by Judge Fleck, and, as found by Mr. Bharti's Hearing Officer, had believed she was acting in accordance with the order.

Ms. Starczewski did not Waive Evidentiary Issues.

WSBA insists, at page 19, that "But Respondent did not object to questions eliciting this evidence during hearing and therefore waived the issue" as to whether the lack of a document in her file could be used as affirmative evidence. Ms. Starczewski absolutely did not waive this evidentiary issue. This objection was briefed in writing, and set forth orally before the Hearing Officer. The WSBA does not present any authority that requires an evidentiary objection at each and every question, in order to preserve an objection.

How Can Pro Se Respondent "Acknowledge" Mistake, yet Argue her Case?

The WSBA is using the fact that Ms. Starczewski is pro se, and therefore must make her own arguments, against her.

The WSBA assertion that Ms. Starczewski failed to acknowledge the nature of her actions, is false, and discriminates against an attorney forced to represent herself in these proceedings.

Ms. Starczewski admitted her actions, admitted losing the Singh case, but had to be able to make arguments on her behalf.

CONCLUSION.

Since reversal is mandatory, under a case that the WSBA has cited in its own brief, to *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), the undersigned will not attempt to respond to each and every issue in the WSBA brief. WSBA depends in large part upon findings, written by Mr. Graffe, and signed without prior notice by the Hearing Officer.

If this Court requires any clarification of other issues presented by WSBA, Ms. Starczewski is willing to provide any supplemental briefing requested.

Respectfully submitted this January 14, 2013.

s/ Marja Starczewski
Marja Starczewski, WSBA 26111
Responding Attorney, pro se.

Certificate of Service on WSBA;

I, Marja Starczewski, hereby certify that on this 14th of January, 2013, I emailed a true copy of this Brief to the WSBA disciplinary counsel, as well as mailing a copy to both, WSBA and the Supreme Court;

Signed under penalty of perjury, under the laws of the State of Washington, at Wenatchee, Washington, on January 14, 2013;

s/ Marja Starczewski

BEFORE THE
DISCIPLINARY BOARD
OF THE
WASHINGTON STATE BAR ASSOCIATION

In re Harish Bharti, Lawyer (Bar No. 33459).	Public No. 09#00081 FINDINGS, CONCLUSIONS, AND HEARING OFFICER'S RECOMMENDATION

In accordance with Rule 10.13 of the Rules for Enforcement of Lawyer Conduct (ELC), a hearing was held before the undersigned Hearing Officer from January 9-13, 2012 and January 24-26, 2012. Special Disciplinary Counsel Michael Hunsinger appeared at the hearing for the Washington State Bar Association (WSBA). Respondent appeared at the hearing with his attorney, Stephenen C. Smith. At the hearing, 23 witnesses provided sworn testimony either live or by teleconference, and approximately 329 exhibits were admitted into evidence totaling 5,980 pages. The transcript is 2,252 pages long. After the hearing, respondent submitted an additional 1,008 pages of exhibits.[1]

[1] These exhibits were provisionally admitted into evidence. They were reviewed and considered to the extent they were not cumulative or irrelevant. In an email dated February 13, 2012, respondent also sought the late introduction of a "Declaration of Marja Starczewski, RE 32 Depositions" by sending the hearing officer a link to download it. This proposed exhibit was not downloaded or considered, and is excluded as untimely.

Exhibit 1

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me, giving me write-ups . . ." TR 1302.

13. On July 21, 2004, respondent signed and filed a wrongful termination complaint in King County Superior Court against the Space Needle Corporation, *Codman v. Space Needle Corporation*, King County Cause Number 04-2-17911-4. The complaint also had signature lines for Ms. Starczewski and Mr. Engan, but these were blank on the version introduced into evidence at the hearing. WSBA Exhibit (hereafter "P") 15.

14. The complaint alleged that Codman had been terminated in retaliation for testifying on behalf of his co-worker, Brian Taylor, at Taylor's unemployment benefits hearing in June 2003. It also alleged that Codman had received only positive employment reviews prior to June 2003, but that "immediately after Codman testified against defendant restaurant at Taylor's unemployment benefits hearing, he began receiving write ups for alleged employment infractions from defendant restaurant." Among other claims, the complaint also alleged that the Space Needle Corporation had wrongfully terminated Codman in violation of RCW 49.12.200, which is a statute prohibiting wage discrimination against women and obviously has no application to Mr. Codman. . *Id.*

15. On August 20, 2004, defense counsel wrote respondent contending that the complaint was baseless because administrative records demonstrated that Mr. Codman had not testified at Taylor's unemployment hearing. The letter demanded that respondent dismiss the complaint or the defendant would amend its answer to assert a counterclaim against Mr. Codman and his attorneys for fees and costs. The letter attached a copy of an administrative order from Mr. Taylor's unemployment hearing that did not identify Mr. Codman as a testifying witness. P-18.

16. Mr. Codman's personnel file showed that he had received approximately twelve write-ups for various infractions over a period of years prior to Taylor's unemployment hearing, but that he had received numerous infractions in a shorter period of time after the hearing. TR 80-81.

17. Mr. Engan responded to the August 20, 2004 letter with his own letter dated August

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sufficient to avoid a violation of RPC 3.1. *Id.*

180. In another decision, the Wisconsin Supreme Court considered whether an attorney had committed an ethical violation for not conducting a sufficient investigation into whether documents that his client provided to him were forgeries. *In re Disciplinary Proceedings Against Nunnery,* 298 Wis.2d 289, 725 N.W.2d 613 (Wis 2007). The Court found that discipline was appropriate given the lawyer's knowledge that the client had previously been diagnosed as a pathological liar; however, the charge was for lack of diligence and was not based on a rule similar to RPC 3.1.

181. Finally, in *Brunswick v. Statewide Grievance Committee*, 103 Conn. App. 601, 931 A.2d 319 (Conn. App. 2007), a lawyer was charged with an RPC 3.1 violation for appealing an arbitration award based on a claim of "evidence partiality or corruption." In the hearing the lawyer argued there was a basis for this claim because the opposition lawyer's bill contained a 1 ½ hour charge for a conference with one of the arbitrators. The Court found that this evidence was a sufficient basis to make the allegation in a notice pleading state without violating RPC 3.1. *Id.* at 617.[40]

182. Because respondent was sanctioned for CR 11 violations in *P.S. v. Momah, Codman* and *Bharti v. Ford & Johnson,* Counts 1 and 2 raise the issue of the interplay between

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Because of his autism, Quinton was unable to provide any information about his care at the Center. However, Mrs. Stephens provided the details of what happened on December 2, 1994. In addition, she related at least three other incidents which suggested that the Center may not have been rendering adequate supervision of Quinton. Mrs. Stephens also told Mr. Neely about conversations she had with some of the employees at the Center which caused her to believe that Quinton's posture correcting chair had been used for discipline or management purposes against her specific directions. The record indicates that Mr. Hunter and Mr. Neely received no cooperation from the defendants during their investigation. In the end, they were left with the choice of advising the Stephenses to give up or file the complaint and proceed with discovery.

[40] The Court went on to find that the lawyer had violated RPC 3.1 by failing to withdraw the allegations after having taken no steps during discovery to substantiate them. *Id.* at 617-18.

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RPC 3.1 and CR 11. Both prohibit similar types of conduct,[41] although CR 11 on its face appears to impose a slightly stricter standard. RPC 3.1 requires a factual basis that is not frivolous, and Comment [2] requires that lawyers "inform themselves about the facts . . . ." CR 11 requires that the lawyer make an inquiry that is "reasonable under the circumstances" and requires that the lawyer's allegations be "well grounded in fact." Also, the standard of proof for RPC 3.1 is higher than that under Rule 11.[42] These differences suggest the possibility that a poorly grounded factual allegation resulting from an unreasonably inadequate investigation could constitute a Rule 11 violation, but at the same time be not so devoid of factual support as to be frivolous so as to constitute a violation of RPC 3.1.

183. Finally, the rationale for RPC 3.1 is stated in Restatement, Law of Lawyering § 110 cmt. c as follows:

> Frivolous advocacy inflicts distress, wastes time, and causes increased expense to the tribunal and adversaries and may achieve results for a client that are unjust. Nonetheless, disciplinary enforcement against frivolous litigation is rare. Most bar disciplinary agencies rely on the courts in which litigation occurs to deal with abuse. Tribunals usually sanction only extreme abuse. Administration and interpretation of prohibitions against frivolous litigation should be tempered by concern to avoid overenforcement.

As several courts have recognized, RPC 3.1 "should be applied cautiously in light of its potential for chilling legitimate but difficult advocacy. *Brunswick,* 103 Conn. App., at 621.

184. Based on these authorities, I conclude that the appropriate legal standard for the type of RPC 3.1 violation alleged here is as follows:

- To be frivolous, a factual allegation asserted in a complaint must be both untrue and must either result from a lawyer's failure to conduct at least a rudimentary investigation,

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[41] CR 11 provides that: "[t]he signature of a party or of an attorney constitutes a certificate by the party or attorney that the party or attorney has read the pleading, motion, or legal memorandum, and that to the best of the party's or attorney's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is well grounded in fact; (2) is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law; (3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation . . .

[42] As WSBA counsel stated in oral argument, the burden for establishing an RPC 3.1 violation is "clear preponderance," whereas the burden for establishing a CR 11 violation is "more probable than not." TR 2134.

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or be made primarily for the purpose of harassing or maliciously injuring a person

- A factual allegation is not frivolous if the lawyer has a good faith basis to believe that discovery will substantiate it.
- RPC violations require more than simple negligence on the part of the lawyer.[43]
- Rule 11 violation findings are not dispositive proof of a violation of RPC 3.1, and the hearing officer must conduct a *de novo* review based on the facts presented at the disciplinary hearing. However, the award of CR 11 sanctions is important evidence in determining whether RPC 3.1 has been violated. Its persuasive value in a proceeding such as this depends multiple factors including whether the court considered the same evidence as that presented in the disciplinary hearing,[44] whether live testimony was taken, the relative amount of preparation by the parties and the differing burdens of proof in the two proceedings, and whether the Rule 11 ruling may have been influenced by other events in the underlying case.
- RPC 3.1 should be applied narrowly to instances of extreme abuse, but should not be over-applied due to the ample enforcement mechanisms available to judges and to the potential for chilling difficult but legitimate advocacy.

185. The WSBA has raised three statements in the *Codman* complaint as grounds for discipline: (1) the allegation concerning Mr. Codman's "testimony," (2) the allegation concerning the lack of write-ups prior to Mr. Codman's appearance at the unemployment hearing, and (3) the reference to RCW 49.12.200 in the complaint.

186. I conclude, based on the written and oral evidence presented to me, that respondent had a reasonable good faith basis to make two of the three challenged assertions. I conclude that respondent, through Mr. Parker's efforts, Mr. Engan's efforts, and his own efforts, conducted a reasonable pre-suit investigation into the facts of Mr. Codman's claim by interviewing him on multiple occasions. *See* P-65 (Codman declaration detailing investigation). Based on the testimony of the witnesses who appeared before me, I conclude that Mr. Codman likely did describe his actions at the Taylor unemployment hearing to respondent and to Mr. Engan as "testimony"–a description that a layperson could reasonably have used under the circumstances. I also find that the allegation that Mr. Codman had not received write-ups before appearing at Mr. Taylor's unemployment hearing was likely made

[43] This was conceded by WSBA counsel during oral argument. TR 2139-44

[44] Disciplinary hearings are conducted pursuant to a relaxed evidentiary standard, so it is likely that more evidence is available to a hearing officer than was available to a judge.

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based on statements from his client.

187. WSBA counsel suggested that the hearing of this matter that a violation of RPC 3.1 should be found in part because respondent had been "warned" by opposing counsel in a letter that aspects of the Codman complaint violated CR 11. *See* P-18. (letter from opposing counsel in *Codman* threatening Rule 11 counterclaim). The same argument was made based on a similar letter sent to Ms. Starczewski in the *Bharti v. Ford & Johnson* matter. P-65. I conclude that such letters have little if any bearing on potential RPC 3.1 issues because they are occasionally used by lawyers as aggressive tactics to pressure opposing counsel into dismissing or settling a case. Evaluating a client's claims to make sure that they are not frivolous should rarely be influenced by the arguments of opposing counsel or by threats of Rule 11 sanctions. Any other rule would unduly restrict a lawyer's ability to advocate for his or her client.

188. Regarding the incorrect citation to RCW 49.12.200, I conclude that it was a clerical error made by Mr. Parker that respondent should have–but did not–notice and correct before the complaint was filed. Evidence at the hearing demonstrated that respondent placed excessive reliance on the work of Mr. Parker and did not adequately supervise or check his work. Since Mr. Parker was not licensed to practice law in the State of Washington, respondent is directly responsible for any ethics violations caused by the work of Mr. Parker. However, in this instance the inaccurate reference to a statute was at best a minor and harmless clerical error. All concerned recognized that Mr. Codman was not making a claim based on wage discrimination against women, which is the subject of RCW 49.12.200. It is possible that respondent intended to cite RCW 49.12.020–a potentially applicable statute.

189. In the practical experience of the hearing officer, many complaints and other pleadings contain minor clerical errors in the form of mistyped statutes and case citations, erroneous references to party and witness names, and even claims based on clearly inapplicable

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lawyer can violate RPC 3.1 by failing to withdraw **claims** after it becomes apparent that they are frivolous,[49] this rule should not be construed so as to impose an affirmative ethical duty on lawyers to continually update and amend **factual allegations** in the complaint as the facts of a case develop. In the real world of litigation in Washington courts, complaints are not continually fine-tuned so that they reflect the current state of the facts at all times. To the contrary, the hearing officer's experience is that lawyers and courts expect that the facts known or alleged at the end of discovery are usually different than those alleged in the complaint. Filing a stream of motions to amend to update facts alleged in the complaint is unnecessary or even impossible under many court's rules.[50] Indeed, in the *Codman* case respondent filed a motion after the court-imposed deadline to amend the complaint and remove some of the allegations the WSBA has challenged, and the motion was denied. P-25.

192. For all of these reasons, I conclude that the WSBA did not prove Count 1 by a clear preponderance of the evidence.

Count 2:By asserting issues in the *Bharti v. Ford* proceeding without a basis for doing so that was not frivolous, Respondent violated RPC 3.1 and/or 8.4(d).

193. Much of the legal analysis in Count 1 relating to RPC 3.1 is relevant to Count 2 and is incorporated herein by reference.

194. Although the guilt or innocence of either Dr. Charles Momah or Dr. Dennis Momah, or whether one impersonated the other, is not at issue in this hearing, whether respondent had a reasonable basis to believe that they committed the acts his clients accused them of was the subject of a great deal of testimony and argument at the hearing, and is potentially relevant to this and other counts. Without reaching any conclusion about the truth or falsity of the claims made by respondent and his clients against Dr. Charles Momah and Dr. Dennis Momah, I conclude that the WSBA did not prove by a clear preponderance of evidence

[49] *E.g., Brunswick v. Statewide Grievance Committee*, 103 Conn. App. 601, 931 A.2d 319 (Conn. App. 2007).

[50] These include deadlines routinely imposed in case schedules for amending pleadings, and rules requiring the preparation of a pretrial order containing factual allegations that supersede those in the complaint and that are based on facts developed during discovery.

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respondent cannot be subject to discipline for violating RPC 3.1 in connection with the complaint in the *Bharti v. Ford & Johnson* case.

208. If it were determined that respondent is subject to RPC 3.1 under the circumstances involved here, I would still conclude that the WSBA did not prove by a clear preponderance of evidence that the challenged allegations in the Second Amended Complaint were frivolous.

209. Regarding the allegation that Messrs. Ford, Johnson, and Weymuller conspired to destroy evidence, I adopt the findings of Judge Lau regarding the evidence presented to her. The evidence presented to her, as well as in this hearing, established that respondent has a nonfrivolous basis to believe that C.G. had a disk of patient records from Dr. Charles Momah and that she was being pressured by representatives of Dr. Charles Momah to help conceal his activities. However, the additional facts that attorney Michele Shaw knew about the disk, was friends with Mr. Ford, and had signed a declaration that contained apparently false statements on other matters did not create a nonfrivolous basis to conclude that Messrs. Ford, Johnson, and Weymuller had conspired to destroy the disk.

210. However, additional evidence was presented in the hearing of this matter that was not available to Judge Lau–specifically, respondent's testimony that he had been told by his unnamed client that C.G. told her that she had given the disk to lawyers (or agents of lawyers) who represented "one of the Momahs." TR 2006. Although there is some reason to question the veracity of this testimony by respondent in light of the fact that it was not presented to Judge Lau, I conclude that respondent could reasonably have concluded that he should not or could not disclose this statement in the hearing before Judge Lau because the *Momah* related cases were still being litigated when the hearing occurred and because of his client's fear of being harassed by representatives of the Momahs. I carefully observed respondent's demeanor when he gave this testimony, and it appeared to me that he was telling the truth.

211. In determining that this additional evidence renders the conspiracy allegation

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non-frivolous, I note that respondent did conduct a reasonably thorough investigation before making it. In addition, the allegation was of the type that could probably only be supported by conducting discovery in the lawsuit. In fact, Judge Lau authorized respondent's lawyers to do just that when she denied the motion to amend without prejudice. P-73.[56] One treatise states that "by no stretch of the imagination" is a complaint frivolous if it contains factual allegations obtained from a client that are coherent, internally consistent, and give no reason to doubt their veracity. *Hazard, Hodes, & Jarvis,* § 27.12, p. 27-27 (2007 Supp.). Moreover, although the statement on which respondent relied was multi-level hearsay, a lawyer is not required to use only admissible evidence in crafting a complaint to avoid an RPC 3.1 violation.[57] Finally, I am mindful of the policy of applying RPC 3.1 narrowly and only to instances of extreme abuse so as to avoid the risk of over-enforcement and chilling legitimate but difficult advocacy.

212. Finally, the WSBA did not call C.G.–who presumably could have verified or denied that she gave the disk to a lawyer or investigator, and could have shed light on whether the recipient had any connection with Messrs. Ford, Johnson, and Weymiller.

213. Based on these considerations, I conclude that the facts presented by respondent gave him the thinnest possible reed on which to support a non-frivolous conspiracy allegation,

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[56] The discovery was never conducted, but not due to any lack of diligence on the part of respondent or his lawyers. The defendants moved for summary judgment on several technical legal grounds shortly after respondent was granted leave to conduct discovery, and within six weeks the entire case was dismissed on summary judgment.

[57] The Court of Appeals addressed a similar issue in *P.S. v. Momah.* There, after noting that respondent had conducted a reasonable investigation into his client's claims, the Court noted that "[a]lthough some of the evidence on which Bharti relied was inadmissible, it is nonetheless proper to consider its influence on an attorney's assessment of his client's credibility or his willingness to take a case; this evidence was still part of the investigation Bharti used in determining whether Perla fabricated her testimony. *Cf. Bokor v. Dep't of Licensing,* 74 Wn. App. 523, 526, 874 P.2d 168 (1994) (evidence inadmissible at trial may nevertheless be relied upon in making a probable cause determination) (citing *Brinegar v. United States,* 338 U.S. 160, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949)). Because Bharti took reasonable steps to investigate P.S.'s claims, the trial court cannot reasonably sanction him solely for failing to accurately assess his client's ultimate credibility. Moreover, we note that, even in the criminal context where the burden of proof is beyond a reasonable doubt, a credible victim's testimony can be sufficient to prove that a sex crime occurred. *See* RCW 9A.44.020(1) ("to convict a person of any [sex offense] it shall not be necessary that the testimony of the alleged victim be corroborated."). The record is insufficient to support the trial, court's imposition of sanctions under CR 11.
Id. at 404-405.

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and that the WSBA did not prove this allegation to be frivolous by a clear preponderance of evidence.

214. Regarding the claims of malicious prosecution and abuse of process in the Second Amended complaint, I conclude that it was not frivolous for respondent, through his lawyers, to bring these claims. Although the claims were dismissed on summary judgment,[58] respondent's lawyers made a good faith argument for modification or extension of existing law and by appropriately citing numerous out-of-state decisions favoring his position. *See* P-79, pp. 6-17.[59] In dismissing the claims, Judge Lau made no suggestion that they were frivolous. Moreover, the majority rule seems to be that malicious prosecution suits can be brought against lawyers for filing a lawsuit on behalf of a client. *See, e.g., Restatement (Second) of Torts* § 677 cmt. d (stating that malicious prosecution claim will lie against attorney if "the attorney acts without probable cause or belief in the possibility that the claim will succeed, and for an improper purpose . . .").

215. Regarding the addition of Mr. Sims Weymuller as a defendant in the Second Amended Complaint, I conclude that this was not frivolous for the same reasons that the other two challenged items were not frivolous. Mr. Weymuller was a lawyer in Mr. Johnson's office who actively participated in prosecuting the *Momah v. Bharti* defamation case, who engaged in the conduct that respondent claimed constituted abuse of process, and who was one of Dr. Momah's lawyers who could have received the disk from C.G.

216. Thus, I conclude that even if respondent were found to be subject to RPC 3.1 despite his status as a party represented by lawyers, the WSBA did not prove by a clear

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[58] The malicious prosecution claim was dismissed because it did not allege two of the seven common law elements, "arrest or seizure of property" and "special injury" as required by *Gem Trading Co. v. Cudahy Corp*, 92 Wn.2d 956, 964 (1979), P-86 at 25-26 (Judge Lau's June 23, 2006 oral ruling). The abuse of process claim was dismissed because Judge Lau followed precedent holding that the filing of even a frivolous claim is not in and of itself an abuse of process, and also found that Dr. Momah's lawyers' conduct during the litigation "unfortunately, is what occur[s] in all hotly contested cases." P-86, at 26.

[59] The defamation claim against Mr. Ford was dismissed because his statement was determined to be a nonactionable opinion and because the claim was time-barred. *Id.*

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the best authority about whether she intended her order to preclude respondent from using the *S.K.* deposition in the way respondent used it.

268. I conclude that the WSBA did not prove by a clear preponderance that the order prohibited respondent from participating in showing the *S.K.* video to P.S. Such use was not prohibited by the language of the order, and the *S.K.* deposition was otherwise usable in the *P.S.* case. Under CR 32(a).

269. This conclusion is inconsistent with statements by Judge Stolz and by the Court of Appeals. However, as described above, the Court of Appeals first made its conclusion based on the wrong protective order. *P.S. v. Momah,* 145 Wn. App. at 406.[71] The Court later acknowledged this, but denied reconsideration anyway. R-87, pp. 3-4. Similarly, Judge Stolz did not have access to all of the material that was introduced in this hearing.[72]

270. Substantial evidence–in the form of hearing transcripts and the testimony of two witnesses who were present at the hearing and who participated in drafting the modified protective order that is at issue–were submitted in this hearing. There is no evidence that either Judge Stolz or the Court of Appeals had access to or considered this additional evidence. My conclusion that respondent did not knowingly violate the modified protective order is based on large part on this additional evidence.

271. My conclusion does not resolve the question whether the use to which respondent and Ms. Starczewski put the *S.K.* videotape deposition was proper in all respects. For example, it may have violated disclosure or discovery orders previously entered by Judge Stolz. It is also possible that showing the video to P.S. might have been found to be improper witness coaching in the middle of the witness' testimony. Both WSBA counsel and Judge Stolz stated their view that it was, but local practice and case law usually allows an attorney to

[71] The Court also erroneously described the videotape deposition as having been taken in "one of Charles' criminal l cases." *Id.* at 406 n. 28.

[72] Judge Stolz was also understandably frustrated with respondent's strategy of attempting to introduce matters from other litigation without laying a proper foundation, and this may have influenced her decision on the narrow issue of the interpretation of the *S.K./N.C./A.M.* protective order.

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(206) 727-8207

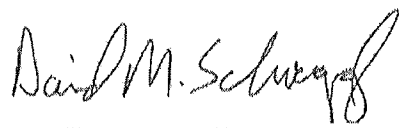
IV. FINDINGS AND CONCLUSION REGARDING SANCTIONS

272. Since I find that the WSBA failed to prove any of the counts in the Amended Formal Complaint by a clear preponderance, no sanctions are appropriate.

V. HEARING OFFICER'S RECOMMENDATION

Based on the above findings and conclusions, I recommend that the Amended Formal Complaint be dismissed in its entirety and that no further action be taken.

Dated this 19 day of November 2012.



David M. Schoeggl, WSBA No. 13638
Hearing Officer

WASHINGTON STATE BAR ASSOCIATION
1325 4th Avenue, Suite 600
Seattle, WA 98101-2539
(206) 727-8207

BEFORE THE DISCIPLINARY BOARD OF THE

WASHINGTON STATE BAR ASSOCIATION

In Re:	)	
	)	
MARJA M. STARCZEWSKI,	)	
	)	Public No. 10#00086
Lawyer (WSBA No. 26111)	)	
	)	

VERBATIM TRANSCRIPT OF PROCEEDINGS

VOLUME II

Taken at: 1325 Fourth Avenue, Suite 600
Seattle, WA 98101

Before: Hearing Officer David A. Thorner

Date Taken: May 25, 2011

Reported By: Michelle M. Neale, CCR.

Treece, Shirley & Brodie Court Reporters
1415 North 200th Street, Suite B-7
Shoreline, WA 98133-3219
(206) 624-6604

Exhibit 2

1 witness' copy?
2 MS. D'ANGELO: I can make it --
3 MS. STARCZEWSKI: Would you like to
4 redact on the witness' copy?
5 MS. D'ANGELO: Sure.
6 MS. STARCZEWSKI: I don't want to be
7 drawing on these.
8 So Exhibit No. R-10.
9 HEARING OFFICER: This is Exhibit No.
10 R-10.
11 MS. STARCZEWSKI: Yes.
12 HEARING OFFICER: Mr. Allen's name and
13 his e-mail has been redacted.
14 MS. STARCZEWSKI: He would appreciate
15 that.
16 HEARING OFFICER: Okay. Exhibit No.
17 R-10 will be admitted.
18 (Respondent's Exhibit No. R-10 was
19 admitted.)
20 MS. STARCZEWSKI: Okay. Exhibit No.
21 R-11. This is the start of my explanation for why I would
22 not have been picking up my home phone in October or
23 November 2007. When counsel said that she tried to call
24 me eight times in October and November 2007, I'm sure she
25 was calling my home phone and I'm absolutely sure that she

1 was right when she said my answering machine was full.
2 I was in trial with Harish Bharti for a
3 month, almost, and I couldn't go home. I was staying at
4 his home. I was basically tricked into attending that
5 trial full time and it was a very difficult time for me.
6 But at the same time I couldn't go home and check my mail
7 or check my phone messages. I should have had time
8 because he had three other lawyers working on this case.
9 But the next set of e-mails is sort of to
10 give you a flavor of how that went and the fact that I
11 didn't volunteer for that and didn't want -- did not
12 intend to attend the whole trial and, in fact, told him I
13 had my own cases to work on, I had other matters to work
14 on, I needed to be able to do other things. But that just
15 didn't work out.
16 Exhibit No. R-11 is my e-mail to Harish
17 Bharti. This is regarding a trial. We actually won at
18 trial so I'm not divulging anything that people don't want
19 divulged. But it was difficult. So this is my e-mail to
20 them saying -- the other side, Mr. Sal Mungia, who has
21 recently been President of the Bar Association, a great
22 lawyer, but he kept us busy and he had issued a 14-page
23 jury questionnaire-- and I'm explaining to Mr. Bharti --
24 he -- he didn't have a secretary and I, of course, didn't
25 have any help, the other two lawyers weren't helping --

1 there's no way to go over 700 pages worth of jury
2 questions and answers. We couldn't have done it. We were
3 looking at an impossible trial for the personnel that we
4 had available.
5 By the way, that jury questionnaire,
6 fortunately, was not permitted by Judge Fleck.
7 But as an introduction to what I was doing
8 in October and November, I move to admit Exhibit No. R-11.
9 MR. GRAFFE: I'm going to object, Your
10 Honor. It's irrelevant to the counts that are pending
11 against the Respondent. Being busy with other matters is
12 not a defense --
13 MS. STARCZEWSKI: But --
14 MR. GRAFFE: I'm not done.
15 Being busy is not a defense or an excuse to
16 fail to comply with the Rules of Professional Conduct.
17 This may be -- and I don't want to suggest
18 that I necessarily agree that it is a mitigating factor --
19 but it may be a mitigating factor. It may be something
20 that would be appropriate to consider if there's a second
21 hearing.
22 But I just don't see the relevance of her
23 busy trial schedule with Mr. Bharti in a month in October
24 for the counts that are alleged. There's a number of
25 documents here that have been proposed as exhibits that

1 relate to that trial. If she wants to open the door to
2 her and Mr. Bharti's conduct in all of the cases involving
3 the Momah litigation, we'll be here for days.
4 HEARING OFFICER: Do you want to
5 respond to that argument?
6 MS. STARCZEWSKI: Well, I think that
7 one of the counts is whether or not I was negligent in
8 that I was not responsive in October and November. And
9 the fact of the matter is if I was required to be in
10 Seattle and that wasn't something that I had planned ahead
11 of time, it wasn't something I had agreed to, it wasn't
12 something I was able to prevent once it happened, then
13 there's no way I could have physically also have been in
14 East Wenatchee picking up my mail or answering my home
15 phone. It's just not physically possible to be in two
16 places at once. And it wasn't something that I had
17 planned ahead of time, it wasn't something I could have
18 prevented, and it wasn't something I could have done
19 anything about.
20 HEARING OFFICER: This trial involving
21 Momah was --
22 MS. STARCZEWSKI: Momah.
23 HEARING OFFICER: How is that
24 pronounced?
25 MS. STARCZEWSKI: Momah, M-o-m-a-h.

1 HEARING OFFICER: M-o-m-a-h.
2 It was a medical case; is that correct?
3 MS. STARCZEWSKI: It was sort of a
4 medical negligence but also involved abuse of patients by
5 Charles Momah.
6 HEARING OFFICER: All right. Where
7 was this case tried?
8 MS. STARCZEWSKI: In King County
9 Superior Court I believe in Kent. It was Judge Fleck's
10 courtroom.
11 HEARING OFFICER: Judge Deborah Fleck?
12 MS. STARCZEWSKI: Yes.
13 HEARING OFFICER: Were you counsel of
14 record in that case?
15 MS. STARCZEWSKI: I don't know what
16 that means. But I was --
17 HEARING OFFICER: Well, what I'm
18 asking you is: Did you file a Notice of Appearance or
19 Notice of Association of Counsel to represent somebody of
20 record in the case?
21 MS. STARCZEWSKI: I don't remember. I
22 would have to check the file.
23 HEARING OFFICER: All right.
24 MS. STARCZEWSKI: I did make argument
25 and at the -- in court and I cross-examined witnesses in

1 court.
2 HEARING OFFICER: Okay.
3 MS. STARCZEWSKI: And I argued
4 evidentiary matters in court.
5 HEARING OFFICER: All right.
6 I am not going to admit documents like this
7 for the reasons that were articulated by Mr. Graffe. If
8 you had other duties and responsibilities other than
9 working on Mr. Singh's case during the relevant time in
10 question, that may -- and I underline the word may -- be a
11 mitigating factor if we get to round two -- and that is
12 the dispositional side of this case. If I make a finding
13 to sustain all or part of the counts that have been levied
14 against you by the Bar Association, then we get to phase
15 two, as you know, because we discussed this before. But
16 it is not relevant to the direct facts and circumstances
17 that apply to this situation, this case, what else was
18 going on.
19 You made the decision to relocate your
20 office from Lynnwood to East Wenatchee then Wenatchee --
21 that's fine and that is in evidence -- and I understand
22 that you were working on other matters because you've made
23 it very clear that you had a number of other clients
24 during the relevant time frame that is at issue in this
25 case -- but putting these documents into the record at

1 this time is not, in my opinion, relevant and does not
2 lead to the admission of relevant information that
3 pertains to my deciding the findings of fact necessary to
4 resolve this case.
5 So this exhibit is marked, as are the other
6 exhibits, and I will allow you to make an offer of proof,
7 if that's what you choose to do. But at this point I'm
8 going to refuse to admit Exhibit No. R-11.
9 MS. STARCZEWSKI: Okay.
10 HEARING OFFICER: Okay.
11 (Respondent's Exhibit No. R-11 was
12 rejected.)
13 MS. STARCZEWSKI: I didn't actually
14 make a decision to relocate my office. I was being
15 evicted, the home was being foreclosed. I didn't have the
16 option of staying in Lynnwood.
17 HEARING OFFICER: Okay. I understand
18 your testimony.
19 MS. STARCZEWSKI: Okay. The exhibits
20 that pertain to that trial would be Exhibits No. R-11, No.
21 R-12, No. R-13, No. R-14, and No. R-15.
22 So would your ruling be the same on all of
23 those?
24 HEARING OFFICER: Let me take a moment
25 to review those documents and I'll so advise you,

1 regarding reinstating the case. It also indicates the
2 date that they were created.
3 I move to admit Exhibit No. R-21.
4 MR. GRAFFE: Just a point of
5 clarification.
6 This is to reinstate after the dismissal
7 that resulted in the hearing on March 7, 2008, and are not
8 documents that you created to attempt to reinstate the
9 case after the Order of Dismissal in May of 2008; is that
10 correct?
11 MS. STARCZEWSKI: Some of these appear
12 to have been created after March 7th.
13 MR. GRAFFE: But I just want to make
14 sure that I'm clear that this was not an attempt to
15 research the viability of vacating the Order of Dismissal
16 that was entered on May 9, 2008; is that correct?
17 MS. STARCZEWSKI: The first document
18 there that you see, that's created July 25, 2008. I would
19 have to look to see why I happened to save that case to
20 this file at that time. But we could have been discussing
21 reinstatement at that point.
22 MR. GRAFFE: There's been no evidence
23 at all of any discussion of reinstatement of case after
24 the Order of Dismissal on May 9th of 2008. When the
25 Respondent said that these are documents relating to

1 MR. GRAFFE: We don't have any
2 context.
3 HEARING OFFICER: Yes. I'm inclined
4 to agree. I don't think that gives us any substantive
5 evidence. The best evidence of this activity is the
6 document itself because the first page of proposed Exhibit
7 No. R-21 references a pdf. The best evidence of that
8 document is the pdf. So unless you were going to offer
9 that document into evidence, I'm not inclined to admit
10 this document.
11 MS. STARCZEWSKI: I haven't actually
12 looked at the document probably since July 2008, so I
13 couldn't tell you what it is. I don't have an independent
14 recollection of what it is.
15 HEARING OFFICER: Okay.
16 MS. STARCZEWSKI: But I gave it to the
17 Bar.
18 HEARING OFFICER: The problem is that
19 if you wanted me to consider that evidence, you have to
20 put it into evidence. If you don't put it into evidence,
21 I cannot consider it because it's not the best evidence of
22 what you're attempting to prove. The best evidence rule
23 requires me to hold you to the standard of producing the
24 best evidence. Clearly, that is the best evidence.
25 As counsel for the Bar has pointed out, the

1 entry of Case, reinstate after dismissal.pdf, July 25,
2 2008 at 8:56 AM does not contain any substantive evidence
3 by way of confirmation. So unless you can make an offer
4 of proof or provide me with better evidence, I am
5 disinclined to admit proposed Exhibit No. R-21.
6 MS. STARCZEWSKI: Well, I think that
7 Exhibit No. R-21 is useful as far as the documents that
8 were created prior to May -- prior to the May dismissal.
9 HEARING OFFICER: Well, the same rule
10 would apply. If you can put some of these documents or
11 all of these documents into evidence, then that would be
12 the evidence for me to consider. This computer screen is
13 not the best evidence and really does not lead, in and of
14 itself, to any conclusions as to what actually occured on
15 these different days.
16 MS. STARCZEWSKI: All right. Some of
17 these documents are in evidence.
18 HEARING OFFICER: All right.
19 MS. STARCZEWSKI: So regarding Exhibit
20 No. R-22, this is also a file folder from within the Singh
21 file. This is a folder that I created when I was
22 downloading copies of actual court orders from the
23 internet. King County files are downloadable now from the
24 King County Courthouse. I believe it costs like 15 cents
25 a page. The file names are given by King County.

BEFORE THE DISCIPLINARY BOARD OF THE

WASHINGTON STATE BAR ASSOCIATION

In Re:	)	
	)	
MARJA M. STARCZEWSKI,	)	
	)	Public No. 10#00086
Lawyer (WSBA No. 26111)	)	
	)	

VERBATIM TRANSCRIPT OF PROCEEDINGS

SANCTIONS HEARING

Taken at: 1325 Fourth Avenue, Suite 600
Seattle, WA 98101

Before: Hearing Officer David A. Thorner

Date Taken: October 13, 2011

Reported By: Michelle M. Neale, CCR.

Treece, Shirley & Brodie Court Reporters
1415 North 200th Street, Suite B-7
Shoreline, WA 98133-3219
(206) 624-6604

Exhibit 3

1 HEARING OFFICER: Would you spell that
2 for us?
3 MR. GRAFFE: C-o-d-m-a-n.
4 Q. (By Mr. Graffe) (continuing) It was in King
5 County Superior Court against the Space Needle
6 Corporation?
7 A. I recall my involvement in that case which
8 commenced after a sanctions motion was filed.
9 Q. You were an attorney of record in that case?
10 A. My name was on the documents but I don't believe
11 my signature was. I believe my -- it was signed by Scott
12 Engan from my office. So since my office had my name,
13 yes, my name was on the case.
14 Q. You were an attorney of record in that case --
15 A. I don't know --
16 Q. -- along with Mr. Bharti?
17 A. I don't know what it means, attorney of record
18 in the case. My name was on the documents because my
19 office was on the case.
20 Q. Are you telling us you don't know the
21 consequence of what an attorney of record means?
22 A. I'm telling you I didn't know what the Codman
23 case was about until after the sanctions motion --
24 Q. I want to follow up on your last comment.
25 Are you telling this Court you do not know

1 the significance of what an attorney of record is?
2 A. I understand my office was responsible for what
3 Scott did.
4 Q. Were you an attorney of record in the Codman
5 case?
6 A. I don't think so. I don't recall filing an
7 appearance in that case, personally.
8 Q. Do you know --
9 A. I mean, by saying that, I guess you were an
10 attorney of record in the Stolz matter because you had
11 filed an appearance, right, Mr. Graffe?
12 HEARING OFFICER: I'm going to direct
13 you, that Mr. Graffe is not the witness.
14 THE WITNESS: Well, he's asking me
15 about a case --
16 HEARING OFFICER: Counsel, listen to
17 me very carefully. I want you to answer the questions
18 that are asked. If you want to object to the question,
19 you can state an objection. I will rule on it. But I do
20 not want you arguing or questioning opposing counsel.
21 That simply is not proper.
22 Mr. Graffe, would you restate your
23 question, please?
24 Q. (By Mr. Graffe) Were you an attorney of record
25 in the Codman case?

1 A. I don't think so until after the sanctions
2 order -- or motion was filed.
3 Q. Were you part of the Order of Sanctions in the
4 Codman case?
5 A. I believe so.
6 Q. Do you recall how much sanctions were imposed
7 against you and Mr. Bharti in that case by Judge Schapira?
8 HEARING OFFICER: Judge who, please?
9 MR. GRAFFE: Schapira, Judge Carol
10 Schapira.
11 A. I recall an amount of $5,000, an amount of
12 $11,000, and that Mr. Bharti settled for, I think, $3,000.
13 Q. (By Mr. Graffe) Do you recall the Bharti versus
14 Ford case?
15 A. I do.
16 HEARING OFFICER: Bharti versus Ford?
17 MR. GRAFFE: Et al.
18 Q. (By Mr. Graffe) Were you an attorney of record
19 in that case?
20 A. Oh, yes.
21 Q. How much were you sanctioned in that case?
22 A. Well, that's the case that I received the
23 reprimand in.
24 MS. STARCZEWSKI: And now I'm going to
25 object to piling on sanctions orders for which a reprimand

1 anything that was done by Judge Stolz. How often is there
2 a decision by the Court of Appeals that a judge is
3 actually biased? It doesn't happen. And it happened in
4 her case. Plus I have a court reporter's declaration that
5 she was biased, a sworn declaration by the court reporter.
6 How often does that happen?
7 Q. I think that calls for a yes or no answer.
8 A. I'll say no.
9 HEARING OFFICER: It does.
10 A. (continuing) Then I'll say no.
11 MS. STARCZEWSKI: At this point I'd
12 like to object to what seems to be retaliatory action by a
13 counsel of record in the Judge Stolz case; namely, one Mr.
14 John Graffe. I mean, he had a judgment in that case on
15 behalf of his clients, U.S. Healthworks. He had
16 improperly garnished some wages in that. There were other
17 issues. And I believe I'm being retaliated against at
18 this time and I'd like to make my objection for the
19 record.
20 HEARING OFFICER: Your objection is
21 noted.
22 Q. (By Mr. Graffe) Was I an attorney in any way
23 involved in the trial of that case?
24 A. I have your appearance, sir, with me.
25 Q. Was I involved in the trial of that case or did

1 tell us what the cost or expenses would have been at that
2 time in late September or October of 2007 that would have
3 reduced the net recovery to Mr. Singh?
4 A. Yes. It would have been the liens, the medical
5 liens, that were in our file, which were --
6 Q. I'm going to ask you about the liens later.
7 But right now my question is specifically
8 regarding costs that were incurred that would be a cost
9 that would be deducted?
10 HEARING OFFICER: I believe what he's
11 trying to ask you is, he wants to know if you can tell us
12 what were the costs that you incurred in pursuing Mr.
13 Singh's case that would have been deducted from the gross
14 amount of a $20,000 settlement? Do you understand the
15 question?
16 THE WITNESS: Yes.
17 HEARING OFFICER: Okay.
18 A. I had offered to waive my costs and fees. So
19 that would not be relevant. I mean, I had a filing fee
20 and whatnot, but I had made an offer to waive that.
21 Q. (By Mr. Graffe) My next question is: What would
22 be the total amount of the liens or any subrogation liens
23 at that time of late September or October 2007 that would
24 need to be resolved?
25 A. The number that I have is for 2006, which is

1 $4,958.85. It would have gone up since then, but I don't
2 know how much.
3 Q. That's the amount that's claimed.
4 Is it typical that those are often
5 negotiated down?
6 A. I have never negotiated those down.
7 Q. Did you get a fee for any of those?
8 HEARING OFFICER: I didn't --
9 A. The client --
10 Q. (By Mr. Graffe) Did you get a fee for any of
11 those?
12 A. I think the client is entitled to a Mahler
13 deduction, but I don't believe that goes to the lawyer but
14 I'm not -- and those rules were changing right at that
15 time so I'm not sure what the rules were.
16 Q. Did you ever offer to make restitution to
17 Mr. Singh?
18 A. Could you please define restitution?
19 Q. Did you ever offer to pay Mr. Singh any money as
20 a result of your handling of this case or mishandling of
21 the case?
22 A. It would have been a fraudulent offer. I never
23 had money to pay. You can't offer what you don't have.
24 HEARING OFFICER: Counsel --
25 A. (continuing) So, no, I've never offered to pay

1 having argued in court before. That's when he finally
2 told me he'd been over his head. I had no idea.
3 Q. The plaintiffs' motion seeking leave to file
4 that first amended complaint was filed February 16, 2005,
5 under the law offices of Marja Starczewski and the law
6 offices of Harish Bharti?
7 A. Did I sign it?
8 Q. I can't tell. Your name is on it as is Mr.
9 Engan's, but it looks -- I don't know whether it's your
10 signature or his. It is your --
11 A. Well, I can tell our signatures apart.
12 Q. -- law firm?
13 A. Oh, yes. He was a partner in my law firm.
14 Q. So you knew that your law firm was involved in
15 that case?
16 A. What does that mean? I didn't know about -- I
17 knew there was a box called Space Needle. I knew that
18 Scott Engan would be responding in writing to a Motion for
19 Summary Judgment. I thought it was regarding a case with
20 multiple plaintiffs who were minorities. I thought it was
21 a straight discrimination lawsuit. The rest I did not
22 know.
23 Q. You knew that your law firm was involved in that
24 case with Mr. Bharti?
25 A. What's that case? That case wasn't Codman.

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To: Marja Starczewski
Cc: Craig Bray
Subject: RE: 201,073-3 - In re: Marja M Starczewski, Attorney at Law (WSBA #26111), Reply Brief.

Rec'd 1/14/2013

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From: Marja Starczewski [mailto:marjalaw@gmail.com]
Sent: Monday, January 14, 2013 4:39 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Craig Bray
Subject: Re: 201,073-3 - In re: Marja M Starczewski, Attorney at Law (WSBA #26111), Reply Brief.

Attached is the Reply Brief.

--
Sincerely;

Marja Starczewski
Attorney
10 S. Cove Ave # 28
Wenatchee, WA 98801

(509) 884-6545
Fax: (206) 339-4517
Cell: (206) 227-7703