IN THE SUPREME COURT OF THE STATE OF OREGON

IN RE:

COMPLAINT AS TO THE CONDUCT OF

FREDRIC SANAI, OSB #981372,

ACCUSED.

OREGON STATE BAR 13-100

S063514 (CONTROL) S061674

APPEAL FROM OREGON STATE BAR TRIAL PANEL RULING,

SIMEON RAPOPORT, TRIAL PANEL CHAIRMAN

THE ACCUSED'S PETITION AND OPENING BRIEF

Filed by the Accused *pro se*,
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Certificate of Filing and Service

I, Accused Fredric Sanai, hereby state I e-filed and e-served this Opening Brief with supporting exhibits via the Oregon Supreme Court's electronic filing system, and further mailed two true paper copies via US mail to Oregon State Bar Counsel Kellie Johnson and the OSB Disciplinary Board Clerk at these addresses:

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/s/ Fredric Sanai
December 11, 2015

IN THE SUPREME COURT FOR THE STATE OF OREGON

In Re: Complaint as to the Conduct of Fredric Sanai, OSB 981372	Case No.: S 063514 (control) and S 061674 Oregon State Bar no. 13-100 Accused's Petition and Opening Brief

Statement of the Case

This is a reciprocal discipline case; the Accused was disbarred by the Washington Supreme Court in June, 2013. The Oregon Bar filed to have the Accused disbarred in Oregon. Justice Balmer issued an order referring the case for a hearing. Rec. 7. The Accused had no previous bar discipline.

Nature of the Judgment to be Reviewed, and Relief Sought

The July 7, 2015 Rapoport Trial Panel judgment recommended disbarment. The Accused requests this Court reject the Panel's opinion and dismiss the Complaint. In the alternative, the Accused requests a new Trial Panel hearing.

Basis of Appellate Authority

This Court has jurisdiction pursuant to BR 12.8 and ORS 9.160.

Date of Request for Review

The Request was filed and served August 31, 2015. An Order dated October 15, 2015 set the brief due date as December 11, 2015.

Questions Presented on Appeal

Was the Accused denied due process of law in the underlying Washington proceedings?

Was the Oregon Bar Trial Panel improperly appointed and did it violate the Accused's rights?

Summary of the Arguments

The grounds for rejecting imposition of reciprocal disbarment in Oregon are limited to the absence of due process in the other state's proceedings, or some other overriding reason. BR 3.5(c)(1)-(2). In this case, two of the three fundamental requirements of due process—an opportunity to be meaningfully heard, and an impartial tribunal—were absent. *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970). The Accused's due process rights were violated in Washington by violations of (a) his right to confront witnesses, (b) this right to be meaningfully heard due to the denial of his request to file an overlength brief, and (c) his right to an impartial tribunal.

1. First Assignment of Error: the Accused was Denied Due Process of Law in Washington: the Denial of the Right to Confront Witnesses

Here, the strongest basis for this Court to reject the Trial Panel disbarment ruling is the expert opinion of the Hon. Richard Sanders, retired Justice of the Washington Supreme Court and expert on Washington law. The Trial Panel concluded that there is no Washington right to confront witnesses: "*Crawford* leaves unanswered the question of whether there is a corresponding "confrontation" right implicit in the concept of "due process of law" in non-criminal cases…in particular, to lawyer discipline under state law." Opinion 23.

That is incorrect. In an attorney discipline case, Washington law holds the accused attorney has *exactly* the same rights to confront witnesses as a criminal defendant has at trial. In his Trial Panel testimony, former Washington Supreme Court Justice Sanders explained this clearly (Justice Sanders' testimony in bold, at TR 584 line 17):

> **…There are a number of cases that say that there are many due process rights vested in a lawyer in a disciplinary proceeding. There is a -- there is -- you have the right to fully present your case, your arguments. You have a right to an impartial tribunal. You have a right to confront witnesses against you amongst several other rights. In fact, there's a Washington case that says that in attorney discipline cases the attorney has the same rights as a criminal defendant.**
> Q. So an accused attorney in a disciplinary case has the same rights as a criminal defendant; is that correct, sir?
> **A. Yes. And *In re Deming* says that.**

The US Supreme Court has held that in respect to due process, bar disciplinary proceedings are "quasi-criminal in nature." *In Re Ruffalo*, 390 U.S.

544, 550 (1968). Because the standard of proof in a bar proceeding is greater than a civil proceeding and the issues and parties are different, there is no collateral estoppel. *In re Whitney,* 155 Wn.2d 451, 464 (2005). This means that *every* factual and legal element of the Washington Bar's case had to be proven independently.

Here, the rulings of Washington courts against the Accused were the heart of the Bar's case. The record demonstrates that Accused's attorney made an objection to the admission of EVERY legal decision for purposes of proving any of the counts against Accused Fredric, an objection he summarily called the "alternate uses objection".[1] See discussion at Rec. 118-121. Nonetheless, the Washington State Hearings Officer quashed all but one of the Accused's subpoenas, denying the Accused his right to confront witnesses against him. Rec. 121. It was crucial to cross examine these witnesses (e.g. Judges Zilly, Thiboudeau, Alsdorf, Wynne) because their judicial rulings were offered (and accepted) to prove the truth of the statements contained in them. TR 627. The Accused's case was prejudiced. Had he been able to call these witnesses, he could have shown these judges were given

[1] The reason that Respondent's attorney only objected to the use of the orders or decisions to prove any of the claims as opposed to an objection for all purposes is that the United States Supreme Court has ruled that court records which are not used to prove any element of a charge may not be excluded under the confrontation clause.

clear evidence of the perjury and fraud of and they chose to ignore it. The Washington Hearings Officer nonetheless quashed the Accused's subpoenas (see Rec. 464-468), preventing him from presenting a full defense,

If the Accused had been allowed to examine these witnesses, the Accused would have shown there had been a fraud on the Court by these judges were aware of it, but were not willing to allow the Accused to re-open the underlying divorce case to show the fraud. Rec 464-469. A full discussion is in Record Exhibit 30, Rec. 464-483.

The principles of fairness required in "quasi-criminal" proceedings, were addressed by the Washington State Supreme Court in *Nguyen v. Dep't. of Health,* 144 Wn.2d 516 (2001). The Court found the quasi-criminal nature of license revocation proceedings required a clear and convincing burden of proof, and that the same due process standards apply for all proceedings involving revocation of a professional license:

> This court has expressly held medical disciplinary proceedings are indeed "quasi-criminal."...These two cases use the term "quasi-criminal" in exactly the same sense the United States Supreme Court used the term when it characterized disbarment proceedings "quasi-criminal." *In re Ruffalo*, 390 U.S. 544, 551, 88 S. Ct. 1222, 20 L. Ed. 2d 117 (1968).

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[2] Even attorney now admits (at the Trial Panel) his client was a liar and perjurer. See TR 493-496.

Nguyen v. State Med. Quality Assur. Bd., supra at 528-529.

The Washington State Supreme Court spelled out the full force of the due process protections in the judicial disciplinary proceedings, and the equivalence of such proceedings in due process respects to attorney disbarment proceedings, in *In Re Discipline of Deming,* 108 Wn.2d 82 (1987):

> "We hold that a judge Accused of misconduct is entitled to no less procedural due process than one Accused of crime. See U.S. Const. amends. 5, 6, 14; Const. arts. 1, § 22 (amend. 10), 4, § 31 (amend. 71). The lawyer charged with misconduct in a disbarment proceeding is entitled to procedural due process. *In re Ruffalo,* 390 U.S. 544, 550, 20 L.Ed.2d 117, 88 S.Ct. 1222 (1968). As stated therein:
>
> > Disbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer.... He is accordingly entitled to procedural due process, which includes fair notice of the charge.... Therefore, one of the conditions this Court considers in determining whether disbarment by a State should be followed by disbarment here is whether "the state procedure from want of notice or opportunity to be heard was wanting in due process."
>
> **A judge is entitled to the same procedural due process protection when facing disqualification as a lawyer facing disbarment.**"
>
> *In re Deming, supra,* 102-104 (bold emphasis added).

It is clear from *Deming, Nguyen* and the cases cited therein that under Washington State law, an attorney (or judge, or medical professional) facing termination of his right to practice his profession must be granted the same due

process protections as a criminal defendant, including the same right to confront witnesses against him.

Apart from the quasi-criminal rights, under Washington law in administrative proceedings the "appearance of fairness doctrine" requires that the author of any document the facts or conclusions of law of which are entered in the proceeding may be called to testify about the contents therein. *Weyerhaeuser v. Pierce County,* 124 Wn.2d 26 (1994). In that case the Washington Supreme Court held that persons whose written conclusions of law and fact would be relied upon in an administrative hearing were witnesses who could be called and cross-examined. The greater protections in professional discipline matters have been acknowledged by the Washington State Supreme Court:

> [T] he appearance of fairness doctrine already provides procedural protections beyond the minimum requirements of the federal due process clauses....
>
> Under the appearance of fairness doctrine, proceedings before a quasi-judicial tribunal are valid only if a reasonably prudent and disinterested observer would conclude that all parties obtained a fair, impartial, and neutral hearing. *Swift v. Island Cy.,* 87 Wn.2d 348, 361, 552 P.2d 175 (1976). Although this doctrine originated in the land use area, *see Smith v. Skagit Cy.,* 75 Wn.2d 715, 453 P.2d 832 (1969), it has been extended to other types of quasi-judicial administrative proceedings, *see Chicago, M., St. P. & Pac. R.R. v. State Human Rights Comm'n,* 87 Wn.2d 802, 557 P.2d 307 (1976).

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

Prior to 2004, Washington State's courts did not rigorously enforce a due process right to cross-examine persons whose recorded out-of-courtroom statements were relied upon in a tribunal. In *State v. Crawford*, a unanimous Washington State Supreme Court held that recorded statements of an assault victim could be used to convict her husband of the crime when her testimony was barred by the marital privilege. *State v. Crawford,* 147 Wash.2d 424 (2002). This was altered in a unanimous United States Supreme Court decision, which over-ruled the Washington State Supreme Court and held that the right to confront witnesses was not subject to a reliability test, but **absolute** where required for the purposes of the confrontation clause.

Based on these Washington and federal cases, there is no doubt that – just as Justice Sanders stated – Washington law mandates that accused attorneys have the same right to confront witnesses as criminal defendants. In the Washington Bar hearing, the Hearings Officer quashed Accused's witness subpoenas and admitted (and relied on) dozens of documents without any opportunity to allow Accused to confront the authors, over Accused's repeated objections. Rec. 464-469. These acts violated Accused's due process rights under Washington law, as Justice Sanders correctly concluded (beginning at TR 607):

Q. Thank you, sir. So the issue there was that Mr. was challenging the entry of some legal writings by a judge or judges because he had no ability to confront those judge or judges; is that accurate, sir?
A. Yes. Well, it appears to me that a substantial part of the bar's case against you was based upon orders and writings of -- by various judges who were critical of you. And your brother took the position that the orders could be admitted as -- for what they are, orders of the court, but that the -- the truth or falsity of the matters contained in those legal writings could not be considered by the court without allowing him -- at least allowing him the opportunity to cross-examine or confront the author. And the -- he made this objection consistent -- consistently. I mean, every time or many times the bar offered an order into evidence, your brother would object saying what I just said, or sometimes he would use a shorthand calling it an alternative objection, that is, that they're inadmissible for the purpose of showing there was an order but not for the truth thereof. And then eventually he had -- he had subpoenaed various judges to -- to come in and testify presumably regarding these -- these orders, and the hearing officer quashed the subpoenas. And your -- all of the subpoenas. And your brother took the position that that violated your right to confront witnesses against you.... And there are many cases that I'm familiar with that say that lawyers in disciplinary proceedings have a right to confront witnesses against them. And the confrontation clause is normally a -- a vehicle for excluding evidence. So evidence that is offered which -- where the lawyer or the litigant is denied the opportunity confront the witness against him for whatever reason should be excluded, and that's a due process right. But here it was not excluded. The orders were considered, not only for the fact that they're orders, but also for the truth of the substance contained therein. And that is reflected repeatedly in the hearing officer's findings of fact.

Justice Sanders reiterates his opinion later in his testimony. (TR 627, lines 16-25).

Q. So you do believe that Hearings Officer Beles committed a due process violation by allowing – by considering the contents of some documents which had been admitted over objection; is that correct, sir?
A. Yes. Yes. Well, not by -- well, the due process violation was not allowing you to call as witnesses the author of documents that he was considering for their -- for the truth of their contents. That was the due process violation.

A: I understand, sir. Thank you.

Beginning in 2003, federal appellate courts began reconsidering the federal constitutional underpinnings of the right to either cross-examine the makers of out-of-court statements or exclude the statements to prove the truth of the matters asserted therein in administrative hearings. There are three separate, overlapping sources of this right. The first source, which has no constitutional basis, is the rules of evidence. The second source is the Confrontation Clause. The Confrontation Clause applies in criminal proceedings and arguably quasi-criminal proceedings. Appellate courts are divided as to whether the Confrontation Clause applies to quasi-criminal cases.[3]

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[3] The United States Supreme Court Court has held that attorney disciplinary cases are "are adversary proceedings of a quasi-criminal nature." *In re Ruffalo,* 390 U.S. 544 (1968). It also held in quasi-criminal delinquency proceedings, absent a valid confession, a determination of delinquency and an order of commitment to a state institution cannot be sustained in the absence of sworn testimony subjected to the opportunity for cross-examination in accordance with our law and constitutional requirements." *In re Gault,* 387 U.S. 1, 57 (1967). In Connecticut, the application of the *Crawford* confrontation right to attorney disciplinary proceedings has been explicitly recognized:

> Because a grievance hearing is quasi-criminal in nature, we look to criminal law to resolve the defendant's claim. "Under *Crawford v. Washington,* the hearsay statements of an unavailable witness that are testimonial in nature may be admitted under the sixth amendment's confrontation clause only if the defendant has had a prior opportunity to cross-examine the declarant.""

Statewide Grievance Committee v. Johnson, 108 Conn.App. 74, 81-82. 946 A.2d 1256 (2008) (footnotes and citations omitted). For the affirmative side in other quasi-criminal contexts, *see, e.g. State v. Kent,* 391 N.J.Super. 352, 375 (App. Div. 2007); *In re Appeal No. 101, Term 1976,* 34 Md. App. 1, 11, 366 A.2d 392 (1976). In a recent decision, the New York Court of Appeals canvassed the use of hearsay evidence in expert witness reports for civil commitment proceedings of sex-offenders, and found that half of the states to have addressed the issue exclude it

The third source are the due process clauses of the Fifth and Fourteenth Amendments. "It is axiomatic that "[a] fair trial in a fair tribunal is a basic requirement of due process." *Caperton v. A. T. Massey Coal Co.* (2009) 556 U.S. 868, _____, *quoting In re Murchison*, 349 U.S. 133, 136 (1955).

The concept of a "fair opportunity to be heard" requires that a party have the ability to cross-examine any person whose oral or written statements are used against a party:

> "The fundamental requisite of due process of law is the opportunity to be heard." *Grannis v. Ordean,* 234 U. S. 385, 394 (1914). The hearing must be "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo,* 380 U. S. 545, 552 (1965). In the 268 present context these principles require that a recipient have .... an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally.
>
> ....
>
> In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses. *E. g., ICC v. Louisville & N. R. Co.,* 227 U. S. 88, 93-94 (1913); *Willner v. Committee on Character & Fitness,* 373 U. S. 96, 103-104 (1963).

Goldberg, supra, at 268-270

Willner, the decision in Goldberg, explicitly heald that any person whose written documents are used against a person must be made available for cross-examination:

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and half permit it in some form. *State v. Floyd,* 2013 NY Slip Op 07653 (NY Ct App. Nov. 19, 2013).

The leading case finding the Confrontation Clause inapplicable to administrative hearings is *Rosenthal v. Justices of the Supreme Court of Cal.,* 910 F.2d 561, 565 (9th Cir.1990) which states that that Confrontation Clause does not apply to non-criminal cases, but noting that the right to call witnesses is a necessary due process element in the California attorney discipline regime in effect at the time.

> [I]n connection with his hearings before the Committee on his 1937 application he was shown a letter containing various adverse statements about him from a New York attorney; that a member of the Committee promised him a personal confrontation with that attorney; but that the promise was never kept.
>
> .....
>
> We have emphasized in recent years that procedural due process often requires confrontation and cross-examination of those whose word deprives a person of his livelihood. *See Greene v. McElroy,* 360 U.S. 474, 492 , 496-497, and cases cited. That view has been taken by several state courts when it comes to procedural due process and the admission to practice law. *Coleman v. Watts,* 81 So.2d 650; *Application of Burke,* 87 Ariz. 336, 351 P.2d 169; *In re Crum,* 103 Ore. 296, 204 P. 948; *Moity v. Louisiana State Bar Assn.,* 239 La. 1081, 121 So.2d 87. Cf. Brooks v. Laws, 208 F.2d 18, 33 (concurring opinion). We think the need for confrontation is a necessary conclusion from the requirements of procedural due process in a situation such as this. *Cf. Greene v. McElroy, supra; Cafeteria Workers v. McElroy,* 367 U.S. 886.

Willner v. Committee on Character and Fitness, 373 US 96, 101-104 (footnotes omitted).

Willner in turn cites this Courts precedent, *In re Crum,* 103 Ore. 296, 204 P. 948 (1922). Thus there is an unbroken line of authority, from this Court's decision in Crum to the United States Supreme Court's decision in *Willner* to the seminal due process case, *Goldberg*, establishing a due process right to exclude written statements of third parties in attorney discipline cases and administrative hearings.

Justice Sanders' expert testimony stands unrebutted, and unrebuttable, by the Oregon State Bar counsel. The Bar offered no testimony to counter the conclusive and authoritative testimony of Justice Sanders that Accused's due process rights to

confront witnesses were violated in the Washington discipline process. The Trial Panel made an error of law and abused its discretion.

2. Second Assignment of Error: the Right to be Meaningfully Heard

The Accused was denied his due process right to be meaningfully heard by the Washington State Supreme Court when it denied his motion to file an overlength brief. This gravely prejudiced the Accused's case, as the Washington Supreme Court then found he had waived many of his arguments, and disbarred him because of it. It was *physically impossible* for the Accused to challenge the Washington hearings officer's 56 page Findings of Fact and Conclusions of Law (FFCL) in the scant 50 pages he was allowed in his brief, as Justice Sanders explains:

> "By decisional law, an appellant who contends that a finding of fact in an FFCL is wrongly decided must, to properly present the challenge, do the following in the opening brief:
> a. Identify the finding of fact in a section of the brief entitled "assignment of error".
> b. Provide a verbatim quotation of the challenged finding of fact.
> c. Explain why the factual finding was wrongly decided.
> d. Explain what the correct factual finding should have been.
>
> Any challenge to a finding of fact that does not follow this procedure is waived. Similarly, any challenge to a conclusion of law must set out the conclusion of law, provide a verbatim quotation of the challenged conclusion, explain why the challenged conclusion was wrong, and explain what the correct conclusion of law would be....Fredric requested leave to file a 132 page opening brief based on his intention to challenge nearly all of the findings of fact...
>
> "The Supreme Court denied the motion, which meant that Fredric was limited to the standard length of 50 pages in the opening brief. For Fredric to

have properly assigned error to all of these paragraph, he would have needed more than 50 pages of text. Fredric explicitly raised the issue of inadequate amount of space in his opening brief. The Supreme Court found that Fredric had waived all but a handful of the challenges to the factual findings. *In Re Sanai,* 177 Wn. 2d at 761. Fredric could not have presented full assignments of error to all of his challenges because of the inadequate page limits in a case with an approximately 10,000 page record. Fredric has a due process right to present all of his arguments; however Fredric was manifestly denied such an opportunity because the sheer volume of the findings at issue could not be presented and argued within the 50 page limitation, let alone other assigned errors.

I am also of the opinion that the due process refusal was prejudicial to Fredric Sanai. The 2013 opinion finds that Fredric waived many, if not most, of his factual and legal arguments. Fredric won his due process arguments in 2009 before the Supreme Court. His arguments from my review of the briefs were not frivolous. **The refusal to allow Fredric adequate space to meet technical pleading requirements meets the test of a structural due process error.** See *Arizonav. Fulminante* 499 U.S. 279 (1991).....Accordingly the application of a rule which prevents Fredric from submitting his factual challenges to the Washington State Supreme Court is, from a due process point of view, the same as a ruling which prevents a criminal defendant from making an argument to a jury. Fredric was not allowed to present his factual and legal contentions to the ultimate fact-finder and decision-maker, the Washington State Supreme Court." *Justice Richard Sanders declaration, found at Rec. 181-196, and Appendix A. (bold emphasis supplied).*

Justice Sanders' unrebutted expert testimony and declaration demonstrates that it was physically impossible for Accused to meet the formal requirements in the space he was allowed. The Trial Panel admits the "Bar offers no evidence to dispute this conclusion, and simply argues, in substance, that exercise of the court's discretion to deny the motion was not a denial of due process." Opinion 10. The Panel then agreed it was not a violation, without explaining how the Accused

could possibly have accomplished this impossible task. Opinion 15. No-one could have.

3. Third Assignment of Error: The Right to an Impartial Tribunal

In addition to the violations of the "appearance of fairness doctrine", the Washington Supreme Court violated the Accused's due process right to a fair and impartial tribunal by allowing Justices who had pre-judged the case (in 2009) to hear the 2013 appeal even though the Accused repeatedly requested their recusal. As discussed in Justice Sanders' Trial Panel testimony and Declaration, in 2009 Justice Chambers and his three dissenting colleagues decided the Accused should be denied a trial because he was obviously guilty of committing misconduct "up and down the West Coast." However, the decision cited by Justice Chambers as demonstrating Fredric's proclivity for committing misconduct "down the West Coast" *did not involve Fredric at all*; it was a California Court of Appeal decision overturning the quoted judge, and not, as Justice Chambers represented, a decision of that judge; and the language cited was the grounds for throwing the judge off the case "in the interests of justice." As described by Justice Sanders:

> "In the 2009 opinion, four justices, in a dissent signed by Justice Chambers, contended that Fredric should not be granted a new trial because the underlying evidence presented to the hearing officer without Fredric's participation demonstrated that he should be disbarred:

"Any one of these excuses might deserve judicial sympathy. But Fredric has an unprecedented record of engaging in abusive and vexatious practices by filing baseless lawsuits and endless motions and appeals (often in direct violation of court orders) in courts up and down the West Coast.....Judge Zilly's comments are echoed by Los Angeles County Superior Court Judge Elizabeth A. Grimes: "Plaintiff has proliferated needless, baseless pleadings that now occupy about 15 volumes of Superior Court files, not to mention the numerous briefs submitted in the course of the forays into the Court of Appeals and attempts to get before the Supreme Court, and not one pleading appears to have had substantial merit. The genesis of this lawsuit, and the unwarranted grief and expense it has spawned, are an outrage." Ex.252, atL n. I (quoting *Sanai v. U.D. Registry, Inc.*,No.8C235671,2005 WL 367327, at *15 n.36 (L.A. County Super. Ct. Feb. t6, 2005). This extraordinarily sad abuse of our judicial system, unprecedented in the annals of the Washington State Bar Association, appears to be precipitated by Fredric's misguided attempt to assist his mother, against his father, Sanai." *In Re Discipline of Fredric Sanai,* 167 Wn.2d 740,756-757 (

Justice Chambers and the three other justices joining his opinion, Justices Fairhurst, C. Johnson and J.M. Johnson, decided that because the evidence presented to the original hearing officer demonstrated that Fredric was committing misconduct "up and down the West Coast" he should be disbarred on the merits even though a majority of the court concluded the default hearing which produced the factual record was improperly convened.

This conclusion is suspect from both a factual and due process point of view. From a factual point of view, the quotation from Judge Grimes was false as attributed to Fredric. The February 16, 2005 decision quoted was not a decision of the L.A. County Superior Court about Fredric Sanai. It was a decision of the Second Appellate District OVERTURNING Judge Grimes in a case involving Fredric's brother and counsel, Moreover, four months later the same language in a related appeal caused the same appellate court to remove Judge Grimes "in the interests of justice" on remand. *Sanai v. Saltz* 2005 WL 1515401, *9 (June 28,2005 Cal.App. 2 Dist.). I must believe this was a good faith albeit tragic mistake in the dissent....But the effect on Fredric of this language in the published opinion would be devastating to his reputation and credibility. He would be seen as dishonest and vicious. Uncorrected errors like this in published opinions last forever

and brand a man for life. I note that this error was brought to the attention of the dissenting justices in the Motion to Recuse pp. 10-11 filed in the subsequent disbarment case (the subject here), but unfortunately to no avail.

Aside from the tragic error discussed above, the irony here is that the dissenters would have imposed disbarment based on a record which the majority rejected. In contrast the dissenters could have merely concluded that denial of a continuance was not error and simply affirmed. But that isn't what happened.

Fredric sought recusal of the four dissenting justices twice. Fredric argued that the four dissenting justices were actually biased against him. Fredric contended that the dissenting justices had prejudged his case through receipt of ex parte information, that is to say, the default trial record.

There is no question that the four dissenting justices decided that Fredric should be disbarred based on the default trial; it is clearly articulated in the 2009 dissent.... Washington State law follows United States Supreme Court precedent in holding that the transmission and consideration of ex parte information to a tribunal is a due process violation if it is considered by the tribunal. *In re Pers. Restraint of Boone*, 103 Wn.2d 224,234-35 (1984). If such information was considered by the tribunal, then the tribunal is required to recuse....

The presence on a tribunal of a judge who is biased in fact, or the presence on a tribunal of a judge where based on all the facts and circumstances an objective observer would conclude there is a probability of bias, constitutes a "structural error" requiring reversal. See *Sullivan v. Louisiana*, 508 U.S. 275,279 (1993), citing *Tumey v. Ohio*, 273U. S. 510 (1927) as an example of structural error. See also *Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868 (2009). No demonstration of prejudice need be made. Nonetheless, it is possible in this case to articulate a specific injury suffered by Fredric. Of the four justices signing the dissent, two ultimately sat on the second appeal. Justice C. Johnson recused on Fredric's case and another case heard the same day. Justice Chambers retired however it is likely for the reasons stated below that he was the assignment justice who made critical determinations in the appellate process to the prejudice of Fredric prior to Justice Chambers' retirement."

Justice Sanders goes on to explain how the Washington State Supreme Court operates internally and states unequivocally that the Accused's due process rights

were violated by the Washington state Supreme Court. *See* Sanders' Declaration at Rec. 188-196 and Justice Sanders' Trial Panel testimony at TR 605, 639, and 644.

From Justice Sanders' Declaration:

> 22. Under Washington State Supreme Court procedure, each appeal is tasked to an "assignment justice." Fredric's appeal was sent to an assignment justice who handled both an interim petition to suspend Fredric and the appeal itself. A May 12, 2012 order refers to the assignment justice. The identity of the assignment justice is kept secret. If the assignment justice is in the majority after oral argument, the assignment justice will write the majority opinion. If the assignment justice leaves the Court while the appeal is pending, the matter would be reassigned to a new assignment justice.
>
> 23. The function of the assignment justice is critical to the appellate process. The assignment justice presents the summary of the record and a discussion of the procedural background and merits of the appeal (or petition for review in discretionary review cases) to the entire Court. While members of the Court can independently review the appellate record, this is not commonly done and in a case involving a 10,000 page record would almost certainly not be done. Therefore the assignment justice, especially in a case like this, performs a critical role.
>
> 24. Justice Chambers did not seek reelection to the court in 2012, thus his term expired in January 2013. Justice Cheryl Gordon McCloud won a contested election to succeed Justice Chambers. Normally under established court procedures she would have inherited Justice Chambers' assigned cases where oral argument had not yet been heard. That she is the author of the 2013 opinion disbarring Fredric suggests strongly she inherited the case as the assignment justice from Justice Chambers. The oral argument was held on March 21, 2013, little time to start on preparation from scratch without relying at least in part on Justice Chambers' work. Therefore even though Justice Chambers had retired his influence was probably felt.
>
> 25. At this point it is important to understand how the nine-member Washington Supreme Court functions. The assignment justice prepares a prehearing memorandum which is distributed about two weeks prior to oral argument. This is the primary document the other

> judges most certainly read. However the voice of every justice is heard and counts in the conference that follows oral argument. In my experience one articulate dissenter can sometimes turn the proposed result. So to say that Fredric could have lost two votes while the result would have been the same is not true. Every single justice counts and if even one justice sat on the case that shouldn't have, or denied due process by sitting, the entire result is unreliable."

The participation of Justice Chambers in the review and analysis of the record would cause any objective observer to believe that there is a probability of bias meeting the *Caperton* threshold.

As Justice Sanders explained in his Declaration and Trial Panel testimony, it is a "beyond a doubt" certainty that the Justice who served as the "assignment justice" in the Accused's 2013 case was Justice Chambers, and then Justice McCloud inherited this role. Justice McCloud wrote the 2013 opinion. At trial, Oregon Bar counsel attempted to show Justice Sanders' conclusion was merely a guess, but he firmly disagreed, as this illustrates (begins at TR 645, line 23):

> BY MS. JOHNSON:
> Q. You gave us some inner workings on how the Washington Supreme Court works on assignment judges or establishing assignment judges; right?
> A. Yes. Correct.
> Q. Okay. In this particular case with Mr. Sanai, what direct evidence do you have of who was the
> assignment judge on Mr. Sanai's case?
> A. For 2013?
> Q. Correct.
> A. Well, it's the practice of the court that the assignment judge writes the opinion if it's – if there is an attorney; so **I would conclude beyond a doubt**, really, that it was Sheryl McCloud as of 2013.
> Q. Sure. So if I hear you correctly, you're making an educated guess?
> A. Well, I think that there are rules for the Washington State Supreme Court. They are -- I don't know whether they're published in the rule book, but they're not -- they're not secret rules. They are written rules. And I believe

the rules say that, that the assignment judge shall be assigned or shall write the majority opinion if the assignment judge is in the majority.

The Bar failed to offer *any* evidence Justice Sanders' testimony was incorrect, or any other evidence on this topic. Nonetheless, the Trial Panel stated "we cannot rely on his conclusions" because "he testified as a retained expert, paid by Respondent to give his opinion." Opinion 17. The Trial Panel concluded this was "speculation of a paid expert witness" and wholly ignored the Accused's case. In the absence of *any* evidence disputing Justice Sanders' assertions, this was an abuse of discretion by the Trial Panel. Justice Sanders' testimony was not speculation, it was a "beyond a doubt" certainty that Justice Chambers was the initial assignment justice. Rec. 196. Given that the Accused's due process right to an impartial tribunal was violated in the Washington discipline process, this Court should dismiss the Oregon Bar's reciprocal discipline case. Justice Sanders' expert testimony stands unrebutted, and unrebuttable, by the Oregon State Bar counsel.

4. Fourth Assignment of Error: The Oregon Trial Panel Violated the Accused's Right to Counsel

This matter was heard before the Oregon State Bar Trial panel on February 2, 3, and 4, 2015. The Accused, under protest and after objecting, was forced to represent himself.

The Accused's attorney unexpectedly withdrew from the case on January 20,

2015, less than two weeks before the hearing. The Accused moved to continue the hearing date so the Accused could secure new counsel. This motion was denied. The Accused then moved to allow California attorney to represent Accused *pro hac vice* in the Oregon trial, This mwas also denied by the Trial Panel Chairman. A concerned friend engaged Portland attorney William Meyer (the Accused was unemployed and out of funds), who appeared with Accused at the hearing and stated he was willing to take Accused's case but needed a little time to prepare. This brief setover was denied by the Trial Panel, so Mr. Meyer said he had no choice but to decline the representation. Mr. Meyer provided Accused no legal services or advice.

It is well established law that a person has certain rights when facing a deprivation hearing, such as the right to due process of law and the right to have an attorney. *Goldberg v. Kelly*, 397 US 254, 271 (1970). On Monday morning, the first day of the OSB hearing, Accused arrived with Portland defense counsel William Aring Meyer. Mr. Meyer asked for a brief continuance so he could adequately prepare to defend Accused. This motion was denied by the Trial Panel, so Mr. Meyer withdrew.

The Accused then renewed his motion to admit California attorney s *pro hac vice* at the hearing, stating no continuance would be required and could fly to Oregon immediately and be in the hearing the next morning. This motion was denied by the Trial Panel because the Bar counsel (in opposing admission) stated had an outstanding California State Bar complaint.

TR 154. Accused explained that the outstanding California State Bar complaint should be disregarded, as it was currently stayed, pending dismissal of most or all of the charges. TR 140-152. The Bar disputed this characterization, and the Trial Panel agreed.

The California State Bar Court has since ruled, and it is clear Accused was correct all along. Eight of the nine charges brought against have now been dismissed, and the one remaining count has been stayed (and will likely also be dismissed). All of the Washington charges were dismissed *with prejudice.* Please see ruling of Judge Donald F. Miles in California State Bar Court case *In re* nos. 10-O-09221-DFM and and 12-O-10457 DFM, dated March 20, 2015, Rec. at. 989-1001.

Accused was thus forced to represent himself (under protest) during the hearing, which lasted three days, until late February 4, 2015. These denials to Accused's right to the counsel of his choice violated the constitutional principles addressed by the United States Supreme Court in *United States v. Gonzalez Lopez,* 548 U.S. 140, 126 S.Ct. 2557, 165 L.Ed.2d 490 (2006) where the United States Supreme Court held that the right to defense counsel includes the right to have counsel *pro hac vice.* While *Gonzalez Lopez* involved a criminal trial, the same right to counsel of one's choice exists in non-criminal cases under the Fifth and Fourteenth Amendments. The Fifth Amendment's Due Process Clause (as imposed on the states by the Fourteenth Amendment) guarantees civil litigants the right to

retained counsel, which includes the right to be represented by the counsel of their choice. *McCuin v. Tex. Power & Light Co.*, 714 F.2d 1255, 1262 (5th Cir.1983), The mandatory terms of UTCR 3.170(3) were also violated by the Trial Panel in denying Accused's out-of-state attorney's *pro hac vice* admission.

The Trial Panel Chair also based his decision on an error of law. Specifically, the Trial panel Chair stated

> "Accused moves to admit California attorney pro hac vice. Pro hac vice admission is not merely a matter of completing some paperwork and submitting a fee. As the Oregon Court of Appeals has observed, pro hac vice admission is a privilege, not a right. *Tahvili v. Washington Mut. Bank*, 224 Or App 96, 109 (2008). See also *Leis v. Flynt*, 439 US 438, 442-43, 99 S Ct 698, 58 L Ed 2d 717 (1979) (no constitutional right to be admitted pro hac vice)." (Ruling of Trial Panel Chair Rapoport. Jan. 29, 2015)

Leis v. Flynt only stands for the proposition that pro hac vice admission is not a Constitutional right *of the attorney seeking pro hac vice admission.* It does not address the question of whether the *client* has a constitutional right to counsel of his choice. That question was addressed in *United States v. Gonzalez Lopez,* 548 U.S. 140, 126 S.Ct. 2557, 165 L.Ed.2d 490 (2006) where the United States Supreme Court held that the right to counsel **includes the right to have counsel pro hac vice**.

Both *Leis* and *Gonzolez Lopez* involved the criminal trials. However, the same right to counsel of one's choice exists in non-criminal cases under the Fifth

and Fourteenth Amendments. The Fifth Amendment's Due Process Clause guarantees civil litigants the right to retained counsel, which ordinarily includes the right to be represented by the counsel of their choice. *McCuin v. Tex. Power & Light Co.*, 714 F.2d 1255, 1262 (5th Cir.1983).

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Thus the CLIENT has a constitutional right to select the attorney of his choice, especially so in a case like this where the client (Fredric) has no time to secure alternative counsel and the out-of-state attorney (has unique knowledge of a complex case.

The Bar argued that: "It is within the trial panel's discretion, upon good cause, to deny the request," and cited *Tahvili v. Washington Mutual Bank,* 224 Or App 96, 197 P3d 541 (2008) as support. *Tahvili* is completely distinguishable. *Tahvili* did not deal with the *admission* pro hac vice of an out-of-state attorney. In *Tahvili* out-of-state attorney had his pro hac vice status revoked for good cause: repeated violations of the Court's rulings after several warnings. Additionally, in *Tahvili,* the out-of-state attorney was associated with Oregon counsel who did not even bother to attend the trial, thus failing to "meaningfully participate" in the representation, as required by UTCR 3.170.

That is a wholly inapplicable comparison. There was no good cause to deny Accused pro hac vice admission of his attorney of choice, Here, out-of-state attorney sought admission, and UTCR 3.170(3) states:

"The court or administrative body **shall** grant the application by order if the application satisfies the requirements of this rule, unless the court or administrative body determines for good cause shown that granting the application would not be in the best interest of the court or administrative body or the parties. At any time and upon good cause shown, the court or administrative body may revoke the out-of-state attorney's permission to appear in the matter." (bold emphasis supplied).

Here, there is no doubt that California attorney satisfied the requirements of UTCR 3.170 for pro hac vice admission. Nonetheless the Trial Panel denied Accused's motion. TR 154. The Trial Panel's reason for denying the motion, the vague and subjective "best interests of the parties," cannot trump the Accused's right of assistance of counsel. TR 154.

The Trial Panel Chair (and, subsequently, the full Trial Panel) committed legal error in denying Accused a brief continuance to allow Oregon counsel Meyer to prepare, and also then committed legal error in denying the Accused his right to his counsel of choice, These decisions grossly prejudiced the Accused's ability to offer a full defense, as the Accused has been representing himself in an unknown field he is not qualified for.

5. Fifth Assignment of Error – The Trial Panel Improperly Admitted Exhibits *en Masse*

Bar counsel came to the hearing with exhibits totaling thousands of pages on a CD-ROM. No paper exhibits were provided to the Trial Panel or the Accused.

The Accused had only seen the Bar's first exhibit list days before, and could not determine what was in fact, on the CD-ROM disc (at first the Accused did not have a computer with him, and later discovered the CD-ROM would not play on his computer). The Bar moved to have these exhibits admitted *en masse*. The Accused objected, stating the exhibits could only be admitted after being offered one-by-one so the Accused could make appropriate objections (*e.g.* on the grounds of relevance, reliability, lack of foundation, lack of authentication, violation of Accused's due process rights to confront witnesses against him, lack of opportunity to make an individual objection, and prejudice to Accused's ability to present a full and fair defense). The Trial Panel Chair overruled the Accused's objections and then admitted the Bar's exhibits all at once (see discussion at TR 179-191). BR 5.1(a) states: "Incompetent, irrelevant, immaterial, and unduly repetitious evidence should be excluded at any hearing conducted pursuant to these rules." Nevertheless, the Trial Panel admitted hundreds of Bar exhibits without even a scant preliminary showing of relevance, materiality, *etc.*, and without the Accused having any opportunity to object to individual exhibits. This was legal error, and prejudiced Accused's ability to present a full and fair defense at the hearing. The Accused made a blanket objection to the admission of all Bar exhibits that had not been individually offered, and moved to strike those exhibits, but that was denied. TR 748-750. The Trial Panel offered the Accused the opportunity to

file written objections to the Bar's admitted exhibits months after the hearing was concluded but such a *post hoc* objection opportunity in no way rectifies the legal error that occurred during the actual hearing itself. This Trial Panel action was an abuse of discretion and warrants a new trial before a properly constituted Trial Panel.

6th Assignment of Error: the Trial Panel Denied the Accused's Right to Confront Witnsses

Oregon's bar rules, like Washington State, allows introduction of hearsay evidence in bar disciplinary proceedings. *See* BR 5.1. However, the Oregon Supreme Court's own precedent states this is improper. *In re Crum,* 103 Ore. 296, 204 P. 948 (1922).

As far back as 1963, the United States Supreme Court explained that the right to confront witnesses in a hearing concerning an attorney's fitness to practice law is an element of constitutional due process:

> We have emphasized in recent years that procedural due process often requires confrontation and cross-examination of those whose word deprives a person of his livelihood. *See Greene v. McElroy,* 360 U.S. 474, 492 , 496-497, and cases cited. 2 That view has been taken by several state courts when it comes to procedural due process and the admission to practice law. *Coleman v. Watts,* 81 So.2d 650; *Application of Burke,* 87 Ariz. 336, 351 P.2d 169; *In re Crum,* 103 Ore. 296, 204 P. 948; *Moity v. Louisiana State Bar Assn.,* 239 La. 1081, 121 So.2d 87. Cf. Brooks v. Laws, 208 F.2d 18, 33 (concurring opinion). We think the need for confrontation is a necessary conclusion from the requirements of procedural due process in a

> situation such as this. *Cf. Greene v. McElroy, supra; Cafeteria Workers v. McElroy,* 367 U.S. 886.

Willner v. Committee on Character and Fitness, 373 US 96, 103-104.

In the Oregon case cited by the United States Supreme Court, *Crum,* the Oregon Supreme Court held that in a proceeding to determine a lawyer's fitness to practice law:

> In a proceeding of this kind, the applicant is entitled to confront the witnesses, to subject them to cross examination, and to invoke the protection of the tried, wise, and well-settled rules of evidence. In re Eldridge, 82 N.Y. 161, 37 Am. Rep. 588.
>
> It has been written that—
>
> > "it is essential to the administration of justice according to law, that the recognized rules of evidence should be observed in this class of cases as well as in all others." People v. Amosx, 246 I.. 299, 92 N.E. 857, 138 Am. St. Rep. 239.

In re Crum, supra, 204 P. at 949.

To avoid repetition, the analysis contained in the First Assignment of Error are hereby incorporated here, by this reference. Given these cited federal cases, *Willner*, and the Oregon Supreme Court's *Crum* opinion, it seems clear that Oregon law requires that accused attorneys be allowed to confront the witnesses against them in Bar disciplinary cases, including reciprocal disciplinary cases. The Accused preserved this issue by timely objecting to The Trial Panel's refusal to allow the Accused to examine the authors of documents introduced into evidence against him; see, e.g. TR 179-191 and 748-750. The Panel Chair disallowed Accused's witness subpoenas for McCloud, Edie, Gibbs and Sullivan, prejudicing the Accused. Rec. 626 and TR 431-432. Had the Accused been allowed to call these witnesses, he would have been able to show the adverse rulings were based

on factual fraud. See Memo at Rec. 109. The Trial Panel's action was legal error, and an abuse of its discretion that prejudiced Accused.

The Need for a New Trial Before a New Trial Panel

A few weeks prior to the February 2nd hearing Accused's attorney unexpectedly withdrew. Accused requested a brief set-over to allow time to find a new attorney. This motion was denied by the Trial Panel Chair. Accused then moved to have the out-of-state counsel who had represented Accused in the underlying Washington state bar proceedings admitted *pro hac vice* to represent Accused for the Oregon hearing. This motion was also denied by the Trial Panel Chair. The Trial Panel Chair then ruled that the Accused could not file any more pre-hearing motions without his leave. TR 100. This precluded the Accused from making important motions that would have helped his defense.

The Due Process Right to Confront Witnesses and Challenge the Bar's Offered Evidence

Prior to the hearing, the Accused timely produced and delivered his exhibits and witness list and hand-delivered it to the Oregon State Bar offices before the September 30, 2014 deadline. Despite repeated requests, including the Accused's November 24, 2014 Request for Production of Documents and a personal request made to Bar counsel Kellie Johnson at his deposition on December 11, 2014, the Accused did not receive a witness list until after filing a motion to compel (filed on

January 9, 2015).

This failure to timely disclose the Bar's witness list made it impossible for the Accused to prepare his defense, as he had no idea who would be appearing to testify against him and no ability to schedule possible depositions of those Bar witnesses in the one week left before hearing set to commence on February 2, 2015.

The Bar then identified (via email on January 23, 2015) two additional witnesses. In addition, the Bar sent a letter dated January 5, 2015 disclosing it had received over 4000 (four *thousand*) pages of documents from the WSBA.

The Accused moved to continue the hearing date to allow examination of this lately disclosed, massive 4000 page discovery, and to allow time to depose the Bar's witnesses (the Accused, it should be noted, was willingly deposed by the Bar counsel over two days in October, 2014). This was denied.

The Accused filed Motions in Limine to bar or limit the testimony of these late-disclosed witnesses. Those motions were denied by the Trial Panel Chairman.

During the hearing, the Oregon State Bar counsel appeared with hundreds of exhibits totaling thousands of pages which the Trial Panel admitted *en masse* without any showing of relevance or materiality (in violation of BR 5.1a) and without Accused having the opportunity to examine them, or object to them. This *en masse* admission of the Bar's evidence violated Accused's due process rights to confront witnesses against him, lack of opportunity to make an individual objection, and gravely prejudiced Accused's ability to present a full and fair defense. The Trial Panel Chair overruled the Accused's objections and then

admitted the Bar's exhibits all at once (see discussion at TR 179-191). BR 5.1(a) states: "Incompetent, irrelevant, immaterial, and unduly repetitious evidence should be excluded at any hearing conducted pursuant to these rules." Nevertheless, the Panel admitted hundreds of Bar exhibits without even a preliminary showing of relevance, materiality, *etc.*, and without the Accused having any opportunity to object to individual exhibits. This was legal error, and prejudiced Accused's ability to present a full and fair defense at the hearing. The Accused made a blanket objection to the admission of all Bar exhibits that had not been individually offered, and moved to strike, but that was denied. TR 748-750.

The concept of a "fair opportunity to be heard" requires that a party have the ability to cross-examine any person whose oral or written statements are used against a party:

> "The fundamental requisite of due process of law is the opportunity to be heard." ...The hearing must be "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo,* 380 U. S. 545, 552 (1965). In the present context these principles require that a recipient have .... an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally.
> ....
> In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses. *E. g., ICC v. Louisville & N. R. Co.,* 227 U. S. 88, 93-94 (1913); *Willner v. Committee on Character & Fitness,* 373 U. S. 96, 103-104 (1963).
>
> *Goldberg, supra*, at 268-270

Willner, explicitly held that any person whose written documents are used

against a person must be made available for cross-examination:

> We have emphasized in recent years that procedural due process often requires confrontation and cross-examination of those whose word deprives a person of his livelihood ....We think the need for confrontation is a necessary conclusion from the requirements of procedural due process in a situation such as this.

Willner v. Committee on Character and Fitness, 373 US 96, 101-104 (footnotes and internal cites omitted) (1963)

It is therefore established that an opportunity to cross-examine witnesses *or whose statements are used in writing against a person* in bar proceedings are required by due process. This was made clear by the Oregon Supreme Court in an important attorney discipline case:

> In a proceeding of this kind, the applicant is entitled to confront the witnesses, to subject them to cross examination, and to invoke the protection of the tried, wise, and well-settled rules of evidence...It has been written that—
>
> > "it is essential to the administration of justice according to law, that the recognized rules of evidence should be observed in this class of cases as well as in all others." *People v. Amosx*, 246 I.. 299, 92 N.E. 857, 138 Am. St. Rep. 239.
>
> *In re Crum,* 103 Ore. 296, 204 P. 948 (1922).

The Trial Panel's denial of the Accused's witness confrontation rights was legal error and an abuse of discretion.

7. Seventh Assignment of Error: the Improper Appointment of a Trial Panel Drawn from the Incorrect Pool of Panel Candidates

Subsequent to the February 2-4 hearing, State Disciplinary Board Chair Nancy Cooper sent an April 6, 2015 letter in a *post hoc* attempt to fix a fatal procedural error. Rec. 798. The Region 4 Regional Chair appointed the three-person Trial Panel to hold the February hearing. This is in direct violation of the Bar's own rules. The Accused timely objected. Rec. 1012. In the section dealing with reciprocal discipline cases, section 3.5 contains this mandatory requirement:

> BR 3.5 (g) Hearing; Review by Court. A trial panel **appointed by the state chairperson** shall make a decision concerning the issues submitted to it. The trial panel's decision shall be subject to review by the court as is authorized in Title 10 of these rules. (bold emphasis supplied)

BR 3.5 is clear and unequivocal. A Trial Panel appointed by the State Chair (and **only** the State Chair) may hold a reciprocal discipline hearing. This point is especially crucial in the Accused's case, because the Trial Panel selected by the Region 4 Regional Chair not only prejudiced Accused's rights before and after the hearing, **but was also chosen from the wrong pool of candidates.** Accused lived and worked in Region 7 (Clackamas County) at all relevant times, not Region 4, and this fact was known to the Bar. As such, the Region 4 Regional Chair should have had nothing to do with Accused's case. Accused's trial panel should have been selected from candidates in Region 7. Instead, all three trial panel members were from Region 4 (Washington and Yamhill counties). The Rapoport Trial Panel

should never have heard the Accused's reciprocal discipline case. This was structural error, and requires the Accused be given a new Trial Panel hearing.

The Oregon Supreme Court addressed the question of whether improper or incorrect selection or composition of a trial panel is structural error in *In Re Hendrick,* 346 Ore. 98, 208 P.3d 488 (2009). In *Hendrick* the Disciplinary Board appointed a Trial Panel to hear the case, and the accused lawyer used a peremptory strike of one panel member. Later, an entire new panel was convened, and the lawyer again sought to strike a panel member. The Board refused to allow the strike. After a decision adverse to the lawyer, the lawyer appealed. The Oregon Supreme Court held that the Board wrongly denied the accused lawyer's motion to strike. The question the Supreme Court then faced was whether any prejudice need be shown. The Oregon Supreme Court held that **no prejudice need be shown** (*i.e.* it is structural error) and ordered that the lawyer be given a new hearing:

> "As to that issue, we think that the party's right to a second trial before a different judge follows from the nature of the right itself. And, if the trial panel was not properly constituted, there is no way to know whether a properly constituted trial panel would have created the same record, made the same rulings, or construed the evidence in the same way, much less reached the same conclusions that this one did." *Hendrick*, at 107.

Hendrick makes clear that improper appointment of a trial panel automatically requires a new hearing. That is the relief Accused is requesting here. Even if a showing of prejudice were required, it is easily shown: the Accused's

Trial Panel arbitrarily and capriciously denied the Accused representation by his attorney of choice, another structural error, and committed further due process errors discussed elsewhere. BR 3.5 is clear and unequivocal. A Trial Panel appointed by the State Chair (and **only** the State Chair) may hold a reciprocal discipline hearing. This point is especially crucial in Accused's case, because the Trial Panel improperly selected by the Region 4 Regional Chair not only prejudiced Accused's rights before and after the hearing, but was also chosen from the wrong pool of candidates. Just as in *Hendrick*, an error in selecting the proper Trial Panel members requires a new Trial Panel hearing with all Trial Panel members properly chosen and appointed. That is the relief Accused requests today.

While the fundamental requirements of due process are notice and a fair opportunity to be heard, the concept of "a fair opportunity to be heard" always requires an impartial tribunal:

> the decisionmaker's conclusion .... must rest solely on the legal rules and evidence adduced at the hearing. *Ohio Bell Tel. Co. v. PUC,* 301 U. S. 292 (1937); *United States v. Abilene & S. R. Co.,* 265 U. S. 274, 288-289 (1924). To demonstrate compliance with this elementary requirement, the decision maker should state the reasons for his determination and indicate the evidence he relied on, cf. *Wichita R. & Light Co. v. PUC*, 260 U. S. 48, 57-59 (1922), though his statement need not amount to a full opinion or even formal findings of fact and conclusions of law. And, of course, an impartial decision maker is essential.
>
> *Goldberg v. Kelly* (1970) 397 US 254, 271.

"It is axiomatic that "[a] fair trial in a fair tribunal is a basic requirement of

due process." *Caperton v. A. T. Massey Coal Co.* (2009) 556 U.S. 868, quoting *In re Murchison*, 349 U.S. 133, 136 (1955). By denying the Accused the opportunity to present a full and fair defense, to have an attorney represent him, to admit hundreds of Bar exhibits *en masse*, and by making prejudicial rulings (such as denying Accused a brief continuance and barring Accused from filing further pre-hearing motions), the Rapoport Region 4 trial panel demonstrated its bias and unwillingness to give the Accused a full and fair hearing.

CONCLUSION

BR 3.5(c)2 allows the Accused to address the issue of whether the Accused should be reciprocally disciplined by this Court. The Accused does not believe disbarment is warranted, for actions taken over a dozen years ago in the course of a family dispute where he sought to protect his abused mother from a vicious, lying husband who is an acknowledged perjurer. TR 493, 496. The Accused is not alone in that opinion; numerous judges, government officials, police, and attorneys testified before the Trial Panel to his unblemished professional reputation and record of exemplary public service. Please see the supporting witness statements in Appendix B.

For these reasons, the Accused respectfully requests the Oregon Supreme Court order the bar complaint dismissed with no discipline imposed, or discipline less than disbarment, as the Accused was denied his due process rights in the underlying Washington proceedings.

In the alternative, the Accused respectfully requests this Court order a new Trial Panel hearing before a properly chosen and appointed Trial Panel selected from the correct pool of candidates.

Dated this 11th day of December, 2015.

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ORAP 5.05 Word Count Certification: the Accused hereby certifies he wrote this brief on Word software, and it gave the word count as 9836 words.

Certificate of Filing and Service

I hereby certify I served opposing bar counsel Kellie Johnson both by the Court's e-file service system and by mailing a true copy of this amended Petition and Opening Brief via US mail to this address:

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I also served a true copy on the State Court Administrator via US mail at this address:

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Dated this 6th day of January, 2016.

/s/ Fredric Sanai, Accused, OSB 981372

ORAP 5.05(2)(d) Certificate of Word Count and Font Size

I hereby certify I prepared this brief on Microsoft Word software and it gave the final word count for the Amended Opening Brief filed January 2016 as 10, 465 words, and I submitted the brief in Times New Roman 14 point font size.

/s/ Fredric Sanai, OSB 981372, Accused pro se