

BEFORE THE ALASKA BAR ASSOCIATION

AREA HEARING COMMITTEE

THIRD JUDICIAL DISTRICT

ALASKA BAR ASSOCIATION

Filed and Entered on

JUN 16 2010

In The Disciplinary Matter Involving)
)
 Wevley William Shea,)
)
 Respondent.)
)

Pursuant to the Rules of
Disciplinary Enforcement

Received By D. O'Negan

ABA Membership No. 7705060

ABA File No. 2008D091

**FINAL REPORT OF THE HEARING COMMITTEE and
RECOMMENDATION RE: SANCTIONS**

I. INTRODUCTION

This constitutes the Final Report of the Hearing Committee in the above matter, pursuant to Alaska Bar Rules 12(i)(4) and 22(l). This Final Report incorporates the April 7, 2010 "Findings of Fact and Conclusions of Law" as to the "liability" phase of this matter; the findings, conclusions and recommendations stated herein as to the appropriate sanction; all briefs and pleadings filed by either party and this Committee in this matter; the electronic record of all hearings and proceedings in this matter; and, all transcripts of those proceedings.

II. DISCUSSION

On April 7, 2010 this Committee issued its "Findings of Fact and Conclusions of Law," in which this Committee held that the Alaska Bar Association had proved by clear and convincing evidence three of its four allegations brought against respondent Wevley Shea. The parties thereafter telephonically appeared at an April 14, 2010 prehearing conference, and by agreement May 26, 2010 was selected for the sanctions hearing;

various prehearing procedures and deadlines were also discussed and agreed upon. On April 15 this Committee issued its "Second Prehearing Scheduling Order" memorializing the procedures and deadlines. No objections were filed, and the May 26 hearing proceeded on schedule. For the sanctions hearing the parties filed hearing briefs and witness lists.¹ The parties had the right to call and cross-examine witnesses, and to give opening and closing statements. The hearing was scheduled for all day May 26, 2010 (9:00 a.m. to 4:30 p.m.), but ultimately the hearing took only about two hours. This Committee then took the matter under advisement.

The Bar presented three witnesses -- attorney Steven O'Hara via his affidavit, attorney John Thorsness (in person), and David Kyzer (in person).² As to the two in-person witnesses, at the hearing Respondent essentially invoked Alaska Rule of Evidence 615 to exclude the witnesses from hearing the opening statements or the other witness' testimony until that witness had completed his own testimony and been excused. Over the Bar's objection the Committee chair granted Respondent's request. Mr. Thorsness testified first about the impact Respondent's statements, allegations and pleadings potentially or actually had on Mr. Thorsness' personal life and legal practice. Respondent cross-examined Mr. Thorsness; the Bar had no redirect. Dr. Kyzer then testified, he read from a prepared written statement of the potential and actual impacts

¹ To be precise, both parties filed prehearing briefs, but only the Bar filed a witness list.

² Mr. O'Hara's affidavit was admitted without objection as Exhibit 1. The affidavit was previously produced by the Bar on May 7, 2010 pursuant to paragraph 1 of this Committee's April 15, 2010 prehearing order, and pursuant to paragraph 2 Respondent was in turn given until May 14 to file a request that any witnesses-by-affidavit be present in person at the May 26 hearing. Respondent filed no such request.

Respondent's actions have had on his life, and Dr. Kyzer's written statement was admitted without objection as Exhibit 4. Respondent elected to not cross-examine Dr. Kyzer. Also admitted without objection were Exhibit 2 (April 21, 2010 letter from Mr. Thorsness to the Bar addressing the impacts upon Mr. Thorsness of Respondent's words and actions) and Exhibit 3 (undated 20-point memo from Dr. Kyzer to the Bar outlining the impacts Dr. Kyzer wished to testify about at the May 26 sanctions hearing). Both Exhibits 2 and 3 had also been produced by the Bar with its May 7, 2010 witness list. Respondent called no witnesses, nor did he testify on his own behalf. The parties then presented closing statements.

The Bar sought as sanctions, first, a suspension in excess of two years. The Bar sought at least this period to affirmatively trigger the mandatory requirements of Bar Rule 29(c)(1), whereby a suspended attorney seeking reinstatement must petition for reinstatement and bear the burden of proving, by clear and convincing evidence at a hearing before a Hearing Committee, that (s)he is qualified to return to the practice of law.³ Second, the Bar asked that prior to applying for reinstatement Respondent be required to demonstrate, via evidence from a psychiatrist or psychologist, that Respondent is mentally fit to return to the practice of law, and that Respondent also be

³ Alaska Bar Rule 29(c)(1) reads in relevant part as follows:

[A]t the hearing [before a Hearing Committee], the Petitioner will have the burden of demonstrating by clear and convincing evidence that (s)he has the moral qualifications, competency, and knowledge of law required for admission to the practice of law in this State and that his or her resumption of the practice of law in the State will not be detrimental to the integrity and standing of the Bar, or to the administration of justice, or subversive of the public interest...

required to demonstrate that Respondent possesses the character and fitness to practice law by meeting the character and fitness requirements of Alaska Bar Rule 2, Sec. 1(d). Third, the Bar sought a recommendation from this Committee that Respondent's suspension begin immediately. The Bar asked this Committee to make this recommendation, recognizing that this Committee has no power to "order" immediate suspension, but rather that the Bar would use any such recommendation to support its request in a separate proceeding brought pursuant to other Bar Rules.⁴

Respondent did little if anything to counter the Bar's legal authority.⁵ Indeed, in his May 17, 2010 sanctions hearing brief, Respondent did not address what Respondent considered to be the appropriate sanction, did not address the legal standards, and did not address any mitigators or aggravators. Respondent instead essentially reargued the liability aspect of this case, even though that issue had been previously decided via this Committee's April 7, 2010 "Findings of Fact and Conclusions of Law." Respondent filed a supplemental pleading on May 25, but that brief too did not address the issue of sanctions; Respondent instead argued that an attorney has a duty

⁴ The Bar also sought as a sanction that Respondent be required to issue a written apology to Dr. Kyzer, John Thorsness, Steven O'Hara, Bill Bankston, and Bruce Bookman. See paragraph 3, page 19 of the Bar's May 21, 2010 Sanctions Brief. This Committee does not adopt this last requested sanction simply because Respondent obviously does not believe that an apology is due, and thus any "ordered" apology would be meaningless. Indeed, via Respondent's June 7, 2010 "Offer of Settlement and Resolution by Wev Shea with Notice to Hearing Panel of Ongoing Fraud, Perjury and Subordination of Perjury by Dr. David Kyzer, His Attorneys and the ABA," Respondent makes clear that he thinks he is due an apology from the Bar.

⁵ In "The Alaska Bar Association's Sanctions Brief" dated May 21, 2010, the Bar offered American Bar Association standards that supported, for each of the three violations committed by Respondent, anything from suspension to disbarment. See the Bar's brief, at pages 8-12 and 15-16.

to disclose certain confidential information, i.e., where there is fraud. But even assuming that Respondent was persuasive on that single issue (which this Committee finds that Respondent was not), Respondent's supplemental brief did not address the appropriate sanctions for the other two counts (conflict of interest and non-professional pleadings). Nor did Respondent really address the issue of the appropriate sanctions in his closing statement at the May 26 hearing.

This Committee finds that the Bar has met its burden of proving the appropriateness of the above three sanctions, and this Committee therefore adopts and recommends those sanctions.⁶ As to the period of suspension, this Committee recommends a 25 month suspension. This period of 25 months is specifically selected not only because this Committee believes that a suspension of at least two years is appropriate, but also because this Committee holds that it is particularly appropriate that Respondent be required to meet the burden imposed upon him by Bar Rule 29(c)(1) prior to being reinstated. As set forth in greater detail below, throughout this disciplinary matter Respondent has repeatedly demonstrated -- both via his pleadings and at the two hearings -- that Respondent either doesn't appreciate or understand the factual basis for the allegations and findings against him, nor the reason why such actions are inappropriate for an attorney. Even at the sanctions hearing Respondent made it clear via his closing statement that he thought his actions and words were justified. Respondent stood by his use of phrases in pleadings like "satanic" and "criminal

⁶ This Committee applied the same burden of proof as in the "liability" phase of this proceeding, i.e., that the Bar had the burden of proving the appropriate sanctions by clear and convincing evidence. This Committee finds that the Bar met its burden.

conspiracy" when describing Dr. Kyzer and his attorneys, and Respondent's more recent pleadings now bring Bar Counsel within that same fold. Respondent filed pleading after pleading in this disciplinary matter that contained the same language, arguments and exhibits that Judge Rindner had refused in December 2007 to even be allowed to be filed in the underlying Superior Court matter. Respondent is still filing such pleadings, even though the sanctions hearing has been concluded (Respondent has filed six pleadings just since May 26, 2010, most with unprofessional titles and the same language that caused the Bar to file its initial allegations against Respondent). Generally speaking, each of these pleadings have wholly avoided or missed the issue at hand.⁷

In reaching this decision this Committee has applied the four-part test set forth in American Bar Association Standards §3.0:

- (1) What ethical duty did the lawyer violate?
- (2) What was the lawyer's mental state?
- (3) What was the extent of the actual or potential injury caused by the lawyer's misconduct?
- (4) Were there aggravating or mitigating circumstances?

⁷ The phrase used by the Bar at closing is that Respondent "still doesn't get it." This Committee finds this to be an accurate description. Most troubling of all is Respondent's June 7, 2010 "Offer of Settlement and Resolution by Wev Shea with Notice to Hearing Panel of Ongoing Fraud, Perjury and Subordination of Perjury by Dr. David Kyzer, His Attorneys and the ABA," in which Respondent, having been found by this Committee to have violated three Alaska Rules of Professional Conduct, "offers to settle" if, inter alia, Assistant Bar Counsel resigns, the Bar apologizes in writing to Respondent, and all charges against Respondent are dropped. Respondent's June 7, 2010 pleading is disturbing evidence that Respondent's perspective is getting far worse and further off-point, not better.

As to the first factor, via this Committee's April 7 decision this Committee found that Respondent violated Alaska Rules of Professional Conduct 1.9(a), 3.1, 3.3(a)(1), and 4.4.

As to the second factor, this Committee finds that Respondent acted with a knowing mental state, that he did so repeatedly and over a number of years.

As to the third factor, this Committee finds that Respondent's actions caused potential injury to Mr. O'Hara, Mr. Thorsness and Dr. Kyzer, plus actual injury to at least Dr. Kyzer. Each of these witnesses provided evidence at the sanctions hearing of the injuries visited upon them by Respondent's actions, and Respondent made no effort to rebut or challenge that evidence. This Committee finds those witnesses' statements to be credible.

As to the fourth and final factor, the Bar met its burden of proving by clear and convincing evidence all six aggravators cited at pages 12-14 of the Bar's May 21, 2010 Sanctions Brief, and also that Respondent was entitled to only one mitigator.⁸ Respondent made no effort to challenge these aggravators, nor did he seek to introduce any other mitigators.

Finally, no Bar Rule, case law or other guideline mandates the appropriate sanctions in this case. Rather, after hearing all the evidence and assessing each witness' and Respondent's credibility, this Committee must exercise its discretion within

⁸ The Bar proved the following aggravators from the American Bar Association Standards For Imposing Lawyer Sanctions: §9.22(b), Dishonest or selfish motive; §9.22(c), Pattern misconduct; §9.22(d), Multiple offenses; §9.22(f), Submission of false statements during the disciplinary process; §9.22(g), Refusal to acknowledge wrongful nature of conduct; and §9.22(i), Substantial experience in the practice of law. The Bar also proved a single mitigator: §9.32(a), No prior disciplinary record.

the parameters established by American Bar Association Standard §3.0 and Alaska case law. The Bar acknowledged at the May 26 hearing that the Alaska cases that upheld a recommendation of disbarment involved attorneys who actively stole money or forged documents, neither of which are at issue in this case. Yet no Alaska case seems to have the kind of ongoing, purposeful, thoroughly unrepentant conduct and lack of personal insight that Respondent has exhibited in this case. Respondent has a long and proud background of public service, and he is credible in his testimony that he wholeheartedly believes in the appropriateness of his actions. But that is precisely the problem: Respondent still does not appreciate that his actions were inappropriate. Indeed, it is hard to imagine a clearer breach of ARPC 1.9(a) (conflict of interest) or 4.4 (unprofessional pleadings) than what the Bar proved in this case.⁹ And it is hard to imagine a respondent who still believes he is so "right" in his approach to his legal duties, even though his urgings that Dr. Kyzer and his attorneys are wrong -- and even criminally wrong -- appear to have have been rejected or ignored by every authority Respondent has confronted: Judge Rindner, the local police, the Alaska State Troopers, the FBI, the Department of Justice, and now this Committee. As stated above, Respondent's June 7, 2010 pleading, entitled "Offer of Settlement and Resolution by Wev Shea with Notice to Hearing Panel of Ongoing Fraud, Perjury and Subordination of Perjury by Dr. David Kyzer, His Attorneys and the ABA," is disturbing evidence that Respondent lacks not just some but any perspective as to his actions and words, and any ability or willingness to recognize their wrongful nature. A longer suspension than

⁹ This is not meant to minimize the importance of the Bar also having proved by clear and convincing evidence Respondent's breach of ARPC 3.1 and 3.3(a)(1) (False statements of fact in court pleadings).

25 months could easily be recommended by this Committee, but this Committee is essentially giving Respondent maximum credit for the single mitigating factor of his lack of prior discipline. Even considering this mitigating circumstance, however, this Committee is concerned about the protection of the public from continued behavior of this nature from Respondent. It is precisely for this reason -- that Respondent has shown no indication that he has to date gained perspective from Judge Rindner's holding or in this disciplinary matter -- that this Committee believes it is crucial to impose upon Respondent the reinstatement requirements set forth in Bar Rule 29(c)(1), to demonstrate compliance with Bar Rule 2, Sec. 1(d), and to demonstrate his mental fitness to return to the practice of law.

To be blunt, there is something terribly wrong with Respondent's actions and lack of perspective. Even a cursory review of the titles of the pleadings filed by Respondent since Day One in this matter, let alone the words and substance within those pleadings -- coupled with the fact that Respondent is still filing such pleadings -- more than justifies at least a 25 month suspension and fulfillment of the other conditions this Committee now recommends, as set forth in the next section.

III. RECOMMENDATION

Based on the above, this Committee recommends (1) that Respondent be suspended from the practice of law in Alaska for a period of 25 months; (2) that prior to reinstatement Respondent should be required to comply with Bar Rule 29(c)(1); and (3) that prior to applying for reinstatement Respondent be required to demonstrate, via evidence from a psychiatrist or psychologist, that Respondent is mentally fit to return to the practice of law, and that Respondent also be required to demonstrate that

Respondent possesses the character and fitness to practice law by meeting the character and fitness requirements of Alaska Bar Rule 2, Sec. 1(d). This Committee further recommends (4) that the Bar take appropriate action to secure the immediate suspension of Respondent from the practice of law.¹⁰

IV. PAYMENT OF COSTS AND FEES

Bar Rule 16(c)(3) authorizes an award of costs and fees following a finding of misconduct. It is unclear whether the Bar Rules require this Hearing Committee to make a recommendation as to this issue, but in any event the Bar made no request for costs/fees. Accordingly, this Committee makes no recommendation as to this issue.

V. APPEAL AND OTHER DEADLINES & PROCEDURES

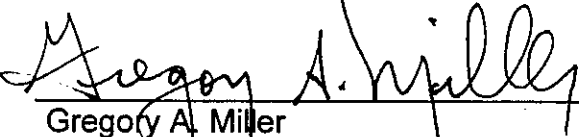
The parties are directed to Bar Rules 22(l) and 25(f) for applicable future deadlines and procedures, including any appeal. As expressly stated in this Committee's April 7, 2010 "Findings of Fact and Conclusions of Law," such deadlines were not triggered by this Committee's April 7 decision. They are now triggered, however, by this instant "Final Report of Hearing Committee, and Recommendation Re: Sanctions."¹¹

Dated this 16th day of June, 2010.

¹⁰ The Bar did not explain which Bar Rule or other procedure it intends to utilize to secure an immediate suspension, and this Committee takes no position as to the proper procedure.

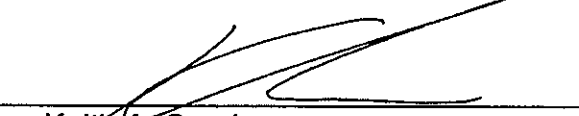
¹¹ This Committee also hereby DENIES "Wev Shea's Motion-Memorandum and Notice to the Hearing Panel on ABA's Intentional or Grossly Negligent Misrepresentations or Fraud on the Hearing Panel at the May 26, 2006 Hearing," dated May 27, 2010.

BIRCH HORTON BITTNER & CHEROT

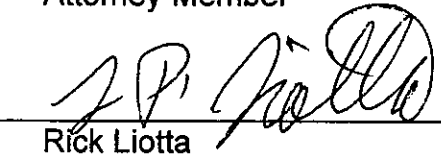
By: 

Gregory A. Miller
Attorney Member & Chair

DORSEY & WHITNEY LLP

By: 

Keith A. Sanders
Attorney Member

By: 

Rick Liotta
Public Member