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Appellate Court Records

IN THE SUPREME COURT OF THE STATE OF OREGON

In re:	
Complaint as to the Conduct of	OSB Case No. 13-100
FREDRIC SANAI,	SC S063514
Accused.	

OREGON STATE BAR'S ANSWERING BRIEF

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Accused

March 2016

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I. STATEMENT OF THE CASE

A. Nature of the Proceeding.

This is a reciprocal discipline proceeding under Oregon State Bar Rule of Procedure (BR) 3.5. The Accused, Fredric Sanai, was disbarred by the Washington Supreme Court in June 2013. Pursuant to BR 3.5(a), Oregon State Bar Disciplinary Counsel (Bar) notified this court of the disbarment and of the State Professional Responsibility Board's recommendation that the Accused be disbarred in Oregon. The Accused filed an answer pursuant to BR 3.5(c). By order dated May 1, 2014, this court referred the matter to the Disciplinary Board (DB) for the purpose of taking testimony on whether the Washington procedure lacked in notice or opportunity to be heard and whether the Accused should be disciplined in Oregon. BR 3.5(e); BR 3.5(c)(1) and (2).

On May 22, 2014, the Bar filed a formal complaint alleging that the Washington State Bar Association (WSBA) procedure did not lack in notice or opportunity to be heard and that the WSBA Findings of Fact and Conclusions of Law (FFCL) provided sufficient evidence that the Accused committed misconduct including: (1) knowingly bringing legal proceedings, knowingly asserting positions therein, and knowingly taking other action in the absence of a basis in law or fact that was not frivolous, conduct prohibited by Oregon RPC 3.1;[1] (2) knowingly disobeying an obligation under the rules of a tribunal, conduct prohibited by RPC 3.4(c); (3) repeatedly filing legal actions with no substantial purpose other than to embarrass, delay, harass or burden a third person, conduct prohibited by RPC 4.4(a); (4) knowingly violating (or assisting another to violate) the rules of professional conduct, conduct

[1] All citations to a rule of professional conduct refer to the Oregon rules unless otherwise noted.

prohibited by RPC 8.4(a)(1); and (5) engaging in conduct prejudicial to the administration of justice, conduct prohibited by RPC 8.4(a)(4). The Bar urged that the Accused be disciplined in Oregon. ER 1 – 62.[2]

The Accused filed his answer on June 11, 2014. ER 63 – 66.

A DB trial panel (panel) heard the matter on February 2-4, 2015, and issued its opinion July 8, 2015. The trial panel found that the WSBA procedure afforded the Accused notice and an opportunity to be heard, and that the Accused should be disbarred in Oregon. ER 67 – 105.

The Accused petitioned for review of the panel opinion and filed his amended opening brief on January 6, 2016.

B. Nature of Judgment Sought to be Reviewed.

The Accused asserts that the panel erred in finding that he was not denied due process in the WSBA proceeding and in concluding that he should be disbarred here. He further argues that he was denied due process in Oregon. He urges the court to do one of three things: dismiss this case; order a new hearing in the matter; or impose a sanction less than disbarment.

The Bar urges the court to adopt the panel's conclusions that: (1) the WSBA disciplinary procedure did not lack in notice or the opportunity to be heard; and (2) the Accused should be disbarred.

C. Statutory Basis for Appellate Jurisdiction.

This matter comes before the Supreme Court pursuant to ORS 9.536(1), BR 3.5(g), BR 10.1 and BR 10.3. This court should consider the matter *de novo* on the record. ORS 9.536(2); BR 10.6.

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[2] "ER" refers to the Excerpt of Record in this matter.

II. THE ACCUSED'S QUESTIONS PRESENTED ON REVIEW

The Accused's Assignments of Error can be framed as Questions Presented, with the Bar's Responses to each, as follows:

A. Does the record support the trial panel's conclusion that the WSBA disciplinary proceeding afforded the Accused notice and opportunity to be heard?

Response: The panel correctly found that the Accused received due process in the WSBA proceeding and on review by the Washington Supreme Court.

B. Did the Accused receive due process in the Oregon disciplinary proceeding?

Response: The Oregon reciprocal discipline proceeding afforded the Accused due process.

C. Does the record support the panel's conclusion that the Accused should be disbarred in Oregon?

Response: The trial panel correctly found that the Accused's misconduct warrants disbarment under the ABA *Standards for Imposing Lawyer Sanctions* and Oregon case law.

III. SUMMARY OF ARGUMENTS

The Accused had notice and opportunity to be heard at every stage of the WSBA proceeding, including the 12-day hearing and review by the Washington Supreme Court (Washington court). Admitting into evidence relevant state and federal court orders did not violate any applicable constitutional right of confrontation or procedural rule. The Washington court's imposition of a page limit for his brief did not impair the Accused's ability to be heard on appeal. Finally, prior review of his case by the Washington court did not render certain justices impartial.

The Accused was not denied due process in Oregon. Appointment of a trial panel by the DB Region 4 chair rather than the DB state chair was a procedural error that did not infringe upon the fairness of the proceeding, including the three-day trial at which the Accused called 13 character witnesses. The panel chair's denial of application to appear *pro hac vice* was supported by good cause shown. Finally, the panel afforded the Accused ample time post-trial to object to admission of the voluminous record of the WSBA disciplinary proceeding, evidence that was material to the issues under BR 3.5(c).

The scope and tenacity of the Accused's abuse of the legal process, and the magnitude of injuries he inflicted on his client, opposing parties and the courts, clearly warrant disbarment.

IV. STATEMENT OF FACTS

The Accused was admitted to the Oregon State Bar in 1998. For many years, he was employed as Yamhill County Deputy Counsel (1999 – 2010) before serving as county counsel from 2010 until 2013. Tr. 355, 713.[3] The Accused was admitted to practice law in Washington in 2002. He sought admission there solely to represent his mother, (in post-dissolution disputes with her ex-husband, the Accused's father, (Tr. 708.

A. Washington Discipline Proceedings, 2004-2013.

The WSBA initiated discipline proceedings against the Accused in July 2004 by filing a formal complaint and notice to answer. Exs. 2, 3.[4] The Accused filed an answer. Ex. 6. In April 2006, the WSBA filed an

[3] "Tr." refers to the transcript of the February 2015 Oregon State Bar reciprocal discipline hearing.

[4] "Ex." refers to exhibits admitted in the Oregon State Bar hearing.

amended complaint (Ex. 12); the Accused filed his answer and affirmative defenses in May 2006. Exs. 12, 15.

A WSBA Disciplinary Board (WSBA DB) hearing officer set a hearing date October 16, 2006. Ex. 11. On the Accused's motion, the hearing date was continued to Monday, April 16, 2007 Exs. 23, 25. On Friday, April 13, 2007, the Accused faxed the hearing officer a doctor's note and requested a continuance. Ex. 40. The hearing officer denied the request, conducted the hearing in the Accused's absence, and thereafter filed a decision recommending that the Accused be disbarred.

Pursuant to WSBA Rule for Enforcement of Lawyer Conduct (ELC) 11.2(b), the 12-member WSBA DB reviewed the hearing officer's decision and, by unanimous vote, adopted it. Ex. 42.

The decision was then reviewed by the Washington court. A five-member majority of the court reversed the decision, holding that the hearing officer had abused his discretion by failing to grant a continuance Ex. 50; *In re Disciplinary Proceeding against Sanai*, 167 Wash.2d 740, 225 P3d 203 (2009) (*Sanai 2009*). Four justices dissented, finding that the hearing officer acted within his discretion and that disbarment was appropriate Ex. 51; *Sanai 2009,* 225 P3d at 210-13. The case was remanded for a new hearing.

On remand, the WSBA DB granted the Accused's request for a new hearing officer and, over WSBA's objections, the Accused's motion to disqualify the new officer. Exs. 60-62, 64 - 65, 67 - 71. Craig C. Beles (Beles) was appointed hearing officer. Ex. 72.

In July 2010, Beles set a hearing date in December 2010 and established prehearing deadlines (i.e., witness lists to be filed by September 6, 2010, exhibit lists by October 4, 2010, and objections by November 10, 2010). Ex. 74. The Accused obtained an extension of

time to file his proposed exhibits (Ex. 79) and then moved for a 12-week trial postponement to obtain new counsel (Ex. 82); when the motion was denied, he sought reconsideration. Ex. 83. Over WSBA's objection, Beles granted a continuance until January 17, 2011. Exs. 85, 86. After additional delays, the hearing date was continued to February 28, 2011. Ex. 94. Over WSBA's objection, Beles granted the Accused's motion to allow the Accused's brother, California attorney (represent him *pro hac vice*. Exs. 98-100.

After the WSBA hearing began, the Accused served subpoenas on one Washington state court judge and two federal court judges who had issued rulings adverse to and the Accused in the dissolution litigation. Exs. 105 - 107. In response to the US Attorney's motion to quash one of the federal court judge subpoenas, presented a one-hour oral argument that the judge should be required to testify based upon the Accused's constitutional rights of confrontation and cross-examination. WSBA Hearing Transcript (Ex. 248) at 1405-1459. Beles quashed the subpoenas because they were late "in the extreme" (Ex. 248 at 1435) and because immunity protected judicial officers from being examined about the reasons for their decisions. Exs. 108; 248 at 1437-1439. Beles concluded that the Accused could make his point through permitted written or oral argument based upon evidence and testimony already in the record. Ex. 108.

Also, well after the hearing began, the Accused subpoenaed Phillip Maxeiner ("Maxeiner"), his parents' former CPA, to appear and produce 11 years of and financial records. Ex. 104. The Accused through counsel claimed that it was a tactical decision not to seek these records through discovery during the first seven years after WSBA filed its formal complaint. Ex. 248 at 1662-65. Maxeiner

objected because the subpoena sought confidential financial records of a non-party and because the short notice to produce the voluminous records imposed an undue burden. ER 54. On March 11, 2011, the tenth full day of trial, Beles recessed for 11 weeks to permit the Accused to obtain Maxeiner's compliance with the subpoena. Beles set a firm date of May 31, 2011, 9:00 a.m. to resume. Exs. 108, 109.

Thereafter, the Accused waited until May 19, 2011 to ask the King County court to enforce the Maxeiner subpoena and scheduled a show cause hearing in that court for precisely the time set for the disciplinary hearing to resume, delaying the discipline hearing for several hours. Ex. 111; Ex. 248 at 1940-1978. Maxeiner produced the documents. Ex. 248 at 2020–2090. Beles issued a protective order sealing certain of financial records. Ex. 114.

In all, the WSBA hearing lasted twelve days. Nine witnesses (including the Accused) testified and hundreds of exhibits were admitted. Through counsel, the Accused filed an opening brief and made an opening statement, then joined his counsel in presenting a joint two-hour closing argument. Ex. 248 at 50-115, 2200–2271, 2275-2285.

On July 26, 2011, Beles filed his Findings of Fact, Conclusions of Law and Recommendation that the Accused be disbarred (FFCL). Ex. 116; ER 6 – 62.

While the decision was under review by the WSBA DB, the Accused filed: a motion to amend findings and reopen the proceedings and requested oral argument on the motion (Exs. 118, 122) (both denied: Ex. 121); motions to vacate the protective order over financial records (Exs. 125, 130); two motions for extensions to file his brief (Ex. 127, 134) (granted: Ex. 137); a motion to file an over-length

brief[5] (Ex. 139) (granted: Ex. 142), a motion to file an over-length reply brief[6] (Ex. 145) (denied: Ex. 147), a motion for additional time for oral argument (Ex. 149, granted in part: Ex. 152) and to disqualify a member of the WSBA DB (member recused himself; Ex. 157); and a motion for continuance of oral argument (Ex. 153) (granted: Ex. 155). On review, the Accused raised due process arguments regarding the right to confront witnesses or to exclude hearsay testimony. Exs. 139-140, 148, and 506 at p 14. The 10 participating members of the WSBA DB unanimously adopted the FFCL. Ex. 157. The Accused appealed. Ex. 159.

Before the Washington court, the Accused moved to disqualify the four justices who dissented in *Sanai 2009* (dissenting justices). Ex. 506 at p 15. The Washington court acknowledged the motion:

> It is not the practice of this Court to rule on a motion seeking recusal of a Justice or Justices, but rather to refer the motion for consideration by each respective Justice for which recusal is sought, and allow each Justice to individually and independently make a determination as to whether or not that Justice believes recusal is appropriate. That process was followed with respect to the motion to recuse .... After independent reviews, all four of the Justices determined that recusal was not appropriate, and therefore have declined to recuse from participation in these cases.

Ex. 507, ex. 7.

The Accused sought reconsideration. Ex. 507, ex. 8. The court denied the motion, stating:

> [T]he denial of a motion for recusal is not subject to reconsideration. Moreover, even if it were proper, the motion is untimely. In addition, any decision to recuse in a particular case is the prerogative of the individual justice.

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[5] The Accused sought permission after filing a 115-page brief, exceeding the 35-page limit.

[6] The Accused filed a 33-page reply brief, exceeding the 10-page limit specifically ordered by the WSBA DB. Ex. 137.

Ex. 506, ex. G. Of the four dissenting justices, two eventually participated in the review.

The Accused also moved for leave to file a 132-page opening brief, exceeding the 50-page brief allowed under Washington Rules of Appellate Procedure (WRAP) and an extension of time if the motion were denied. Ex. 507, ex. 4. The court denied leave to file an over-length brief but granted an extension of time. Ex. 507, ex. 5. Through counsel, the Accused filed an opening brief and a preliminary reply brief raising constitutional claims (including an alleged violation of his right to confrontation) and related arguments. Ex. 507, exs. 10, 11. The Accused's counsel presented his case at oral argument.

On June 6, 2013, the Washington court issued a unanimous opinion adopting the WSBA recommendation and ordered the Accused disbarred from the practice of law. Ex. 164. *In re Sanai*, 177 Wash.2d 743, 302 P3d 864 (2013) (*Sanai 2013*).

B. The Accused's Misconduct in Washington.

The FFCL found the following facts and misconduct.[7]

and April 2002 dissolution decree appointed Maxeiner to serve as special master to sell the family home and a vacant lot and divide the proceeds equally between the parties. ER 9.

filed a *pro se* appeal, thus staying a full-price sale of the lot scheduled to close in June 2012. ER 9 – 10.

[7]The judgment, order or determination of discipline shall be sufficient evidence that the Accused committed the misconduct described therein. BR 3.5(b).

1. *Lis Pendens* Notices, 2002-2008.

The Accused made his first appearance for at a June 25, 2002 hearing in Snohomish County Superior Court, at which Judge Thibodeau ordered the stay on the sale lifted by July 2, 2002, unless posted a bond. did not post a bond but, on July 2, 2002, the Accused filed a notice of *lis pendens* in the dissolution and recorded it against the lot. He filed subsequent *lis pendens* notices against the lot and the house the following month. ER 10-11.

The Accused then sought reconsideration of Judge Thibodeau's June 25, 2002 order, effectively staying the vacant lot sale. ER 11.

Through July and August 2002, the Accused obtained a show cause order why a new trial should not be granted based on "new evidence" that had wiretapped conversations from the family home; filed motions for permission to file audiotapes, for a protective order, for an order sealing the audiotapes, for an order to seal court file, and for sanctions against former trial counsel, Kenneth Brewe, (alleging that Brewe had disclosed confidential health care information about in 2001 court filings). The Accused did not appear at the hearing on his sanctions motion. ER 11-12.

Judge Thibodeau denied the Accused's motions (except to allow to remain in the family home without bond pending appeal). In denying sanctions against Brewe, the judge found that no confidential health care information had been disclosed; he awarded and Brewe sanctions against ER 12-13.

In late September 2002, Judge Thibodeau issued orders: immediately disqualifying the Accused from representing requiring to lift the *lis pendens* absent a stay in the Court of Appeals; and prohibiting and the Accused from filing further *lis*

pendens or "taking any further action to delay or obstruct the sale of the vacant lot." ER 12-13.

filed a "*pro se*" appeal of Judge Thibodeau's orders. Thereafter, in defiance of the order disqualifying him from representing the Accused filed at least seven motions in the Court of Appeals to block the vacant lot sale or to challenge his disqualification. Every motion was denied, after which the Accused responded with a "reapplication," a motion to reconsider or a motion to modify. ER 14-15.

While the Accused was losing these motions in the Court of Appeals, he and his brother, filed their own action in US District Court, alleging that had engaged in illegal wiretapping. ER 15.

On February 13, 2003, after the Court of Appeals denied the Accused's request to stay Judge Thibodeau's order that release the *lis pendens* notices, Judge Thibodeau released the notices. However, before that release could be recorded, recorded a new *lis pendens* notice citing his and the Accused's federal wiretap action against . ER 15-16. At the same time, the Accused sought review by the Court of Appeals of Judge Thibodeau's order; that review was denied. ER 16.

In March 2003, Judge Thibodeau ordered to vacate the family home. The Accused appealed to the Washington court; the court denied relief and asked the parties to address whether the Accused could continue representing in light of Judge Thibodeau's disqualification order. ER 16. The Accused then: moved for clarification (denied); refiled his motion for revision of Judge Thibodeau's *lis pendens* ruling (denied); moved for clarification of the Court Commissioner's denial (denied); moved for supersedeas (denied); and moved to modify (denied). ER 16. After the court ruled that the Accused remained

disqualified from acting for and dismissed all pending motions, the Accused moved to modify that ruling. In September 2003, the Washington court unanimously denied all pending motions and sanctioned the Accused and ER 17.

In December 2003, the Washington Court of Appeals affirmed Judge Thibodeau's original decree (except for one term not at issue here). Citing "inappropriate, untimely, and unduly repetitive" motions and errors in the brief the Accused filed for the court sanctioned $10,000 for "extreme intransigence" and "abusing the appellate process." ER 17. The Accused then sought review by the Washington Supreme Court and certiorari in the United States Supreme Court (both denied). ER 17.

Beles found that, by repeatedly filing *lis pendens* notices to cloud title to property the decree ordered sold, and by filing multiple meritless actions and motions in trial and appellate courts solely to impede implementation of court orders, delay proceedings, and burden or harass and Brewe, the Accused knowingly brought frivolous actions, in violation of Washington RPC (WRPC) 3.1; delayed litigation (WRPC 3.2); disobeyed an obligation under the rules of a tribunal (WRPC 3.4(c)); used means with no substantial purpose other than to embarrass, delay or burden a third person (WRPC 4.4(a)); knowingly assisted or induced another to violate the RPCs (WRPC 8.4(a)); engaged in conduct prejudicial to the administration of justice (WRPC 8.4(d)); and willfully disobeyed or violated a court order (WRPC 8.4(j)). ER 13-15, 18-19, 58. In all instances, the Accused acted intentionally and caused actual serious harm to , Brewe, potential purchasers, and the courts. ER 19 - 21.

2. Federal Action against Judicial Officers, 2003-2005.

Four days after the Washington court dismissed the Accused's multiple motions, the Accused sued Judge Thibodeau, three members of the Court of Appeals and the Court of Appeals Commissioner in federal court, alleging that Judge Thibodeau's order disqualifying him from representing and the other defendants' denial of relief from that order violated and his civil rights. The Accused also sought a temporary restraining order (TRO) staying all proceedings in the dissolution and moved to overturn the rulings disqualifying him. ER 22. After the court denied his first TRO request, the Accused reapplied two more times. ER 23.

After the federal court dismissed the case for lack of subject matter jurisdiction, the Accused moved for reconsideration, filed a fourth request for a TRO and appealed to the Ninth Circuit. The trial court denied the motions. In August 2005, the Ninth Circuit affirmed. ER 24.

Beles found that, in suing the judges who had ruled against him and filing meritless motions in that proceeding, the Accused repeatedly filed frivolous claims, in violation of WRPC 3.1; used means with no purpose other than to embarrass, delay, or burden another (WRPC 4.4); and engaged in conduct prejudicial to the administration of justice (WRPC 8.4(d)). ER 58. The Accused acted intentionally and caused actual serious harm by burdening the courts and defendant judicial officers. ER 25.

3. State and Federal Wiretap Lawsuits (including Defamation ERISA and claims), 2002-2005.

In August 2002, the Accused, two of their siblings, and sued , Internal Medicine and Cardiology practice (IMC) and IMC employee Mary McCullough in King County

Superior Court, alleging illegal wiretapping from the IMC offices (located in King County). ER 26. The Accused sought over $6 million in damages and a $12 million pre-judgment writ of attachment. However, neither the Accused nor other plaintiffs produced any evidence of wiretapping from the IMC offices; there was no basis for King County jurisdiction. ER 27.

In October 2002, the Accused filed an amended complaint adding new attorney, William R. Sullivan, and Sullivan's law firm (the firm) as defendants, alleging that they had disclosed confidential healthcare information about ER 27. (One week earlier, Snohomish County Judge Thibodeau had rejected these allegations as frivolous and sanctioned and the Accused for bringing them against Brewe. ER 27.) The amended complaint also asserted defamation against , Sullivan, and the firm based upon grievances Sullivan and had made to WSBA about the Accused's conduct. The defamation claim was frivolous: former RLD 12.11(b) (current ELC 2.12) protected communications to the WSBA as "absolutely privileged, and no lawsuit predicated thereon may be instituted against any grievant, witness, or other person providing information." ER 27. Nevertheless, the Accused reasserted this defamation claim in his third amended complaint filed in June 2003. ER 39.

The same day they filed their amended complaint in King County, the Accused and other plaintiffs sued in US District Court for $16 million, again alleging illegal wiretapping. The Accused sought a TRO freezing assets but Judge Thomas Zilly denied the request (and all other injunctive relief he sought throughout the litigation). In addition to wiretapping, the Accused alleged ERISA violations against IMC for (a beneficiary of IMC's retirement plan)

as well as himself (as a "derivative beneficiary"). Despite Judge Zilly's ruling that the Accused had no standing to make such a claim, the Accused continued asserting ERISA claims in his own name. Judge Zilly eventually dismissed all of the ERISA claims and sanctioned the Accused and others for bringing claims against McCullough. ER 29-30.

While a defense motion to stay the federal case pending conclusion of the state court action was pending, the Accused and filed a second wiretap case in federal court against and IMC, alleging the same defamation claims pending in the state court wiretap case. ER 30 - 31.

The Accused and used the federal wiretap cases as the basis for recording three separate *lis pendens* notices against the vacant lot and another *lis pendens* notice against the family home. Judge Zilly ordered the release of the notices in April 2003; three days later, filed a new *lis pendens*. ER 31.

At a May 15, 2003 hearing, the parties stipulated that the Accused and other plaintiffs would dismiss the Snohomish County wiretap case and assert all remaining claims in the now-consolidated federal cases. Judge Zilly ordered all *lis pendens* released and prohibited the Accused and other plaintiffs "from filing any new Notice of *Lis Pendens* affecting the vacant lot." He ordered, "Each of the plaintiffs herein shall cease and desist from taking any further action whatsoever to delay or obstruct the sale of the aforesaid real property." ER 32.

Five days later, the Accused filed a partition action against in King County and recorded another *lis pendens* against the vacant lot (discussed below). ER 33. The Accused also moved for clarification of Judge Zilly's order without informing the court that he had already filed a new *lis pendens*. Judge Zilly denied the motion. ER 33. The Accused

appealed to the Ninth Circuit (later dismissed for lack of jurisdiction). ER 32. In July 2003, the Accused recorded another *lis pendens* against the vacant lot, also based upon the partition case.

Finding that the Accused and "have made a mockery and are making a mockery of the legal system," Judge Zilly found them in contempt for new *lis pendens* notices and imposed sanctions and attorney fees. ER 34. The Accused appealed; the Ninth Circuit later affirmed. ER 34.

In June 2003, the Accused and other plaintiffs filed an amended complaint in the federal action alleging 17 causes: against McCullough, and IMC for illegal wiretapping and ERISA violations (the Accused reasserted his claim to be a beneficiary of the IMC retirement plan); and against Sullivan, and the firm for defamation (again, based on the complaints to WSBA). ER 38-39. The Accused issued eight subpoenas for and McCullough's financial information, including one to McCullough's credit union, seeking personal account and credit card statements. In doing so, the Accused failed to provide prior notice to McCullough's counsel, as required by the federal discovery rules. Beles found not credible the Accused's testimony that his failure to provide notice was simply a mistake. ER 38.

Judge Zilly quashed the credit union subpoena and ordered the parties to stipulate to a protective order. The Accused frustrated this process by providing a telephone number he did not answer and then accusing opposing counsel of failing to call him. ER 35.

A federal magistrate (to whom all discovery matters were referred) later imposed a protective order, ordering the Accused to issue no additional financial records subpoenas without prior court approval, to return all documents produced and to retain no copies. ER 36. The

Accused defied this order by using some of the documents in the state court litigation and appeals.[8] He justified his action by stating, "Once the plaintiffs received the discovery, plaintiffs were free to use it. [The magistrate's] order to return the discovery was too late. The cat is out of the bag." ER 36. In further defiance of the order, the Accused issued new subpoenas "as attorney for Plaintiff (his sister) for financial documents related to a bond issued by insurer, again failing to provide the required prior notice to opposing counsel. ER 37. Judge Zilly sanctioned the Accused for issuing this subpoena and disqualified him from representing his sister. ER 37.

By November 2003, Judge Zilly had dismissed the ERISA and defamation claims. The Accused appealed; the Ninth Circuit eventually affirmed. ER 39.

In May 2004, the Accused moved for leave to file a fourth amended complaint; Judge Zilly denied the motion. ER 39. Ten days later, the Accused filed a third federal wiretap action against Sullivan, the firm, McCullough, and Maxeiner, again alleging defamation and ERISA violations (the claims Judge Zilly had previously dismissed). ER 40. In October 2004, Judge Zilly dismissed the Accused's defamation claims as "substantially identical" to the claims he had dismissed in the consolidated federal wiretap case in November 2003. Judge Zilly also dismissed the ERISA claims on summary judgment as without basis and "nearly identical" to the claims he had dismissed ER 44. Judge Zilly sanctioned the Accused, and for asserting frivolous causes of action and for engaging in abusive and outrageous

[8] Later, the Accused also offered some of these records in the WSBA hearing. ER 55.

conduct that was burdensome, improper, and disrespectful. ER 45. The Accused appealed; the Ninth Circuit dismissed the appeal. ER 45.

In orders issued in May and July 2005, Judge Zilly dismissed all of the plaintiffs' remaining claims against McCullough, and IMC, noting that the plaintiffs had provided no evidence of McCullough's or IMC's involvement in any alleged wiretapping. In his July 1, 2005 order dismissing all remaining claims with prejudice, Judge Zilly observed that the Accused and other plaintiffs had committed an "indescribable abuse of the legal process" by engaging in conduct that was "outrageous, disrespectful and in bad faith," "the most abusive and obstructive litigation tactics this Court has ever encountered." ER 41.

The Accused filed an emergency motion to stay Judge Zilly's order, arguing that it was "void in its entirety and therefore may be ignored." ER 43. The Accused petitioned for a writ of mandamus, which the Ninth Circuit denied (ER 43), and filed a notice of "preliminary injunction appeal," which the Ninth Circuit found frivolous because Judge Zilly's order in no way resembled a preliminary injunction. Beles found that the Accused characterized Judge Zilly's order as an injunction in order to make it appealable, solely for purposes of delay. ER 43.

The Accused engaged in other disturbing behavior in connection with the federal actions. He failed to appear for depositions or to respond to discovery; he never produced alleged wiretapping equipment despite multiple discovery requests and motions to compel. ER 41-42. Also, while suing for allegedly wiretapping his telephone calls, the Accused arranged for a Yamhill County sheriff's deputy to secretly tape record telephone calls placed to by the Accused's sister. The Accused arranged for these clandestine recording sessions to take

place in his Yamhill County office, unbeknownst to his boss, County Counsel John Gray. ER 40; Tr. 363.

In November 2005, Judge Zilly ordered the Accused, , and to pay $273,437 in attorney fees to the defendants. In March 2007, Judge Zilly awarded McCullough $14,041 in attorney fees against the Accused, and others based on their meritless ERISA claims. ER 42. Eventually, after the sale of the family home generated over $800,000 in net proceeds, the defendants collected approximately $314,000 from share. ER 18, 43-44.

Beles found that, by signing or filing *lis pendens* notices in violation of a federal court order, the Accused willfully disobeyed a court order, in violation of WRPC 8.4(j), knowingly disobeyed an obligation under the rules of a court (WRPC 3.4(c)), and engaged in conduct prejudicial to the administration of justice (WRPC 8.4(d)). ER 59. By filing defamation actions against Sullivan and the firm in multiple courts, the Accused brought frivolous claims (WRPC 3.1), violated a duty under the ELCs in connection with a disciplinary matter (WRPC 8.4(l)), used means with no purpose other than to embarrass, delay, or burden another (WRPC 4.4), and engaged in conduct prejudicial to the administration of justice (WRPC 8.4(d)). ER 59.

By issuing a financial records subpoena without notice to defendants and after being ordered not to do so without prior court approval, the Accused knowingly disobeyed an obligation under the rules of a tribunal (WRPC 3.4(c)) and engaged in conduct prejudicial to the administration of justice (WRPC 8.4(d)). ER 59.

By filing similar claims multiple times in multiple courts, failing to appear for deposition and otherwise prolonging the proceedings, the Accused delayed litigation (WRPC 3.2), used means with no purpose

other than to embarrass, delay, or burden another (WRPC 4.4), and engaged in conduct prejudicial to the administration of justice (WRPC 8.4(d)). ER 59.

Beles found that, in all instances, the Accused acted intentionally and caused actual serious harm to parties and the courts. ER 45-47.

4. Partition Action, 2003-2006.

Two weeks after the Washington court refused to stay all post-dissolution orders and five days after Judge Zilly ordered him to release all *lis pendens* notices and desist from any action to obstruct sale of the vacant lot, the Accused filed a partition action and recorded another *lis pendens* notice in King County Superior Court. ER 32-33, 47, 59.

After the defendants moved to dismiss, the Accused requested a continuance to conduct discovery, "to see if we could turn up any evidence of tampering with the telephone wires or recording devices." Ex 248 at 1523-24; ER 48. Without evidence of wiretapping at IMC (located in King County), the Accused named IMC in the partition action solely as a pretext to file outside of Snohomish County, where he had already lost several motions. ER 49.

The King County court transferred the case to Snohomish County. In December 2003, Snohomish County Judge Wynne dismissed the case as "wholly frivolous" and noted that the filing in King County was a blatant act of forum-shopping. ER 50. Judge Wynne awarded $13,000 in attorney fees and imposed $2,500 in sanctions against the Accused and for forum-shopping and misrepresentations to the court. ER 50. The Accused appealed; in January 2006, the Court of Appeals affirmed, finding that the appeal itself was frivolous and brought solely for purposes of delay. ER 50-51.

By filing the partition action solely to re-litigate the property division under the dissolution decree, and to record new *lis pendens* notices in violation of state and federal court orders forbidding such obstruction, the Accused brought a frivolous action (WRPC 3.1); delayed litigation (WRPC 3.2); knowingly disobeyed an obligation under the rules of a tribunal (WRPC 3.4(c)) and willfully violated a court order (WRPC 8.4(j)). ER 59. The Accused acted intentionally and caused actual serious harm to and the courts. ER 51.

Collectively, the Accused's repeated violations of court orders, repeated filing of pleadings, motions or appeals without merit, repeated filing of similar claims in multiple courts, delaying enforcement of his parents' dissolution decree and forcing to defend in multiple courts and multiple grounds, constitute conduct demonstrating unfitness to practice law, in violation of WRPC 8.4(n). ER 52-53, 60.

5. The Accused's Conduct at WSBA Discipline Hearing, February-June 2011.

Beles made specific findings regarding the Accused's conduct during the WSBA hearing. Noting that the Washington court had previously instructed in the Accused's case that "subpoenas asking judges to justify their reasoning are clearly disfavored, if not outright barred by case law" (*Sanai 2009*, 225 P3d at 209), Beles concluded that the Accused knew it was improper to subpoena Judges Thibodeau, Zilly and Beezer to explain why they disagreed with him in the dissolution litigation and appeals. ER 53.

Beles found that the Accused's delay in attempting to obtain Maxeiner's compliance with the records subpoena until the 11-week recess had nearly concluded, and then scheduling an appearance on the matter in state court for the very time the WSBA hearing was set to

resume, were "the latest in a long line of delaying tactics and another example of [the Accused's] unilateral disregard for orders he felt he could simply ignore." ER 54-55.

In direct defiance of federal protective order prohibiting him from retaining copies of records he had improperly obtained by subpoena in 2003, the Accused introduced at the hearing a protected financial record, claiming that it proved that had hidden assets. ER 55.

C. Oregon Reciprocal Discipline Proceedings, 2014-2015.

1. Appointment of Trial Panel.

This court referred this matter to the Disciplinary Board (DB) in May 2014. In July 2014, the Bar requested the appointment of a trial panel to hear the matter; the DB Regional Chairperson for Region 4 (Region 4 chair) appointed a three-member panel from DB members located in Region 4. The Accused neither objected to the appointment by the Region 4 chair nor exercised a challenge (for cause or peremptory) against any of the panel members.

The three-day trial concluded February 4, 2015. The panel chair settled the transcript by order dated March 12, 2015 and the parties filed post-hearing briefs and closing arguments on April 3, 2015.

On April 6, 2015, the DB State Chairperson (state chair) notified the parties that the panel appointment by the Region 4 chair may have been a potential procedural error but that, finding no prejudice to either party, she ratified the appointment. DB Record, doc. 54. The Accused objected, claimed prejudicial error and requested a new hearing before a new trial panel. DB Record, doc. 58. After giving the Accused the opportunity to brief the issue, the state chair denied the objection. DB

Record, docs. 60, 65. The Accused moved for reconsideration, which the state chair denied. DB Record, doc. 66.

2. *Pro Hac Vice* Application.

Two days before trial was set to begin, the Accused moved to admit *pro hac vice* to represent him. certificate of compliance for *pro hac vice* admission revealed that he was the subject of a pending disciplinary case in California but claimed that he had "completely prevailed in the proceedings in October of 2014" and that the California Bar judge "has been drafting his order of dismissal and complete exoneration." Ex. 501. The trial panel chairperson ("panel chair") denied *pro hac vice* admission.

The Accused sought reconsideration at trial. Tr. 97-135. In response, the Bar offered a written declaration and testimony of California Bar Senior Trial Counsel Brooke A. Schafer, who testified that: of the nine disciplinary counts then pending against five arose from the Washington marital dissolution proceedings; sworn characterizations that he had prevailed and that a dismissal order was forthcoming were untrue. Ex. 274; Tr. 538-40, 542. The panel denied the Accused's motion to reconsider. Tr. 154.

3. Objections to Bar's Evidence.

The panel chair admitted the Bar's exhibits over the Accused's objections (made both during and post-hearing). The bulk of the Bar's exhibits (Exs. 1 - 164) comprised the record of the WSBA disciplinary proceeding (pleadings, orders, opinions, notices, and correspondence from July 2004 - June 2013). Exhibit 248 was a CD containing the transcript of the 12-day hearing.

Exhibits 165 - 239, 241 - 247, 250 - 257, and 262 - 268 were pleadings, notices, orders, and other documents filed in the dissolution litigation and appeals in the state and federal courts. These documents had been admitted into evidence by Beles and were thus part of the record of proceedings that resulted in the Accused's disbarment in Washington.

V. ARGUMENTS

A. The WSBA proceedings afforded the Accused notice and the opportunity to be heard at both the trial and appellate levels.

In this reciprocal discipline case, the Accused bears the burden to establish that the WSBA proceeding lacked in notice and opportunity to be heard. BR 3.5(f). Where the rules of the other jurisdiction satisfy the requirements of due process and the adjudicatory authority complied with those rules, this court finds that the attorney received sufficient notice and opportunity to defend. *In re Devers,* 317 Or 261, 264, 855 P2d 617 (1993). The record clearly establishes that the WSBA proceedings satisfied due process standards applicable in a lawyer disciplinary proceeding.

"The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 US 319, 333, 96 S Ct 893, 902, 47 L.Ed.2d 18, 32 (1976), *quoting Armstrong v. Manzo*, 380 US 545, 552, 85 S Ct 1187, 1191, 14 L. Ed.2d 62, 66 (1965). With respect to attorney discipline, this court has held that

> The 'essential elements' of due process in the context of a lawyer discipline proceeding are notice and an opportunity to be heard and defend 'in an orderly proceeding adapted to

> the nature of the case before a tribunal having jurisdiction of the cause.'

In re Devers, 328 Or 230, 232, 974 P2d 191 (1999), *citing In re J. Kelly Farris*, 229 Or 209, 214, 367 P2d 387 (1961).

Here, the Accused does not argue that the WSBA proceeding lacked in notice. He contends that he was denied the opportunity to be heard. However, none of the elements he describes as error infringed on his opportunity to defend in an orderly proceeding before an adjudicative body that complied with procedural rules adopted to ensure due process.

1. The Accused was not denied any applicable right to confront witnesses.

The Accused argues that admitting copies of judicial orders and rulings, without allowing him to cross-examine the judges on the basis of those rulings, violated his right to confront the witnesses against him. He cites the Sixth Amendment to the US Constitution, which ensures that, "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

The Accused's argument is incorrect for two reasons. First, no confrontation clause right exists in attorney disciplinary proceedings.[9] Bar disciplinary proceedings are not criminal prosecutions.[10] *In re Griffith*, 304 Or 575, 587, 748 P2d 86 (1987). There is no confrontation clause right in disbarment proceedings. *Rosenthal v. Justices of the*

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[9] The Accused cites *In re Crum*, 103 Or 296, 204 P 948 (1922), but that case is inapplicable because it was decided under Bar procedural rules that were much more akin to rules of a criminal trial than the BRs in effect in recent decades.

[10] In both Oregon and Washington, bar discipline proceedings are *sui generis*, neither civil nor criminal. BR 1.3; ORS 9.529; ELC 10.14(a).

Supreme Court of California, 910 F2d 561, 565 (9th Cir. 1990) *cert den*, 488 US 1087 (1991).

Second, even if the Confrontation Clause did apply in an attorney discipline case, it would pertain only to testimonial evidence. *State v. Cook*, 340 Or 530, 542, 135 P3d 260 (2006) ("Conversely, if a hearsay statement is not 'testimonial,' then the Sixth Amendment confrontation clause does not apply." (citations omitted)). Records created for the purpose of administering an entity's affairs, rather than proving some fact at trial, are not testimonial in nature. *See, State v. Tryon*, 242 Or App 51, 54-57, 255 P3d 498 (2011) (holding that an affidavit of service for a restraining order was not testimonial), citing *Melendez-Diaz v. Massachusetts*, 557 US 305, 323-24, 129 S Ct 2527, 2539-40, 174 L.Ed.2d 3 (2009). Thus, admission of a prior court order does not implicate the Confrontation Clause because it is not testimonial; the order memorializes the court's action. The orders and rulings by Judges Thibodeau, Zilly and Beezer served the same purpose as the certificate of service in *State v. Tryon*: they showed that the Accused had notice of the court's rulings when he defied them. In adopting Beles's FFCL, the Washington Supreme Court agreed, finding that either the orders or rulings were not offered for the truth of the matter, or that the truth of the matter was so clearly established by other evidence that any possible confrontation error was harmless. *Sanai 2013*, 302 P3d at 873-76.

Finally, like Oregon BR 5.1(a), Washington ELC 10.14(d)(1) permits a hearing officer to admit and give effect to evidence, including

hearsay,[11] that possesses probative value commonly accepted by reasonably prudent persons in the conduct of their affairs, and to exclude irrelevant or immaterial evidence. The Accused sought to cross-examine the judges so they would "justify themselves" (Ex. 248 at 33) and "acknowledge that the new facts create doubt about the correctness of their rulings." *Sanai 2013*, 302 P3d at 876 (quoting the Accused's post-hearing motion). However, the Washington court had already ruled, in *Sanai 2009*, that "subpoenas asking judges to justify their reasoning are clearly disfavored, if not outright barred by case law." *Sanai 2009*, 225 P3d at 208-09. The correctness of judicial rulings in the post-dissolution litigation was irrelevant to whether the Accused's conduct violated Washington's ethics rules. *Sanai 2013*, 302 P3d at 876.

Hearing Officer Beles complied with WSBA procedural rules and prior appellate rulings in the case itself when he quashed the Accused's subpoenas. This action did not deny the Accused the right to be heard in an orderly proceeding adapted to the nature of the case.

2. Imposition of a reasonable page limit by the Washington Supreme Court did not deny the Accused due process.

Like this court, the Washington court imposes limits on the length of briefs and rules for how error shall be assigned. *See*, ORAP 5.05(b)(i)(A)-(C) and WRAP 10.4(b); ORAP 5.45(2) and WRAP 10.3(a)(4), respectively. This court has held that the imposition of page limits does not present an obstacle to due process.

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[11] Although BR 5.1(a) does not explicitly allow hearsay, hearsay evidence is admissible in Bar proceedings if it satisfies the standards of the rule. *In re Taylor*, 319 Or 595, 602, 878 P2d 1103 (1994), *citing Reguero v. Teacher Standards and Practices*, 312 Or 402, 417, 822 P2d 1171 (1991) (discussing admissibility of hearsay evidence in administrative proceedings.

> The exercise of professional skill and judgment often requires a lawyer to pick and choose among arguments or theories, and a death penalty appeal is no exception to that requirement. *See, Smith v. Robbins*, 528 US 249, 288, 120 S Ct 746, 145 L.Ed.2d 756 (2000) (appellate counsel 'need not (should not) raise every non-frivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal.'). Effective appellate advocacy requires counsel to make those choices.

Pratt v. Armenakis, 335 Or 35, 40, 56 P3d 920 (2002).

The Accused exercised his right under WRAP 10.4(b) to seek permission to file an over-length brief "for compelling reasons." The fact that the Washington court did not find his reasons compelling and denied the request does not render the page-length limitation a denial of due process.

Additionally, the Accused's assertion that the Washington court would not consider any factual assignment of error not preserved in a particular manner does not appear to be supported by Washington case law. *See, Daughtry v. Jet Aeration Company*, 91 Wash.2d 704, 709-10, 592 P2d 631, 633-34 (1979) (ruling on a finding of fact even though the petitioner was not in strict compliance with WRAP requirements for assigning error). Here, the Washington court did not state that the Accused waived his right to assign error to the findings. Instead, it declined to examine them because the Accused did not present supporting arguments. *Sanai 2013*, 302 P3d at 873.

The Oregon panel found that the Washington court did not reject the Accused's assignments of error due to a page-limitation technicality. Instead, the Washington court concluded, in light of the imperfect assignments of error, that the record of the 12-day hearing (containing over 2,300 pages of transcript and nearly 500 documents) fully supported the FFCL. Trial Panel Op at 12; ER 78.

3. Prior review by the same judicial body does not impair the impartiality of the tribunal.

While the FFCL was on review by the Washington Supreme Court, the Accused twice requested that the four dissenting justices in *Sanai 2009* recuse themselves from hearing the matter, alleging that they were biased against him. Ex. 507, exs. 6, 8. By the time *Sanai 2013* was argued, one of the justices had recused himself and another had retired; the other two (Justices Fairhurst and Johnson) declined to recuse themselves.

The Washington State Code of Judicial Conduct requires judges to disqualify themselves from proceedings in which their impartiality might reasonably be questioned, including but not limited to existence of *personal* bias or prejudice about a party or a party's lawyer; *personal* knowledge of facts in dispute; *personal* relationship to a party, a party's lawyer or a material witness; or other *personal* interest that could be substantially affected by the proceeding (emphasis added). Judges are also required to disqualify themselves when they, while a judge or judicial candidate, have made a public statement (other than in a judicial proceeding or opinion) that commits them to reach a particular result or rule in a certain way in the controversy. Rule 2.11(A), Wash Code of Judicial Conduct. These and other circumstances requiring disqualification describe situations in which the judicial officer has a personal interest, a personal relationship, or a public commitment to partiality. The Accused has provided no evidence suggesting that any such personal interest or partiality required Justices Fairhurst or Johnson to recuse themselves.

Furthermore, the Accused was not entitled to disqualify any justice who had previously opined in his case. Although Washington statute does not provide a procedure for recusal of appellate judges, the

Washington Court of Appeals has applied to the appellate bench the standards of recusal for trial judges under RCW 4.12.050. *See, State v. Carlson*, 66 Wash. App. 909, 833 P2d 463 (1992). The statute restricts the party's ability to seek recusal to a time before the subject judge has "made any ruling whatsoever in the case." This timeliness requirement extends to cases that have been tried, reversed on appeal, and remanded for a new trial before the original judge. *See, State v. Belgarde*, 119 Wash.2d 711, 837 P2d 599 (1992) (defendant's conviction was reversed and remanded for new trial before the judge who presided at the first trial; defendant's affidavit of prejudice was untimely because the judge had already ruled in the case). Justices Fairhurst and Johnson had already ruled in this matter and the Accused's motion to recuse was not timely.

In the Oregon hearing, the Accused offered the declaration and testimony of former Washington Supreme Court Justice Richard B. Sanders, who described the past protocol and practices of the Washington court.[12] Ex. 506, ex. A. Justice Sanders, who charged the Accused $385 per hour to serve as an expert witness (Tr. 650), conjectured that one of the dissenting justices very likely served as the "assignment justice" in *Sanai 2013* and would therefore have been in a position to influence the other eight justices to join in the unanimous decision to disbar the Accused. Tr. 596-99, 601. The Oregon panel properly found that Justice Sanders's belief was unsupported by any factual evidence, either direct or circumstantial; his opinions as to claimed denial of due process were "purely speculation, carefully

[12] Justice Sanders participated in *Sanai 2009*, joining the majority opinion reversing the first disbarment order and remanding for a new hearing. He had left the court in 2011, before *Sanai 2013* was heard. Tr. 575-76.

couched in terms of probability and inference." Trial Panel Op at 17; ER 84.

Beyond the speculation of a paid expert, the only evidence of "bias" on the parts of Justices Fairhurst or Johnson is that, in the usual course of proceedings, they found against the Accused and in favor of disbarring him in 2009.[13] There is no evidence or probability that any member of the Washington court had a personal interest in the proceeding or bias against the Accused. The panel correctly concluded that the Accused was not denied an impartial review by the Washington Supreme Court.

B. The Oregon proceedings afforded the Accused the opportunity to be heard on the factual and legal issues raised under BR 3.5.

1. Procedural error in the appointment of the trial panel did not result in any prejudice to the Accused.

When the Supreme Court refers a reciprocal discipline matter to the DB for hearing, "a trial panel appointed by the State Chairperson shall make a decision concerning the issues submitted to it." BR 3.5(g). Under BR 2.4(e)(6) (describing the duties of the state chair), the state

[13] The Accused cited multiple cases to illustrate that structural due process error occurs when an objective observer would see the probability of judicial bias. However, these cases involved obvious personal interests by the subject judges and are therefore inapplicable here. For example, in *Tumey v. Ohio*, 273 US 510, 47 S Ct 437, 71 L.Ed. 749 (1927), a village mayor who served as a judge (without a jury) received a portion of the fines he imposed; this direct pecuniary interest in finding guilt indisputably deprived defendants of due process. In *Caperton v. A.T. Massey Coal Company, Inc.*, 556 US 868, 129 S Ct 2252, 173 L.Ed.2d 1208 (2009), a state appellate court judge should have recused himself when the CEO of defendant Massey had donated $3 million to his election campaign for that appellate seat after a $50 million judgment had been awarded against Massey and it was likely that Massey would appeal in that court. A campaign contribution of this magnitude and the temporal relationship between the judge's election and the pending case created too high a probability of actual bias to be constitutionally tolerable.

chair may appoint DB members from *any region* to serve on trial panels as may be necessary to resolve matters submitted to the DB.

Here, the state chair did not appoint the trial panel; instead, the Region 4 chair made the appointments. Region 4 is the region in which the Accused practiced law and worked as Yamhill Deputy County Counsel and County Counsel from 1999 – 2013 (almost his entire legal career to that point).[14] Tr. 355, 713. Thus, had the state chair appointed the panel, members very likely would have been selected from the Region 4 pool, given the Accused's long-standing professional ties to Yamhill County. Indeed, the state chair ratified the appointment from Region 4.

More importantly, upon appointment of the trial panel, the Accused did not exercise his right to make a peremptory challenge or any challenge for cause as provided under BR 2.4(g). The Accused neither objected to nor expressed concern regarding the Region 4 chair's appointment of the panel in any pretrial matter, during trial, at the close of trial, in his written closing argument or in making objections to the transcript. Indeed, there is no evidence the Accused either perceived or believed that the panel could not conduct a fair hearing. In fact, on the first day of hearing, two panel members disclosed on the record their personal acquaintances and/or "fairly good" friendships with six of the Accused's character witnesses. Tr. 86-87. Appointing a panel from Region 4 arguably worked to the Accused's advantage.

The Accused cites *In re Hendrick*, 346 Or 98, 208 P3d 488 (2009) for the proposition that a new trial is required because appointment by the Region 4 chair resulted in an improperly constituted trial panel. In

[14] By the time the trial panel was appointed in July 2014, the Accused had left the Yamhill County Counsel's Office and maintained his office and residence Clackamas County (Region 7).

Hendrick, the DB denied an attorney the right to exercise a peremptory challenge when, after the first trial panel in the case was dismissed due to the equivalent of a mistrial, the DB appointed a new three-person panel. Because the attorney had already exercised a peremptory challenge when the first panel was appointed, the DB would not allow him to exercise another peremptory with respect to the second panel. On appeal, the court found the DB erred in denying the attorney a peremptory challenge when faced with a completely new panel, effectively rendering him powerless to remove any member in the absence of cause. 346 Or at 106-07. Because the attorney's case was not heard by a properly constituted trial panel, a new trial before a new panel was warranted. 346 Or at 107.

To the extent that the panel in this case was not properly constituted, the "impropriety" stems solely from a procedural error in the appointment of members from the Region 4 pool by the Region 4 chair, rather from *any* region by the state chair. Unlike *Hendrick*, there was no member on the panel who the Accused had the right to remove but was prevented from doing so. The alleged impropriety did not deny the Accused any procedural right or otherwise restrict his ability to participate in the composition of a panel whose impartiality he could trust.

2. Denial of *pro hac vice* application did not infringe on due process.

In a lawyer discipline proceeding, due process principles do not require that the attorney be represented by counsel. *See, In re Harris*, 334 Or 353, 364-65, 49 P3d 778 (2002) (rejecting argument that an indigent attorney has a constitutional right to appointed counsel; court disbarred *pro se* attorney).

In October 2014, the panel chair ordered the hearing to commence on February 2, 2015. Noting that the date approached the end of the time frame in which the hearing could be held pursuant to BR 5.4 (i.e., before February 12, 2015), he nevertheless chose it to accommodate the Accused and his counsel, Michael A. Colbach. The panel chair warned that no continuance could be granted absent a showing of compelling necessity. BR 2.4(h). Pre-hearing Meeting Order, Oct. 16, 2014; DB Record, doc.12.

Two weeks before the trial date, Colbach moved to withdraw, citing a non-waivable conflict. The Accused had the opportunity to object but did not do so. DB Record, doc. 21. Three days before trial, the Accused moved for *pro hac vice* admission of his brother a member of the State Bar of California. Ex. 501.

Appearance as *pro hac vice* counsel is a privilege, not a right. *Tahvili v. Washington Mutual Bank*, 224 Or App 96, 109, 197 P3d 541 (2008). A court shall grant a *pro hac vice* application if it satisfies the requirements of UTCR 3.170 (setting out standards and procedures for granting and revoking *pro hac vice* status), unless the court determines for good cause shown that granting the application would not be in the best interests of the court or the parties. UTCR 3.170(3). To determine whether good cause is shown, the court may examine the totality of the circumstances; an adversarial showing by a proponent or opponent of the application is not required. *Tahvili,* 224 Or App at 113.

pro hac vice application materials disclosed that he was subject to pending discipline proceedings in California. Ex. 501. The charges included five counts alleging ethical misconduct in his parents'

dissolution proceedings, the same matters at issue in the Oregon reciprocal discipline proceeding against the Accused.[15]

Furthermore, the Bar had notified the Accused and the panel chair that it was attempting to subpoena to testify at trial and that, if he appeared in Oregon, the subpoena would be served, necessitating his withdrawal and possibly delaying the trial. DB Record, doc. 26 at 7-8.

The panel chair cited both of these factors in denying the Accused's motion to admit *pro hac vice.* "Under the circumstances, it would not be in the best interest of the disciplinary process – including the trial panel and the parties . . . – to allow ... to be admitted *pro hac vice*." DB Record, doc. 40.

Trial panel chairs are required under BR 2.4(h) to address issues that may facilitate an efficient hearing and to oversee the orderly conduct of the hearing. The panel chair fulfilled this responsibility and satisfied the principles of UTCR 3.170(3) when he denied application for *pro hac vice* admission for good cause shown.

The panel's rejection of last-minute *pro hac vice* application was proper and did not result in a due process violation when the Accused thereafter proceeded *pro se*.

3. The trial panel properly admitted the Bar's exhibits over the Accused's objections.

Trial panels may admit evidence that possesses probative value commonly accepted by reasonably prudent persons in the conduct of their affairs. A trial panel should exclude incompetent, irrelevant,

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[15] attempted to minimize the California proceedings by stating in the written materials, "I completely prevailed in the proceedings in October 2014, and the State Bar Court Judge . . . has been drafting his order of dismissal and complete exoneration." Ex. 501. However, California State Bar trial counsel testified that this was not true. Ex. 274; Tr. 538-40, 542.

immaterial and unduly repetitious evidence. BR 5.1(a). However, no error in admitting or excluding evidence shall invalidate a trial panel decision unless, upon a review of the record as a whole, this court determines that denial of a fair hearing occurred. BR 5.1(b).

This court referred this matter to the DB for the purpose of taking testimony on the two issues set out in BR 3.5(c): whether the WSBA discipline proceeding was lacking in notice and opportunity to be heard; and whether the Accused should be disciplined in Oregon for misconduct. BR 3.5(c)(1) and (2). Records of the WSBA disciplinary proceeding are clearly competent, relevant and material to the issue whether the Accused had notice and opportunity to be heard. Accordingly, the Bar introduced, and the panel properly admitted, exhibits comprising the record of the WSBA proceeding, beginning with the Formal Complaint (Ex. 2) through the Washington Supreme Court Order of Disbarment (Ex. 164), and including the transcript (on CD) of the 12-day hearing (Ex. 248). Tr. 189, 434. As to the issue whether the Accused should be disciplined in Oregon, material evidence includes exhibits and testimony relevant to factors under the ABA *Standards for Imposing Lawyer Sanctions* and Oregon case law: the Accused's mental state; the extent to which his misconduct resulted in actual or potential injury to his client, the public, the courts or the profession; and aggravating or mitigating factors. Thus, the Bar offered, and the trial panel properly admitted, numerous exhibits relating to the Accused's conduct in the dissolution proceeding in Snohomish County, the multiple *lis pendens* notices he filed or recorded, the legal actions he filed in federal and state courts, and his appeals of adverse decisions or rulings in those matters. Tr. 434. Each of these exhibits was obtained from the WSBA evidentiary record.

The Accused made a blanket objection to nearly all of the Bar's exhibits; the panel chair invited the Accused to make written objections to any of the Bar's individual exhibits in his post-hearing memoranda. Tr. 748-50. The Accused reiterated his blanket objections, but the panel did not reverse its decision to admit the Bar's exhibits. Trial Panel Op at 18 – 20; ER 84-86.

The panel did not err in admitting evidence relating to the WSBA disciplinary proceedings or to standards for imposing sanction.

C. The trial panel properly found that the Accused should be disbarred in Oregon.

The FFCL, adopted by the Washington court in *Sanai 2013*, is sufficient evidence that the Accused committed the misconduct described therein. BR 3.5(b). The Accused may not challenge in this proceeding the facts found in Washington. *In re Devers*, 317 Or 261, 264-65, 855 P2d 617 (1993). As in most reciprocal discipline cases, the Accused's acts violated the rules of both states. However, in determining appropriate sanction, this court focuses on the misconduct under Oregon's rules. *See, Devers,* 317 Or at 265.

The FFCL establishes that Accused knowingly brought legal proceedings, asserted positions therein, and took other action without a non-frivolous basis in law or fact, in repeated violation of Oregon RPC 3.1; knowingly disobeyed an obligation under the rules of a tribunal, in repeated violation of RPC 3.4(c); used means with no substantial purpose other than to embarrass, delay, harass or burden a third person, in repeated violation of RPC 4.4(a); knowingly violated or assisted another to violate the rules of professional conduct, in violation

of RPC 8.4(a)(1); and engaged in conduct prejudicial to the administration of justice, in repeated violation of RPC 8.4(a)(4).

1. ABA *Standards for Imposing Lawyer Sanctions*.

In fashioning a sanction, this court follows the analytical framework set out by the ABA *Standards for Imposing Lawyer Sanctions* (1991) (amended 1992) (ABA Standards). *In re Herman*, 357 Or 273, 289, 348 P3d 1125 (2015), citing *In re Obert*, 352 Or 231, 258, 282 P3d 825 (2012). The court first determines the presumptive sanction by examining the duties violated, the Accused's mental state, and the actual or potential injury caused. ABA Standard 3.0. The court then considers aggravating or mitigating factors. Finally, the court examines the appropriate sanction under Oregon case law. *Herman*, 357 Or at 289.

(a) Duties Violated.

The Accused violated duties owed to the legal system to refrain from knowingly violating court orders, avoid bringing frivolous claims, and avoid using methods that have no substantial purpose other than to embarrass, delay, harass, or burden a third person. ABA Standard 6.2.

(b) Mental State.

The Accused's conduct demonstrates both intent (the conscious objective or purpose to accomplish a particular result) and knowledge (the conscious awareness of the nature or attendant circumstances of the conduct, but without the conscious objective or purpose to accomplish a particular result). ABA Standards at 6.

The Accused acted intentionally when he repeatedly disobeyed court orders and delayed the property sales ordered in the dissolution. Both Snohomish County Superior Court Judge Thibodeau and US

District Court Judge Zilly ordered the Accused to stop filing *lis pendens* notices. He ignored their orders and deliberately persisted to thwart the sale of the property. His multiple violations of a federal protective order were also deliberate ("The cat is out of the bag").

The Accused acted with knowledge, intent and deliberate disregard for his client, the opposing party and the courts when he repeatedly filed frivolous claims of wiretapping, defamation and ERISA violations, sued judges and judicial officers, and filed multiple claims for emergency relief (and appealed the denials of same) without reasonable bases in law or fact for doing so.

(c) Actual or Potential Injury.

The Accused's conduct caused both actual and potential injury to his client, the public, the legal system, and the profession. His conduct resulted in over $300,000 in sanctions and attorney fees, paid out of his mother's half of the community property. Tr. 450. The Accused reported that is now broke, working as a live-in caregiver. Tr. 722. He harmed the opposing party, , who spent tens of thousands of dollars defending against frivolous lawsuits in multiple jurisdictions for over several years. Tr. 452-54. He caused actual injury to employee, business, and attorneys by knowingly bringing repetitive frivolous legal claims against them in state and federal courts. He injured the courts by suing state court judges who had disqualified him from representing his mother and, later, by subpoenaing state and federal court judges to testify in the WSBA hearing after the Washington court had ruled in *Sanai 2009* that doing so was disfavored.

The Accused's conduct resulted in actual harm to the legal system in the form of serious interference with legal proceedings as he sought to delay, frustrate, and circumvent lawful orders. He squandered the

courts' time and resources by prompting a multitude of unnecessary hearings. His conduct undermined the public's confidence in the integrity of the law.

The profession was also injured because it is judged by the conduct of its members. ABA Standard 7.0. *See In re Gastineau*, 317 Or 545, 558, 857 P2d 136 (1993).

Drawing together the factors of duty, mental state, and injury, the ABA Standards provide that disbarment is the preliminary sanction for abuse of the legal process:

> [I]n cases involving failure to expedite litigation or bring a meritorious claim, or failure to obey any obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists, disbarment is generally appropriate when a lawyer knowingly violates a court order or rule with the intent to obtain a benefit for the lawyer or another, and causes serious injury or potentially serious injury to a party or causes serious or potentially serious interference with a legal proceeding.

ABA Standard 6.21.

(d) Aggravating and Mitigating Factors.

The following aggravating factors apply in this matter.

(a) Pattern of misconduct. ABA Standard 9.22(c).

(b) Multiple offenses. ABA Standard 9.22(d).

(c) Bad faith obstruction of the disciplinary proceeding by intentional failure to comply with rules or orders of the disciplinary agency. In the WSBA proceeding, the Accused employed "a long line of delaying tactics" and displayed "unilateral disregard for orders that he felt he could simply ignore." FFCL 49-50; ER 54-55. In Oregon, the Accused "continued to try and game the system" through excessive motion practice and other maneuvers. Trial Panel Op at 37, ER 103. ABA Standard 9.22(e).

(d) Refusal to acknowledge the wrongful nature of his conduct. ABA Standard 9.22(g). This factor applies when no reasonable lawyer could argue that the lawyer's actions were appropriate. *In re Paulson*, 341 Or 13, 32, 136 P3d 1087 (2006), citing *In re Meyer (I)*, 328 Or 211, 218, 970 P3d 652 (1999) (using and explaining the standard). *See also, In re Knappenberger*, 340 Or 573, 586, 135 P3d 297 (2006). Before the Oregon panel, the Accused displayed a disturbing refusal to recognize his misconduct, attributing his job loss as Yamhill County Counsel to "publicity" about his Washington disbarment in the local newspaper. Tr. 713-14. Under questioning by the panel, the Accused would not acknowledge that he had violated Judge Zilly's order to desist from obstructing the property sales. Tr. 732 – 735. Only after persistent prompting did he allow that his violation of the order was "gamesmanship." Tr. 736.

(e) Acting with selfish and dishonest motives. A selfish motive may be personal gain or convenience. ABA Standard 9.22(b). *See generally, In re Davenport*, 334 Or 298, 320-321, 48 P2d 91, *modified on recons,* 355 Or 67, 57 P3d 897 (2002), citing *In re Dinerman*, 314 Or 308, 318, 840 P2d 50 (1992). The Accused acted in pursuit of a personal agenda at the expense of his parents, employee and attorneys, the Washington and federal courts, and the rule of law. FFCL at 52; ER 57.

Only two mitigating factors clearly apply this matter:

(a) Absence of a prior disciplinary record. ABA Standard 9.32(a); and

(b) Imposition of other sanctions (disbarment in Washington). ABA Standard 9.32(k). *In re Lopez*, 350 Or 192, 201, 252 P3d 312 (2011), citing *In re Page*, 326 Or 572, 579-80, 955 P2d 239 (1998).

Character or reputation evidence can be considered in mitigation. ABA Standard 9.32(g). The Accused called 13 character witnesses, only a few of whom had read the FFCL or *Sanai 2013*. Most were not familiar with the Accused's activities in Washington and generally considered it an acrimonious "family matter" in which he had made "poor choices" or "bad decisions" in advocating for his mother. Tr. 239, 241-52, 251-52, 310-11, 373-74. His boss of 11 years, former Yamhill County Counsel John M. Gray, Jr., was arguably the most knowledgeable witness as to the Accused's character. However, the Accused had not told Gray that the WSBA had initiated disciplinary proceedings against him; Gray did not learn about it until "much later." Tr. 354, 358. Gray also did not know that the Accused had used his county office and enlisted a sheriff's deputy to secretly record telephone calls to use in the Washington litigation. Tr. 363. Because the Accused's character witnesses testified from limited knowledge, their observations should receive little if any weight in mitigation.

The Accused testified that he was experiencing personal or emotional problems and drinking heavily at the time some of his misconduct occurred. Tr. 711; ABA Standard 9.32(c). However, he offered no evidence necessary to substantiate or use impairment in mitigation (i.e., medical evidence of the condition; evidence that the condition caused the misconduct; and evidence that recovery--demonstrated by meaningful and sustained rehabilitation--has arrested the misconduct and that recurrence is unlikely). *In re Cohen*, 330 Or 489, 502, 8 P3d 953 (2000); ABA Standard 9.32(i).

The two mitigating factors are far outweighed by the multiple serious aggravating factors. There is no basis to depart from the presumptive sanction of disbarment.

2. Case Law.

The court's observation that "case-matching is an inexact science," *In re Stauffer*, 327 Or 44, 70, 956 P2d 967 (1998), is particularly fitting in this matter, as Oregon case law fortunately does not offer many examples of litigation-related misconduct as extreme or protracted as the Accused's. However, two cases provide support for disbarment where an attorney has abused the legal system over a period of several years.

In re Paulson, 346 Or 676, 216 P3d 859 (2009), *adhered to as modified on recons*, 347 Or 524, 225 P3d 41 (2010), provides the most relevant guidance. There, the lawyer (as personal representative and trustee of a client's small estate proceeding) filed three legal actions, denied the state's legitimate priority claim against the small estate, and refused to comply with the probate court's orders. He collected fees from the small estate without court approval and delayed for months complying with an order to repay the estate. The lawyer's multiple filings of pleadings, motions and objections over a three-year period resulted in protracted court proceedings that became "a nightmare for virtually everyone involved solely because of [his] actions." 346 Or at 681. In addition, on the first day of a six-month disciplinary suspension (for previous misconduct), the lawyer continued to practice law by filing motions to postpone in other client matters; on each motion, he falsely stated that his disciplinary case was "on appeal." Paulson also failed to cooperate in the Bar investigation of several complaints.

The court found that the lawyer acted intentionally or knowingly and with a selfish motive; refused to acknowledge the wrongful nature of his misconduct; and engaged in bad faith obstruction of the discipline process. In ordering disbarment, the court noted a "persistent disregard"

for rules of conduct and the duties the lawyer owes to his clients, the public, the legal profession and the legal system. 346 Or at 722.

Here, the Accused also has demonstrated persistent disregard for the rules. His intentional violations of court orders are akin to Paulson's violation of a Bar suspension order. Further, although the Accused has no prior discipline (an aggravating factor in *Paulson*), he repeatedly acted in defiance of court rules and orders after he and his client had been admonished for the same conduct. He continued to file and record *lis pendens* notices and to file frivolous motions, claims and appeals after being sanctioned for doing so. Like the attorney in *Paulson*, the Accused demonstrated intransigence and unwillingness to conform his conduct to the rules even after being held in violation.

In re White, 311 Or 573, 815 P2d 1257 (1991) resulted in a three-year suspension for an attorney who, over a five-year period, filed 15 cases against his client's business partners, including duplicate claims in different counties and cases with substantially similar allegations. The court found that the attorney filed a multitude of vexatious actions and intentionally used the legal system as a tool to harass, rather than to resolve his client's legitimate disputes.[16] In choosing suspension, the court noted as mitigating factors inexperience in the practice of law and the remoteness of White's prior discipline (reprimand for different type of misconduct).

The Accused's conduct is far more egregious than White's in that he brought frivolous claims against judicial officers, continued to pursue

[16] Although White also engaged in a criminal act that reflected adversely on his fitness to practice, that violation played no role in sanction because it was isolated and remote in time. 311 Or at 591-92.

meritless actions after being sanctioned by the courts,[17] openly violated court orders,[18] and intentionally caused delay in the WSBA disciplinary proceedings. The Accused's misconduct resulted in over $300,000 in sanctions and led to his client's financial ruin.

Sanctions are not intended to penalize the accused lawyer, but instead are intended to protect the public and uphold the dignity, respect and integrity of the profession. *In re Stauffer*, 327 Or 44, 66, 956 P2d 967 (1998); *In re Kimmel*, 332 Or 480, 488, 31 P3d 414 (2001). Protecting the public, the courts and the profession from the Accused's proven willingness to resort to abuse, obstruction and bad faith necessitates disbarment.

VI. CONCLUSION

The 12-day WSBA hearing and review by the Washington Court afforded the Accused ample opportunity to defend against the WSBA's charges. Through counsel, he called witnesses and cross-examined WSBA witnesses, introduced exhibits, and presented written and oral arguments. The Accused filed briefs and presented oral arguments to the WSBA DB and the Washington Court. The record demonstrates that the Accused was afforded notice and opportunity to be heard in Washington, thus satisfying the first requirement for imposition of reciprocal discipline under BR 3.5(c)(1).

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[17] The FFCL cites 11 separate sanction orders issued in the dissolution and partition actions and 6 issued in the state and federal wiretapping cases. ER 12-13, 15-18, 20, 28, 34, 37-38, 42, 44-45, 50-51.

[18] The Accused violated Judge Thibodeau's orders to cease filing *lis pendens* notices or taking further action to delay sale and disqualifying him from representing Judge Zilly's orders to cease filing *lis pendens* notices or taking further action to delay sale; the magistrate's protective order over improperly obtained financial records and order to cease serving further records subpoenas without court permission; and Beles's order setting resumption of the WSBA hearing.

The record also establishes that the Accused should be disciplined in Oregon. His repeated gross misconduct is extraordinary. In dismissing the Accused's claims in the wiretap/ERISA action in July 2005, Judge Zilly observed:

> Plaintiffs' conduct in this litigation has been an indescribable abuse of the legal process, unlike anything this Judge has experienced in more than 17 years on the bench and 26 years in private practice: outrageous, disrespectful, and in bad faith. Plaintiffs have employed the most abusive and obstructive litigation tactics this Court has ever encountered, all of which are directed at events and persons surrounding the divorce of and including parties, lawyers, and even judges. Plaintiffs have filed scores of frivolous pleadings, forcing baseless and expensive litigation. The docket in this case approaches 700 filings, a testament to plaintiffs' dogged pursuit of a divorce long passed.

FFCL at 36; ER 41.

WSBA hearing officer Beles agreed, calling the number and volume of the Accused's pleadings in the state and federal actions "nothing short of mind-numbing." ER 8. Citing "years of vexatious litigation and repeated frivolous claims" and "abuse of the legal process and disregard of lawful court orders" (FFCL 50-51, ER 55-56), Beles concluded:

> Many of [the Accused's] pleadings are well written and, at first glance, may have the look of legitimacy, but when examined critically and in context, they reveal themselves for what every justice, judge, commissioner and clerk has found them to be. In his tortured pursuit of his illusive [sic] goal, [the Accused] has attempted to turn each collateral proceeding, including the instant disciplinary hearing, into either a *de facto* appellate review or virtual trial *de novo* of his parents' dissolution. And, when in [the Accused's] opinion, a tribunal has failed to address each and every one of his arguments to his personal satisfaction, he has felt entitled to disregard such orders as illegitimate.
>
> [The Accused's] vexatious and frivolous court filings and his self-righteous unwillingness to accept final court orders, even after exhaustion of all legitimate means of appeal, has resulted in the worst case of continuing lawyer misconduct,

> short of felonious activity, that I have witnessed in my 36 years as a member of the Washington State Bar.

FFCL 51-52; ER 56-57.

In finding that the Accused should be disbarred here, the Oregon panel noted that the Accused's "misconduct continued for years unabated, despite numerous admonitions and instructions by a number of judges," and extended even into the reciprocal discipline proceeding, in which the Accused still tried to "game the system." Trial Panel Op at 37, ER 103. The Accused's discipline by the Washington court resulted from fair proceedings that afforded notice and ample opportunity to be heard. Disbarment is clearly warranted by the Accused's record of large-scale vexatious conduct, relentless abuse, obstruction, and bad faith.

DATED this 2nd day of March, 2016.

OREGON STATE BAR

By: _____
Susan Roedl Cournoyer, OSB No. 863381
Assistant Disciplinary Counsel

CERTIFICATE OF FILING AND SERVICE

I hereby certify that I e-filed the foregoing OREGON STATE BAR'S ANSWERING BRIEF on the 2nd day of March, 2016, by submitting the electronic form in Portable Document Format (PDF) that allows text searching and allows copying and pasting text into another document to:

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I further certify I served the foregoing OREGON STATE BAR'S ANSWERING BRIEF on the 2nd day of March, 2016, by mailing two certified true copies by first class mail with postage prepaid through the United States Postal Service to:

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DATED this 2nd day of March, 2016.

OREGON STATE BAR

By: _____
Susan Roedl Cournoyer, OSB No. 863381

CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

I certify that (1) this Answering Brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this Answering Brief (as described in ORAP 5.05(2)(a)) is 13,333 words.

I certify that the size of the type in this Answering Brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

I certify pursuant to ORAP 9.17(5)(e) that the electronic form of this Answering Brief has been scanned for viruses and that it is virus free.

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