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No. 201,872-6

IN THE SUPREME COURT OF THE STATE OF
WASHINGTON

JOHN R. MUENSTER,
Petitioner/Appellant,

v.

WASHINGTON STATE BAR ASSOCIATION,
Respondent.

APPEAL FROM PROCEEDINGS INSTITUTED BY
RESPONDENT AGAINST PETITIONER IN
CONNECTION WITH WSBA NO. 16#00008

PETITIONER/APPELLANT'S REPLY BRIEF

JOHN R. MUENSTER
P.O. Box 30108
Seattle, WA 98113
Telephone: (206)501-9565
Email: jmkk1613@aol.com
Petitioner/Appellant

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NOTES

I. INTRODUCTION

Via letters to the Chief Justice and to respondent Washington State Bar Association (“WSBA”) dated November 18, 2018, Petitioner permanently cancelled and terminated his membership in the Washington bar.

Petitioner notified the Western and Eastern District Courts of Washington of his departure from the state bar. He permanently cancelled and withdrew from his membership in the bar of those courts. In response, the federal courts entered orders acknowledging receipt, updating their records to reflect the cancellation, and closing petitioner’s file.

This case can be resolved via the entry of an order like the federal court orders referenced above. A proposed order is included for the Court’s convenience in the Appendix to petitioner/appellant’s opening brief.

Respondent WSBA and its disciplinary board erred by failing to dismiss WSBA case no. 16#00008 and failing to close Petitioner’s file after he cancelled and terminated his bar membership and closed his practice in November, 2018. In its answering filing, respondent Office of Disciplinary Counsel (“ODC”) opposes petitioner’s right to quit. This reply brief is submitted in rebuttal.

II. REPLY TO ODC “INTRODUCTION” AND “COUNTERSTATEMENT OF THE CASE”

A. Petitioner’s brief/memorandum urging dismissal, and other material filings challenging this prosecution, appear to have been overlooked in the ODC brief and overlooked by the disciplinary board.

Respondent’s description of the record is inaccurate and incomplete. Petitioner’s filings are important to the issues in this appeal. Unfortunately, it appears that most if not all of petitioner’s important filings with the ODC disciplinary clerk/ disciplinary board, discussed below, were not discussed in respondent’s description of the record nor were they discussed by the disciplinary board.¹

(1) Via letter to the Chief Justice dated November 18, 2018, Petitioner exercised his constitutional right under the First and Fourteenth Amendments to close his practice, exit the profession and cancel his membership in the Washington State Bar Association (“WSBA”). CP 94-97, 197-198. The letter is an important part of the record,

¹ Petitioner repeatedly moved to dismiss this proceeding for lack of jurisdiction during the hearing officer and disciplinary board phases of this matter, as well as in this appeal. Petitioner raised other important issues. It appears that the disciplinary board did not file any response to any of petitioner’s motions or documents discussed herein.

in the view of the undersigned. The ODC brief does not appear to address it.

(2) Via letter to the Status Changes section of the WSBA dated 11-18-2018, Petitioner cancelled and terminated his membership. CP 120-121. Petitioner enclosed a copy of his 11-18-2018 letter to the Chief Justice. *Ibid.* He requested a refund of his 2018 dues on a *pro rata* basis. *Ibid.* The letter is an important part of the record. The ODC brief does not appear to address it.

(3) Via letters dated 11-18 and 11-21-2018, Petitioner advised the hearing officer in WSBA case no. 16#00008 that he had closed his practice, exited the profession, and disavowed his membership. CP 148-154. Petitioner contended that the WSBA as currently structured is illegal. CP 148-149, 152. Petitioner contended that the WSBA lacks jurisdiction in this matter and dismissal is required. CP 149. The letter is an important part of the record. The ODC brief does not appear to address it.

(4) After petitioner terminated and cancelled his membership in the Washington bar in November, 2018, and after petitioner notified the hearing officer of his departure, the hearing officer filed an after-the fact adverse decision.

(5) On December 28th, 2018, Petitioner timely filed and served a notice of appeal to the disciplinary board (“board”) from the ruling of the hearing officer in this matter. CP 211-221. In Petitioner’s notice of appeal, petitioner again moved to dismiss the proceeding for lack of jurisdiction. CP 212-217. His previously-filed memorandum and motion to dismiss for lack of jurisdiction, attached to his notice of appeal, served as his briefing before the board. *See* CP 129-130; CP 214-221, CP 236-239. These documents are an important part of the record. The ODC brief does not appear to acknowledge the filing of the memorandum and motion to dismiss or the legal arguments submitted in the documents.

(6) On April 12, 2019, Petitioner filed and served on the board a Renewed Notice of Lack of WSBA Jurisdiction, with exhibits. CP 223-235.

The notice included another copy of Petitioner’s notice of appeal to the Board and another copy of his memorandum/brief with the motion to dismissal. CP 226-235. In his transmittal email of the notice to the WSBA clerk, CP 223, Petitioner requested that the renewed notice, the notice of appeal and his memorandum/brief be

forwarded to the members of the disciplinary board. CP 223.

These documents are an important part of the record. The ODC brief does not appear to acknowledge the filing of any of these documents. In fact, petitioner does not know whether any documents he filed during the hearing officer/disciplinary board phases of this matter were ever actually delivered to the members of the disciplinary board. The board did not file anything in response to petitioner's brief/memorandum seeking dismissal, nor to petitioner's objections to jurisdiction, nor to the other documents petitioner filed in this proceeding.

(7) Also on April 12, Petitioner served and filed his Designation of Clerk's Papers and Notice re Briefing, Lack of WSBA Jurisdiction. CP 129-130. This document designated the previously filed briefing (docket nos. 117.00, 118.00 and the Renewed Notice of Lack of Jurisdiction) as Petitioner's briefing for the board to review. CP 236-239.

The ODC erroneously claims that petitioner did not file a brief.² As the foregoing discussion shows, petitioner attached his brief/memorandum with his motion to dismiss for lack of jurisdiction to his notice of appeal to the board—the very beginning of the board phase of the proceeding. CP

² See ODC brief, page three.

212-221. Additional copies of the brief were contained in subsequent filings.

In sum, repeated challenges to WSBA jurisdiction were filed and noted in every phase of this proceeding. All of these filings appear to have been overlooked by the disciplinary board and the ODC.

The ODC brief likewise overlooks the content of petitioner's notice of appeal to this Court. CP 197-200. The Court was advised that petitioner had exercised his constitutional right under the First and Fourteenth Amendments to the United States Constitution to close his practice, exit the profession and cancel his membership in the WSBA. CP 197. Documents discussed above were again cited in the notice of appeal. CP 198-199. The notice of appeal challenged the WSBA's jurisdiction. CP 197-199.

As noted previously, petitioner's objection to the WSBA's jurisdiction may be raised at any time. *See, e.g., Skagit Surveyors & Eng'rs, L.L.C. v. Friends of Skagit County*, 135 Wash.2d 542, 556, 958 P.2d 962 (1998); RAP 2.5(a)(1). The content of petitioner's notice of appeal to this Court, with its attachments, is an important part of the record. The ODC brief does not appear to address it.

(8) The ODC brief erroneously claims that petitioner “made his closing argument by email.”³ The true facts are different. On April 26, 2018, Petitioner filed a four-page Post-Hearing Memorandum/Closing Argument.⁴ The post-hearing memorandum reads in pertinent part:

After both sides rested yesterday, undersigned counsel [petitioner] advised the Hearing Officer that his closing argument would be about two minutes long and asked to proceed with his closing. The ODC counsel asked to delay their closing until today. A telephone conference was scheduled to hear argument.

Respondent respectfully submits this post-hearing memorandum/closing argument in writing, in lieu of attendance at the telephonic conference scheduled for April 26, 2018 at 1:30 p.m.

Respondent’s Post-Hearing Memorandum/Closing Argument, pages 1-2, *ODC v. John R. Muenster*, No. 16#00008.

³ ODC brief, page 14.

⁴ A copy of the Post-Hearing Memorandum/Closing Argument is reproduced in the Appendix for the Court’s convenience

In sum, Petitioner asked to give his oral closing on April 25, at the conclusion of the testimony. The ODC asked for a delay to the next day and received it. Petitioner then filed his four-page closing memorandum raising a series of issues. The hearing officer thus had the benefit of Petitioner’s written closing argument. The ODC claim that petitioner “made his closing by email” is simply not accurate.

B. Inaccuracies in the ODC brief “Introduction”.

(1) ODC misstatement #1 re: the subject of the appeal. The ODC erroneously claims that petitioner “brings this appeal from the Board decision declining to order sua sponte review.”⁵ The ODC is incorrect.

Petitioner’s Notice of Appeal states in pertinent part:

John R. Muenster hereby appeals to the Supreme Court of Washington from the failure of the Disciplinary Board to dismiss this matter for lack of jurisdiction, as described below.

Notice of Appeal by John Muenster to the Washington Supreme Court, page one, CP 197. Petitioner’s Assignment of Error reads:

II. ASSIGNMENT OF ERROR:

Respondent WSBA and its disciplinary board erred by failing to

⁵ See ODC brief, p.2.

dismiss WSBA case no. 16#00008 and failing to close Petitioner's file after he cancelled and terminated his bar membership and closed his practice in November, 2018.

Petitioner/Appellant's Opening Brief, Section II, page 2.

The ODC claim re the subject of the appeal is incorrect.

(2) ODC Misstatement #2: Failure to note petitioner's objection to the hearing officer's findings.

The ODC brief erroneously states that petitioner "does not challenge any of the hearing officer's findings of fact or conclusions of law."⁶ Once again, the ODC is incorrect.

Petitioner's Notice of Appeal to the Supreme Court incorporates petitioner's brief/memorandum urging dismissal of this proceeding for lack of jurisdiction . CP 198, CP 228-235. Section C of the brief challenges the findings as incorrect:

C. The proposed findings are incorrect.

Without waiving any objections to jurisdiction, the undersigned respectfully objects to the proposed findings propounded by the ODC counsel and ODC hearing officer in this matter. In place of those findings, the contents of the Answer and Affirmative Defenses to the first amended complaint filed by the

⁶ ODC brief, page 2.

undersigned in 2017 should be substituted. Testimony given by the undersigned and Andi Knight and exhibits submitted by the undersigned should have been considered. These materials should have formed the basis for the findings and conclusions in this matter.

Notice of Appeal by John Muenster to the Washington Supreme Court, Attachment II, Memorandum Urging Dismissal of This Proceeding, page 7, CP 220; Attachment III, CP 234 (same).

Moreover, the ODC has overlooked petitioner's repeated argument that the ODC counsel and hearing officer improperly rewrote the fee agreement between the parties—a fee agreement that was central to petitioner's defense. We quote from the memorandum/brief seeking dismissal:

B. Fee agreement disputes should be adjudicated in Superior Court under Washington contract law where litigation has been instituted, not in the WSBA system.

The undersigned and a former client are opponents in a Superior Court lawsuit over fees. There is a written, signed fee agreement that the undersigned relies on.

In construing a contract, the court is to follow these rules:

“When interpreting a contract our primary

goal is to discern the intent of the parties, and such intent must be discovered from viewing the contract as a whole.” [footnote citation omitted].

. . .

This court does not “interpret what was intended to be written but what was written.” [footnote citation omitted].”

Washington Federal v. Gentry, 179 Wash.App. 470, 490, 319 P.3d 823 (Division One, 2014), *review granted*, 180 Wash. 2d 1021, *affirmed and remanded*, *Wash. Fed. v. Harvey*, 182 Wash.2d 335, 340 P.3d 846 (2015).

. . .

Rewriting the terms of an agreement between the parties is beyond the trial court’s authority. *Gentry, supra*; *Butler v. Caldwell*, No. 48931-3-I, 2002Wash.App. LEXIS 622, *1, *11 (Division One, 2002).

In the proposed findings in this matter, the ODC counsel and the hearing officer rewrote the fee agreement. In doing so, they violated the foregoing contract law rules. Through their actions, they impaired the obligations of the contract entered into by the parties.

The ODC counsel and ODC hearing officer had been advised of the pending

Superior Court proceedings. They were urged to defer the ODC proceedings until resolution of the Superior Court matter. They were advised of the state Supreme Court's preference for deferral as expressed in *In re the Disciplinary Proceeding Against Gillingham*, 126 Wash.2d 454, 458 fn.3, 896 P.2d 656, 1995 Wash. LEXIS 166 (1995). Unfortunately, these reasonable norms were not followed.

The only apparent reason for the ODC personnel to press forward with their version of the matter would be to assist the former client in the Superior Court case. This is not appropriate. WSBA proceedings are not conducted by a judge. They are not guided by the rules of evidence, the rules of civil procedure or constitutional law. Parallel proceedings conducted under different rules can lead to conflicting results between the two forums.

WSBA member resources should not be used to advance the interests of a private party in a private lawsuit. It was wrong to do so here. This could have been avoided through principled, timely action by the ODC actors.

Petitioner's Notice of Appeal with Brief/Memorandum Urging Dismissal, pages 5-7, CP 102-104; *Petitioner's Renewed Notice of Lack of WSBA Jurisdiction*, CP 137-139; *Petitioner's Notice of Appeal to the Supreme Court With Brief/Memorandum Urging Dismissal*, CP 232-234.

In sum, the record demonstrates that the hearing officer's findings were challenged, and challenged repeatedly, by petitioner in these proceedings. The ODC's claim to the contrary is erroneous and mistaken.

(3) ODC Misstatement #3: Failure to note petitioner's request for relief and opposition to ODC position.

The ODC brief erroneously states that petitioner "does not argue that disbarment is an inappropriate sanction."⁷ The ODC is incorrect.

The conclusion to Petitioner's Opening Brief reads:

The Court should acknowledge petitioner's cancellation and termination of his bar membership, dismiss case no. 16#00008, vacate the "costs and expenses" order and close the file. A proposed order is provided in the Appendix for the Court's convenience.

Petitioner/Appellant's Opening Brief, page 19. *See also*

⁷ ODC brief, page 2.

pages 1-3; page 11 (noting dismissal is appropriate due to mootness because petitioner is no longer a lawyer); pages 11-13 (noting that dismissal is appropriate because the state bar act does not grant the agency jurisdiction over petitioner after he closed his practice and quit his membership in 2018); pages 12-17 (First and Fourteenth Amendments prohibit the agency from collecting 2019 dues from petitioner or suspending him for non-payment after he quit); pages 14-17 (noting constitutional challenge to the mandatory bar association law; noting that the Thirteenth Amendment codifies the constitutional right to quit). The ODC claim that petitioner did not oppose disbarment in his brief is erroneous and mistaken.⁸

C. The ODC omitted reference in its brief to the pending civil case between petitioner and the complainant, which covers similar ground.

In 2017, the complainant filed a civil case in Superior Court against petitioner, citing the ODC's claims. CP 86-87. Petitioner filed an Answer, Affirmative Defenses and

⁸ Opposition to disbarment should not be taken in any way to mean petitioner wants to have any future connection with the WSBA whatsoever. In 2018, Petitioner exercised his constitutional right to permanently quit the WSBA and the legal profession in Washington. CP 197-200. That concluded this matter.

a Counterclaim, based upon the signed, written fee agreement between the parties. CP 87.

In the hearing officer phase, Petitioner raised the following issues: (1) the written fee agreement between the parties requires the matter to be resolved in Superior Court, CP 87-88; (2) The bar's general rule against taking action on disciplinary matters when a civil proceeding is pending addressing the same issues should be followed here as to the Myser matter counts (7-12), CP 88-89; (3) No ELC rule authorizes the office of disciplinary counsel to exercise concurrent jurisdiction over the same matter as a pending civil case, CP 89; (4) The disciplinary system has the same hallmarks as the criminal law system. The disciplinary system's hallmarks trigger the protections of the Fourth, Fifth, Sixth Amendments, as well as the Due Process Clause of the Fourteenth Amendment.⁹ Accordingly, constitutionally-required provisions and protections should be in place here, among them the following: (a) trial by jury; (b) a unanimous verdict, (c) proof beyond a reasonable doubt; (d) the presumption of innocence; (e) application of the

⁹ See *Respondent's Affirmative Defenses E, F, G, H and I*, filed 5-18-2017.

Washington Rules of Evidence (ER); (f) the protections of the Sixth and Fourteenth Amendment rights to confrontation, compulsory process and presentation of a defense; and (g) the protection of the rule of statutory construction that penal laws (whether “criminal” or “non-criminal”) are strictly construed against the prosecuting authority and liberally construed in favor of the respondent. CP 91-93.

These important issues were renewed in the notices of appeal with the attached memoranda and motions to dismiss. See CP 197-200, CP 212-221. They were also renewed in petitioner’s *Renewed Notice of Lack of WSBA Jurisdiction*. See CP 131-140, CP 152-154. The disciplinary board did not respond to the motion to dismiss nor any of the other arguments in the documents.

III. REPLY ARGUMENT

A. The Standard Of Review Is *De Novo*.

This is a documents case. The appeal presents issues of law. Issues of law are reviewed *de novo*.

The WSBA’s lack of jurisdiction was repeatedly raised during all phases of this proceeding in the documents discussed above. Further, Petitioner’s challenge to the WSBA’s jurisdiction may be raised at any time. See, e.g., *Skagit Surveyors & Eng’rs, L.L.C. v.*

Friends of Skagit County, 135 Wash.2d 542, 556, 958 P.2d 962 (1998); RAP 2.5(a)(1). Review is *de novo*.

The ODC brief does not seem to recognize these issues. The federal constitution and the state bar act are ignored. The ODC's brief repeatedly misstates the record. The legal issues repeatedly raised in petitioner's motions to dismiss, petitioner's opening brief and other documents are ignored. These shortfalls lead the ODC brief to erroneously assert that review is limited to the "sua sponte" order.¹⁰ The ODC is incorrect.

The ODC brief and the board are effectively silent on two important issues: the constitutional right to quit and the lack of ODC jurisdiction. Petitioner's challenge to ODC jurisdiction and assertion of the right to quit were raised repeatedly in all phases of this proceeding. Further, they may be raised at any time. Review of these issues of law is *de novo*.

B. The ODC claim of lifetime jurisdiction over petitioner is incorrect. Petitioner permanently cancelled and terminated his bar membership in 2018.

The ODC asserts that once someone is admitted to practice in Washington, they are subject to ODC

¹⁰ See ODC brief, pp. 17-21.

jurisdiction. No date for termination of this “jurisdiction” is recognized by the ODC in its brief.¹¹ The ODC seems to claim jurisdiction for life.

The ODC position conflicts with the constitutional right to quit in the First, Thirteenth and Fourteenth Amendments of the United States Constitution.¹² It conflicts with the state bar act. The ODC’s position is not supported by the ELC rules, the ODC’s abstract “policy” or the ODC’s claim of limitless “plenary power”.

1. “Plenary power”.

The ODC brief says that the court “has exclusive, inherent and plenary power to admit, discipline and disbar lawyers.”¹³ That power does not extend to petitioner, who is not a lawyer.

The state constitution’s jurisdiction provision for this Court is Article 4, Section 4. That provision does not authorize the ODC or the Court to block petitioner from permanently quitting the bar association and the profession. In fact, Section 4 does not specifically refer to

¹¹ *See* ODC brief, pp. 23-26.

¹² The text of these Amendments is reproduced in the Appendix herein.

¹³ *See* ODC brief, p. 23.

lawyers at all.¹⁴

2. Petitioner is not a “lawyer” under the ELC.

The ODC claims that the ELC rules apply to Petitioner.¹⁵ The ODC is mistaken. Those rules govern the procedure by which a “lawyer” may be subjected to disciplinary sanctions. ELC 1.1.

There is no definition of the term “lawyer” in the ELC. No ELC rule says that petitioner—who cancelled and permanently terminated his membership in the Washington bar in 2018—is a “lawyer” for purposes of the ELC.

This conclusion is fortified by the venue rule, ELC 1.2. The first sentence says that if a lawyer is admitted to practice in Washington, he can be pursued here for acts done elsewhere. The next two sentences address the reverse fact pattern—a non-resident lawyer not admitted to practice here can be pursued if he provides or offers to provide legal services here. The venue rule (and the similarly worded choice of law rule cited by the ODC, RPC 8.5(a)) does not reach persons who permanently

¹⁴ Article IV, section 4 of the state constitution is reproduced in the Appendix herein.

¹⁵ ODC brief, pages 23-26.

terminated and cancelled their membership in the Washington bar. Neither rule creates ODC jurisdiction for life over petitioner. Petitioner once was admitted to practice, in 1975. However, he has since permanently cancelled and terminated his membership in the bar. The language, context and labelling of these rules undercut the ODC claim.

Petitioner exercised his constitutional right to quit when he sent his termination letters to the Court and to the WSBA in November, 2018. The ODC claims that quitting has no effect in their system—that it is just a “declaration”.¹⁶ The absurdity of the ODC’s position is illustrated by the following examples:

Example 1 illustrates the ODC position: It is 1865. Petitioner is a slave on the “ODC Plantation” in South Carolina. Petitioner goes to the overseer and says: “I quit! I hereby terminate and cancel my position as a slave on this plantation. I’m leaving!” The ODC Plantation overseer replies: “Not so fast! You can’t quit! We didn’t give you our permission! What you say doesn’t change anything. It’s just your declaration! You are still a slave on the ODC Plantation. You can’t leave! Go back to work. And pay your next year plantation dues or else we’ll

¹⁶ ODC brief, pp. 21-22.

suspend you!”

Example 2 illustrates petitioner’s position--the correct approach. The facts and dialogue are the same as in Example 1, with the addition of the following: Petitioner tells the ODC overseer the following: “But Mr. Overseer, today is December 6, 1865. The Thirteenth Amendment has just been ratified. Slavery and involuntary servitude have been abolished! I have the right to quit! You can’t force me to stay on your plantation, pay your dues, or order me around! You have no power over me! And suspending me after I have permanently quit the profession is simply not logical.”

Construing ELC 1.2 and RPC 8.5 to create lifelong ODC jurisdiction over anyone who took the bar exam and was admitted would render those rules unconstitutional as applied to petitioner, who permanently cancelled and terminated his membership in 2018. The Thirteenth Amendment protects the right to quit the legal profession. The First and Fourteenth Amendments prevent the ODC from requiring petitioner to remain subject to the ODC’s jurisdiction. *See Petitioner’s Opening Brief*, pages 11-17.

3. The state bar act supports petitioner’s position.

The ODC asserts that it has jurisdiction now, in 2019,

because petitioner was admitted “at his request” in 1975.¹⁷ This ODC assertion is inaccurate on several grounds.

The state bar act establishes a mandatory bar system. RCW 2.48 *et.seq.* Petitioner had to join in 1975 in order to practice law. Four decades later, petitioner closed his practice and permanently terminated his membership.

Respondent WSBA is a state agency created by the Legislature. RCW 2.48.010. Respondent cannot exercise jurisdiction over persons beyond that granted by the state bar act (“act”).

The state bar act grants authority to the WSBA to set and collect bar dues on an annual basis. RCW 2.48.130. Under the act, bar membership is not permanent—it must be renewed every year. A lawyer loses his membership if he does not pay the annual dues. RCW 2.48.160. Petitioner declined to renew his membership for 2019. He permanently quit the profession in 2018.

Nothing in the state bar act blocks petitioner from permanently quitting the association. Nothing in the state bar act allows the ODC to have lifelong power over petitioner.

¹⁷ Logically, if one can voluntarily become a member, one can voluntarily cancel one’s membership. There is no “gotcha for life” provision in the state bar act.

4. ELC 9.3 does not apply in this case.

The ODC next cites ELC 9.3.¹⁸ ELC 9.3 is a *quid pro quo* rule. In exchange for the label of “resignation”, the requestor is compelled to give things of value to a government agency—the ODC. The things of value include money (“costs and expenses”) and a written confession.¹⁹ This case does not fall under ELC 9.3.

A fatal flaw in the ODC argument is the erroneous claim that resignation under ELC 9.3 is permanent, but petitioner’s written, permanent cancellation and termination of his membership somehow was not.²⁰ The ODC is mistaken. Petitioner has the right to permanently quit the legal profession and did so. The blessing of the ODC is not a prerequisite.²¹

¹⁸ See ODC brief, pp. 27-28

¹⁹ In the criminal law context, a confession obtained under these circumstances would be violative of the Fifth and Fourteenth Amendments to the United States Constitution.

²⁰ See ODC brief, page 28. APR 17(c), cited by the ODC, does not apply to petitioner because petitioner permanently terminated and cancelled his membership in the legal profession altogether.

²¹ The BOG bylaw (“IIIIH”) ODC cites at page 27 of its brief does not trump (no pun intended) the constitutional right to quit, nor does it trump the state bar act. The bylaw

5. Prior decisions cited by the ODC are not apposite because they did not involve a citizen who permanently terminated and cancelled his membership in the legal profession.

The ODC cites several cases in which disbarred lawyers who could pursue reinstatement were held subject to disciplinary investigation.²² The *ratio decedendi* of those cases seems to be that since disbarment in those states is not permanent, the disbarred lawyers could seek reinstatement and would resume the practice of law. Petitioner's case is different. Petitioner has permanently cancelled and terminated his membership in the Washington bar.

C. Washington's mandatory bar association laws²³ are unconstitutional under the First, Thirteenth and Fourteenth Amendments to the Constitution of the United States.

A challenge to the constitutionality of North Dakota's mandatory bar association laws was recently considered

is invalid because it conflicts with these provisions. The Board of Governors did not have statutory or constitutional authority to enact it.

²² See ODC brief, pp. 29-32.

²³ See RCW 2.48 et.seq., RCW 2.48.170.

by the United States Supreme Court. *See Fleck v. Wetch (North Dakota State Bar Association)*, --U.S.--, 139 S. Ct. 590, 202 L.Ed.2d 423 (2018) (petition for certiorari challenging mandatory bar membership requirement; *cert. granted and case remanded* for consideration under *Janus v. AFSCME, Council 31*, 583 U.S.--, 138 S. Ct. 2448, 201 L.Ed.2d 924 (2018)). The ODC points out that on remand, the Eighth Circuit did not hold the system unconstitutional.²⁴

Mr. Fleck has filed a new petition for certiorari in the United States Supreme Court dated November 21, 2019. The petition reads in pertinent part:

But mandatory bar associations—which are analogous to public sector unions in constitutionally relevant respects, as this Court recognized in *Keller*, 496 U.S. at 12—do just what *Janus* forbids. Attorneys are forced to join them and pay them annual dues—dues which, unless the attorney takes steps to prevent it, will be spent on non-germane political activities and speech that the attorney may disagree with. The constitutionality of laws compelling attorneys to join and pay a bar association is now the subject of lawsuits in at least Louisiana, *Boudreaux v. La. State Bar Ass’n*, No. 2:19-cv-11962

²⁴ *See* ODC brief, page 34, fn. 4.

(E.D.La., filed Aug. 1, 2019), Oklahoma, Texas, Wisconsin, Oregon, and Michigan. [citation footnotes omitted].

Fleck v. Wetch, Supreme Court No. _____, *Petition for a Writ of Certiorari*, pages 11-12, November 21, 2019. Should the United States Supreme Court hold mandatory bar membership and money payments to bar associations unconstitutional, petitioner seeks to apply the ruling here.

The ODC erroneously contends that there is no review of any issue in this case other than “sua sponte review”.²⁵ That mistaken assertion is dealt with by the facts and arguments set forth in both of petitioner’s briefs.

IV. CONCLUSION

The Court should acknowledge petitioner’s cancellation and termination of his bar membership, dismiss case no. 16#00008, vacate the “costs and expenses” order and close the file. A proposed order is provided in the Opening Brief Appendix for the Court’s convenience.

DATED this the 25th day of November, 2019.

Respectfully submitted,
S/ John R. Muenster
JOHN R. MUENSTER
Petitioner/Appellant

²⁵ See ODC brief, pp. 33-35.

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Const. Art. 4, Section 4

Section 4 Jurisdiction. The supreme court shall have original jurisdiction in habeas corpus, and quo warranto and mandamus as to all state officers, and appellate jurisdiction in all actions and proceedings, excepting that its appellate jurisdiction shall not extend to civil actions at law for the recovery of money or personal property when the original amount in controversy, or the value of the property does not exceed the sum of two hundred dollars (\$200) unless the action involves the legality of a tax, impost, assessment, toll, municipal fine, or the validity of a statute. The supreme court shall also have power to issue writs of mandamus, review, prohibition, habeas corpus, certiorari and all other writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction. Each of the judges shall have power to issue writs of habeas corpus to any part of the state upon petition by or on behalf of any person held in actual custody, and may make such writs returnable before himself, or before the supreme court, or before any superior court of the state or any judge thereof.

First Amendment, United States Constitution

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Thirteenth Amendment, United States Constitution Section One

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Fourteenth Amendment, United States Constitution Section One

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

BEFORE THE DISCIPLINARY BOARD
OF THE WASHINGTON STATE BAR ASSOCIATION

OFFICE OF DISCIPLINARY
COUNSEL (“ODC”),
Plaintiff,

v.

JOHN R. MUENSTER, WSBA #
6237,
Respondent.

NO. 16#00008

RESPONDENT’S POST-
HEARING
MEMORANDUM/CLOSING
ARGUMENT

Noted for telephonic conference:
April 26, 2018 @ 1:30 pm

I. INTRODUCTION.

After both sides rested yesterday, undersigned counsel advised the Hearing Officer that his closing argument would be about two minutes long and asked to proceed with his closing. The ODC counsel asked to delay their closing until today. A telephone conference was scheduled to hear argument.

Respondent respectfully submits this post-hearing memorandum/closing argument in writing, in lieu of attendance at the telephonic conference scheduled for April 26, 2018 at 1:30 p.m.

II. RENEWAL OF OBJECTIONS TO THE HEARING

Respondent respectfully renews his objections to the hearing previously presented in writing and at the hearing:

(A) The fee agreement requires the Myser matter to be resolved in King County.

(B) The bar's general rule against taking action on disciplinary matters when a civil proceeding is pending addressing the same issues should be followed here as to the Myser matter counts (7-12).

(C) No ELC rule expressly authorizes the office of disciplinary counsel to exercise concurrent jurisdiction over the same matter as a pending civil case.

(D) Until trial of *Myser v. Muenster* in King County Superior Court, the ODC and hearing officer lack jurisdiction to conduct a hearing on the merits in WSBA case no. 15-00545.

(E) The current disciplinary system has the hallmarks of the criminal law system. The disciplinary system's hallmarks trigger the protections of the Fourth, Fifth, Sixth Amendments, as well as the Due Process Clause of the Fourteenth Amendment.²⁶ Accordingly, constitutionally-required provisions and protections should be in place here, among them the following: (a) trial by jury; (b) a unanimous verdict, (c) proof beyond a reasonable doubt; (d) the presumption of innocence; (e) application of the Washington Rules of Evidence (ER); (f) the protections of the Sixth and Fourteenth Amendment rights to confrontation, compulsory process and presentation of a defense; and (g) the protection of the rule of statutory construction that penal laws (whether "criminal" or "non-criminal") are strictly construed against the prosecuting authority and liberally construed in favor of the respondent.²⁷

²⁶ See *Respondent's Affirmative Defenses E, F, G, H and I*, filed 5-18-2017.

²⁷ "Where two possible constructions are permissible, the rule of lenity requires us to construe the statute strictly against the State in favor of the accused." *State v. Gore*, 101 Wn.2d 481, 485-86, 681 P.2d 227, 39 A.L.R.4th 975 (1984); *Staats v. Brown*, 139 Wash.2d 757, 769, 991 P.2d 615 (2000).

III. SUMMARY OF FACTS AND DEFENSES

The contents of Mr. Muenster's Answer and Affirmative Defenses to the first amended complaint are incorporated herein by reference as though fully set forth. Testimony given by the undersigned and Andi Knight and exhibits submitted by the undersigned are likewise incorporated herein by reference as though fully set forth.

IV. REQUEST FOR RUNNING OBJECTION TO ODC CLOSING RE: MYSER MATTER

In keeping with the objections renewed in Section II.A, B, C, and D above, the undersigned respectfully requests a running objection to closing argument by ODC counsel re the Myser matter, Counts 7-12. The granting of the running objection would obviate any need for the undersigned to appear personally to make objections during the ODC argument. This appears to be the most productive approach.

V. CONCLUSION

Respondent respectfully requests that findings and a ruling on Counts 7-12 of the First Amended Complaint herein be deferred until after trial or other disposition in

Myser v. Muenster, King County Superior Court case no. 17-2-32881-2. See *In re the Disciplinary Proceeding Against Gillingham*, 126 Wash.2d 454, 458 fn.3, 896 P.2d 656, 1995 Wash. LEXIS 166 (1995).

DATED this the 26th day of April, 2018.

Respectfully submitted,
MUNSTER AND KOENIG

By: S/ John R. Muenster

John R. Muenster

Attorney at Law, WSBA No. 6237

Of Attorneys for Respondent John Muenster

CERTIFICATE OF SERVICE

I certify that on or about the date set forth below, I filed the foregoing document with the Clerk of the Court via online filing. On or about the same date, I served counsel for the respondent via online filing and email.

DATED this the 25th day of November, 2019.

S/ John R. Muenster

John R. Muenster

MUENSTER & KOENIG

November 25, 2019 - 3:07 PM

Transmittal Information

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Appellate Court Case Number: 201,872-6
Appellate Court Case Title: In re: John Roling Muenster, Attorney at Law (WSBA #6237)

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