BEFORE THE DISCIPLINARY BOARD
OF THE
WASHINGTON STATE BAR ASSOCIATION

In re THOMAS F. MCGRATH, JR., Lawyer (WSBA No. 1313)	NO. 09#00070 **SECOND AMENDED** FINDINGS OF FACT, CONCLUSIONS OF LAW AND HEARING OFFICER'S RECOMMENDATION

Pursuant to Rule 10.13 of the Rules for Enforcement of Lawyer Conduct ("ELC"), a hearing was held before the undersigned Hearing Officer on May 24, 25, and 26, 2010. Disciplinary counsel Kathleen Dassel appeared for the Association, and respondent appeared through counsel Kurt Bulmer.

I. FORMAL COMPLAINT

The respondent was charged by Formal Complaint dated December 18, 2009, with five counts of violating the Rules of Professional Conduct:

Count 1: By misrepresenting to opposing counsel that certain documents did not exist, respondent violated RPC 4.1 (knowingly making a false statement to a third person) and/or RPC 8.4(c) (dishonesty, fraud, deceit or misrepresentation) and/or RPC 8.4(d) (conduct prejudicial to the administration at justice).

Count 2: By willfully disobeying or violating the court's order directing him to provide true and complete responses to discovery, respondent violated RPC 8.4(j) (willfully disobey or violate a court order).

Count 3: By making false certifications to discovery responses, respondent violated RPC 8.4(c) and RPC 8.4(d).

Count 4: By engaging in conduct, while representing a client, that manifests prejudice and/or bias toward another party on the basis of national origin, respondent violated RPC 8.4(h) (conduct prejudicial to the administration of justice by manifesting prejudice).

Count 5: By communicating ex parte with Judge Jim Rogers of the King County Superior Court without authorization to do so by law or court order, respondent violated RPC 3.5(b) (impartiality and decorum of the tribunal).

II. HEARING

At the hearing May 24 through 26, 2010, witnesses were sworn and presented testimony, and exhibits were admitted into evidence. Having considered the evidence and argument of counsel, the Hearing Officer makes the following Findings of Fact, Conclusions of Law and Recommendation.

III. FINDINGS OF FACT

The following facts were proven by a clear preponderance of the evidence as required by ELC 10.4(b).

A. Counts 1, 2 and 3

1. Respondent was admitted to practice law in Washington on March 6, 1970, disbarred by order of the Washington Supreme Court on December 9, 1982, and readmitted to practice law on June 22, 1993.

2. A grievance was filed against respondent on July 21, 2008, by Judge Jim Rogers of the King County Superior Court [Exhibit A-34].

3. On February 11, 2005, respondent filed a Summons and Complaint on behalf of his client Chiropractic Wellness Center at Capitol Hill P.S., Inc., a Washington professional service corporation against Katherine Ellison, John Doe Ellison and Always Chiropractic and Wellness, LLC (hereinafter "Ellison"). [Exhibit A-1] By Amended Answer, Counterclaims, and Third-Party Complaint, Ellison counterclaimed against Chiropractic Wellness Center of Capitol Hill P.S., Inc., and impleaded Chiropractic Wellness Centers P.S., Inc., Melinda Maxwell D.C. and respondent Thomas F. McGrath, Jr. (erroneously named as "John McGrath" in the caption) and their marital community (hereinafter "CWC"). [Exhibit A-2] Respondent represented the CWC parties throughout the litigation with co-counsel. All of CWC's claims were dismissed on summary judgment, and the caption was re-styled to denominate Ellison as plaintiff and the CWC entities and persons as defendants. The case proceeded to trial on Ellison's claims. The litigation was contentious and difficult.

4. During the litigation, the parties served each other with discovery requests. Respondent continually interposed general and specific objections to Ellison's discovery requests and made express representations that documents within the scope of the discovery requests did not exist. In response to Ellison's First Requests for Production of Documents, respondent interposed general objections to all of the requests and specific objections to the majority of the requests. Many of the objections were not made in good faith. For example, Ellison's Request for Production No. 23 stated:

> Produce a copy of the marketing calendar for each and every chiropractor hired, retained, or contracted by you to provide chiropractic services at every location you conducted business in, for a period of two years before Katherine Ellison became employed by you and to date.

Respondent prepared and served the following response:

> Objectionable. What is a "Marketing Calendar." (sic) This request is vague, overbroad, ambiguous, burdensome and invasive.

A "Marketing Calendar" was a specific compilation of information and dates described in CWC's office manual, referred to by CWC employees and was a term understood by CWC and respondent.

5. Additional discovery requests served by Ellison sought payment and other business records relevant to Ellison's claims for employment discrimination, disparate treatment, failure to pay wages owed, and other issues central to her claims.

6. Respondent testified that his practice upon receiving discovery requests and orders compelling production was to give the discovery request or order to his wife and ask

her to assemble responsive information and material. Respondent testified that he made little or no effort to inquire about or search for documents or information. Respondent's wife testified to the same effect.

7. Respondent was defendant Maxwell's husband, was a corporate officer of the CWC professional service corporations, had previously represented CWC in business matters and litigation and shared office space with defendant Maxwell.

8. Discovery responses were signed by respondent. CR 26(g) provides in pertinent part:

> Every request for discovery or response or objection thereto made by a party represented by an attorney shall be signed by at least one attorney of record in his individual name .... The signature of the attorney or party constitutes a certification that he has read the request, response, or objection, and that to the best of his knowledge, information, and belief formed after a reasonable inquiry it is: (1) consistent with these rules and warranted by existing law or good faith argument ...; (2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

9. On Ellison's motions, the court entered orders directing respondent's clients to "withdraw all 'general objections' to Ms. Ellison's first requests for production," "to withdraw all boilerplate objections to Ms. Ellison's first requests for production," and compelling responses to the requests for production that were the subject of the motion to compel. By Order dated February 13, 2007, the court found:

> ... CWC exercised bad faith in its responses to Ms. Ellison's first requests for production. This court finds that CWC's use of generic and blanket general objections, cut-and-paste objections to essentially all of the discovery requests, and refusal to provide responses to questions as basic as asking CWC to produce an employee roster violated CWC's duty to exercise good faith under both CR 26 and CR 37....

[Exhibit A-15, p. 2, line 19]

10. The court entered a further order on April 19, 2007, finding that CWC had not complied with its previous order compelling production and finding that:

> CWC, Ms. Maxwell, and McGrath falsely certified responses to Ms. Ellison's requests for production.

[Exhibit A-24, p. 7, line 11]

The court further stated:

> This court also finds that CWC, Ms. Maxwell, and Mr. McGrath have acted in bad faith as to their other responses to discovery.

[Exhibit A-24, p. 7, line 19]

The court further stated:

> This court finds that Ms. Maxwell's, CWC's, and Mr. McGrath's actions as described above were willful and intentional and undertaken to mislead both Ms. Ellison and this court in regard to the completeness of their discovery responses. This Court also finds that Ms. Maxwell, CWC, and Mr. McGrath have willfully and intentionally disregarded this Court's prior order to compel.

[Exhibit A-24, p. 8, line 4]

The court further stated:

> This court finds that Ms. Maxwell, CWC, and Mr. McGrath had actual knowledge of these violations. This court also finds that those individuals had actual knowledge that the responses and certifications were not simply incorrect, but were falsely sworn.

[Exhibit A-24, p. 8, line 17]

The court further stated:

> This court finds that if in response to clear requests for production, and an order to compel, CWC, Ms. Maxwell, and Mr. McGrath have still knowingly and willfully withheld documents material to Ms. Ellison's claims that they knew were both requested and ordered compelled, that no order this court could fashion now would be sufficient to ensure their compliance in the future. This court finds its previous order was clear.

[Exhibit A-24, p. 9, line 4]

The court further found:

> Ms. Maxwell, CWC, and Mr. McGrath falsely certified responses to requests for production ....

[Exhibit A-24, p. 10, line 11]

11. Documents within the scope of the requests for production, that respondent and his client had denied existed, were later located by CWC.

12. The court's findings were based largely on deposition testimony of Melinda Maxwell wherein she acknowledged the existence of records that CWC discovery responses had described as non-existent. Dr. Maxwell testified in this proceeding that she was responsible for gathering all information responsive to the discovery requests.

13. After entry of the above-cited Orders, Ellison moved for a default judgment for failure to make discovery. The court (Honorable Jim Rogers) issued an order denying the requested relief but stating: "It was evident at the hearing on the Motion that counsel for the Maxwell parties had not yet made certain basic inquiries within his own client's companies about certain discovery." [Exhibit A-28, 4th page, line 7]

14. Respondent, by virtue of his marriage, past representation of CWC, position as a CWC corporate officer and general familiarity with CWC's business operations had reason to believe that responsive documents and information existed and that discovery responses he prepared stating otherwise and his certification pursuant to CR 26(g) were incorrect. Respondent did not conduct a reasonable inquiry into the existence of responsive documents and information.

15. Respondent's conduct caused harm to the administration of justice in frustrating the orderly progression of the case and unnecessarily requiring the court to devote time and resources to addressing frivolous, unfounded and unreasonable discovery objections and responses. Ellison's case was jeopardized by CWC's incomplete discovery responses. Judges Carey and Rogers spent an inordinate number of hours on discovery issues.

B. Counts 4 and 5

16. On February 20, 2008, respondent prepared and transmitted to Judge Jim Rogers a typed letter addressing a pending motion. The letter sent to and read by Judge Rogers included the following handwritten postscript added by the respondent.

> Your Decision is going to effect American's (sic) – How (sic) are you going to trust and believe – a (sic) alien or a U.S. citizen.
>
> Thomas McGrath (signature) # 1313

[Exhibit A-26]

17. A second letter, also dated February 20, 2008, was handwritten and transmitted by respondent to Judge Rogers. The letter read:

> 2-20-08
>
> Dear Judge Rogers:
>
> How many jobs do we give to aliens like Dr. Ellison. (sic) She was schooled here in the U.S. and refuses to become a U.S. citizen. She needs to go back to Canada.
>
> In that regard, I am asking the Court to freeze all of her assets pending the outcome of this case.
>
> Thomas P. McGrath, Jr.
> Attorney for Plaintiff CWC,
> King County Superior Court

[Exhibit A-27]

18. Judge Rogers received and read both letters in due course during the pendency of the motion.

19. The typed February 20, 2008, letter [Exhibit A-26] included the following:

> All my correspondence to the Judges (sic) chambers will be attached to my declaration as exhibits and made a part of this record, if needed for appeal or for whatever other purpose.

> All correspondence to your chamber have been sent to opposing counsel either by fax and/or email and/or mail, and if my (sic) fax, this office has kept transmission reports.
>
> Respectfully submitted,
>
> Thomas F. McGrath, Jr.
>
> cc: Dan L. Bridges [opposing counsel]

20. On February 20, 2008, respondent prepared, served and filed the "Declaration of Thomas F. McGrath, Jr. re: Letters to Court" stating in part as follows:

> I, Thomas F. McGrath, Jr. declare under penalty of perjury of the laws of the State of Washington that the following statements are true, accurate and correct to the best of my knowledge regarding the current letters I have sent to the Court with copies to co-counsel and defense counsel, which I respectfully be made (sic) a part of this case record:
>
> 1. Letter dated January 30, 2008, regarding alleged misstatements in Dr. Ellison's response. Exhibit "A."
>
> 2. Letters dated February 8, 2008, regarding counsel's medical reports. Not attached.
>
> 3. Letter dated February 13, 2008, self-explanatory, marked Exhibit "B."
>
> 4. Letter dated February 20, 2008 (marked Exhibit "C") regarding the motion for Default by Dr. Ellison and the declaration of her husband, Tommy Coburn.
>
> DATED this 20th day of February, 2008.
>
> s/ Thomas F. McGrath, Jr.

[Exhibit A-100]

21. Appended to the declaration was a copy of the February 20, 2008, typed letter from respondent to Judge Rogers that did not include the handwritten postscript.

22. No copy of the handwritten February 20, 2008, letter was appended to the declaration.

23. Respondent's ex parte communications addressed matters at issue before the court and were intended by respondent to be persuasive to the court on those issues.

24. Opposing counsel did not learn of the ex parte communications until several months later at the time of the trial.

25. Judge Rogers did not learn that the ex parte communications had not been provided to opposing counsel until the time of the trial.

26. Judge Rogers initially contemplated a show cause hearing to consider sanctions for the ex parte communications. Thereafter, he determined to refer the matter to the Washington State Bar Association in lieu of conducting a show cause hearing.

27. Respondent, notwithstanding prior apologies, is of the belief that Ellison's national origin and immigration status supported a valid argument in support of the relief he sought.

28. Respondent's conduct caused actual harm to the public's view of the integrity of the bar and the administration of justice.

IV. CONCLUSIONS OF LAW RELEVANT TO COUNT 1

1. The court finding that respondent intentionally failed to produce documents, misrepresented their existence and violated a court order in failing to provide discovery was

based on deposition testimony of Melinda Maxwell that is not in evidence in this proceeding, is not consistent with the testimony of Dr. Maxwell in this proceeding and was probably reached on a "preponderance of the evidence" standard. Absent evidence that respondent had actual knowledge of existence of the documents, as opposed to remaining consciously ignorant of whether such documents and information existed, it cannot be found by a clear preponderance of the evidence that respondent knowingly made a false statement or violated a court order in violation of RPC 4.1 or intentionally or willfully misrepresented facts in violation of RPC 8.4(c). Respondent violated RPC 8.4(d) in providing discovery responses to opposing counsel without conducting a reasonable inquiry into the truthfulness of the responses in circumstances where inquiry and investigation by respondent was clearly called for. Had Respondent undertaken a reasonable inquiry, he would have known that the discovery responses were false.

V. CONCLUSIONS OF LAW RELEVANT TO COUNT 2

1. Absent proof of willfulness by a clear preponderance of the evidence, Count 2 is dismissed as not proven.

VI. CONCLUSIONS OF LAW RELEVANT TO COUNT 3

1. The Washington Civil Rules for Superior Court govern the administration of justice for civil cases. CR 26(g) provides that an attorney's signature on a discovery response is a certification and representation that the attorney has read the response and, to the best of his knowledge, information and belief ***formed after a reasonable inquiry*** is correct as required by the rules, not interposed for improper purpose and not unreasonable or unduly

burdensome to the opposing party. The "reasonable inquiry" requirement exists to prevent frustration of discovery by a willfully ignorant responding attorney. Respondent's certification was a false representation to the court and opposing counsel that he had made a reasonable inquiry to determine that the responses were complete and correct. By certifying the responses pursuant to CR 26(g), respondent made an intentional misrepresentation to opposing counsel and the court in violation of RPC 8.4(c) and 8.4(d).

VII. CONCLUSIONS OF LAW RELEVANT TO COUNTS 4 AND 5

1. By directing argument to the court to the effect that the opposing party's national origin and citizenship status compromised her credibility and legal position, respondent intentionally violated RPC 8.4(h).

2. By communicating ex parte with a judge and advocating with respect to the merits of a pending dispute, respondent intentionally violated RPC 3.5(b).

VIII. PRESUMPTIVE SANCTION

1. Count 1. With respect to respondent's misrepresentations concerning the existence of documents in violations of RPC 8.4(d), ABA Standard 6.1 dealing with false statements, fraud, and misrepresentation directs that "**suspension** is generally appropriate" where a lawyer "knows" that false statements or documents are being submitted to the court or that material information is improperly being withheld [Section 6.12] [emphasis added] and provides that "**reprimand**" is generally appropriate when a lawyer is "negligent" either in determining whether statements or documents are false or in taking remedial action when material information is being withheld …." [Section 6.13]

Respondent's misconduct, by his admission and the testimony of his wife, with respect to the provision of discovery responses and documents was more than merely negligent. However, it cannot be found by a clear preponderance of the evidence that respondent had actual knowledge that responsive information and documents were being withheld. Accordingly, the presumptive sanction with respect to the discovery responses is **reprimand** pursuant to Section 6.13.

2. Count 3. ABA Standard 6.2 regarding abuse of the legal process provides in pertinent part:

> **Suspension** is generally appropriate when a lawyer knows that he or she is violating a court order or rule and causes injury or potential injury to a client or a party, or causes interference or potential interference with a legal proceeding.

By a clear preponderance of the evidence, respondent served and filed Civil Rule 26(g) certifications thereby representing that he had made a reasonable inquiry and certified the discovery responses based on such reasonable inquiry. By the testimony of respondent and his wife, respondent made no reasonable inquiry.

The presumptive sanction is, therefore, **suspension**.

3. Count 4. ABA Standard 7.2 provides:

> **Suspension** is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to client, the public, or the legal system.

Respondent knowingly made statements manifesting prejudice based on national origin of the opposing party.

The presumptive sanction is, therefore, **suspension**.

4. Count 5. ABA Standard 6.22 provides:

> **Suspension** is generally appropriate when a lawyer knows that he or she is violating a court order or rule, and causes injury or potential injury to a client or a party, or causes interference or potential interference with a legal proceeding.

ABA Standard 6.32 provides:

> **Suspension** is generally appropriate when a lawyer engages in communication with an individual in the legal system when the lawyer knows that such communication is improper and causes injury or potential injury to a party or causes interference or potential interference with the outcome of the legal proceeding.

The presumptive sanction is, therefore, **suspension**.

IX. AGGRAVATING AND MITIGATING FACTORS

A. Aggravating.

ABA Standard 9.22 sets forth a list of aggravating factors to be considered in determining the appropriate sanction for professional misconduct. The following aggravating factors apply in this case:

1. Prior disciplinary offenses. Respondent was disbarred in 1982 following conviction for second degree assault with a deadly weapon. *See*, *In re Disciplinary Proceeding Against McGrath*, 98 Wn.2d 337, 655 P.2d 232 (1982).

2. Multiple offenses.

3. Refusal to acknowledge wrongful nature of conduct (Count 4).

4. Substantial experience in the practice of law.

B. Mitigating

ABA Standard Section 9.32 sets forth a list of mitigating factors. The following mitigator applies to this matter:

1. Remoteness of prior offense in terms of time and nature of offense.

X. RECOMMENDATION

The hearing officer recommends that respondent be suspended as follows:

1.	Count 3	1 month
2.	Count 4	1 month
3.	Count 5	1 month
	TOTAL	**3 months**

DATED this 20th day of July, 2010.

Timothy J. Parker, WSBA No. 8797
Hearing Officer

CERTIFICATE OF SERVICE

I certify that I caused a copy of the Second Amended FOF, COL & HO's Recommendation to be delivered to the Office of Disciplinary Counsel and to be mailed to Respondent/Respondent's Counsel at [illegible] by Certified/first class mail, postage prepaid on the 21st day of July, 2010.

Clerk/Counsel to the Disciplinary Board