

FILED
SEP 19 2013
DISCIPLINARY BOARD

BEFORE THE
DISCIPLINARY BOARD
OF THE
WASHINGTON STATE BAR ASSOCIATION

In re

JANE RYAN KOLER,

Lawyer (Bar No. 13541).

Proceeding No. 13#00005

STIPULATION TO SIX-MONTH
SUSPENSION

Under Rule 9.1 of the Rules for Enforcement of Lawyer Conduct (ELC), the following Stipulation to Six-Month Suspension is entered into by the Washington State Bar Association (Association), through Senior Disciplinary Counsel Joanne S. Abelson, Respondent lawyer Jane Ryan Koler, and Respondent's counsel Anne I. Seidel.

Respondent understands that she is entitled under the ELC to a hearing, to present exhibits and witnesses on her behalf, and to have a hearing officer determine the facts, misconduct and sanction in this case. Respondent further understands that she is entitled under the ELC to appeal the outcome of a hearing to the Disciplinary Board, and, in certain cases, the Supreme Court. Respondent further understands that a hearing and appeal could result in an outcome more favorable or less favorable to her. Respondent chooses to resolve this proceeding now by entering into the following stipulation to facts, misconduct and sanction to avoid the risk, time, expense attendant to further proceedings.

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1 **I. ADMISSION TO PRACTICE**

2 1. Respondent was admitted to practice law in the State of Washington on October 27,
3 1983.

4 **II. STIPULATED FACTS**

5 2. In the Fall of 2006, Pacific Topsoils, Inc. (Pacific) hired Parametrix, an
6 environmental engineering firm, to assist it with obtaining a grading permit from Snohomish
7 County as part of a Voluntary Correction Agreement for environmental remediation.
8 Parametrix was to prepare a wetlands delineation report.

9 3. In October 2006, the Washington State Department of Ecology (Ecology) met with
10 Pacific's Environmental Director, Janusz Bajsarowicz, regarding a complaint of unauthorized
11 grading and filling of wetlands. Ecology asked that Pacific delineate the wetlands on site and
12 provide the report to Ecology. Mr. Bajsarowicz advised Ecology that Pacific already was in the
13 process of preparing the wetlands delineation and had hired Parametrix to perform the work.

14 4. The contract between Pacific and Parametrix was signed on November 13, 2006. It
15 does not reference Respondent.

16 5. In December 2006, a Parametrix employee contacted Ecology to report that the
17 wetlands delineation was complete and that wetlands had been found on the site. Later that
18 month Mr. Bajsarowicz also advised Ecology that the wetlands delineation was finished,
19 wetlands had been identified on the site, and that Pacific would begin work on a mitigation plan.
20 Mr. Bajsarowicz was not a management-level employee of Pacific.

21 6. Also in December 2006, Pacific's owner, Dave Forman, hired Respondent. Mr.
22 Forman, now deceased, was Respondent's primary contact at Pacific. According to Ms. Koler,
23 Mr. Forman was not aware that Mr. Bajsarowicz had agreed to provide the report to Ecology
24

1 and did not authorize either Mr. Bajsarowicz or Parametrix to be in direct contact with Ecology.

2 7. Parametrix issued its final report on January 24, 2007.

3 8. The Parametrix report identified wetlands on the site.

4 9. In March 2007, Ecology issued an administrative order and penalty to Pacific for
5 illegally filling wetlands.

6 10. In April 2007, Pacific appealed the administrative order and penalty to the Pollution
7 Control Hearing Board (PCHB).

8 11. In May 2007, unbeknownst to Respondent, Ecology obtained a copy of the January
9 24, 2007 Parametrix report from the employee who wrote it. This copy did not contain maps,
10 photographs, and other attachments referenced in the report. Over the next few months,
11 Ecology attempted to obtain the Parametrix report from Pacific through discovery so it would
12 have the complete report and to ensure the authenticity of the report that Ecology had been
13 given.

14 12. Respondent did not assert work product objections initially. Instead, she objected on
15 grounds that the proceedings were penal and Ecology could not force Pacific to produce
16 evidence to support the charges.

17 13. In August 2007, Ecology's counsel issued a subpoena duces tecum to Parametrix.

18 14. In a motion for protective order Respondent filed on August 31, 2007, she stated that
19 "the preliminary [Parametrix] examination was prepared on behalf of [Pacific] at the request of
20 [Pacific's] attorney, specifically because it appeared likely that litigation would arise relating to
21 the alleged filling of wetlands. Under that contract, Parametrix was hired as a consulting
22 expert."

23 15. This was not true.
24

1 16. In a declaration Respondent signed on August 27, 2007 in support of the motion
2 referenced above, she stated, "When it became apparent that one or more government agencies
3 were alleging that [Pacific] had illegally filled wetlands at its Smith Island facility in Snohomish
4 County, I retained a scientist who was working for Parametrix, Inc. to conduct a preliminary
5 examination of 37 acres. [¶] I retained this scientist as a consulting expert, specifically in
6 anticipation of litigation."

7 17. This was not true.

8 18. Respondent made a similar claim, also untrue, in a September 12, 2007 declaration
9 in support of a motion to quash.

10 19. Were Respondent's claims true, the Parametrix report arguably would qualify as
11 protected work product and would be undiscoverable under CR 26(b)(5).

12 20. Respondent, however, had not hired Parametrix.

13 21. The PCHB administrative law judge rejected Respondent's argument that the
14 Parametrix report was protected by work product privilege.

15 III. STIPULATION TO MISCONDUCT

16 22. By misrepresenting to the PCHB that she had retained Parametrix to prepare the
17 report in anticipation of litigation to support her argument that the report should be protected
18 from discovery under the work product privilege, Respondent violated RPC 3.3(a)(1) and RPC
19 8.4(d).

20 IV. PRIOR DISCIPLINE

21 23. Respondent has no prior discipline.

22 V. APPLICATION OF ABA STANDARDS

23 24. The following American Bar Association Standards for Imposing Lawyer Sanctions
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1 (1991 ed. & Feb. 1992 Supp.) apply to this case:

2 ABA Standard 6.1 -- False Statements, Fraud, and Misrepresentation

3 6.11 Disbarment is generally appropriate when a lawyer, with the intent to deceive the
4 court, makes a false statement, submits a false document, or improperly withholds
5 material information, and causes serious or potentially serious injury to a party, or
6 causes a significant or potentially significant adverse effect on the legal proceeding.

7 6.12 Suspension is generally appropriate when a lawyer knows that false statements or
8 documents are being submitted to the court or that material information is improperly
9 being withheld, and takes no remedial action, and causes injury or potential injury to a
10 party to the legal proceeding, or causes an adverse or potentially adverse effect on the
11 legal proceeding.

12 6.13 Reprimand is generally appropriate when a lawyer is negligent either in
13 determining whether statements or documents are false or in taking remedial action
14 when material information is being withheld, and causes injury or potential injury to a
15 party to the legal proceeding, or causes an adverse or potentially adverse effect on the
16 legal proceeding.

17 6.14 Admonition is generally appropriate when a lawyer engages in an isolated
18 instance of neglect in determining whether submitted statements or documents are false
19 or in failing to disclose material information upon learning of its falsity, and causes little
20 or no actual or potential injury to a party, or causes little or no adverse or potentially
21 adverse effect on the legal proceeding.

22 25. For purposes of this stipulation, the parties agree that Respondent acted knowingly.

23 Respondent contends that she acted negligently but both to avoid a hearing on this matter
24 (including having to make public the information in Exhibit A to this Stipulation) and due to
25 proof problems caused by the death of Dave Forman, is stipulating that the Association would
26 be able to prove by a clear preponderance of the evidence that she acted knowingly as defined
27 by the ABA Standards.

28 26. If this case were to proceed to hearing, Respondent would offer the following
29 evidence regarding her state of mind: as discussed in Exhibit A, Respondent was under
30 substantial stress during this time period. She handles many land use cases like this one, which
31 frequently involve experts, whom she almost always hires herself. In the underlying case alone,

1 she had retained five other experts herself. She believes that the conditions discussed in Exhibit
2 A caused her to confuse the circumstances of Parametrix's retention with the retention of
3 numerous other experts. Because Respondent and Mr. Forman were unaware at the time of Mr.
4 Bajsarowicz's and Parametrix's contacts with Ecology, they agreed in December 2006 to treat
5 Parametrix as a consulting expert. That conversation rather than the details of Parametrix's
6 retention were in Respondent's mind when she signed the documents discussed above.

7 27. The legal system suffers injury when lawyers make misrepresentations to the
8 tribunal during the course of litigation. Additionally, resources were expended unnecessarily to
9 resolve the discoverability of the report. Respondent's misconduct did not affect the result of
10 the legal proceedings.

11 28. The presumptive sanction is a suspension under ABA Standard 6.12.

12 29. The following aggravating factor applies under ABA Standards Section 9.22:

13 (i) substantial experience in the practice of law [admitted 1983].

14 30. The following mitigating factors apply under ABA Standards Section 9.32:

- 15 (a) absence of a prior disciplinary record;
16 (b) personal or emotional problems [see attached confidential Exhibit A];¹
(g) character or reputation [see letters attached as Exhibit B];
17 (l) remorse.

18 31. It is an additional mitigating factor that Respondent has agreed to resolve this matter
19 at an early stage of the proceedings, thereby saving resources that would have been required to
20 litigate this matter.

21 32. A six-month suspension is proportional to other cases where a lawyer made knowing
22 misrepresentations. See, e.g., In re Disciplinary Proceeding Against Conteh, 175 Wn.2d 134,

23 ¹ The parties will request that the Disciplinary Board enter an order protecting Exhibit A under ELC
24 3.2(e).

1 284 P.3d 724 (2012). Although the misconduct here is similar to that in Conteh, Respondent
2 has more mitigators and fewer aggravators than in Conteh.

3 **VI. STIPULATED DISCIPLINE**

4 33. The parties stipulate that Respondent shall be suspended from the practice of law for
5 six months.

6 34. To allow Respondent to wind down her practice in a predictable and orderly fashion,
7 the parties agree to jointly ask the Supreme Court to start the suspension on November 15,
8 2013, or two weeks after the Court enters its order approving this stipulation, whichever is later.

9 **VII. RESTITUTION**

10 35. Restitution is not required under the facts of this case.

11 **VIII. COSTS AND EXPENSES**

12 36. In light of Respondent's willingness to resolve this matter by stipulation at an early
13 stage of the proceedings, Respondent shall pay attorney fees and administrative costs of \$1,000
14 in accordance with ELC 13.9(i). The Association will seek a money judgment under ELC
15 13.9(l) if these costs are not paid within 30 days of approval of this stipulation.

16 37. Reinstatement from suspension is conditioned on payment of costs.

17 **IX. VOLUNTARY AGREEMENT**

18 38. Respondent states that prior to entering into this Stipulation she has consulted
19 independent legal counsel regarding this Stipulation, that Respondent is entering into this
20 Stipulation voluntarily, and that no promises or threats have been made by the Association, nor
21 by any representative thereof, to induce the Respondent to enter into this Stipulation except as
22 provided herein.

1 X. LIMITATIONS

2 39. This Stipulation is a compromise agreement intended to resolve this matter in
3 accordance with the purposes of lawyer discipline while avoiding further proceedings and the
4 expenditure of additional resources by the Respondent and the Association. Both the
5 Respondent lawyer and the Association acknowledge that the result after further proceedings in
6 this matter might differ from the result agreed to herein.

7 40. This Stipulation is not binding upon the Association or the respondent as a statement
8 of all existing facts relating to the professional conduct of the respondent lawyer, and any
9 additional existing facts may be proven in any subsequent disciplinary proceedings.

10 41. This Stipulation results from the consideration of various factors by both parties,
11 including the benefits to both by promptly resolving this matter without the time and expense of
12 hearings, Disciplinary Board appeals, and Supreme Court appeals or petitions for review. As
13 such, approval of this Stipulation will not constitute precedent in determining the appropriate
14 sanction to be imposed in other cases; but, if approved, this Stipulation will be admissible in
15 subsequent proceedings against Respondent to the same extent as any other approved
16 Stipulation.

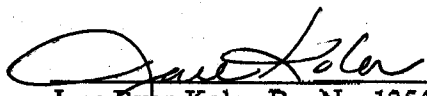
17 42. Under Disciplinary Board policy, in addition to the Stipulation, the Disciplinary
18 Board shall have available to it for consideration all documents that the parties agree to submit
19 to the Disciplinary Board, and all public documents. Under ELC 3.1(b), all documents that
20 form the record before the Board for its review become public information on approval of the
21 Stipulation by the Board, unless disclosure is restricted by order or rule of law.

22 43. If this Stipulation is approved by the Disciplinary Board and Supreme Court, it will
23 be followed by the disciplinary action agreed to in this Stipulation. All notices required in the
24

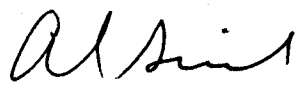
1 Rules for Enforcement of Lawyer Conduct will be made.

2 44. If this Stipulation is not approved by the Disciplinary Board and Supreme Court, this
3 Stipulation will have no force or effect, and neither it nor the fact of its execution will be
4 admissible as evidence in the pending disciplinary proceeding, in any subsequent disciplinary
5 proceeding, or in any civil or criminal action.

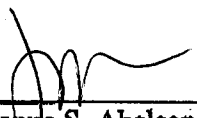
6 WHEREFORE the undersigned being fully advised, adopt and agree to this Stipulation
7 to Discipline as set forth above.

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10 _____
Jane Ryan Koler, Bar No. 13541
Respondent

Dated: July 31, 2013

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12 
13 _____
Anne I. Seidel, Bar No. 22742
Counsel for Respondent

Dated: August 2, 2013

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15 
16 _____
Joanne S. Abelson, Bar No. 24877
Senior Disciplinary Counsel

Dated: August 5, 2013

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EXHIBIT A
(CONFIDENTIAL)