

IN THE SUPREME COURT OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of)	Case No. 11-52
)	
MICHAEL L. SPENCER)	SC S060977
)	
Accused-Petitioner.)	

PETITION FOR REVIEW, OPENING BRIEF AND EXCERPT OF RECORD

Appeal from the decision of the Oregon State Bar Trial Panel dated December 5, 2012.

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FIRST ASSIGNMENT OF ERROR

The Trial Panel erred in ruling that the Appellant violated RPC 1.7(a)(2) by ruling:

“The Accused’s representation of Ms. Smith-Canfield in a real property transaction in which he stood to earn a commission is a conflict of interest. RPC 1.8(b) states that in the event of a current conflict of interest, a lawyer may represent a client if the client gives informed consent confirmed in writing. The accused admittedly did not obtain informed consent as to his representation as a realtor in the real estate transaction and did not obtain a confirmation in writing from Ms. Smith-Canfield. This failure violated RPC 1.7(a)(2).”

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SECOND ASSIGNMENT OF ERROR

The Trial Panel erred in ruling that the Appellant violated RPC 1.8(a) by ruling:

“The Accused further testified that he represented Ms. Smith-Canfield as both an attorney and as a realtor in the purchase of the real property. This scenario creates a particularly troubling situation since the Accused is representing his client in both the business aspect of the sale in his capacity as a realtor and furnishing the legal services to complete the sale. This

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APPELLANT'S BRIEF

STATEMENT OF THE CASE

1. The Nature of the Proceeding and Relief Sought.

This is a Petition for Review of a decision of the Trial Panel Opinion suspending the Accused for a period of 60 days.

2. The Nature of the Decision to be Reviewed.

This is an appeal of a final decision by the Trial Panel and mailed on December 19, 2012.

3. Statement of the Statutory Basis of Appellate Jurisdiction.

This Court has appellate jurisdiction over this matter pursuant to ORS 9.536.

4. Statement of Appellate Jurisdiction.

The Trial Panel's Decision was mailed on December 19, 2012. The Petition for Review was filed on January 8, 2013.

5. Questions Presented on Appeal.

A. Did the Trial Panel err in concluding that the Bar proved by clear and convincing evidence there was a substantial risk that the Accused would put his interest in a contingent fee ahead of his client's interests, in violation of the Accused's fiduciary and statutory duties to put the client's interest ahead of any interest of the Accused.

B. Did the Trial Panel err in concluding that the real estate broker/client relationship, entered into as part of and at the same time as the attorney/client relationship was a business transaction with a client?

C. Did the Trial Panel err essentially dismissing Accused's affirmative defense that a real estate broker is apparently more likely than an attorney to put his interest in his contingent fees ahead of his client's interests, when both professions have equivalent legal duties to always put the client's interests first and that the representation of a client as a real estate broker was any more of a business transaction subject to RPC 1.8(a) than the representation of a client as an attorney?

D. Did the Trial Panel err in admitting Exhibit 38, the Judgement entered in the United States Bankruptcy Court?

6. Concise Summary of Arguments.

A. The Bar alleged that the Accused's representation of the client as a real estate broker violated RPC 1.7(a)(2) in that there was a substantial risk that the Accused would put his interest in his contingent fee ahead of the interests of the client. No evidence was submitted and the sole basis for the allegation was that the fee for the professional representation was based upon the successful completion of the representation. The Accused, in his representation as a real estate broker, was under the same fiduciary obligation to put his client's interest

first and was also under a statutory obligation pursuant to ORS 686.810(3)(c).

B. The Bar alleged that the Accused violated RPC 1.8(a) by having a business transaction with a client without complying with the notice and consent provisions of that section. The professional representation of a client by a real estate broker is no more of a business transaction than the professional representation of a client by an attorney. Likewise, the joint representation was entered into at the same time and for the same purpose so there was no existing attorney/client relationship.

C. There is no factual or legal basis for holding that an attorney representing a client is more or less likely to put his interest in his fees ahead of the interests of the client than there is for a real estate broker or that the professional representation of a client as a real estate broker is any more of a business transaction than is the representation of a client by an attorney. To determine otherwise, without a factual or legal basis, violates the provisions of Article I Section 20 of the Oregon Constitution.

D. Over the Accused's objection, the Trial Panel admitted a Judgment entered in the United States Bankruptcy Court in a civil proceeding against the Accused. The civil judgment has no relevance in this proceeding because the standard of proof in this case is higher than that in the civil proceeding.

7. Summary of Material Facts.

Accused is an attorney admitted to practice in Oregon in May of 1983. (Tr. 77) Accused has been a licensed real estate broker since 2003. (Tr. 79)

On March 3, 2008, Accused was contacted by Ms. Smith-Canfield for advice regarding her financial situation. (Tr. 83) During the initial consultation, the Accused learned that Ms. Smith-Canfield was in the process of selling a home in Tennessee and that she anticipated that she would receive about \$30,000.00 from the sale. (Tr. 13-14) It was further determined that Ms. Smith-Canfield was employed, making \$8,000.00 per month (Tr. 169) which put her significantly over the median income for a single person. (Tr. 170) Under the “Means Test” requirements of the Bankruptcy Code, she would be allowed a rental deduction of \$54.00 per month if she was renting a place to live. (Tr. 170) However, she could deduct her entire house payment of \$1,675.14 if she were buying a house. (Tr. 170) Ms. Smith-Canfield was satisfied with her rental and would not have been looking to buy a house except for the Bankruptcy. (Tr. 19, 69-70)

FIRST ASSIGNMENT OF ERROR

The Trial Panel erred in ruling that the Accused violated RPC 1.7(a)(2) by ruling:

“The Accused’s representation of Ms. Smith-Canfield in a real property transaction in which he stood to earn a commission is a conflict of interest. RPC 1.8(b) states that in the event of a current conflict of interest, a lawyer may represent a client if the client gives informed consent confirmed in writing. The accused admittedly did not obtain informed consent as to his representation as a realtor in the real estate transaction and did not obtain

a confirmation in writing from Ms. Smith-Canfield. This failure violated RPC 1.7(a)(2).”

A. Preservation of Error

The error alleged is in the decision of the trial panel. It is preserved by the filing of the Request for Review in this case. However, the Accused argued in closing arguments that there was no evidence to support the Bar’s contention. (Tr 210)

This Court has held:

“Further, we find nothing in our prior case law or the Oregon Rules of Civil Procedure that requires a party to take particular steps to preserve the kind of issues now under consideration. We acknowledge that, prior to 1965, Oregon civil practice required either party in a trial to the court to object to the trial court's findings of fact, or to ask for additional or different findings, or to raise on appeal the argument that that party should have prevailed as a matter of law. See *Thompson, Georgeson, Inc. v. Ward*, 240 Or. 429, 431, 400 P.2d 557 (1965) (stating that objections to findings serve function of directed verdict at bench trial). However, that preservation requirement was based on former ORS 17.430 (1963), repealed by Or. Laws 1965, ch. 177, § 1. That statute was replaced by former ORS 17.431 (1965), which explicitly withdrew that preservation requirement. See *Clarke's Trucking v. Land Management*, 278 Or. 153, 156, 562 P.2d 976 (1977) (so stating); see also former ORS 17.431(6) ("Requests for findings or objections to findings are not necessary for purposes of appellate review."). The Oregon Rules of Civil Procedure later incorporated former ORS 17.431 into ORCP 62 E almost verbatim.

In view of the evolution of the pertinent rules described above and our conclusion that the Court of Appeals' preservation rule does not advance fairness or efficiency, we decline to require a party that bears the burden of persuasion at a court trial to raise, for preservation purposes, the claim that it should prevail on the evidence as a matter of law.”

Peiffer v. Hoyt, 339 Or. 649, 659, 125 P.3d 734 (2005)

B. Standard of Review

“The court shall consider each matter *de novo* upon the record and may adopt, modify or reject the decision of the trial panel in whole or in part and thereupon enter an appropriate order.” DR 10.6

ARGUMENT

RPC 1.7(a)(2) provides:

“Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a current conflict of interest. A current conflict of interest exists if: . . .

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer . . .”

In order to sustain the finding of the trial panel, there must be evidence in the record which shows that there was a **significant risk** that the Accused’s representation of Ms. Smith-Canfield was materially limited by his personal interest in receiving a fee contingent upon the successful representation of her as a real estate broker. The only “evidence” relating to this issue was the fact that the fee would be received only if the client purchased a house that the Accused had located for her.

“The Bar must prove each violation by clear and convincing evidence, BR 5.2, which means that the truth of the asserted facts must be ‘highly probable.’”

In re Cobb, 345 Or. 106, 119, 190 P.3d 1217 (2008)

A real estate broker is the agent of the client, who is the principal, and as such has a fiduciary duty to the client to put the client’s interests ahead of the

broker's interest, which is the interest in a fee. That is the same fiduciary duty an attorney owes to a client regarding the attorney's interest in a fee.

A real estate broker representing a buyer is also subject to the provisions of ORS 696.810(3)(c) which provides:

“A buyer's agent owes the buyer involved in a real estate transaction the following affirmative duties: . . .

(C) To be loyal to the buyer by not taking action that is adverse or detrimental to the buyer's interest in the transaction.”

This duty may not be waived pursuant to ORS 696.810(5):

“Except as provided in subsection(3)(g) of this section, an affirmative duty may not be waived.”

“Significant” is not defined in the Rules of Professional Conduct. However, Webster's defines “significant” as:

“(1) having meaning . . . (2) suggesting or containing a disguised or special meaning . . . (3) a: having or likely to have influence or effect; IMPORTANT, WEIGHT b: probably caused by something other than mere chance . . .”

In regard to RPC 1.7(a)(2) a “significant risk” should be interpreted as a risk which is likely or probable to occur, rather than something that is a mere potential.

In the case of a real estate broker, putting his interest in his fees for service ahead of his client's interest would violate not only his fiduciary duty but a statutory affirmative duty. There is no evidence in the record to show that real estate brokers are likely to violate the law in this manner. Unless this Court can say, as a matter of law, that the 17,230 licensed real estate brokers in this State are

likely to violate the law by putting their interest in their fees ahead of their client's interests, then there is no basis to support this determination.

While the Rules of Professional Conduct are not statutes, the rules of interpretation of the statutes should be applied to the RPC. In this case, the Court is asked to interpret RPC 1.7(a)(2) (and RPC 1.8 below) as to whether an attorney, who obviously has an interest in receiving fees for professional services, is subject to these RPC's in regards to those fees and whether an attorney acting as a real estate broker, who has an equivalent duty to put the client's interests ahead of his interest in his fees, is to be treated equally. The position of the Bar is that an attorney's interest in his fees, contingent or otherwise, does not rise to a "significant risk" that the attorney would put that interest ahead of his clients, but that a real estate broker's interest in his fees for his professional services would rise to a "significant risk." As set forth in the Third Assignment of Error, an interpretation of the RPC which excludes attorney's in this matter, without some justifiable basis, would violate Article I Section 20 of the Oregon Constitution. In applying the maxims of statutory construction, this Court has held:

"Here, the applicable maxim is that, when one plausible construction of a statute is constitutional and another plausible construction of a statute is unconstitutional, courts will assume that the legislature intended the constitutional meaning. Statutes therefore will be construed accordingly."

State v. Kitzman, 323 Or. 589, 602, 920 P.2d 134 (1996)

The trial panel and bar placed significant emphasis on the fact that a real

estate broker is paid upon the purchase of a house. In other words, the fee of a real estate broker is contingent upon the successful representation of the client. There is again no evidence that simply because the fee is contingent, that a real estate broker is likely to put his interest in his fee ahead of the interests of his client. Contingent fees are specifically authorized for attorneys in all matters other than domestic relations or criminal cases under RPC 1.5(c).

In comparing the interests of a real estate broker in his fees for services to his client with the contingent fees allowed for attorneys in a personal injury case, it is clear that there is no difference in this case. An attorney in a personal injury case generally gets 25% of the recovery if no law suit is filed, 33 1/3% of the recovery if a law suit is filed and 40% of the recovery in the case goes to trial. The decision to settle, file a law suit or go to trial is based upon the advice the attorney gives the client. In other words, the attorney can significantly affect his fee by the advice he gives. The attorney certainly has an interest in getting paid.

Indeed, it doesn't matter whether the legal fee is contingent or hourly. Attorneys give their clients legal advice which has a direct impact on the amount of fees received by the attorney. In a litigation case, clearly an attorney who recommends filing a law suit is going to get paid more, on an hourly basis, than if the attorney advises the client to not file a law suit. Where is there any evidence to show that there is any more risk in the professional advice given by a real estate

broker that the real estate broker would put his interest ahead of his clients to get a fee than there is in an attorney's advice? There is no evidence or other basis to support that contention.

Formal Ethics Opinion 2006-176, dealing with issue, states:

“Under Oregon RPC 1.7, Lawyer's other business interests in the real estate transaction would give rise to a conflict under Oregon RPC 1.7(a)(2) since there is a significant risk that these other roles would interfere with Lawyer's representation of Client. This would be true whether Lawyer plays the nonlawyer roles as the owner or co-owner of a non-law business or as an employee or independent contractor for such a business. In either instance, Lawyer's interest in fees or income from these other roles, if not also Lawyer's liability concerns from those other roles, would create a significant risk that Lawyer's ability to ‘exercise independent professional judgment and render candid advice’ (Oregon RPC 2.1) would be compromised.”

This opinion is simply not supported by any evidence or reason. It makes an assumption of a significant risk that the lawyer acting as a real estate broker would put his interest in his fees ahead of the interests of his clients, just as the Bar argues. However, there is no evidence to support that assumption, either presented in this case or set forth in the opinion. The opinion shows the clear bias of its author in favor of the legal profession and against other professions which have equivalent legal duties to their clients as do the attorneys. Certainly there are some differences, but as to the issue raised in this case, that being that a real estate broker has a significant risk of putting his interest in his fees ahead of the interests of his client's interests, the opinion cannot stand and this Court should specifically

disavow it.

SECOND ASSIGNMENT OF ERROR

The Trial Panel erred in ruling that the Accused violated RPC 1.8(a) by ruling:

“The Accused further testified that he represented Ms. Smith-Canfield as both an attorney and as a realtor in the purchase of the real property. This scenario creates a particularly troubling situation since the Accused is representing his client in both the business aspect of the sale in his capacity as a realtor and furnishing the legal services to complete the sale. This conduct, without meeting the necessary disclosure requirements, is a violation of RPC 1.7(a)(2) and 1.8(a).”

A. Preservation of Error

The error alleged is in the decision of the trial panel. It is preserved by the filing of the Request for Review in this case. However, the Accused argued in closing arguments that there was no evidence to support the Bar’s contention and that the RPC was not violated. (TR 216 - 220)

This Court has held:

“Further, we find nothing in our prior case law or the Oregon Rules of Civil Procedure that requires a party to take particular steps to preserve the kind of issues now under consideration. We acknowledge that, prior to 1965, Oregon civil practice required either party in a trial to the court to object to the trial court's findings of fact, or to ask for additional or different findings, or to raise on appeal the argument that that party should have prevailed as a matter of law. See *Thompson, Georgeson, Inc. v. Ward*, 240 Or. 429, 431, 400 P.2d 557 (1965) (stating that objections to findings serve function of directed verdict at bench trial). However, that preservation requirement was based on former ORS 17.430 (1963), repealed by Or. Laws 1965, ch. 177, § 1. That statute was replaced by former ORS 17.431 (1965), which explicitly withdrew that preservation requirement. See

Clarke's Trucking v. Land Management, 278 Or. 153, 156, 562 P.2d 976 (1977) (so stating); see also former ORS 17.431(6) ("Requests for findings or objections to findings are not necessary for purposes of appellate review."). The Oregon Rules of Civil Procedure later incorporated former ORS 17.431 into ORCP 62 E almost verbatim.

In view of the evolution of the pertinent rules described above and our conclusion that the Court of Appeals' preservation rule does not advance fairness or efficiency, we decline to require a party that bears the burden of persuasion at a court trial to raise, for preservation purposes, the claim that it should prevail on the evidence as a matter of law."

Peiffer v. Hoyt, 339 Or. 649, 659, 125 P.3d 734 (2005)

B. Standard of Review

"The court shall consider each matter *de novo* upon the record and may adopt, modify or reject the decision of the trial panel in whole or in part and thereupon enter an appropriate order." DR 10.6

ARGUMENT

RPC 1.8(a) provides in relevant part:

"(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless . . ."

There is no issue in this case that the Accused gave written disclosures or obtain the client's informed consent. He did not. The issues are whether the representation of the client in a professional, fiduciary capacity is a "business transaction" and if it is a business transaction, whether it must be separate from the legal representation of the client.

"Business transaction" is not defined in the RPC. The question is whether

the representation of a client in a professional, fiduciary capacity is included in this definition. For the purposes of this issue, RPC 1.8 is essentially the same as the ABA MR 1.8. The comments to MR 1.8 set out that:

“ . . . It does not apply to ordinary fee agreements between client and lawyer, which are governed by Rule 1.5, although its requirements must be met when the lawyer accepts an interest in the client’s business or other nonmonetary property as payment of all or part of a fee.”

The Oregon Supreme Court has previously noted that:

“[T]he ABA Standards, which represent a comprehensive authority concerning sanctions and lawyer discipline cases, serve as a helpful guide to this court—although not as binding authority—in determining issues surrounding the determination of the appropriate sanction in a given circumstance.”

In re Cohen, 330 Or. 489, 499, 8 P.3d 953 (2000).

The comments make great sense since if the attorney/client fee agreement is a business transaction, whether contingent or not, then in every case the attorney would have to provide the client with a letter explaining that the attorney might have a personal interest in the fees to be earned that the attorney might put ahead of the client’s interest and that the client should seek independent legal counsel about whether the client should enter into the representation, as well as getting written, informed consent. Surely that is not the intent of this section and it certainly has never been so interpreted.

Likewise, the fee of a real estate broker for representing a client should not be deemed a “business transaction” regardless of when it is paid. The real estate

broker has no “pecuniary interest” in the house being sold, only an interest in getting paid for the services rendered.

The Bar, in closing argument, equated a real estate broker’s interest in a transaction to that of a car salesman.

“Finally, if you made a law that said car dealers have to look, have the best interest of the car buyer in mind when they sell the car, it wouldn't change whether or not the car dealer has an adverse interest in the business transaction.”

(Tr. 206) There is a significant difference between the interest of a real estate broker in his commission and that of a car dealer. The car dealer actually owns the car and is selling it for his benefit. Even if it is an employee and not the actual owner, the employee is representing the owner’s interest and therefore has a pecuniary interest in the transaction.

The Rule also implies that there must be an existing attorney/client relationship before these provisions are effective. In other words, the initial retainer of an attorney by a client is not subject to this rule.

“A conflict under Oregon RPC 1.8(a) requires that a lawyer-client relationship exist at the time of the business transaction. In re Harrington, 301 Or 18, 25, 718 P2d 725 (1986).”

The Ethical Oregon Lawyer, Section 8.11

In this case, the Accused undertook to represent the Client in regards to her financial matters. A Chapter 13 Bankruptcy was planned and in order to accomplish that, it was necessary and appropriate for the Client to purchase a

residence. The Client would not have purchased a residence but for the benefits in the Bankruptcy. In order to accomplish this result, the Accused needed to have both a law license to file the Bankruptcy and a Real Estate Broker's license to locate a residence for the Client. These were not separate transactions, but different parts of the same transaction.

THIRD ASSIGNMENT OF ERROR

The Trial Panel erred in dismissing Accused's affirmative defense of Article I Section 20 of the Oregon Constitution by ruling:

"The Accused raises an affirmative defense that RPC 1.7(1)(a)(2) and 1.8(a) of the rules of Professional Conduct, as the Oregon State Bar is attempting to apply it, stating it violates Article 1 Section 20 of the Oregon Constitution. The panel finds the defense insufficient. Mr. Spencer has the right to "earn a living" as a real estate broker and engage in real estate transactions. The Oregon State Bar does not argue otherwise. The issue is that when Mr. Spencer is engaged in an attorney client relationship, then he is required to follow the rules regulating his actions as an attorney including compliance with the Rules of Professional Conduct."

A. Preservation of Error

The error alleged is in the decision of the trial panel. It is preserved by the filing of the Request for Review in this case. However, the Accused argued in closing arguments that the interpretation advanced by the Bar violated Article I Section 20 of the Oregon Constitution. (TR 224 - 228)

This Court has held:

"Further, we find nothing in our prior case law or the Oregon Rules of Civil Procedure that requires a party to take particular steps to preserve the kind

of issues now under consideration. We acknowledge that, prior to 1965, Oregon civil practice required either party in a trial to the court to object to the trial court's findings of fact, or to ask for additional or different findings, or to raise on appeal the argument that that party should have prevailed as a matter of law. See *Thompson, Georgeson, Inc. v. Ward*, 240 Or. 429, 431, 400 P.2d 557 (1965) (stating that objections to findings serve function of directed verdict at bench trial). However, that preservation requirement was based on former ORS 17.430 (1963), repealed by Or. Laws 1965, ch. 177, § 1. That statute was replaced by former ORS 17.431 (1965), which explicitly withdrew that preservation requirement. See *Clarke's Trucking v. Land Management*, 278 Or. 153, 156, 562 P.2d 976 (1977) (so stating); see also former ORS 17.431(6) ("Requests for findings or objections to findings are not necessary for purposes of appellate review."). The Oregon Rules of Civil Procedure later incorporated former ORS 17.431 into ORCP 62 E almost verbatim.

In view of the evolution of the pertinent rules described above and our conclusion that the Court of Appeals' preservation rule does not advance fairness or efficiency, we decline to require a party that bears the burden of persuasion at a court trial to raise, for preservation purposes, the claim that it should prevail on the evidence as a matter of law."

Peiffer v. Hoyt, 339 Or. 649, 659, 125 P.3d 734 (2005)

B. Standard of Review

"The court shall consider each matter de novo upon the record and may adopt, modify or reject the decision of the trial panel in whole or in part and thereupon enter an appropriate order." DR 10.6

ARGUMENT

Article I Section 20 of the Oregon Constitution provides:

"No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens."

The Accused contends that any interpretation of either RPC 1.7(b)(2) or

1.8(a) which holds that an attorney's interest in his fees for a professional representation of a client does not constitute a substantial risk of a material limitation on the representation of the client or a business transaction, while a real estate broker's interest in his fees for a professional representation of a client does, violates Article I Section 20 of the Oregon Constitution by granting to a class of citizens, attorneys, privileges or immunities that do not apply to other citizens on the same terms.

As pointed out above, in both cases, the attorney and the real estate broker are under fiduciary and legal obligations to put their client's interests ahead of their own. The obligation is absolute for a real estate broker as it cannot be waived, although technically the obligation of an attorney might be waive able. In any event, there is no higher obligation than an absolute obligation.

“Article I, section 20, offers protection from ‘unlawful governmental discrimination against individuals as individuals, as well as against individuals based on their membership in some class.’”

State v. Washington, 246 Or. App. 1, 6, 264 P.3d 176 (2011)

“The law governing standardless distribution of privileges and immunities under Article I, section 20, is well settled. That provision bars unlawful governmental discrimination against individuals as individuals, as well as against individuals based on their membership in some class. *State v. Buchholz*, 309 Or. 442, 446, 788 P.2d 998 (1990); *State v. Clark*, 291 Or. 231, 237, 630 P.2d 810, cert. den., 454 U.S. 1084, 102 S.Ct. 640, 70 L.Ed.2d 619 (1981). The former type of unlawful discrimination occurs when the state distributes a benefit or burden in a standardless, ad hoc fashion, without any “coherent, systematic policy.” *State v. Freeland*, 295 Or. 367, 375, 667 P.2d 509 (1983). The prohibition on ad hoc distribution

of burdens or benefits “reaches forbidden inequality in the administration of laws under delegated authority as well as in legislative enactments.” Clark, 291 Or. at 239, 630 P.2d 810.”

State v. Savastano, 243 Or. App. 584, 589, 260 P.3d 529 (2011)

In the present case, there is absolutely no evidence to support a contention that a real estate broker, representing a client in a professional fiduciary capacity, subject to equivalent legal obligations to put the client’s interests ahead of the brokers interest in his fees, is somehow different that the representation of a client by an attorney. The interpretation advanced by the Bar would distribute a benefit to attorneys and a burden upon real estate brokers who are also attorneys without standards and in an ad hoc fashion.

FOURTH ASSIGNMENT OF ERROR

The Trial Panel erred in admitting Exhibit 38, the Judgment of the United States Bankruptcy Court by ruling:

“Well, this is difficult, but I am going to overrule your objection and receive it. I think that the panel is wise enough to weigh in on this, and that this does not have res judicata effect. I think I'll just stop speaking at that point.”

A. Preservation of Error

The error alleged was preserved by the Accused objecting to the admission of the Exhibit:

“Objection. Again, relevance. This is a civil proceeding with a burden of proof which is preponderance of the evidence. I've researched extensively, and I have never found a case where the Bar has tried to introduce a civil

judgment in a disciplinary proceeding with the burden of proof that is significantly higher as proof of that fact. However, under Oregon law, and I'll site you to the case of State vs. Morrow, 158 Or 412, this is an old case, 1938. In a criminal case, and I don't think any of the attorneys here would doubt that you cannot introduce evidence of a civil judgment to prove facts in a criminal case, because the burden of proof is different, higher. It is not proof of anything in this case, and therefore has no relevance. It's an opinion, perhaps, of someone, but it's based upon findings that are not admissible in this case because they can't prove anything, because the burden there was less. So I object to any testimony about what's in here, or these documents, if they are offered, because of that. There is no preclusive effect. There's no res judicata effect of it. And it is inappropriate for you to consider it." (TR 63-64) The Trial Panel overruled the objection, stating:

"Well, this is difficult, but I am going to overrule your objection and receive it. I think that the panel is wise enough to weigh in on this, and that this does not have res judicata effect. I think I'll just stop speaking at that point." (Tr 65)

B. Standard of Review

"The court shall consider each matter de novo upon the record and may adopt, modify or reject the decision of the trial panel in whole or in part and thereupon enter an appropriate order." DR 10.6

ARGUMENT

This Assignment of Error is a precautionary assignment. While the Trial Panel Chair admitted the Exhibit stating that it did not have res judicata effect, it is not known what purpose the Exhibit was admitted for nor whether it was taken into consideration by the Trial Panel.

The burden of proof in a disciplinary hearing is clear and convincing evidence. DR 5.2 The burden of proof in a civil case is a preponderance of evidence, a significantly lower burden. While no cases have been found where a

civil judgment was admitted in a disciplinary proceeding, this Court has held in criminal cases, where the burden of proof is higher, that:

“We deem the law to be that generally a judgment recovered in a civil action is not admissible in a criminal trial to prove any fact therein involved.”

State v. Morrow, 158 Or. 412, 430, 75 P.2d 737 (1938) Nothing has changed since this decision was rendered and this holding should apply in this case. There is no relevance at all to a judgment entered in another court in a proceeding having a lower burden of proof.

Even the argument of Bar Counsel fails to show how this Judgment had any relevance:

“I agree that it has no preclusive effect. It's not res judicata. And I agree that the burden of proof here is considerably higher. Unlike a jury in a criminal case, I'm confident that the panel can take the opinion for what it is, look at the evidence that it has before it, and take the opinion for whatever weight it has, realizing it doesn't settle it for the panel, and consider it part of the evidence here at this proceeding.”

(Tr. 64)

Since there is no relevance was argued for it's admission, it was error for the Trial Panel to admit the judgment for any reason.

CONCLUSION

In conclusion, this Court should reject the opinion of the Trial Panel in whole.

Respectfully submitted:

/s/ Michael L. Spencer
Michael L. Spencer, OSB # 83090
Accused-Petitioner

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

Brief Length:

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 6,417.

Type Size:

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

Dated this 27th day of February, 2013.

/s/ Michael L. Spencer

Michael L. Spencer, OSB # 83090

mike@mspencer.com

CERTIFICATE OF eFILING
And
PROOF OF SERVICE

I certify that I submitted the original of MICHAEL L. SPENCER'S ("Accused") PETITION FOR REVIEW, BRIEF AND EXCERPT OF RECORD via eFiling on February 27, 2013, so that it may be filed with the Appellate Court Administrator at this address:

Appellate Court Administrator
Appellate Courts Record Section
1163 State Street
Salem, Oregon 97301

I further certify that on February 27, 2013, I served via eService a true and correct copy of the MICHAEL L. SPENCER'S ("Accused") PETITION FOR REVIEW, BRIEF AND EXCERPT OF RECORD to Linn D. Davis.

/s/ Michael L. Spencer
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