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No. 201,115-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN THE MATTER OF THE
DISCIPLINARY PROCEEDINGS AGAINST

THOMAS F. McGRATH, JR.

An Attorney at Law

Bar Number 1313

OPENING BRIEF OF RESPONDENT McGRATH

Attorney for Respondent McGrath

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 ORIGINAL

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**Appendix A – Hearing Officer’s Findings of Fact,
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TABLE OF AUTHORITIES

Cases:

*In re Disciplinary Proceedings
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Thomas F. McGrath (McGrath) had a client who was also his wife, Melinda Maxwell (Maxwell). It is undisputed that he acted as her attorney in regards to all relevant matters at issue in this case including as the attorney for Maxwell's corporation CWC. In a case in which McGrath was co-counsel but another attorney was the lead attorney, Maxwell ended up with a judgment against herself and CWC. Because the judgment owner filed eleven writs of garnishment, seven notices of deposition and six subpoenas for a total of 24 matters CWC and Maxwell needed to move into bankruptcy as quickly as possible. A rush filing was prepared which admittedly was not done as well as it should have been but such filings can always be amended and the crucial thing is to get it filed. During the bankruptcy, CWC asked its lawyer, McGrath, to help pay CWC's obligations incurred in the ordinary course of business and McGrath's trust account was used to accomplish this for a short period of time. Additionally, Maxwell owned a condominium which had been damaged and she asked McGrath to represent her on this and to help collect the insurance funds and pay the contractors.

The allegations in this case are that McGrath committed bankruptcy fraud for errors on the bankruptcy forms and violated trust account rules by the processing of client funds in his trust account such

that he should be disbarred. He made processing errors on the forms and it was appropriate for him to use his trust account for his client's funds. He did nothing wrong and this court should dismiss the case.

A. ASSIGNMENTS OF ERROR

1. The record does not provide substantial evidence to support the Amended Findings of Fact, Conclusions of Law and Hearing Officer's Recommendation.
2. The hearing officer and the Disciplinary Board committed error when they found that McGrath had violated 18 U.S.C § 152, particularly in regard to proof of intent and materiality.
3. The hearing officer and the Disciplinary Board committed error when they found that McGrath had violated RPCs particularly in regard to those requiring intent.
4. The hearing officer and the Disciplinary Board committed error when they found that the appropriate sanction was disbarment.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Does the record provide substantial evidence to support the Amended Findings of Fact, Conclusions of Law and Hearing Officer's Recommendation? (Assignment of Error 1.)
2. Did McGrath violate 18 U.S.C. § 152? (Assignment of Error 2.)
3. Did McGrath violate any RPCs? (Assignment of Error 3.)
4. Should the court dismiss this matter? (Assignment of Error 4.)

C. STATEMENT OF CASE

The factual assertions are found within the body of this brief.

1. Procedural History

The Association charged McGrath with 9 counts of misconduct in an Amended Formal Complaint. CP 72. A hearing was held in October and November 2011. The hearing officer filed his Amended Findings of Fact, Conclusions of Law and Hearing Officer's Recommendation (AFFCLR) on April 13, 2012. CP 37. He found violations by McGrath on all 9 counts and recommended disbarment as to Counts 1, 2, 3 and 4, relating to filings in the Bankruptcy Court, CP 64, a suspension for Counts 5, 6, 7 and 8, relating to how McGrath handled his trust account, CP 65, and a reprimand for an ex parte communication with the court. Count 9. CP 66. Based on the premise that where there are different sanction recommendations the ultimate sanction should be consistent with the most serious sanction recommendation, he found the presumptive sanction was disbarment. CP 66. He then found there were 7 aggravating factors and no mitigating factors and recommended disbarment for each count. CP 67-68.

The Disciplinary Board adopted verbatim the Hearing Officer's Amended Findings of Fact, Conclusions of Law and Hearing Officer's Recommendation by unanimous vote and filed its order on September 19, 2012. (This order does not seem to have been included in the Clerk's Papers but it is Bar File # 59 and we will ask that the record be

supplemented). McGrath timely appealed and brings this matter to this court for review. CP 69.

D. DISCUSSION

The elements of McGrath's argument turn on the AFFCLR's so reference is made herein to the paragraph numbers of the AFFCLR's rather than to each Clerk's Papers page number since it is the easiest way to track the discussion. The AFFCLR's are found at CP 37-68. McGrath accepts that much of the AFFCLR's are correct as far as they go but specifically challenges significant other portions of the AFFCLR's. The specific sections challenged are set forth in the discussion. For convenience a set of the AFFCLR's are attached as Appendix A.

1. Credibility

McGrath's credibility was one of the issues in the case and the hearing officer found that McGrath was not credible but that is not the end of the inquiry for this court. While it is certainly true that credibility findings of the trier of fact are given great weight, *In re Disciplinary Proceedings Against Van Camp*, 171 Wn.2d 781, 811, 257 P.3d 599 (2011), they are not infallible and the amount of weight to give them can be judged in part by the apparent care taken by the finder of fact in describing what was credible and what was not. A close examination of

the AFFCLR shows that the hearing officer did not address what was credible and what was not with any specificity. A general statement of lacking credibility is worthless to the reviewer – did he really mean that he did not believe McGrath about his personal history, for example? Of course not, but where is the line? Unless the hearing officer makes specific findings as to what specific testimony he found to lack credibility there is no way to evaluate those findings in the context of the conclusions reached. Here, the hearing officer took no such care and his credibility determinations should be given no weight.

2. **Background Information**

McGrath, at the time of the hearing, was 70 years old and had been admitted to the Washington D. C. Bar as a lawyer in 1969 while on active duty in the Marine Corp in Vietnam. RP 1436. He had graduated with a business degree from SMU in 1964 and Baylor Law School in 1967. RP 1437.

After getting out of the Marines he came to Washington and worked as house counsel for a title company until he started working for a law firm in 1969. He was then admitted in Washington State in 1970. RP 1439. He did primarily creditor collection work. RP 1439; 1440. He was then disbarred for a period and owned some businesses before being

reinstated in 1993. RP 1441. He took up his practice and concentrated on mortgage work as a loan officer. RP 1442. He has been in solo practice and moved into bankruptcies. RP 1446; 1447. He has extensive experience in the mortgage business and obtaining loans. RP 1448.

Melinda Maxwell was married to McGrath but prior to the marriage McGrath, as Maxwell's attorney, formed her corporations, the CWC corporations. He has at all times since approximately 2000 through the date of the hearing been her attorney. RP 1461. She was 52 when they got married. RP 1464. She had accumulated assets as her separate property including accounts at Wachovia. RP 1463; 1464. McGrath has never contributed either his own funds or community funds to the Wachovia accounts. RP 1464. Soon after the CWC corporations were formed he began to do collection work for the corporations in his capacity as her attorney. RP 1466. He did other attorney work for her including personal in addition to the collection matters. RP 1466. He has continued to do collection work through the time of the hearing. RP 1480.

3. **Discussion of Disputed Factual Portions of AFFCLR**

There are 141 paragraphs in the 32 pages of the AFFCLR. McGrath accepts many of them as verities on this appeal but contests

many others. As he did at the Board, the most direct way to tell the story and to address the specifics is to review those Findings seriatim.

AFFCLR 1 – McGrath was admitted to the practice of law in 1970 and the nature of his practice is that he primarily represents clients in debtor bankruptcy and creditor collections. In fact, he has filed hundreds of Chapter 7s and Chapter 13s. RP 581. However, he had very little experience in Chapter 11s and until CWC’s had not filed one in five or ten years and maybe only two in 20 to 30 years. RP 584; 586. He was the owner of Wakefield Group, LLC d/b/a as Olympic Mortgage Lending Corporation. AFFCLR 2.

AFFCLR 3 – McGrath and his wife are the sole owners of M & T Investments, LLC. But this finding indicates that McGrath and his wife formed M & T to obtain loans for the purchase of Stevens and Bayliner boats. There is no evidence to support this conclusion. The only evidence as to why M & T was formed is from McGrath and he testified that it was formed a year and one-half before he and Maxwell were married in order to have a separate identity for the boats and for liability purposes. RP 1461

AFFCLR 4 – McGrath represented Maxwell and her CWC Centers in a civil suit against her former employee, Ellison, and attorney Peick was co-counsel. However, this finding under-characterizes McGrath’s

representation of CWC and Maxwell. McGrath represented CWC and Maxwell on many matters over the years including collections for both CWC Clinics, lawsuits and judgments which were filed on his pleading papers and in his capacity as attorney for CWC. RP 1465. He represented Maxwell in her separate capacity such as her will, collection matters before she incorporated, CWC corporate duties such as filing the annual report; refinancing her condo and the sale of CWC Capitol Hill. RP 1466; 1468; 1481; 1484. AFFCLR 5 – McGrath agrees and, in fact strongly argues that at all times he was the attorney for CWC.

AFFCLR 6 - CWC's suit was dismissed and the counterclaims proceeded to trial. AFFCLR 7 –There was a jury verdict that went against CWC. After the jury verdict but prior to judgment McGrath and his wife took pre-judgment steps and pre-bankruptcy steps to protect various assets. This finding implies that there is something wrong with this but, of course, that is not correct. There is nothing improper in doing so and just as Atwood, a collections lawyer who testified on behalf of the Bar, stated it was her duty to take all legally available steps to posture her client, RP 232, it was McGrath's duty to do the same.

AFFCLR 8 – It is undisputed that M & T sold a Bayliner boat but this finding states that the Bayliner boat was sold in June 2008 which is

simply wrong. The boat sold in April 2008. Exh. 821 – Signed purchase and sale agreement. To the extent that this finding implies that McGrath and his wife sold the boat as part of the planning in regards to the potential Ellison judgment such implication is completely incorrect. The boat had been on the market for over three years. RP 1510. There is no basis in the record and thus no substantial evidence to support a finding that the boat was sold as part of the pre-judgment planning but even if it had been, there is nothing wrong with positioning assets in anticipation of a judgment.

AFFCLR 9 - This finding states that the McGrath testified at a deposition that the proceeds from the sale of the Bayliner boat were community property and the hearing officer cites deposition pages Exh 6007 pp 111 and 112 and transcript pages 1730 but McGrath testified to no such thing at the deposition. The referenced pages to the deposition make no reference at all to the proceeds of the Bayliner.

AFFCLR 10 – The finding that a jury awarded over \$500,000 is also not correct. In fact, the jury award was \$305,165 and even with the addition of attorney fees, costs, unpaid discovery sanctions, and interest the total was still not over \$500,000 but rather was \$475, 896.24. Exh. 705 – Final judgment. The problem with this is not the dollar amounts but rather that it shows that the AFFCLR were not drafted with great care and,

therefore, when this court is conducting its own review, it should look carefully at the record and cannot rely upon the AFFCLR's as being accurate.

AFFCLR 11 – At the heart of much of this case is the fact that on July 15, 2008, McGrath prepared and Maxwell executed three promissory notes and deeds of trust but the findings are wrong in that they assert that there were three notes for a total of \$225,000 while in fact the three different instruments cover the same \$75,000 debt. Exhs. 600, 602 and 605.

AFFCLR 12, 13, 14, 15 – These findings state that McGrath falsely stated that CWC and Maxwell owed him money for his legal services in the Ellison suit, that the notes were designed to mislead and discourage creditors, that McGrath and Maxwell knew that no money was owed, that McGrath's testimony about this was not credible and that these conclusions are based on a 2007 e-mail to Maxwell. The support identified for Finding 13 is RP 765, 767, 806, 807. Those are only the testimony of hostile opposing counsel and represent her opinion but do not provide any substantive evidence of why the notes were prepared. Her opinions are not substantive evidence of what McGrath was doing. The findings cite RP 117 but that page is testimony from Atwood regarding her opinion that the

e-mail made claims of attorney fees inconsistent with the recitation of them in the bankruptcy proceedings. This provides no substantive evidence that no attorney fees were owed. The finding also cites RP 1318 in which McGrath indicates that he may very well have sent such a communication but that page and the several subsequent pages only confirm that he sent the e-mail and does not provide any substantive proof that Maxwell and CWC did not owe him any money. The only evidence to support the finding that no legal fees were owed is the e-mail itself and the finding that the testimony of McGrath was not credible. We are not given which testimony was not credible. An e-mail from a lawyer to a client does not prove that no fees were owed. A lawyer can change his mind and tell a client that he now wants to charge the client and the client can agree with that. The only evidence here is that in a 2007 e-mail McGrath told his client that he would not charge her. That does not prove that in 2008, when the note was signed, that the parties had not agreed to now collect the charges.

AFFCLR 16, 17, 18 and 19 – These findings state that McGrath created false legal billings in September 2009; that he prepared them in September 2009 but dated them 2005 and 2009 and then he provided them to creditors and trustees as proof he had provided the legal services. The

hearing officer does not tell us what was false. If the assertion is that the records are false because McGrath did not do the work, that is not supported by any evidence. For example, it is uncontested McGrath attended the Ellison trial and participated as lawyer. RP 686 (Peick was not sure about the first day but admitted he did not have a good memory of that.) AFFCLR 5 finds that at all material times McGrath was CWCs attorney. One of McGrath's billings, Exh. 6000, Bates # 350 shows time for the trial. Is it the contention that these trial time entries and all other entries are false and McGrath did not do the work reflected in the bills? That would not appear to be the case.

The contention must be that the billings were false because they were dated from 2005 to 2009 but were not prepared until 2009. There is no evidence much less substantive evidence to support the contention the bills were not prepared until 2009. The Bar's attempt to prove this by asserting that McGrath's bookkeeper created the entries was not proven. AFFCLR 19. The only other evidence cited is in AFFCLR 17 which finds that inconsistent billings regarding Peick were not material but that the 2009 statements were materially inconsistent with a 2006 Federal fee declaration.

First, it must be noted that the hearing officer cites Exhs. 345 and 349 but these are a check and deposit slips which have nothing to do with the billing statements. He also cites Exh. 3000 but that is a letter from Peick which has no bearing on when the bills were created particularly in view of AFFCLR 17 stating that any difference between McGrath's billings and Peick's were not material. The hearing officer cites Atwood's testimony at RP 687 and 692 but she has no personal knowledge of when the bills were created. In short, the only evidence of any relevance cited by the hearing officer is the Federal fee declaration, Exh. 702. The only evidence he relies upon to show that the billing statements were not prepared until 2009 is a statement that McGrath's testimony about when he prepared the invoices was not credible, AFFCLR 18, and the finding of material inconsistencies between the Federal fee declaration and the billing statements. He does not state why the inconsistencies are important. The Federal fee declaration is not a billing but rather is a summary and copies of the billings are not attached. McGrath explained the difference – they were different matters, everything he billed for representing Maxwell and the CWCs was not appropriate to bill in seeking fees for the removal. RP 1295; 1298. There is no finding that his testimony explaining the difference was not credible.

The fact that time in a declaration is not consistent with time in the actual billings when the purpose for the billing and the declaration are different does not provide substantial evidence that the bills were created later. Furthermore, the billing address and name of the building change in the middle of the billings which is further evidence that they were printed contemporaneously with the dates on the bills. Exh. 6000.

Even if McGrath's testimony of when he prepared the bills is not given credence, that does not mean the Bar gets to avoid putting on proof that they were not prepared when they were. There has to be something more and there is not.

AFFCLR 20, 21, 22, 23, 24, 25, 26, 27 and 28 – These findings relate to the creation of a note and deed of trust to Olympic Mortgage against Maxwell's condominium. There is no dispute that the note and deed of trust were created and it is agreed that ultimately there was no loan ever issued. However, it is not true that Olympic is not a legal entity. It is, as the findings state, a lawful d/b/a. McGrath obtained a certificate to this effect from the state.

McGrath testified that this was a financing device called "table funding" and that the point is to put into place a note and deed of trust in order to provide for priority and to have a means of getting a loan. RP 497

– 498. He explained that table funding is a where you have the note and deed of trust in the name of the broker and at the time of closing the ultimate lender receives an assignment of the loan. RP 1589. No one testified that he was not correct about the concept of table funding.

On July 15, 2008, McGrath prepared a promissory note from Maxwell to the McGrath Corporation. Exh. 600. The note was to secure attorney fees in the Ellison case and any other matters that he was representing her on. RP 493. The note was secured by a deed of trust. Exh 601. RP 494. He also prepared a promissory note to Olympic Mortgage. EXH 606. RP 495. The amount of the note was based on the liabilities she had plus projected attorney fees in the Ellison case and the purpose was to attempt to obtain a loan for that amount of money. RP 496. The Bar made much of the fact that the note was filed in King County but just because something is listed in the King County records it does not mean that is the amount actually owed. RP 499. There are no laws which prohibit table funding. RP 501; 502. The hearing office understood the concept when he summarized it as “Okay. So you prepared the notes and deeds of trust basically to kind of make it easier to finding financing, because then you can offer a secured position to a potential lender.” RP 502.

The supposed substantial evidence to support these findings is that there was no loan and therefore, it could not be legitimate, that the business address listed was not Respondent's address but his ex-wife's, McGrath's testimony about the nature of the note to pre-secure funding of a loan as a legitimate business practice was not credible, that McGrath knew the loan could not be funded because she was insolvent and he made no attempt to get a loan. As for insolvency – AFFCLR 27, the hearing officer cites to RP 1680 and 1692. RP 1680 specifically states he did not think CWC was insolvent, just that Maxwell was not drawing a salary and RP 1692 also does not say she was insolvent, just that the judgment made it hard for her to get funding. This is another example of many where the hearing officer cites evidence which does not support what he represents it to be and does not provide the substantial evidence needed to support the findings on this review.

Regarding the finding that there was no attempt to finance the loans, all the hearing officer cites is Exh. 714 which is a response to a subpoena in which he acknowledges that no loan was obtained nor were there any loan applications but that is not the same as not having made any attempts to finance the loan. McGrath did indeed attempt to market the loan to many account executives and banks but could not get any funding

because of her financial situation. RP 498; 1590. There is no finding that he was not credible in this statement.

Accordingly, if there is a legitimate concept of table funding then the loan would not have to be funded, it would make no difference what address was used and it would belie the conclusion that McGrath was not credible when he testified as he did. The Bar produced no authority that table funding was not allowed.

Such funding is recognized in WAC 208-660-006:

Table Funding" means a settlement at which a mortgage loan is funded by a contemporaneous advance of loan funds and an assignment of the loan to the person advancing the funds. The mortgage broker originates the loan and closes the loan in its own name with funds provided contemporaneously by a lender to whom the closed loan is assigned.

Also:

.... [T]his term has morphed into any loan product that is closed in the originators name regardless of who funds the loan. Today, any loan that is funded by the time the borrower signs their closing documents would be considered table funded.

See Appendix B. The point is that there is indeed a concept of table funding and it is perfectly legal. Because such concept is legal there is no substantial basis for the finding that the note and deed of trust were

deceptive or designed to mislead or that McGrath intended the note and deed of trust to conceal the alleged “falsity” of the claim.

In addition, the Bar makes much of the supposed deceptive nature of having a filed deed of trust at the courthouse as being misleading as to the amount of debt owed by Maxwell, but that ignores the fact that what is filed at the courthouse is not an accurate reflection of what is owed. Every time a payment is made on a mortgage, a reduction in the amount of the loan is not recorded at the courthouse. A person cannot tell by looking at the filed paperwork at the courthouse the current status of an obligation. RP 1470.

AFFCLR 29 – One of the notes and deeds of trust were for Maxwell’s obligation to her other lawyer, Peick. That note and deed of trust were entered into and there is no finding that these were improper. This is an affirmative demonstration that notes and deeds of trust of the type prepared by McGrath, even if intend to benefit some creditors over others, are not improper.

AFFCLR 30 – Maxwell paid the recording fees for the notes and deeds of trust but McGrath contests the characterization in this finding regarding the terms “debtor” and “beneficiary.” The deeds of trust are identified as grantor and grantee which is an accurate statement of the

roles involved. Exh 601 (Maxwell to McGrath); 607 (Maxwell to Olympic); and 608A (Maxwell to Peick). The deeds of trust were to be returned to Maxwell but this means nothing whatsoever.

AFFCLR 31 – There were two CWCs one of which was CWC Capitol Hill. Maxwell sold CWC – Capitol Hill to another doctor, Mulanax, and McGrath acted as escrow. However, McGrath also acted as Maxwell’s attorney in the matter. RP 1484; 1486. Exh. 194, Sub-Exh. S, page 94. AFFCLR 32 - Mulanax executed a promissory note but contrary to the findings, there were not two promissory notes. Exh. 194, sub-exhibit S, page 76, showing only one note. Maxwell assigned \$5,000 to the business broker and the balance to Peick for his legal fees.

AFFCLR 33 –The King County Court entered a final judgment in the Ellison matter but in another example of the lack of care taken by the hearing officer in the findings the judgment was not entered on October 30, 2008, but rather was entered on November 14, 2008, and was not nunc pro tunc to July 14, 2008, but rather was nunc pro tunc to October 30, 2008. Exh. 705. Again these sorts of things might be relatively minor matters but these repeated factual errors go to the record as a whole and the court needs to look at that record, as identified herein, rather than accept the findings since they are demonstratively wrong in many parts.

AFFCLR 34 – McGrath wrote to Ellison’s counsel regarding that attempts to collect would result in a bankruptcy filing but the testimony was that he wrote Bridges in the context of not requiring a superseded bond on the appeal which was pending, RP 999. There is absolutely nothing wrong with telling the other side that if they insistent on seeking judgment that you will seek bankruptcy protection.

AFFCLR 35 – Ellison hired collection attorney Atwood who garnished various bank accounts including the McGrath Corporation which is McGrath’s law office. But this finding is incorrect in saying that Atwood did not garnish the trust account. She made no distinction in the garnishments she sent, RP 440. None of the citations by the hearing officer deal with what she did. The hearing officer does cite to testimony by Heston (an expert witness testifying on behalf of the Bar) that in her opinion the banks cannot garnish trust accounts since they are fiduciary accounts, RP 939. But when pressed she could not come up with any authority to back her claim and did not provide any later, RP 940 – 945. However, that is a conclusion she reaches which is contrary to what actually happens. The very reason to avoid commingling is because it can result in a lawyer’s trust fund being garnished. *In re Discipline of McKean*, 148 Wn.2d 849, 864, 64 P.3d 1226 (2003) – citing the ABA and other

sources. If there was a blanket law against garnishment of trust accounts as Heston suggests, there would be no need for such admonishments from the court or the ABA. While Heston may be an expert on some issues she is either not an expert on trust accounts garnishments or is an expert who is wrong.

AFFCLR 36 –In order to stay the garnishments a Chapter 7 bankruptcy was filed on July 21, 2009 for Maxwell and a Chapter 11 for CWC on July 23, 2009. McGrath contests the implication that he prepared the petitions and schedules exclusively as the evidence, discussed below, shows they were prepared in conjunction with Maxwell.

AFFCLR 37 – McGrath withdrew as counsel for Maxwell and CWC but the characterization that the court required him to do so is an overbroad statement. The hearing officer cites to RP 768 but that is only to the effect that McGrath was an “insider” under the bankruptcy laws. The same is true for the citations to RP 910, 911 and 914. What really happened is that on August 14, 2009, there was a hearing before the court in regards to the Chapter 11 case. McGrath attended the hearing with attorney (now Judge) Dore who indicated he was the prospective attorney for CWC and the bankruptcy judge gave them until August 20 to get a replacement attorney. There was no order requiring McGrath to withdraw

as counsel. RP 296 - 298. But this occurred when Dore filed his appearance on August 20, 2009, in the Chapter 11. Exh. 214. Nor was he ordered off the Chapter 7 but he was no longer the attorney as of August 20, 2009, when he withdrew as counsel in that case. Exh. 126.

AFFCLR 38 – McGrath contests the finding that the petitions and schedules were false, withheld material information and concealed assets and that there was any intent to hinder, delay or defraud the court, trustees and creditors. This will be discussed later in this brief.

AFFCLR 39 – The hearing officer asserts at this finding that McGrath's actions violated every single provision of 18 U.S.C. § 152, subsections (1) through (7). He cites RP 751 which makes no sense as that page deals with who the trustee was that was appointed and what a trustee's duties are. He cites RP 911- 912 which makes no sense as that page is nothing more than Heston testifying about creditors relying on the schedules and that it depends upon the circumstances whether there is a preponderance of the evidence showing that a debtor failed to disclose material assets or made a false oath or account in the initial filing. She also discusses amendments and an example from a case she was involved in. The hearing officer cites RP 1381 which is yet again Heston testifying about where items go in the schedules. None of these demonstrate that

McGrath violated the cited U.S.C. provisions. This finding of a violation of the U.S.C. is a legal conclusion and is to be reviewed de novo and there is no evidence to show that McGrath did violate the U.S.C. and nothing to tell us, if he did, what sections he is supposed to have violated.

AFFCLR 40 – The bankruptcy court denied Maxwell’s bankruptcy discharge and found that McGrath and Maxwell acted in bad faith and for obstruction of the bankruptcy process but that is simply restatement of what a court found and does not prove that McGrath and Maxwell did, in fact, act in bad faith or obstructed. These are hearsay statements and do not prove in a Bar case that in fact such things actually happened.

AFFCLR 41 – This finding relates to what McGrath is supposed to have testified to at his 2010 deposition and seeks to find that McGrath was not credible when he testified at the hearing regarding how the petitions were prepared, that any errors were mistakes and that he did not review them. The hearing officer simply misstates the record when he asserts that McGrath testified at his 2010 deposition that he prepared and filed every document in the petitions and schedules. Appendix C, Transcript page 34, line 10. The actual testimony, regarding the Maxwell personal filing is as follows:

Q. (By Bar) And did you prepare this filing on behalf of Ms. Maxwell?

A: (By McGrath) Yes.

Q. And did you prepare the documents contained in this exhibit?
There are 44 pages of them.

A; Yeah, Yes.

There is nothing in this testimony which suggests that he testified that he “prepared and filed every document in the petitions (plural) and schedules” (plural). [Emphasis added.] All this says is that he prepared whatever was in the exhibit being referenced and besides his testimony does not mean that he did not work with her in the preparation of the documents.

The hearing officer also cites RP 1214 – 1215 – but that only shows that McGrath denied preparing every one of the documents and that the Bar then read in the part of the 2010 deposition cited above. The hearing officer cites RP 1637 – but all that shows is that McGrath gave his wife some information to help her fill in the forms and that she then sat at the computer and filed out the forms with the information she knew. The hearing officer cites RP 1639 – but all that shows is that he did not use the short form for filing the Chapter 7 bankruptcy. The hearing officer cites 1649 – 1650 – but all these show is that he had Maxwell sit at the computer and start to fill out the forms and that he “really didn’t review”

the filing since he wanted to get it filed before a two o'clock deadline. The hearing officer cites RP 1772-1773 – but all these show is that McGrath says he does not remember whether he looked at the schedules.

What the facts show regarding how the first petition was prepared is that they were done in a rush after Atwood had served eleven writs of garnishment, seven notices of deposition and six subpoenas for a total of 24 matters that had to be addressed. RP 1594. The subpoenas created a crucial return deadline of July 21, 2009 at two o'clock because that was when the depositions were scheduled. RP 1603. Atwood knew about M & T, Wakefield, both CWCs, McGrath Corp and various bank and other accounts. RP 1605. It is ludicrous to believe that McGrath or his wife filed bankruptcy petitions with the hope of somehow hiding their marital relationship or any other aspect of the lives from Atwood or anyone else. McGrath sought to have the subpoenas quashed but his motion was continued past the July 21, 2009, deposition date so about two hours before the two o'clock scheduled depositions, McGrath and Maxwell determined that they would seek to file a bankruptcy. RP 1607. They raced to get the Chapter 7 done and got it filed at 1:53 pm. Moments before the depositions were to start which meant that the automatic stay started. RP 1638. The forms as filed were not well done and reflect the speed at which

they were prepared. There are many, many errors – some minor and some major. RP 1640 – 1649. Maxwell did the input at the computer. RP 1650.

AFFCLR 42 – This section finally identifies what McGrath is supposed to have done that was false which consists of assertions that he failed to identify himself as a multi-level “insider,” did not identify Maxwell as his wife and did not provide his income. *See* more detailed discussion of these issues below. As for “finding” that these actions violated 18 U.S.C. § 152 – this is a legal conclusion and is to be reviewed de novo and is discussed below regarding the legal standard which had to be met.

AFFCLR 43 – This finding asserts that McGrath filed originals and amendments to the petitions that were incomplete and failed to identify concealed and fraudulently transferred assets. The filings identified are July 21 – Maxwell Chapter 7; July 2 – CWC – Chapter 11; July 27 – Maxwell Chapter 7 amendments; and August 24 – CWC Chapter 11 amendment. However, there is no identification as to what the improper items were. *See* more detailed discussion of these issues below. The statement of what is a fraudulent transfer is a question of law and this along with the assertion that these unspecified actions violated 18 U.S.C. § 152 are legal conclusions and are to be reviewed de novo.

AFFCLR 44, 45, 46, and 47 are allegations that are reviewed in the more detailed discussion of these issues below. The legal conclusions are also discussed below.

AFFCLR 48 – McGrath contests the finding that he filed any claims – the claims were all for Maxwell. *See* discussion of these insurance claims below. We accept the fact finding that the condo was Maxwell's.

AFFCLR 49, 50 and 51 are allegations that are reviewed in the more detailed discussion of these issues below as well as the legal conclusions that the insurance proceeds were a bankruptcy asset and that there is a violation of 18 U.S.C. § 152.

AFFCLR 52 - This is nothing more than a general statement with no specifics regarding what specific debtor assets were supposed to have been transferred after the filing. McGrath contests this general finding as it lacks sufficient detail to allow a meaningful reply since the hearing officer does not provide any substantive evidence to support this generalized statement.

AFFCLR 53 – The allegation that McGrath intentionally failed to identify transfers of CWC funds to his trust account is discussed below. However, it is to be pointed out that these transfers were not illegal and it

is not improper to make such transfers to avoid garnishment. The legal conclusions as to whether these funds were in the ordinary course of business and whether there are violations of 18 U.S.C. § 152 are discussed below.

AFFCLR 54 – McGrath contests the credibility findings regarding the assertion that he said it was necessary to deposit the CWC funds into the account to pay employees. This same finding determines that the checks should have been deposited to the Homestreet Bank account and the employee's paid from there so the credibility issue is not the need to deposit and pay the employees but rather the statement that there was a need to use the trust account. But there is no citation to where he is supposed to have said that this was the need. As for the finding that he intentionally failed to identify the Homestreet account, there is no evidence to prove intent. The only evidence is that it was not listed. There is no evidence to show that McGrath even knew about the account.

AFFCLR 55 and 56 – The allegation that McGrath intentionally failed to identify the insurance funds received on the condo and their payment to persons who cleaned up the condo or were going to do construction work on it are discussed below. The legal conclusions that

these were the assets of the estate and that there was a violation of the 18 U.S.C. § 152 are discussed below.

AFFCLR 57 – McGrath and Maxwell refused to deliver the insurance proceeds since they had a colorable claim that they were not bankruptcy assets. The determination that these were assets of the estate by the court is an accurate recitation of what the court found but it is not a legal conclusion in this case since the hearing officer is required to make his own legal conclusions.

AFFCLR 58 – This is nothing more than a general statement with no specifics so we contest this general finding as it lacks sufficient detail to allow a meaningful reply. AFFCLR 59 and 60 – We contest the findings that the 2008 promissory notes and deeds of trust securing indebtedness to McGrath and Olympic were false. *See* discussion regarding why these notes and deeds of trust are valid elsewhere. The legal conclusion that these were violations of the 18 U.S.C. § 152 are discussed below.

AFFCLR 61 – We accept that the trustee filed a complaint but that does not mean that the trustee’s conclusions regarding the notes and deeds of trust were correct.

AFFCLR 62 and 63 – It is correct that McGrath appointed his former wife the successor trustee on the Olympic Mortgage and that she

then reconvened the deed. There is nothing wrong with this and no approbation is attributed to it in the findings.

AFFCLR 64 – The allegation that McGrath falsely claimed that the marital community owed the Stevens boat is discussed below. The legal conclusions that the boat was community property and that there was a violation of the 18 U.S.C. § 152 are also discussed below. AFFCLR 65 – We contest the finding that the Proof of Claim was a false swearing. *See* discussion of why the claim for attorney fees was proper elsewhere. *See* discussion of why this is not a violation of the U.S.C. below.

AFFCLR 66 – We accept that McGrath maintained a trust account at the Bank of America. AFFCLR 67 – This finding claims that McGrath used his trust account as a personal bank account but this is nothing more than a general statement with no specifics so we contest this general finding as it lacks sufficient detail to allow a meaningful reply.

AFFCLR 68 – McGrath paid personal and third party debt from the trust account. But as long as the funds were either his or the funds of his client there is nothing wrong with this. There is no law or RPC provision that provides that a lawyer cannot pay his personal bills with funds from the trust account as long as they are earned fees. *See* discussion in legal discussion below.

AFFCLR 69 – This finding is premised on the assertion that there was the commingling of personal funds with client funds but there is no proof that any of the funds were personal funds at the time they were deposited. Once they became earned or personal funds, they were paid out. Additionally, the Bar’s own witness, Heston, stated that IOLTA funds were not subject to attachment.

AFFCLR 70 – This finding of credibility is based on the legally improper conclusion that only client funds that are directly connected with a specific and actual representation can be deposited to the trust account. There is no authority for such determination and in fact the RPCs require that all funds of clients be deposited to the trust account. *See* discussion below.

AFFCLR 71 – This finding that McGrath deposited personal funds to his account is based on the assertion that each of these four checks were personal funds:

- June 18, 2007 – Exh. 319 – \$100 – This is a check from Wellness One made payable to TMC Trust. Wellness was a client and the check was made out to the trust account. There is no proof that the check was personal funds of McGrath, RP 1156 – 1157.
- November 27, 2007 – Exh. 321 – \$118- This is a check made out to McGrath Corp Trust from Maxwell and the memo line says “Corp.” The only testimony about this check came from McGrath and

that was that this was to pay the corporate licensing fees of his client, CWC. There is no proof that the check was the personal funds of McGrath. RP 1160.

- November 30, 2007 – Exh. 322 – \$17,000 – These are two check from accounts of McGrath – one for \$5,000 and one for \$17,000. The \$17,000 check has a memo line of “CWC.” These were personal funds but they were being deposited as a contribution in order to pay his client’s legal bills to Peick. RP 1162. If Maxwell’s mother had given McGrath a checks for \$17,000 to help pay Maxwell’s and CWC’s legal bills, where would the funds have to go? Of course, to his trust account since these would be fund held by the lawyer on behalf of a client. It makes no difference that he was the source of the funds, the same principal applies and these were no longer personal funds once they were deposited for that purpose.
- December 5, 2007 – Exh. 323 - \$299 –The only evidence regarding these funds came from McGrath. He testified that these were transferred to the trust after he learned that a filing fee had been deposited to his operating account by mistake. RP 1163 – 1164. Accordingly, there is no evidence to support that these were personal funds of McGrath’s.

There is no evidence to support a finding that personal funds of McGrath’s were deposited to the trust account.

AFFCLR 72 and 73 – These findings that McGrath concealed Maxwell’s personal funds by depositing them to his trust account and by depositing them to the account commingled those funds is based on the assertion that both of the cited checks were Maxwell’s personal funds. The two checks are July 23, 2007 – Exh. 320 - \$16,200 and December 26,

2007 – Exh. 325 - \$20,000. These were checks from Maxwell's Wachovia account. They were the personal funds of his client Maxwell. The hearing officer specifically found that McGrath represented Maxwell in the Ellison lawsuit. AFFCLR 4. The only evidence regarding the purpose of these funds came from McGrath. He testified that they were to pay Maxwell's legal fees to Peick. If any client gives a lawyer funds to pay a bill for her, including to another lawyer, where do the funds go? Of course, to the trust account. The WSBA would be very upset if it found out that in such situation the lawyer had put them into his office account. It make no difference that the funds came from his wife – she was still his client as specifically found by the hearing officer and it make no difference that the bill to Peick could have been paid directly by Maxwell. There is no requirement that she pay her bills that way. Once she gave her lawyer funds to pay her legal bills, the funds had to go to his trust account so it is true that personal funds of a client were deposited to trust but there is nothing improper in such funds being deposited to the lawyer's trust account and, in fact, they had to be. There is no proof of improper commingling of non-client funds.

AFFCLR 74 and 75 – These findings that there was the improper deposit of M & T funds into the trust account rests on the premise that these were community funds and that they were not client funds. [*See* discussion regarding M & T elsewhere.] McGrath represented M & T,

these were client funds and there was nothing improper in them being deposited to the trust account.

AFFCLR 76 and 77 - These findings that McGrath concealed Maxwell's personal funds by depositing them to his trust account and by depositing them to the account commingled those funds is based on the assertion that both of these deposits were Maxwell's personal funds. The two deposits are April 23, 2008 -- Exh. 348 - \$1,177 and December 19, 2008 -- Exhs. 352 and 353 - \$60. The \$1,177 deposit was a check from AFLAC insurance and was originally made out to Maxwell. The \$60 deposit were two checks -- one made out to CWC and one made out to Maxwell but identified on the memo line as being for "Wellness Fair." The only testimony regarding the \$1,177 was that it might be an account receivable for CWC or possibly that it might be a check for health care payments for McGrath but there is no certainty about what it is. RP 1181. The only testimony regarding these checks came from McGrath and he felt that these were donations to his client Maxwell. RP 1190 -- 1191. There is no proof on any kind that these three deposits were not funds of a client. The Bar did not prove and there is no substantial evidence to support any finding that these deposits were somehow improper.

AFFCLR 78 and 79 - These findings that McGrath concealed CWC receivables and money by depositing them to his trust his account and by depositing them to the account commingled those funds is based on

the assertion that both of these deposits could not be properly deposited to the trust account. The two deposits are December 17, 2008 – Exh. 351 - \$1,537.76 and December 19, 2008 – Exhs. 354 and 357 - \$263.58. The \$1,537.76 check is from the law firm of Phillips and Webster and is made out to CWC with the law firm's client identified on the memo line as paying in full. The \$263.58 is, contrary to the findings, and which do not identify all the exhibits, is made up of Exhs. 354, 355, 356 and 357 – consisting of a \$30 check to Maxwell for a "Wellness Fair"; \$109 as an accounts receivable; another \$109 as an accounts receivable and \$15.58 as an accounts receivable. The only testimony regarding these check came from McGrath and it was to the effect that these were account receivables on behalf of CWC or were payments to Maxwell; RP 1188 – 1192. The Bar did not prove and there is no substantial evidence to support any finding that these deposits were somehow improper and were not the funds of his admitted client CWC. If McGrath was collecting account receivables for his client then of course they had to go into his trust account.

AFFCLR 80 and 81 – These findings regarding the deposit of insurance proceeds to his trust account are premised on the assertions that these fund should not have been deposited to his trust account since they were personal funds, yet as discussed elsewhere the condo was Maxwell's separate property and he was acting as her attorney in dealing with the

insurance company. Accordingly, they were client funds and had to go to into his trust account even if he had an interest in the funds as well. RPC 1.15A(h)(ii) –funds belonging in part to the lawyer and in part to a client or third party must be deposited to trust.

AFFCLR 82 and 83 – These findings regarding CWC funds deposited to the trust account are premised on the assertion that such funds should not have been deposited to the trust account yet, as discussed elsewhere, there is no dispute that these were CWC funds and that they were to be paid out on CWCs behalf. CWC was a client. The Bar can argue that perhaps the CWC funds could have been deposited in a non-law firm account but if they were provided to its lawyer, the only place the funds could properly go was into the trust account. If any business client gives a lawyer funds to pay bills and whether or not there is an argument as to whether the lawyer should have accepted them in the first place, if he accepts them he must deposit them to the trust account since they are not his funds. These findings are not about whether McGrath should have accepted the funds in the first place but rather relate to what he did with them once he did. Since they were client funds and not his, he had to deposit them to trust account.

AFFCLR 84 and 85 - These findings that McGrath concealed Maxwell's personal funds by depositing them to his trust his account and by depositing them to the account commingled those funds are based on the assertion that these four deposits could not be properly deposited to the trust account. The four deposits are:

- February 25, 2009 – Exh. 390 and 391 (the last one not cited by the hearing officer) - \$15,000 – These were two Wachovia checks. They were used to pay Maxwell's legal fees to the appellate firm on the Ellison case, to pay Maxwell's share of the boat payments and to pay Maxwell's other obligations such as her fees on the condo. RP 1617- 1621.
- March 3, 2009 – Exh 392 - \$121.44 – This is a check from the State of Washington made out to Maxwell. The only testimony about it came from McGrath and he did not know what it was for. RP 1246.
- April 9, 2009 – Exh. 396 and 397 - \$79.50 – These are two checks one for \$30.77 from Wachovia and one for \$48.73 from MDC Acquisition made out the Maxwell, D. C. The only testimony came from McGrath and he did not know what the funds were for. RP 1248. These funds were then paid out to Maxwell. RP 1617.
- July 13, 2009 – Exh. 406 - \$8,615.92 – This is a check from Wachovia made out to Dr. Maxwell. McGrath testified that while they were personal funds of Maxwell's they were also the funds of a client which, as client funds could be deposited to trust. RP 661 and 663.

It should be noted here that while the hearing office also cites Exh. 397A he does not tie it to any findings. None of the evidence establishes that

these were improper deposits to trust. It is the Bar's burden to show the deposits were improper and they did not provide substantive evidence that they were.

AFFCLR 86 and 87 - These findings that McGrath concealed his own personal funds by depositing them to his trust account and by depositing them to the account commingled those funds is based on the assertion that these four deposits could not be properly deposited to the trust account:

- June 24, 2009 – Exh. 398 - \$1,000 – This is a check from McGrath's operating account to his trust account. He did not know why he was making this transfer. RP 1251.
- September 14, 2009 – Exh. 439 - \$3,900 – This is a cashier's check made out to South Coast Surety was marked as not used for purpose intended and deposited to the trust account. McGrath did not know why this had happened. RP 1099-1100.
- October 20, 2009 – Exh. 440 - \$3,418.47 – This is the deposit of Maxwell's CWC paycheck into the trust account. McGrath testified that this was his client's funds and would have been used to pay any number of her personal obligations. RP 1100 – 1106.
- November 6, 2009 – Exh. 441 - \$3,418.37 – This is another Maxwell CWC paycheck. The funds were used to pay her obligations since she was a client. RP 1106 – 1107.

None of the evidence establishes that these were improper deposits to trust. It is the Bar's burden to show the deposits were improper and they did not.

AFFCLR 88 and 89 – These finding that McGrath would collect debts for clients, deposit the collections to the trust account and then each quarter disburse the balances owed to his clients and retain the balance in his trust account and that this constituted commingling is based entirely on McGrath's testimony. But he also testified that he would either pay out the balance to his operating account or he kept them in the trust account and he treated them as earned fees. RP 1478. What the hearing officer does not recite is that these were the funds that were then used to pay the personal obligations that the Bar and the hearing officer are critical of at AFFCLR 61. The Bar made no showing that there is any sort of per se rule that leaving earned funds in the account and then using them to pay personal obligations is wrong. That is what McGrath did. RP 666; 1022. The problem would be if the funds were not withdrawn in a timely fashion but the Bar made no showing that the earned funds were not paid against personal obligations in such a way that there was not a timely withdrawal. They did not prove either as a matter of fact or law the McGrath did anything improper when he considered the fees to be earned fees and left them in the trust account and then timely disbursed them.

AFFCLR 90, 91, 92, 93, 94 and 95 – We accept that McGrath did not keep his trust records perfectly but his failure to do so caused no harm and the Bar showed none. However, as discussed below, at AFFCLR 98, he was not ignorant of the amounts in his trust account. There is no evidence of any overdrafts or the use of client funds.

AFFCLR 96 – We accept that a minor mistake happened one time in 2009 and a check was written to cash rather than to a named payee, in this case Maxwell. This happened when McGrath cashed some checks for his wife through his trust account and just did not think it through. RP 1615. The WSBA did not show that Maxwell was not entitled to the funds and there was no harm caused by this technical violation.

AFFCLR 97 – This allegation asserts that between 2007 and 2009 McGrath gave Maxwell unlimited control of the trust account. It is true that McGrath delegated to his wife the ability to handle the trust account but there was no evidence that this constituted unlimited control. The Bar did not prove these allegations. *See* discussion at AFFCLR 98.

AFFCLR 98 – This finding incorrectly states that McGrath gave Maxwell unsupervised and unrestricted access to the trust account. That is not true. McGrath kept the trust account checks in his office and when she wanted to write checks she had to come and ask him for it. They kept track of the deposits and checks and he knew what was coming in and going out. RP 6567-658. He kept a running list of the CWC deposits into his

account. RP 1002. The Bar did not prove that McGrath “knew” she concealed her money and CWC funds in the account. The funds were deposited for a valid purpose. Finally the hearing officer finds that these actions jeopardized client funds and risked subjecting them to attachment by Maxwell’s creditors. There is no evidence to show that anything Maxwell did in any way jeopardized client funds. The hearing officer found at AFFCLR 35 that the trust account cannot be garnished so it is inconsistent for him to now find that the trust account was in jeopardy of garnishment.

AFFCLR 99 – We accept that McGrath sent a letter and CD to the judge but at the same time McGrath specifically advised the other parties that he was sending the disc to the judge. Exh. 153. This is not improper ex parte contact. He told the other parties what he was doing. Despite the implication, there is no rule that says a lawyer cannot send things directly to a judge – neither the Bar nor the hearing officer cite to any such rule.

AFFCLR 100 – This is a legal statement that ex parte contact is always prohibited but the problem with this statement is that it is not ex parte contact when you tell the other parties that you are doing so particularly since if the judge accepted the filing, it would be placed on the PACER system and everyone would have access to the filed letter and document.

AFFCLR 101 – We accept that the letter and CD were returned but the statement by a law clerk in a letter that something is improper does not prove that it is. As stated above there is no rule to that effect and the Bar has cited none. It may be a judge’s policy not to accept such filings but that does not make it improper to send it when he told the other parties he was doing so.

AFFCLR 102 – This finding asserts that McGrath sent the judge a letter electronically with copies to all parties but that is not what happened. Silva, on her own, sent the letter to the Judge. McGrath filed it with the clerk through the ECF System. RP 1312 -1314. However, in view of the finding that this was not intended as ex parte contact (and that he gave copies to all parties so it could not be ex parte contact) we will treat this as a de minimus error by the hearing officer.

AFFCLR 103 – This finding clearly has a typographical error in that it references the preceding paragraph which deals with the September 24, 2009, letter but then points to the September 15, 2009, letter for a determination that that letter was improper ex parte contact. The hearing officer obviously meant the September 15, 2009, letter and as explained above he is incorrect in his conclusion that this was improper ex parte contact.

The remaining paragraphs of the AFFCLR are discussed below.

4. **Discussion of Alleged Improper Information Provided in the Bankruptcy in violation of 18 U.S.C. § 152**

General Discussion Regarding 18 U.S.C. § 152: The alleged violations of 18 U.S.C. § 152 are legal conclusion subject to review by this court de novo. In order for the Bar to prove violations of 18 U.S.C. § 152 they have to show “an evil state of mind.” *Morissette v. United States*, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952). Furthermore, they have to show that McGrath acted “knowingly and fraudulently. This requires that:

- (1) the statement was made under oath;
- (2) the statement was false;
- (3) the person making the statement knew the statement was false;
- (4) that the statement was made with fraudulent intent; and
- (5) the statement related materially to the bankruptcy case.

Matter of Beaubouef, 966 F.2d 174 (5th Cir. 1992).

In considering matters of intent it must also be kept in mind that the whole reason for filing the petitions was to stop Atwood from continuing to seek the collection of the judgment and the garnishments. Based on the number of garnishments and subpoenas she sent which triggered the bankruptcy there was no realistic possibility of “fooling” her as to what assets were out there and what the relationship was between McGrath and Maxwell.

The point of the bankruptcies was to get the automatic stay in place. RP 998. McGrath was counsel on the bankruptcies initially but got

off the cases on August 20, 2009. RP 504. His role was to get them filed as quickly as possible to get the stay in place. RP 998. He did not spend the time he would ordinarily spend with a bankruptcy client with Maxwell because it was the eleventh hour. RP 582. They prepared the Chapter 7 filing together. RP 582. She has worked at his office and was familiar with the data entry system for bankruptcy cases. RP 583. Maxwell prepared most of the Chapter 7 petition. RP 587. Contrary to what the hearing officer found, McGrath stated that he did review the Chapter 7 before it was signed. RP 588. When the Chapter 7 was amended on July 28, 2009, those amendments were prepared by McGrath. RP 588. He did so in response to information from the U.S. Trustee's office that there were deficiencies. RP 589. On the amendments he provided his gross monthly income. RP 5890. They did not provide any income for Maxwell because at that time she was not taking any salary. RP 590. He reviewed the items he was asked to review but did not review all parts of the Chapter 7 filing. RP 591. There is always an opportunity to amend bankruptcy schedules. RP 590. The schedules were amended again on August 24, 2009. Exhs. 128 through 136. McGrath was no longer her attorney but was helping her as her husband. RP 593. The information they changed came from

Maxwell and he both. RP 593. He filled out the CWC information based on what Maxwell told him. RP 594.

Discussion of Specific Findings Regarding 18 U.S.C. § 152:

AFFCLR 42 - This is a finding that McGrath failed to identify himself as a multi-level bankruptcy insider. There is no requirement that he make such disclosures. Any such failure is not material. While the hearing officer finds intentional behavior there was no substantive proof that any such failure was intentional. To make such finding the hearing office has to have substantial evidence that there was an intent not to disclose the “insider” information yet there is none.

AFFCLR 42 - This is a finding that McGrath did not identify himself as Maxwell’s spouse – There cannot be any possible intention to deceive when the petitions indicated that there was a spouse and that the spouse had an interest in some of the properties. In addition the petitions would be sent to Atwood who was fully aware of the relationship between McGrath and Maxwell. The only evidence to support the contention that there was an intentional plan to not list McGrath as a spouse is the bald fact that he was not listed by name. This is not substantial evidence of intent to deceive. If no spouse had been identified at all there might be an issue but where the existence of the spouse is disclosed there cannot be an

intent to hide the spouse. There simply is no proof to show that Maxwell or McGrath had a fraudulent intent when he was not listed by name.

AFFCLR 42 - This is a finding that McGrath did not provide his income – They did not provide any information about the spouse but identified there was a spouse so there was no possibility that they would get away with providing nothing about the spouse’s income. Again the only proof is the bald fact that the information was not listed but that is not substantial proof of an intent to deceive as opposed to errors made in the haste of filing.

AFFCLR 42 - This is a finding that McGrath substantially reduced and falsified Maxwell’s income to avoid re-designation of the bankruptcy as a Chapter 13 – Where is the proof of this? The evidence is that since Maxwell was not drawing any salary they did not list her as having one. There was no proof that she was hiding CWC money and not paying herself in order to deceive anyone. If fact, the evidence showed that she was having to put substantial amounts of her own money into the CWC to keep it afloat. There is no substantial evidence that they reduced and falsified Maxwell’s income.

AFFCLR 44 - This is a finding that McGrath’s claim that no estate assets had been transferred prior the bankruptcies is misleading – This

allegation is without details as to what assets the hearing officer means so there is no way to know what the hearing officer is asserting. It is in the nature of a general introduction to specifics.

AFFCLR 45 – This is a finding that McGrath failed to identify the November 2008 sale and transfer of CWC Capitol Hill Clinic and transfer of the sale proceeds - CWC Capitol Hill was sold in November 2008 – it was a separate entity and was not in bankruptcy. The promissory notes had been assigned by it to others. Maxwell had no obligation to list this on her personal schedules since she no longer owned it and she had no obligation to list it on the CWC schedules since it was a separate entity from the CWC she still owned. RP 1219; 1220.

AFFCLR 46 - This is a finding that McGrath failed to identify Maxwell's sale and transfer of jewelry – There is no proof that McGrath even knew about the sale and transfer of the jewelry. Absent proof that he knew of it, he cannot have had the necessary evil mind or intent to deceive. What the evidence showed is that McGrath had given Maxwell a wedding ring. RP 643. It was not listed on the July 21, 2009, bankruptcy schedules. Maxwell provided the values for her property on the schedules. RP 650. Maxwell had sold the jewelry and did not tell McGrath about it until after the bankruptcy had been filed. RP 654. He first learned of it

after her 341 hearing. RP 655. He was shocked to learn that she had sold it. RP 1499. There was no intent to deceive because he did not know about the sale and transfer.

AFFCLR 47 - This is a finding that McGrath failed to identify the June 2008 sale of the M & T boat – In order for this to be a violation there would have to be proof that the sale had to be listed in the first place. There is no dispute that property that is not owned by Maxwell, CWC or is not community property has to be listed. While the Bar tried valiantly to prove that M & T and the boat were community property, they did not do so as a matter of fact or as a matter of law.

M & T Investments was an LLC consisting of McGrath and Maxwell created in 2000 before they were married. It was formed by McGrath and they are the only two members. RP 597. It is a recognized corporation of the State of Washington. Exh. 800. In 2004 M & T got a loan to buy a Stevens boat. McGrath and Maxwell were guarantors on the loan, RP 1105, but the boat was owned by M & T and they shared the costs of it. RP 1104-1105. There was no evidence that M & T and the boats that it owned had been converted from the separate property of each of them to community property. The schedules identified that Maxwell had an interest in M & T which is all she had to do. RP 1219. Since the boat

which was transferred was not owned by her and was not community property it did not have to be listed.

AFFCLR 49 – This is a finding that McGrath failed to identify the transfer and concealment of Harford’s \$7,908 pre-bankruptcy insurance proceeds, and AFFCLR 55 – which is a finding that McGrath failed to identify \$18,625.99 in condo insurance proceeds after the bankruptcy, and AFFCLR 55 – which is a finding that McGrath failed to report payment of \$15,000 of the insurance funds to ServPro, and AFFCLR 56 - which is a finding that McGrath failed to identify \$53,982.99 in condo insurance proceeds and payment of \$50,000 to McBride Construction:

All of these have to do with the condo which was found by the hearing officer to be owned by Maxwell. The condo was Maxwell’s separate property which she acquired before they were married. RP 1047. The condo was insured by Hartford. RP 604. They were both listed on the condo insurance because of McGrath’s personal property. He has never claimed an interest in the condo itself. RP 604. There was damage to the condo caused by a water leak before the bankruptcy was filed and Maxwell filed a claim against the insurance. RP 605; 611. McGrath did not claim he had lost anything as a result of the damage. RP 605. McGrath represented Maxwell regarding the condo damage. RP 618. Exh 1042 [a

letter on McGrath's attorney stationary sent to one ServPro regarding settling the dispute regarding ServPro's services.] Exh 1030 [a letter on McGrath's attorney stationary to McBride Construction.]

Hartford began to send checks. RP 613. First, there was a check for \$7,000 on about July 7, 2009 for an advance on the contents, pack-out, moving and storage. Exh. 1007. The check was deposited to McGrath's trust account. RP 615. It was McGrath's idea to deposit the check to his trust account because it was Maxwell's money, not his. He was representing her on the insurance claim and the funds were for one of her creditors. RP 618. It was not his money and she was a client. RP 618. He specifically stated that he was representing Maxwell on the condo flooding and repairs. RP 619. The Bar never demonstrated anything to the contrary.

The insurance company later sent another check to pay "ServPro" who were the people who cleaned up the water damage. RP 622. Exh. 1011. The check was for \$18,625.99 on about August 7, 2009 and was specifically identified as being for "ServPro mitigation" billing. There was also a third check issued on about August 10, 2009, for \$154 for electrical usage that ServPro was using to dry out the condo. RP 622; 624. Exh 1011. These checks were also deposited to the trust account because they were client funds. Exh. 433. RP 628. Another check in the amount of

\$53,982.99 came on about August 11, 2009 for building costs. Exh. 1014. This check was also put into the trust account. RP 631. Then \$50,000 was paid out to McBride's to begin the reconstruction. Exh. 1030.

None of these checks or payouts was listed on the bankruptcy schedules. They were not listed because the money was conditioned payment for repairs to the condo and if not used for that purpose it had to be returned to Hartford. RP 639; 1097. *See* Exh. 1013 which is a letter from Hartford which provided that "If your repairs are less than the estimated amount, you may only recover the actual cost of the repairs." McGrath understood this to mean that any money left from the funds sent by Hartford after the actual repair had been made had to be returned to Hartford. RP 1577. The funds that were received were for the benefit of third parties. RP 1046. The money was not Maxwell's or McGrath's money. RP 1048. There is no requirement that funds which were not Maxwell's or community property be listed in the bankruptcy. Even if McGrath was not ultimately correct as a matter of law as to the ownership of the money he had a reasonable belief that the funds were being held for others and, therefore, he cannot have had the evil mind or intent required to prove a violation of the U.S.C.

AFFCLR 50 – This is a finding that McGrath failed to identify the transfer of Maxwell’s personal funds of \$61,253.86 into the trust account between July 23, 2007 and July 21, 2009 and AFFCLR 51 – which is a finding that McGrath failed to identify \$14,388.69 in CWC funds in the trust account between December 17, 2008 and July 21, 2009; and AFFCLR 53 – which is a finding that McGrath failed to identify transfer of CWC assets into trust account between July 24, 2009 and August 20, 2009:

These all relate to the placing of Maxwell’s or CWC funds into the trust account. There is nothing wrong with an owner funding her company when it is strapped for cash. McGrath knew Maxwell was depositing CWC checks into his trust account. RP 634. The money being deposited to the trust account was to pay employees as well as other bills and obligations. RP 655. These funds were not listed in the personal bankruptcy because they were CWC funds. RP 656. McGrath has no idea Maxwell did not use the Homestreet account but there is nothing which required her to do that. RP 656-657. A client can put personal and corporate funds into a lawyer’s trust account. RP 663. The Bar did not provide any authority to the contrary nor can it. The nature of the funds from the client is not relevant. The only relevant question is whether the

funds are a client's or not. In this case it is indisputable that Maxwell and CWC were clients of McGrath.

The assertion appears to be that these were preferences. It is not a preference if payments are made in the normal course of business. RP 668. Payments in the normal course do not have to be listed on the bankruptcy schedules. RP 669. McGrath did not amend the Chapter 11 schedules in regard to the CWC funds in his trust account since shortly after they were filed he was no longer her attorney. RP 1004-1005. And when the new attorney, Judge Dore, took over he did not amend them either to include these funds even though he knew about them. RP 1007.

AFFCLR 64 – This is a finding that McGrath falsely claimed that the Stevens boat was the sole property of Maxwell's husband by putting "H" on schedule D in an intentional attempt to remove the boat from creditor's claims. This was simply an inputting error, RP 1220, and there is no proof to the contrary. In any case there was no requirement that the boat be listed at all, *see* discussion in regards to AFFCLR 47, since it was the property of M & T. Since it did not have to be listed, this was not a material error.

AFFCLR 65 – This is a finding that McGrath falsely claimed attorney fees based on the promissory note and deed of trust – As

discussed above, there was no false claim of attorney fees. This entire finding is based on the premise that the e-mail to his wife definitively proved that there were no attorney fees, yet people can and do change their minds for all sorts of reasons. There can be no false claim if the claim was valid as it was in this case.

In short, the crucial findings in this case regarding disbarment tie-in to claims that 18 U.S.C. § 152 was violated but the Bar has to have proven the necessary “evil mind” and intent, which it did not do.

5. **Discussion of Additional Facts Regarding Sanctions**

AFFCLR 104 – This is a finding that McGrath acted intentionally in regard to Counts 1 and 2. There is no substantive evidence of this. The record on review shows that McGrath did not act intentionally and had a lawful basis for what he did and/or reasonably believed he did. Since he did not act intentionally he cannot be blamed for any harm caused in his good faith action. There is no basis in the finding that he was obstructive and acted in bad faith. Findings by a court to that effect cannot be used to prove this and there must be independent findings by the hearing officer establishing that McGrath’s actions were not simple the product of hard fought litigation. There are no such independent factual determinations.

AFFCLR 105 – This findings regarding commingling are dependent upon the conclusions that the funds he put into his trust account could not be properly deposited. But all funds were client funds and as discussed above were properly were placed in trust. He did not use his trust account in the manner described in *McKean* or *Trejo* (cases cited by the hearing officer) and those cases are not controlling. This finding must be rejected.

AFFCLR 106 – This relates to whether knowledge regarding the trust account records. The evidence does not support a “knew or should have known finding.” McGrath kept records just not the perfect ones desired by the Bar. At the most, he was negligent.

AFFCLR 107 – This relates to the one-time cash withdrawal. As discussed above, this cash withdrawal was an isolated mistake and at the most was negligent.

AFFCLR 108 – This relates to access to the trust account and is simply wrong as a matter of law. There is no RPC which prohibits allowing someone to access the trust account. It may not be a best practice but it is not prohibited by any rule.

AFFCLR 109 – This relates to the alleged improper ex parte contact but as discussed above there was no such improper contact so no finding in this regard is appropriate.

6. **Discussion of Conclusions of Law Portion of AFFCLR**

AFFCLR 110 – This is standard language regarding finding of fact being conclusions of law but it is meaningless unless such conclusions of law are supported by some legal reasoning or citation. In this matter, they are not.

AFFCLR 111 - We agree on the burden of proof.

AFFCLR 112, 113, 114, 115, 116, 117, 118 – These are all determinations that the Bar affirmatively proved the violations of the cited sections. But as demonstrated above it did not. The substantial evidence needed to prove these violations is not present and the Bar did not prove its case. It particularly did not do so in regards to meeting the proof of intent required for the RPC violations alleging violation of the U.S.C. as discussed above and they did not prove the necessary intent required for the RPC 8.4(c) violations.

7. **Discussion of Sanctions Analysis Portion of AFFCLR**

AFFCLR 119 – We accept the statement of the law in regards to what the process is in applying the ABA Standards.

AFFCLR 120, 121 122, 124,125, 126, 127 128 and 129 – To make the analysis made by the hearing office the premise must be true – namely that the alleged violations occurred. Since they did not the analysis is faulty and must be rejected. To the extent that the hearing office repeats statements made in other portions of his findings such as at 121, 124, 125 and 128 the prior objections raised by Respondent are incorporated herein.

AFFCLR 130 – We accept that this is a correct statement of the law.

AFFCLR 131 – For all the reasons set forth above the determination of disbarment is inappropriate and must be rejected.

AFFCLR 132 – Introductory and no comment is required.

AFFCLR 133 – This is a correct statement of the prior discipline rule but it should be given no weight in view of the fact that the discipline was in 1982 and was on totally different type issues.

AFFCLR 134 – As discussed above, the Respondent did not engage in misrepresentations or deceptive conduct so the aggravator of dishonest and selfish motive does not apply.

AFFCLR 135 and 136 – Since Respondent did not engage in misconduct he did not engage in a pattern of misconduct or have multiple violations.

AFFCLR 137 and 138 – It is true that Respondent has refused to admit that he engaged in misconduct and he is not required to. He is allowed to defend himself without fear of having this aggravator used against him if he does not confess. In this case, this aggravator is improperly applied.

AFFCLR 139 – Respondent does have substantial experience in the law but in this instance that is not an aggravator but rather goes to show that he understood bankruptcy and the right to amend.

AFFCLR 140 – The hearing officer fails to apply any mitigators but clearly in view of the terms which were imposed on McGrath and his wife and the settlement he had to reach he is entitled to other penalties and sanctions and he is entitled to remoteness of prior offenses. The hearing officer appears to find that he is aggravating all counts including the reprimand and the suspensions up to disbarment. For all the reasons set forth above this disbarment recommendation should be rejected and the allegations against McGrath dismissed.

AFFCLR 141 - For all the reasons set forth above the disbarment recommendation should be rejected and the allegations against McGrath dismissed.

8. Proportionality

The recommended sanction of disbarment against McGrath is excessive. A lawyer who knowingly engaged in dishonesty by making false statements to the court and where there were aggravating factors and mitigating factors given little weight was suspended for six-months. *In the Matter of Disciplinary Proceedings against Conteh*, 175 Wn.2d 134, 284 P.3d 724 (2012). A lawyer fabricated billings and submitted them to a court to support motions for attorney fees and had aggravating factors that outweighed his mitigators. He received a six-month suspension. *In re Disciplinary Proceedings Against Dynan*, 152 Wn.2d 601, 98 P.3d 444 (2004).

E. CONCLUSION

McGrath has had problems in the past which makes him an easy target for assertions that he acted improperly this time. However, a close reading of the record shows that he rushed to help his wife in an emergency process in a situation where an experienced collection attorney who knew all about he and his wife, as is demonstrated by the eleven writs of garnishment, seven notices of deposition and six subpoenas she served on them, would be closely looking at his every move. It simply defies logical and human experience to think that McGrath in this circumstance

thought that any substantial error on the bankruptcy forms was not going to be discovered. He had taken steps, including the table funding process, to protect assets but that is not illegal. He reasonably believed that a lawyer could help a client pay bills while in bankruptcy in the ordinary course of business and it is not improper for a lawyer to use his or her trust account to pay bills of clients. He had every reason in the world to believe that any insurance funds left after payment of construction costs had to be returned to the insurance company so the funds were not Maxwell's but rather either belonged to the contractor or the insurance company so did not need to be reported as an asset of Maxwell's in the bankruptcy.

As a matter of fact and law, McGrath did not violate any rules or statutes in this matter and the case should be dismissed.

Dated this 21st day of February, 2013.

/s/
Kurt M. Bulmer, WSBA # 5559
Attorney for Respondent McGrath

APPENDIX A

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FILED

APR 13 2012

DISCIPLINARY BOARD

BEFORE THE
DISCIPLINARY BOARD
OF THE
WASHINGTON STATE BAR ASSOCIATION

In re

THOMAS F. MCGRATH, JR.,

Lawyer (Bar No. 1313).

Proceeding No. 10#00055

AMENDED FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
HEARING OFFICER'S
RECOMMENDATION

In accordance with Rule 10.13 of the Rules for Enforcement of Lawyer Conduct (ELC), the undersigned Hearing Officer held the hearing on October 10 - 12, 2011 and November 8 - 16, 2011. Respondent appeared at the hearing and was represented by Kurt Bulmer. Disciplinary Counsel Kathleen A. T. Dassel appeared for the Washington State Bar Association (the Association).

FORMAL COMPLAINT FILED BY DISCIPLINARY COUNSEL

The Amended Formal Complaint filed by Disciplinary Counsel charged Thomas F. McGrath Jr. with the following counts of misconduct:

AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW
AND HEARING OFFICER'S RECOMMENDATION - 1
(NO. 10#00055)

043

1 Count I – By drafting, filing, making, and presenting false claims and accounts and/or
2 making false statements about Melinda Maxwell's and CWC's assets, property, and bankruptcy
3 estates to the court, trustee and/or creditors, by receiving, transferring, secreting, and concealing
4 debtors' property from the court, trustee and/or creditors, and/or by disobeying his obligations
5 as an attorney under the bankruptcy rules, Respondent violated RPC 8.4(c) (Conduct Involving
6 Dishonesty), RPC 8.4(d) (Conduct Prejudicial to the Administration of Justice), RPC 4.1
7 (Truthfulness in Statements to Others), and/or RPC 3.3(a) (Candor Toward the Tribunal).

8 Count 2 – By intentionally making and using false statements, accounts, and claims
9 against Maxwell's and CWC's debtor estates, and by fraudulently receiving, transferring, and/or
10 concealing property or assets belonging to debtors' estates, and/or by conspiring with Melinda
11 Maxwell and/or unknown others to do so in order to defraud the bankruptcy court, the trustee
12 and/or creditors, Respondent violated RPC 8.4(b) (Criminal Conduct) through violation of
13 18 U.S.C. §152, subsections (1) through (7) (Concealment of Assets, False Oaths and Claims),
14 18 U.S.C. §157 (Bankruptcy Fraud), and/or 18 U.S.C. §371 (Conspiracy) and by committing
15 such felonies, and RPC 8.4(d).

16 Count 3 – By intentionally commingling lawyer funds and funds belonging to his
17 marital community, Maxwell, and/or CWC, with client funds, Respondent violated
18 RPC 1.15(A)(h)(1) and RPC 8.4(d).

19 Count 4 – By using his trust account to fraudulently conceal funds belonging to his
20 marital community, Maxwell, and/or CWC, Respondent violated RPC 8.4(c).

1 Count 5 – By failing to maintain complete and/or accurate trust account records,
2 Respondent violated RPC 1.15(A)(h)(2), RPC 1.15B(a)(1), RPC 1.15B(a)(2), and
3 RPC 1.15B(a)(8).

4 Count 6 – By failing to reconcile his check register balance to his client ledgers,
5 Respondent violated RPC 1.15A(h)(6).

6 Count 7 – By withdrawing funds or allowing funds to be withdrawn from his trust
7 account by writing a check made payable to "cash," Respondent violated RPC 1.15(A)(h)(5).

8 Count 8 – By allowing a non-lawyer to issue and/or sign checks from his trust account,
9 Respondent violated RPC 1.15A(h)(9).

10 Count 9 – By communicating or attempting to communicate ex parte on one or more
11 occasions with Bankruptcy Court Judge Karen Overstreet without authorization to do so by law
12 or court order, Respondent violated RPC 3.5(b) (Impartiality and Decorum of the Tribunal),
13 RPC 8.4(a) (Prohibiting Violation or Attempted Violation of the RPC), and RPC 8.4(d).

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

16 **FINDINGS OF FACT REGARDING COUNTS 1 AND 2**

17
18 1. Respondent was admitted to the practice of law in the State of Washington on
19 March 6, 1970. Respondent primarily represents clients in debtor bankruptcy and creditor
20 collection through his firm, The McGrath Corporation.

21 2. Respondent is the sole owner of a mortgage brokerage company, The Wakefield
22 Group, LLC, dba Olympic Mortgage Lending Corporation (Wakefield Group).

1 3. Respondent and his wife, Melinda Maxwell (Maxwell), are the sole owners of
2 M&T Enterprises, LLC (M&T), which was formed to obtain loans for the purchase of Stevens
3 and Bayliner boats.

4 4. Beginning in 2005, Respondent represented Maxwell and her business,
5 Chiropractic Wellness Centers (CWC), in a civil suit against a former CWC employee
6 Dr. Katherine Ellison (Ellison). Attorney John Peick (Peick) was Respondent's co-counsel.

7 5. During all material times, Respondent served as corporate secretary, registered
8 agent, and attorney for CWC, which operated two chiropractic clinics.

9 6. In October 2007, CWC's suit was dismissed on summary judgment, and Ellison's
10 counterclaims against CWC, Maxwell, and Maxwell and Respondent's marital community
11 proceeded to trial.

12 7. To avoid Ellison's potential judgment, Respondent began encumbering and
13 disposing of Maxwell's, CWC's, and Maxwell and Respondent's marital assets.

14 8. In June 2008, M&T sold the Bayliner boat. Respondent deposited the sale
15 proceeds in his trust account, using them to pay marital debt and Maxwell's personal debt, and
16 then redirected the remainder of the proceeds to his office operating account. TR 808, 821, 826,
17 827 1730 31, 1182 1187, 1801 85; 1202 03, EXS 349, 367, 369, 373, 6007.

18 9. At a 2010 deposition, Respondent testified that the Bayliner sale proceeds were
19 community property. At the disciplinary hearing, Respondent testified that the proceeds of the
20 sale of the Bayliner boat were not community property. That hearing testimony was not
21 credible. EX 6007, pp. 111 1 12; TR 1730 32.

1 10. On July 14, 2008, a jury awarded Ellison over \$500,000 against Maxwell, CWC,
2 and Maxwell and Respondent's marital community.

3 Promissory Notes and Deeds of Trust

4 11. On July 15, 2008, Respondent prepared, and Maxwell executed, three
5 promissory notes (notes) totaling \$225,000 in favor of Respondent and the McGrath
6 Corporation. See EXS 600, 602 605. Respondent secured the notes by recording a deed of trust
7 against Maxwell's condo and a UCC Financing Statement against CWC's personal property,
8 including its accounts and receivables. EXS 601 605.

9 12. The notes prepared by Respondent falsely claim that Maxwell and CWC owed
10 Respondent money for his legal services in the Ellison suit.

11 13. The notes and securing documents were designed to mislead and discourage
12 Ellison and other creditors from making claims against Maxwell's and CWC's property.
13 TR765 767, 806 07.

14 14. During all material times, Respondent and Maxwell knew that she and CWC
15 owed no money to Respondent for legal services, and that Maxwell and CWC were not
16 otherwise indebted to him. Respondent's testimony at the hearing that Maxwell and CWC were
17 indebted to him for his legal fees was not credible.

18 15. In October 2007, Respondent had e-mailed Maxwell that she owed him no
19 money, that he had freely contributed his legal services in the Ellison suit, and that he would not
20 charge Maxwell and CWC for legal services he provided and costs he paid on their behalf.
21 EX 6010; TR 117 18, 1318 22.

1 16. Respondent prepared false legal billing statements in September 2009, claiming
2 that he had performed legal services between 2005 and 2009. Although the statements were all
3 prepared in September 2009, Respondent dated them between 2005 and 2009. Respondent
4 offered the false statements to creditors and trustees as proof that he had provided legal
5 services.

6 17. The 2009 billing statements contained time entries that were materially
7 inconsistent with Respondent's 2006 Ellison Federal fee declaration. EXS 345, 349, 702, 3000;
8 TR 687 692. Although Respondent's billing statements were not completely consistent with
9 Peick's billing statements, those inconsistencies were not material.

10 18. Respondent's testimony that he prepared the invoices beginning in 2005, and that
11 they represent debt supporting the promissory notes, was not credible. TR 1289-1301.

12 19. Attorney Sarah Atwood (Atwood) testified at the hearing, and swore in her
13 September 2009 declaration filed with the Bankruptcy Court, that she observed Respondent's
14 billing statements being prepared in September 2009 at Respondent's accountant's office.
15 EX 171; TR 194 196, 256-260. Respondent's accountant, Catherine Silva, denied in her
16 hearing testimony having prepared the billing statements. There is insufficient evidence to
17 determine that the billing statements were prepared by Ms. Silva.

18 20. On July 15, 2008, Respondent prepared, and Maxwell executed, a fourth
19 promissory note for \$185,500 in favor of "Olympic Mortgage Lending Corporation" (Olympic
20 Mortgage). EX 606. Respondent secured the note by recording a second Deed of Trust further
21 encumbering Maxwell's condo. EX 607.

1 21. The \$185,500 note falsely claims that Olympic Mortgage loaned Maxwell
2 money. There was no debt incurred by Maxwell underlying Olympic Mortgage's note.
3 TR 1772.

4 22. During all material times, Respondent and Maxwell knew Olympic Mortgage
5 did not loan money to Maxwell, and that she was not indebted to it. TR 1388.

6 23. The Olympic Mortgage note and deed of trust were deceptive and designed to
7 mislead and discourage Ellison and other creditors from collecting debt owed to them by
8 Maxwell and CWC. TR806-07.

9 24. Olympic Mortgage Lending Corporation is not a legal entity itself but rather a
10 "d/b/a" of Respondent's corporation legally known as The Wakefield Group LLC d/b/a Olympic
11 Mortgage Lending Corporation. The business address of the Wakefield Group is Respondent's
12 business address.

13 25. Respondent intended to conceal the falsity of Olympic Mortgage's claim and to
14 hinder, deceive and discourage Ellison and other creditors in their investigation of Maxwell's
15 financial affairs when he identified "Olympic Mortgage Lending Corporation" as the note's
16 beneficiary and used Terrell McGrath's (his ex-wife) residential address as its business address.
17 EX 100.

18 26. Respondent's testimony, that the \$185,500 note represented actual debt, or that it
19 was a legitimate business practice designed to pre-secure funding of a loan by a future lender,
20 was not credible.
21

1 27. During all material times, Respondent knew that the \$185,500 note would not be
2 funded by another lender because Maxwell was insolvent. TR 1680, 1692.

3 28. Respondent made no attempt to finance the loan. He did not contact a lender, or
4 market or broker the note. EX 714.

5 29. On July 18, 2008, Respondent again encumbered Maxwell's condo by preparing
6 and recording another Deed of Trust in favor of John Peick for \$50,000 for legal fees Maxwell
7 and CWC owed to Peick. EX 608A.

8 30. Maxwell paid all recording fees on every deed of trust. After recording, each
9 deed of trust directed that it be returned to "debtor" Maxwell, not to the alleged beneficiary.
10 EX 608.

11 Sale of CWC At Capitol Hill

12 31. On October 17, 2008, Maxwell sold the CWC Capitol Hill clinic, excluding
13 personal property, to Dr. Calvin Mulanax for \$50,000. Respondent acted as escrow agent for
14 the transaction. EX 924, Sub-section S.

15 32. Dr. Mulanax executed two promissory notes in favor of Maxwell for \$5,000 and
16 \$45,000. Maxwell then assigned the \$5,000 note to a business broker for his commission, and
17 the \$45,000 note to Peick for legal fees.

18 Ellison Judgment

19 33. On October 30, 2008, the King County Superior Court entered final judgment
20 for Ellison nunc pro tunc to July 14, 2008. EX 705; TR 74,1554.
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1 34. In November 2008, Respondent wrote Ellison's counsel, Dan'l Bridges, advising
2 him that any attempt by Ellison to collect the judgment would result in Respondent filing a
3 bankruptcy petition. In February 2009, Ellison hired Atwood to assist in collecting the
4 judgment. TR231, 1555.

5 35. On June 30, 2009, Atwood garnished the bank accounts of Maxwell, CWC,
6 M&T, The Wakefield Group, The McGrath Corporation, and Respondent. Atwood did not
7 garnish Respondent's trust account because it is a fiduciary account not subject to garnishment.
8 EX 709; TR 232, 937 939, 1593.

9 Bankruptcy Cases

10 36. To stay the garnishments, Respondent prepared Maxwell's Chapter 7 bankruptcy
11 and filed it on July 21, 2009. Respondent prepared CWC's Chapter 11 bankruptcy and filed it
12 on July 23, 2009. EXS 100, 208, 710,711 713.

13 37. On August 20, 2009, the bankruptcy court required Respondent to withdraw as
14 bankruptcy counsel. Respondent, as a multi-level bankruptcy "insider," had substantial
15 conflicts of interest because he was Maxwell's spouse, CWC's registered agent, attorney and
16 secretary; and a purported creditor of the bankruptcy estates. TR 768 , 910, 911, 914.

17 38. The bankruptcy petitions and schedules (filings) Respondent prepared were
18 false, withheld material information, and concealed assets with the intent to hinder, delay or
19 defraud the court, trustees and creditors.

20 39. Respondent's actions violated 18 U.S.C. §152, subsections (1) through (7).
21 TR 751, 911 12, 1381.
22

1 40. In 2009, the bankruptcy court sanctioned Respondent and Maxwell for bad faith,
2 for withholding discovery, and for obstruction of the bankruptcy process. In 2010, the court
3 denied Maxwell's bankruptcy discharge.

4 41. At his 2010 deposition, Respondent testified that he prepared and filed every
5 document in the petitions and schedules. Respondent's testimony at the disciplinary hearing
6 that Maxwell prepared the bankruptcy petitions and schedules, that the false information and
7 omissions in the documents were simple mistakes made by Maxwell, and that Respondent did
8 not review the filings before Maxwell filed them, was not credible. EX 6009 p. 34; TR 1214-
9 1215, 1637, 1639, 1649-50, 1772-73.

10 42. The filings failed to identify Respondent as a multi-level bankruptcy "insider" to
11 the debtors. They did not identify Respondent as Maxwell's spouse. They did not provide his
12 income. They substantially reduced and falsified Maxwell's income to avoid re-designation of
13 her bankruptcy to a Chapter 13 bankruptcy case. These actions violated 18 U.S.C. § 152.

14 43. On July 21, July 23, July 27, and August 24, 2009, Respondent prepared and
15 filed original and amended filings that were incomplete and that failed to identify the concealed
16 and fraudulently transferred assets. A fraudulent transfer is either a transfer made for less than
17 fair consideration less than two years prior to the date of the debtor's bankruptcy filing or a
18 transfer that was made by the debtor with actual intent to hinder, delay or defraud a creditor
19 within two years prior to the date of filing. TR 754. These actions violated 18 U.S.C. § 152.
20

1 44. In the filings and Statement of Financial Affairs (SOFA), Respondent
2 affirmatively misled the court, trustees, and creditors by claiming that no estate assets had been
3 transferred prior to the bankruptcies. These actions violated 18 U.S.C. § 152.

4 45. In the filings and SOFA, Respondent failed to identify the November 2008 sale
5 and transfer of CWC's Capitol Hill Clinic, and Maxwell's transfer of the sale proceeds through
6 her assignment of the sale proceeds to pay her debts. EX 100, p.36; TR 768-69. These actions
7 violated 18 U.S.C. § 152.

8 46. In the filings and SOFA, Respondent failed to identify Maxwell's 2008 sale and
9 transfer of her jewelry valued at \$30,000, and the fraudulent transfer and concealment of the
10 assets. These actions violated 18 U.S.C. § 152.

11 47. In the filings and SOFA, Respondent failed to identify M&T's June 2008 sale
12 and fraudulent transfer of the community's Bayliner boat for a net profit of \$5641.76. By so
13 concealing the asset, Respondent violated 18 U.S.C. § 152.

14 48. Respondent and Maxwell, as co-insureds, filed a claim with The Hartford
15 Insurance Company (Hartford) for damages to Maxwell's condo.

16 49. In the filings and SOFA, Respondent failed to identify his and Maxwell's June
17 and July 2009 pre-bankruptcy fraudulent transfer and concealment of \$7,908 of Hartford
18 insurance policy proceeds, a bankruptcy estate asset, in Respondent's trust account. EXS 1002,
19 1003, 1005, 1006, 1007. These actions violated 18 U.S.C. § 152.

20 50. In the filings and SOFA, Respondent failed to identify pre bankruptcy fraudulent
21 transfers and concealment of \$61,253.86 of Maxwell's personal funds, a bankruptcy estate asset,
22

1 in Respondent's trust account between July 23, 2007 and July 21, 2009. These actions violated
2 18 U.S.C. § 152.

3 51. In the filings and SOFA, Respondent failed to identify pre-bankruptcy fraudulent
4 transfers between December 17, 2008 and July 21, 2009 and fraudulent concealment of
5 \$14,388.69 of CWC's funds, a bankruptcy estate asset, in Respondent's trust account. These
6 actions violated 18 U.S.C. § 152.

7 Post-Petition Transfers

8 52. Respondent affirmatively misled the court, trustees and creditors by falsely
9 claiming in the filings and SOFA that no debtor assets had been transferred after the filing of
10 the bankruptcies. Each post-petition transfer or concealment constituted a separate violation
11 under the bankruptcy code.

12 53. In the filings and SOFA, Respondent intentionally failed to identify post-petition
13 fraudulent transfers and concealment of CWC's assets between July 24, 2009 and August 20,
14 2009 in Respondent's trust account. The assets were transferred to avoid creditor garnishment.
15 These actions violated 18 U.S.C. § 152.

16 54. Respondent's testimony, that it was necessary to deposit CWC's funds in his trust
17 account to pay its employees, was not credible. Maxwell opened a new CWC Homestreet Bank
18 checking account on July 17, 2009, where CWC funds should have been deposited and checks
19 issued to pay CWC's employees. Respondent intentionally failed to identify the Homestreet
20 Bank account on the filings and SOFA.
21

1 55. In the filings and SOFA, Respondent intentionally failed to identify his and
2 Maxwell's August 18, 2009 post-petition fraudulent transfer and concealment of \$18,625.99 of
3 Hartford insurance policy proceeds, an estate asset, in Respondent's trust account. On
4 September 9, 2009, Respondent transferred \$15,000 of the \$18,625.99 by writing a check from
5 his trust account to Serv Pro to pay Maxwell's debt for cleaning and repairs to her condo.
6 Respondent concealed and failed to report the transfer of these funds to the court, the trustees,
7 and the creditors. The trustee was required to institute litigation against Serv Pro for the return
8 of the asset. EXS 1011, 1027, 1029, 1030; TR 433. These actions violated 18 U.S.C. § 152.

9 56. In the filings and SOFA, Respondent intentionally failed to disclose his
10 August 29, 2009 post-petition transfer and concealment of \$53,982.99 of Hartford insurance
11 policy proceeds, an estate asset, in Respondent's trust account. On September 9, 2009,
12 Respondent transferred \$50,000 of the \$53,982.99 by writing a check from his trust account to
13 McBride Construction as down payment for Maxwell's debt for repairs to the condo. The
14 trustee was required to negotiate with McBride for the return of the asset. EXS, 437, 1014,
15 1027, 1029, 1030. These actions violated 18 U.S.C. § 152.

16 57. In September 2009 when the trustee discovered the existence of the Hartford
17 asset and demanded its return, Respondent refused. The trustee was required to file a motion
18 for the return of the asset, which Respondent resisted. The court found that the Hartford funds
19 were an asset of the estate and required its return.
20

1 Respondent's False Claims and Accounts Against the Estates

2 58. On July 21, 2009, Respondent filed false claims and accounts in Maxwell's
3 bankruptcy filings to hinder, delay or defraud the court, the trustees and the creditors.

4 59. On Schedule D of the filings, Respondent falsely claimed that Respondent's
5 2008 promissory notes and deeds of trust represented secured indebtedness encumbering
6 Maxwell's condo and taking priority over other creditors. These actions violated
7 18 U.S.C. § 152.

8 60. On Schedule D of the filings, Respondent falsely claimed that Olympic
9 Mortgage's 2008 promissory note and deed of trust represented secured indebtedness
10 encumbering Maxwell's condo and taking priority over other creditors. These actions violated
11 18 U.S.C. § 152.

12 61. On or about September 20, 2009, the trustee filed a complaint to set aside
13 Olympic Mortgage's deed of trust on the condo.

14 62. On September 22, 2009, after receiving notice of the complaint, Respondent
15 executed and filed a document appointing his ex-wife as successor trustee for Olympic
16 Mortgage.

17 63. On September 23, 2009, Respondent's ex-wife, at Respondent's behest,
18 reconveyed the deed of trust to Maxwell, fully forgiving all debt alleged under the Olympic
19 Mortgage deed of trust and removing the encumbrance from her condo.

20 64. On Schedule D of the filings, Respondent falsely claimed that the community-
21 owned Stevens boat was the sole property of Maxwell's "husband," identified only by the letter
22

1 "H" on the schedule. This was an intentional attempt by Respondent to remove the Stevens
2 boat from creditor claims. These actions constitute a violation 18 U.S.C. § 152.

3 False Oath and False Swearing

4 65. On October 21, 2009, Respondent signed a bankruptcy Proof of Claim under
5 penalty of perjury for \$61,807.05 plus interest as a creditor against Maxwell's estate. The Proof
6 of Claim was based on his 2008 promissory note and deed of trust falsely alleging Maxwell's
7 indebtedness for legal services in Ellison case. EX 6010. These actions violated
8 18 U.S.C. § 152.

9 **FACTS REGARDING COUNTS 3 THROUGH 8**

10 66. At all times from 2007 through mid 2010, Respondent maintained an IOLTA
11 trust account at Bank of America ending in 7218.

12 Commingling of Personal Funds

13 67. During all material times between January 2007 through November 2009,
14 Respondent used his trust account as a personal bank account. He deposited or allowed others
15 to deposit his personal funds and those of Maxwell, CWC, M&T, and his marital community to
16 his trust account to conceal the funds.

17 68. Respondent paid personal and third-party debt from the trust account. This
18 included Maxwell's condo mortgage, M&T's boat mortgages, moorage and insurance fees for
19 the boats, refurbishing costs for Maxwell's condo, private club dues, CWC/Maxwell's storage
20 rental fees, and CWC/Maxwell's employees' wages.

1 69. Such continuous commingling of client and personal funds in Respondent's trust
2 account jeopardized client funds and exposed them to an invasion of the trust account by a
3 personal creditor satisfying a judgment.

4 70. Respondent's testimony that he was justified in depositing and commingling
5 Maxwell's and CWC's personal funds in his trust account, when such deposits were
6 unconnected to his legal representation, was not credible. Respondent was entitled to deposit
7 only client funds that were directly connected with a specific and actual representation by him.
8 Respondent admitted at hearing that, after he deposited Maxwell's and CWC's personal funds,
9 he wrote trust account checks to pay his and Maxwell's personal debts unconnected to any
10 specific legal representation by him.

11 Deposit of Personal Funds to Trust Account

12 71. In 2007, Respondent concealed his personal funds by depositing them to his trust
13 account as follows: \$100 (June 18, 2007), \$118 (November 27, 2007), \$17,000 (November 30,
14 2007) and \$299 (December 5, 2007). EXS 319, 321, 322, 323. By so doing, Respondent
15 commingled his own funds with client funds in the trust account.

16 72. In 2007, Respondent and Maxwell concealed Maxwell's personal funds by
17 depositing them to Respondent's trust account as follows: \$16,200 (July 23, 2007) and \$20,000
18 (December 26, 2007). EXS 320, 325.

19 73. By the specific actions set forth in the preceding paragraph, Respondent
20 commingled Maxwell's personal funds with client funds in the trust account.
21

1 74. In 2008, Respondent concealed M&T's community funds, representing proceeds
2 from the sale of Respondent and Maxwell's Bayliner boat, by depositing them to Respondent's
3 trust account as follows: \$5,641.76 (June 19, 2008). EX 349.

4 75. By the specific action set forth in the preceding paragraph, Respondent
5 commingled the community funds of M&T with client funds in the trust account.

6 76. In 2008, Respondent and Maxwell concealed Maxwell's personal funds by
7 depositing them to Respondent's trust account as follows: \$1177 (April 23, 2008) and \$60
8 (December 19, 2008). EXS 348, 352, 353.

9 77. By the specific actions set forth in the preceding paragraph, Respondent
10 commingled Maxwell's personal funds with client funds in the trust account.

11 78. In 2008, Respondent and Maxwell concealed CWC receivables and money by
12 depositing them to Respondent's trust account as follows: \$1,537.76 (December 17, 2008) and
13 \$263.58 (December 19, 2008). EXS 351, 354 357.

14 79. By the specific actions set forth in the preceding paragraph, Respondent
15 commingled CWC's receivables and money with client funds in the trust account.

16 80. In 2009, Respondent and Maxwell concealed marital funds representing
17 proceeds from claims submitted by them to The Hartford Insurance Company by depositing
18 them to Respondent's trust account as follows: \$904 (April 9, 2009), \$7,000 (July 13, 2009),
19 \$18,625.99 (August 18, 2009), \$53,982.99 (August 29, 2009). EXS 397A, 407, 433, 437.
20

21 81. By the specific action set forth in the preceding paragraph, Respondent
22 commingled his and Maxwell's personal marital funds with client funds in the trust account.

1 82. In 2009, Respondent and Maxwell concealed CWC funds by depositing them to
2 Respondent's trust account as follows: \$67.79 (February 2, 2009), \$933.08 (March 3, 2009),
3 \$617.89 (June 6, 2009), \$3,355.82 (July 7, 2009), \$899.24 (July 10, 2009), \$1,739.92 (July 13,
4 2009), \$2,397.02 (July 15, 2009) \$1,819.30 (July 17, 2009), \$757.09 (July 20, 2009), \$1,562.23
5 (July 27, 2009), \$240.81 (July 128, 2009), \$1,228.96 (July 31, 2009), \$1120.27 (August 5,
6 2009), \$132.50 (August 18, 2009), EXS 386 - 389, 393, 397B, 397C, 401, 402, 424, 427,
7 429,433.

8 83. By the specific actions set forth in the preceding paragraph, Respondent
9 commingled CWC's personal receivables and funds with client funds in the trust account.

10 84. In 2009, Respondent and Maxwell fraudulently concealed Maxwell's personal
11 funds by depositing them to his trust account as follows: \$15,000 (February 25, 2009), \$121.44
12 (March 3, 2009), \$79.50 (April 9, 2009), \$8615.92 (July 13, 2009). EXS 390, 392, 396, 397,
13 397A, 406.

14 85. By the specific actions set forth in the preceding paragraph, Respondent
15 commingled Maxwell's personal funds with client funds in the trust account.

16 86. In 2009, Respondent concealed his personal funds by depositing them to his trust
17 account as follows: \$1000 (transfer from Respondent's operating account to his trust account)
18 (June 24, 2009), \$3900 (September 14, 2009), \$3418.47 (October 20, 2009), \$3418.37
19 (November 6, 2009). EXH 398,439, 440,441.

20 87. By the specific actions set forth in the preceding paragraph, Respondent
21 commingled his own funds with client funds in the trust account.
22

1 88. Respondent testified at hearing that as part of his practice he collected debt for
2 creditor clients. He deposited debtor payments for clients in his trust account. At the end of
3 each quarter, he would disburse two thirds of the money to the creditor clients. He would leave
4 his remaining one third fee in the trust account. TR 1477 78.

5 89. By the specific actions set forth in the preceding paragraph, Respondent
6 commingled his own funds with client funds in the trust account.

7 Respondent's Trust Account Records

8 90. Between January 2007 and July 2009, Respondent did not maintain complete
9 and accurate trust account records.

10 91. Between January 2007 and July 2009, Respondent did not maintain any client
11 ledgers for his trust account.

12 92. Between January 2007 and July 2009, because he failed to maintain client
13 ledgers, client transactions were not recorded.

14 93. Between January 2007 and July 2009, Respondent did not maintain a complete
15 and accurate check register and did not keep a running balance or accurately state the client's
16 name, the payor or payee of the transaction, the date of the transaction, and/or the amount of the
17 transaction. His records were not adequate to identify and track client funds, especially in light
18 of personal deposits to the trust account.

19 94. Between January 2007 and July 2009, Respondent's check register was not
20 accurate in that the entries for one or more transactions were not recorded and the running
21 balances were missing or were not accurate.
22

1 95. Respondent failed to reconcile his check register balance and bank statements to
2 one another. Although Respondent testified that he would, from time to time, call the bank to
3 determine the balance, such a practice could not identify whether or not there were outstanding
4 checks that would alter the balance. Moreover, such a practice was of little use in guarding
5 against the disbursement of funds of one client for the benefit of another or the detection of the
6 resulting shortages or increases in the account, as identified in the balance error notices
7 Respondent received from the bank.

8 Other Trust Account Violations

9 96. On April 9, 2009, Respondent allowed funds to be withdrawn from his trust
10 account by writing a check on the account made payable to "cash," EX 460; TR 1262, 1264.

11 97. Between January 2007 and November 2009, Respondent gave Maxwell, who is
12 not a lawyer or authorized signatory on Respondent's trust account, unlimited control of the
13 account.

14 98. While Respondent was aware that Maxwell was using his trust account for
15 personal transactions, he gave her unsupervised and unrestricted access to the account. He
16 knew that she concealed her money and CWC's money in the account, and signed Respondent's
17 name or her own name to checks she disbursed from the account to pay personal debt. These
18 actions jeopardized Respondent's client funds in the trust account and risked subjecting the
19 funds to attachment by Maxwell's creditors.
20

1 Ex Parte Contact

2 99. On September 15, 2009, Respondent sent a letter and compact disc (CD) by
3 United States mail directly to bankruptcy Judge Karen A. Overstreet. The letter stated: "I am
4 enclosing the original CD of the Maxwell 341 hearing on 8/25/09. I think it is worth listening
5 to if you have the time." Respondent did not send a copy of the letter to other parties in the case
6 or file it with the clerk.

7 100. Ex parte contact is always prohibited except as explicitly permitted. There was
8 no law or court order authorizing Respondent to directly contact or attempt to contact Judge
9 Overstreet.

10 101. Respondent's letter and CD were returned to him by the judge's clerk who
11 advised him that direct ex parte contact was improper. She instructed him that he could only
12 contact the judge during an official court hearing where all parties were present or by filing a
13 pleading with the clerk of the court.

14 102. After receiving the clerk's letter, Respondent on or about September 24, 2009,
15 communicated a second time with Judge Overstreet by electronically sending her a letter from
16 Respondent and Maxwell's accountant, whom Respondent also represented as a client, that
17 discussed the case. Although he copied all parties on the electronic letter, Respondent should
18 not have directly contacted the judge and sent her materials. However, this communication was
19 not intended as an *ex parte* communication.
20

21 103. By the specific actions set forth in the preceding paragraph, Respondent's
22 September 15, 2009 letter constituted an improper *ex parte* contact.
23

1 163 Wn.2d 701, 725 726, 185 P.3d 1160 (2008), the court explained that the prohibition against
2 commingling also "prevents lawyers from shielding personal assets from their own creditors by
3 hiding funds in client trust accountsThus, there is ample evidence that continued
4 commingling of client and personal funds in the trust account could result in a personal creditor
5 satisfying a judgment against Trejo from the client trust account." Respondent's conduct caused
6 potentially serious injury.

7 106. **Counts 5 and 6: Inadequate Trust Account Records.** Respondent knew or
8 should have known that he was dealing improperly with client funds by inadequate trust
9 account record keeping. Respondent's conduct caused potential serious injury.

10 107. **Count 7: Withdrawing Trust Account with Check Payable to "Cash."**
11 Respondent knew or should have known that he was dealing improperly with trust account
12 funds by making a check payable to "Cash" instead of a named payee. Respondent's conduct
13 caused potential serious injury.

14 108. **Count 8: Unauthorized Access to Trust Account.** Respondent knew or
15 should have known that he should not have relinquished control of his trust account to Maxwell,
16 an unauthorized signatory who was not a lawyer. He allowed her unrestricted access to the
17 account to make deposits and to draft and sign Respondent's name or her own name to trust
18 account checks. Respondent's conduct caused potentially serious injury.

19 109. **Count 9: Improper Ex Parte Contact.** Respondent knew or should have
20 known that it was improper for him to engage in an improper ex parte contact with Judge
21 Overstreet, and should not have sent a second letter to her after being advised that his first
22

1 contact was improper. There was no law or order in this case permitting him to engage in such
2 conduct. There was potential injury to the bankruptcy cases because such contact creates the
3 appearance of unfairness. If the materials had reached the judge, she may have been required to
4 recuse herself from the case causing further delay and additional expense to the court, trustees
5 and creditors. Respondent's conduct caused potentially serious injury.

6 CONCLUSIONS OF LAW

7 Violations Analysis

8 110. All Findings of Fact above that are by nature Conclusions of Law are
9 incorporated herein.

10 111. In these proceedings, the WSBA has the burden of proving each count by a clear
11 preponderance of the evidence.

12 112. The Association proved by a clear preponderance of the evidence the charges set
13 forth in Counts 1 and 2 of the Amended Complaint. Between 2007 and November 2009, by
14 drafting and presenting false claims and accounts and making false statements and oaths, by
15 receiving, transferring and concealing Maxwell's and CWC's bankruptcy estate assets,
16 Respondent violated RPC 3.3(a), RPC 4.1, RPC 8.4(b), and RPC 8.4(c). By engaging in such
17 conduct and by disobeying his obligations as an attorney under the bankruptcy code, rules, and
18 statutes, Respondent violated RPC 8.4(d). Counts 1 and 2 are proven by a clear preponderance
19 of the evidence.
20
21
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23
24

1 113. Between January 2007 and November 2009, by commingling non-client funds
2 with client funds in his trust account, Respondent violated RPC 1.15(A)(h)(1) and RPC 8.4(d).
3 Count 3 is proven by a clear preponderance of the evidence.

4 114. Between January 2007 and November 2009, by concealing funds belonging to
5 himself, his marital community, Maxwell, and CWC in his trust account, Respondent violated
6 RPC 8.4(c) as alleged in Count 4. Count 4 is proven by a clear preponderance of the evidence.

7 115. Between January 2007 and November 2009, by failing to keep adequate and
8 accurate books and records regarding his trust account, Respondent violated RPC 1.15(A)(h)(2),
9 RPC 1.15A(h)(6), RPC 1.15B(a)(1), RPC 1.15B(a)(2), and/or RPC 1.15B(a)(8). Counts 5 and 6
10 are proven by a clear preponderance of the evidence.

11 116. On April 9, 2009, by allowing funds to be withdrawn from his trust account by
12 writing a check on his account made payable to "cash," instead of to a named payee,
13 Respondent violated RPC 1.15(A)(h)(5). Count 7 is proven by a clear preponderance of the
14 evidence.

15 117. Between at least January 2007 and November 2009, by allowing or relinquishing
16 control of his trust account to an unsupervised non-lawyer to deposit, issue and sign checks
17 from his trust account, Respondent violated RPC 1.15A(h)(9). Count 8 is proven by a clear
18 preponderance of the evidence.

19 118. On September 15, 2009, by communicating ex parte with Bankruptcy Court
20 Judge Karen Overstreet without authorization to do so by law or court order, Respondent
21

1 violated RPC 3.5(b), RPC 8.4(a), and RPC 8.4(d). Count 9 is proven by a clear preponderance
2 of the evidence.

3 Sanction Analysis

4 119. A presumptive sanction must be determined for each ethical violation. In re
5 Anshell, 149 Wn.2d 484, 501, 69 P.2d 844 (2003). The following standards of the American
6 Bar Association's Standards for Imposing Lawyer Sanctions ("ABA Standards") (1991 ed. &
7 Feb. 1992 Supp.) are presumptively applicable in this case:

8 120. ABA Standards 5.11, as applied to violations of RPC 8.4(b) and RPC 8.4(c), and
9 ABA Standards 6.11, as applied to violations of RPC 8.4(d), RPC 3.3, and RPC 4.1, are most
10 applicable to Respondent's violations of RPC 8.4(c) (dishonesty), RPC 8.4(d) (prejudice to the
11 administration of justice by violating clear practice norms), RPC 3.3 (candor to the tribunal),
12 and RPC 4.1 (truthfulness to others) charged under Counts 1, 2, 3 and 4.

13 **5.11 Disbarment is generally appropriate when:**

- 14 (a) **a lawyer engages in serious criminal conduct, a necessary element**
15 **of which includes intentional interference with the administration**
16 **of justice, false swearing, misrepresentation, fraud, extortion,**
17 **misappropriation, or theft; or the sale, distribution or**
18 **importation of controlled substances; or the intentional killing of**
19 **another; or an attempt or conspiracy or solicitation of another to**
20 **commit any of these offenses; or**
21 (b) **a lawyer engages in any other intentional conduct involving**
22 **dishonesty, fraud, deceit, or misrepresentation that seriously**
23 **adversely reflects on the lawyer's fitness to practice.**

24 5.12 Suspension is generally appropriate when a lawyer knowingly
25 engages in criminal conduct which does not contain the elements
26 listed in Standard 5.11 and that seriously adversely reflects on the
lawyer's fitness to practice.

5.13 Reprimand is generally appropriate when a lawyer knowingly
engages in any other conduct that involves dishonesty, fraud, deceit,

1 or misrepresentation and that adversely reflects on the lawyer's fitness
2 to practice law.

3 5.14 Admonition is generally appropriate when a lawyer engages in any
4 other conduct that reflects adversely on the lawyer's fitness to practice
5 law.

6 6.11 **Disbarment is generally appropriate when a lawyer, with the
7 intent to deceive the court, makes a false statement, submits a
8 false document, or improperly withholds material information,
9 and causes serious or potentially serious injury to a party, or
10 causes a significant or potentially significant adverse effect on the
11 legal proceeding.**

12 6.12 Suspension is generally appropriate when a lawyer knows that false
13 statements or documents are being submitted to the court or that
14 material information is improperly being withheld, and takes no
15 remedial action, and causes injury or potential injury to a party to the
16 legal proceeding, or causes an adverse or potentially adverse effect on
17 the legal proceeding.

18 6.13 Reprimand is generally appropriate when a lawyer is negligent either
19 in determining whether statements or documents are false or in taking
20 remedial action when material information is being withheld, and
21 causes injury or potential injury to a party to the legal proceeding, or
22 causes an adverse or potentially adverse effect on the legal
23 proceeding.

24 6.14 Admonition is generally appropriate when a lawyer engages in an
25 isolated instance of neglect in determining whether submitted
26 statements or documents are false or in failing to disclose material
information upon learning of its falsity, and causes little or no actual
or potential injury to a party, or causes little or no adverse or
potentially adverse effect on the legal proceeding.

121. Respondent was intentionally dishonest and hindered, obstructed, and misled the
court, trustees and creditors before and during the bankruptcy process. He made substantial,
dishonest misrepresentations about the bankruptcy and assets. Respondent was intentionally
dishonest and deceitful in his false swearing under penalty of perjury and in using his trust
account to conceal large amounts of non-lawyer personal funds and bankruptcy assets for
multiple years. Respondent's deception, dishonesty, and misrepresentations violate clear

1 practice norms requiring lawyers to be truthful and candid during litigation. Such
2 untruthfulness compromised the fairness of the judicial process, while increasing costs to the
3 parties and the judicial system.

4 122. The presumptive sanction for Counts 1, 2, 3 and 4 is disbarment for each count
5 under Standards 5.11 and 6.11.

6 123. ABA Standards 4.12 is most applicable to Respondent's violations of
7 commingling and trust account abuse. ABA Standards 4.11-4.14 provides:

8 4.11 Disbarment is generally appropriate when a lawyer knowingly
9 converts client property and causes injury or potential injury to a
client.

10 4.12 **Suspension is generally appropriate when a lawyer knows or**
11 **should know that he is dealing improperly with client property**
12 **and causes injury or potential injury to a client.**

13 4.13 Reprimand is generally appropriate when a lawyer is negligent in
14 dealing with client property and causes injury or potential injury to a
client.

15 4.14 Admonition is generally appropriate when a lawyer is negligent in
16 dealing with client property and causes little or no actual or potential
17 injury to a client.

18 124. Respondent knew that he was improperly commingling, knew that he did not
19 maintain complete and accurate trust account records, knew that he withdrew trust account
20 funds by writing a check payable to "cash," and knowingly permitted a non-lawyer to issue and
21 sign checks from his trust account. These actions caused potential injury to all client funds in
22 trust because it exposed them to Respondent and his wife's creditors. ABA Standards
23 Section 4.12, calling for suspension, applies to Counts 5, 6, 7, and 8 of the Amended
24 Complaint.

1 125. In *In re McKean*, 148 Wn.2d 849, 64 P.2d 1226 (2002), the Court held that
2 suspension was the presumptive sanction for a lawyer who knowingly commingled his own
3 funds with client funds. The Court held:

4 The commentary accompanying ABA Standard 4.12 makes clear that
5 suspension applies when a lawyer mishandles a client's money, even
6 when no ultimate harm comes to the client. "Because lawyers who
7 commingle client's funds with their own, subject the client's funds to
8 the claims of creditors, commingling is a serious violation for which a
9 period of suspension is appropriate even in cases when the client does
10 not suffer a loss." ABA Standards 4.12 cmt.

11 Id. at 870.

12 126. The presumptive sanction for Counts 5, 6, 7, and 8 is suspension under
13 Standards 4.12.

14 127. ABA Standards 6.33 is most applicable to Respondent's violation of RPC 3.5(b)
15 prohibiting improper ex parte contact charged under Count 9. ABA Standards 6.31 - 6.33
16 provide:

17 6.31 Disbarment is generally appropriate when a lawyer:

18 (a) intentionally tampers with a witness and causes serious or
19 potentially serious injury to a party, or causes significant or potentially
20 significant interference with the outcome of the legal proceeding; or

21 (b) makes an ex parte communication with a judge or juror
22 with intent to affect the outcome of the proceeding, and causes serious or
23 potentially serious injury to a party, or causes significant or potentially
24 significant interference with the outcome of the legal proceeding; or

25 (c) improperly communicates with someone in the legal
26 system other than a witness, judge, or juror with the intent to influence or
affect the outcome of the proceeding, and causes significant or
potentially significant interference with the outcome of the legal
proceeding.

 6.32 Suspension is generally appropriate when a lawyer engages in
communication with an individual in the legal system when the lawyer
knows that such communication is improper, and causes injury or

1 potential injury to a party or causes interference or potential interference
2 with the outcome of the legal proceeding.

3 **6.33 Reprimand is generally appropriate when a lawyer is**
4 **negligent in determining whether it is proper to engage in**
5 **communication with an individual in the legal system, and causes**
6 **injury or potential injury to a party or interference or potential**
7 **interference with the outcome of the legal proceeding.**

8 6.34 Admonition is generally appropriate when a lawyer engages in an
9 isolated instance of negligence in improperly communicating with an
10 individual in the legal system, and causes little or no actual or potential
11 injury to a party, or causes little or no actual or potential interference
12 with the outcome of the legal proceeding.

13 128. Respondent's *ex parte* violation should be sanctioned because he acted
14 negligently when he engaged or attempted to engage in impermissible *ex parte* communication
15 with the court. Respondent's letter to Judge Overstreet was unauthorized and was made without
16 the knowledge of and outside the presence of opposing counsel. This conduct risked affecting
17 the outcome of the proceeding and there was potential injury to the legal system, the court, the
18 trustee and the creditors.

19 129. The presumptive sanction for Count 9 is a reprimand.

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

23 131. Based on the Findings of Fact and Conclusions of Law and application of the
24 ABA Standards the appropriate presumptive sanction is disbarment.

25 132. The following aggravating factors set forth in Section 9.22 of the ABA
26 Standards are applicable in this case:

1 Facts Regarding Aggravating and Mitigating Factors

2 133. Respondent was disbarred in 1982 by the Supreme Court following conviction
3 for second degree assault with a deadly weapon. In re Disciplinary Proceeding Against
4 McGrath, 98 Wn.2d 337, 655 P.2d 232 (1982). Respondent was reinstated in 1993.

5 134. With regard to Respondent's misrepresentations and deceptive conduct, as set
6 forth above, he acted with both a dishonest and selfish motive.

7 135. With regard to his actions involving the transfer and concealment of estate
8 property, his commingling and concealment of personal funds, his multi-year inadequate trust
9 account record-keeping to conceal his dishonesty, and his ex parte communications,
10 Respondent engaged in patterns of misconduct.

11 136. Respondent has committed multiple offenses.

12 137. Respondent has steadfastly refused to acknowledge the wrongful nature of his
13 misconduct.

14 138. Respondent has insisted that he had a right to engage in such behavior, and he
15 has blamed others for his dishonest and unethical behavior.

16 139. Respondent was admitted to practice in 1970 and has substantial experience in
17 the practice of law.

18 140. I have considered the mitigating factors under Standard 9.32 of the ABA
19 Standards and find that none apply. Based on the number and severity of aggravating factors
20 with no mitigating factors, I recommend disbarment for each count.
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Recommendation

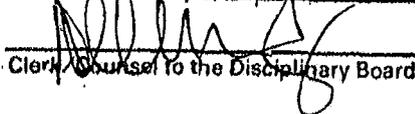
141. Based on the ABA Standards and the applicable aggravating factors and no mitigating factors, the Hearing Officer recommends that Respondent Thomas F. McGrath Jr. be disbarred.

Dated this 12th day of April, 2012.


Scott M. Ellerby, Bar No. 16277
Hearing Officer

CERTIFICATE OF SERVICE

I certify that I caused a copy of the Amended FOF, CON & HO's Recommendation
to be delivered to the Office of Disciplinary Counsel and to be mailed
to Kyle Wilmer Respondent/Respondent's Counsel
at The Belton P.O. #3 Seattle WA 98101 by Certified/first class mail
postage prepaid on the 12th day of April, 2012


Clerk/Counsel to the Disciplinary Board

APPENDIX B

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What is table funding in real estate?

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Answer:

Table funding. In the classical sense, is when the lender, generally a mortgage banker or savings and loan, funds the loan with the loan documents using a draft or check. Also called wet closing, this term has morphed into any loan product that is closed in the originators name regardless of who funds the loan. Today, any loan that is funded by the time the borrower signs their closing documents would be considered table funded.

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Relevant answers:

- What is real estate investment and funding?**
Real estate investing generally means buying or otherwise making an investment in real property (real estate). Some will include investments in funds or trusts that own the property but such...
- What can you do with a real estate license without a real estate broker?**
In most states you are required to place your license with a broker before you can start practicing real estate, so you wouldn't be able to do anything with it except say that you have one
- Who offers non recourse real estate funding?**
check out North American Savings Bank (NASB) at www.1ralending.com
- How do you do real estate?**
I believe you are asking, how do you get started in this career? Depending on the state you are in, the licensing requirements may vary. The process is usually something like this... 1. You make...
- What can an employee of a real estate office do who is not a real estate agent?**
phones; make copies; file; distribute mail & faxes; send faxes; type letters; prepare mailings. <><> You can also prep contract/sales files with the standard (blank) forms used in...

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APP B G

APPENDIX C

1 A. Well, it's an electronic signature.

2 Q. (By Ms. Dassel) Yes. That constitutes
3 your signature, doesn't it?

4 A. Yes.

5 Q. And is that Melinda Maxwell's electronic
6 signature also on this document, on the very page -- I
7 can give them to you.

8 A. Yeah, on page three it's her electronic
9 signature. I'm sure she signed the original.

10 Q. And did you prepare this filing on behalf
11 of Ms. Maxwell?

12 A. Yes.

13 Q. And did you prepare the documents contained
14 in this exhibit? There are 44 pages of them.

15 A. Yeah. Yes.

16 Q. Okay, thank you.

17 Ms. Maxwell owns a condo at 1805 West 12th
18 Street; is that right? You've testified about this
19 before.

20 A. She did own it. Not anymore.

21 Q. Not anymore, yeah. Did you personally ever
22 reside at the condominium?

23 A. For a number of years.

24 Q. What period of time was that?

25 A. April 28th of 2000 until the place was

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Attached please find our opening brief in this matter. There are two files – one for the brief and one for the Appendices.

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