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In Re Pangburn Respondent's Brief Dckt. 38215

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IN THE SUPREME COURT OF THE STATE OF IDAHO

IN THE MATTER OF BOBBY E. PANGBURN,)
ATTORNEY AT LAW)

_____))
IDAHO STATE BAR,)
Plaintiff-Respondent,)

v.)

BOBBY E. PANGBURN,)
Respondent-Appellant.)
_____)

Supreme Court Docket No. 38215-2010
ISB FILE NO. FC 10-07

RESPONDENT'S BRIEF

Appeal from the ISB Professional Conduct Board Hearing Committee,
Chairman Randall R. Adams, Presiding.

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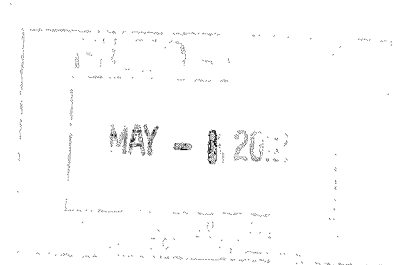


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I.

STATEMENT OF THE CASE

A. Nature of the Case

This is an attorney discipline case. A Hearing Committee (“Committee”) of the Professional Conduct Board has recommended to this Court that Appellant Bobby E. Pangburn (“Appellant”) be disbarred for professional misconduct and that the effective date of disbarment be February 1, 2010.

B. Course of Discipline Proceedings

In a prior Idaho formal charge reciprocal disciplinary case, Appellant was suspended for five years, with three years withheld, commencing January 31, 2008. That suspension arose out of Appellant’s representation of clients in Oregon. In August 2004, Respondent resigned in lieu of discipline in Oregon. Consistent with the Oregon rules, the resignation did not include an admission of any violation of the Oregon rules of professional conduct. (R., pp. 185-186.)

Appellant’s two-year suspension commenced January 31, 2008 following issuance of a Disciplinary Order by this Court on January 17, 2008. (Exhibit 9, pp. 9-12.) Appellant was eligible to request reinstatement following that suspension on February 1, 2010. (R., p. 186.)

However, on May 20, 2010, before Appellant requested reinstatement, the Idaho State Bar (“ISB”) filed the Complaint in this disciplinary matter. (R., p. 186.) The Complaint alleged that Appellant committed specified acts of professional misconduct in conjunction with the representation of two clients. Count One alleged that Appellant violated I.R.P.C. 1.16(d) [Failure to refund unearned fees upon termination of representation] and 8.4(c) [Conduct

involving dishonesty, fraud, deceit or misrepresentation]. Count Two alleged that Appellant violated I.R.P.C. 1.3 [Failure to act with reasonable diligence and promptness], 1.7(a) [Conflict of interest] and 8.4(d) [Engaging in conduct prejudicial to the administration of justice]. Count Three alleged that Appellant violated I.R.P.C. 5.5(a) [Engaging in the unauthorized practice of law], I.B.C.R. 516(a)(10) [Practicing law after effective date of suspension] and I.B.C.R. 516(a)(7) [Failing to remove attorney listing from telephone directory]. (R., pp. 2-12.)

The Committee was assigned on June 1, 2010. (R., pp. 13-14.) The Committee issued a Scheduling Order on August 2, 2010 that required Respondent to file an answer by August 9, 2010 and scheduled an evidentiary hearing for October 6 and 7, 2010. (R., pp. 17-19.) On August 9, 2010, Appellant filed his Answer. The Answer denied that Appellant violated the Idaho Rules of Professional Conduct alleged in the Complaint. (R., pp. 20-24.) On August 13, 2010, the ISB served its First Set of Interrogatories and Request for Production of Documents. (R., pp. 25-26.)

On October 6, 2010, the parties filed a Stipulation. The Stipulation provided that Appellant would serve an additional 18 months suspension, an additional 18 months of suspension would be withheld, and it specified terms and conditions relating to reinstatement and a three year probation upon terms and conditions. (R., pp. 28-92.)

Paragraph 7 of that Stipulation provided that “if the Hearing Committee of the Professional Conduct Board or the Idaho Supreme Court declines to accept this Stipulation and/or Recommendation, each party has the right to withdraw from this Stipulation and proceed to hearing on the merits.” (R., p. 38.) On October 27, 2010, the Committee issued its Recommendation consistent with the Stipulation. (R., pp. 93-95.) On October 28, 2010, the Clerk of the Professional Conduct Board filed the record with the Idaho Supreme Court.

On November 30, 2010, the Court issued its Order to Remand. That order remanded the case to the Committee “for the reconsideration of more significant sanctions.” (R., p. 184.)

On February 18, 2011, the Committee entered a Scheduling Order scheduling an evidentiary hearing on April 4, 2011. (R., pp. 98-99.) The parties filed a Pre-Hearing Stipulation on March 30, 2011. In the Pre-Hearing Stipulation, the parties stipulated to the admission of facts, the ISB’s Exhibits 1-9 and Appellant’s Exhibit 10 and that the hearing would be limited to the issue of the recommended sanction. (R., pp. 100-114.) The hearing was conducted on April 4, 2011. (R., pp. 115-182 (transcript)) Following presentation of the evidence, the Committee took the matter under advisement. On July 27, 2011, the Committee entered the Hearing Committee Decision. (R., pp. 183-213.) That Decision recommended that Respondent be disbarred. (R., p. 212.)

On August 11, 2011, Appellant filed his Motion to Alter or Amend and Request for Hearing. (R., pp. 214-248.) On August 18, 2011, the ISB filed its Memorandum in Response to Motion to Alter or Amend and Request for Hearing. (R., pp. 249-257.) On August 23, 2011, Appellant filed his Reply to Plaintiff’s Response to Respondent’s Motion to Alter or Amend. (R., pp. 258-263.)

On November 9, 2011, the Committee issued its Decision on Motion to Alter or Amend and Request for Hearing. (R., pp. 264-268.) The Committee denied the Motion to Alter or Amend, recommended Appellant be disbarred, but recommended that the effective date of the disbarment be February 1, 2010. (R., p. 267.) On November 15, 2011, the Clerk of the Professional Conduct Board filed the Supplemental Certificate of Record Following Remand. Appellant file his Notice of Appeal on December 3, 2011.

C. Statement of Facts

The Committee's Decision summarized the stipulated facts and contained additional findings of fact. (R., pp. 184-205.) The Committee initially specified Appellant's disciplinary history with the Idaho and Oregon state bars. In June 2001, Appellant was publically reprimanded by a Hearing Committee of the Professional Conduct Board for violations of I.R.P.C. 1.3, 1.4, 1.15(d) and 8.4(d). The public reprimand provided that Appellant accepted a \$200 flat fee to accomplish an expungement sought by his client, Maldonado. Maldonado made numerous inquiries about the progress of the matter. At first, Appellant assured him the matter was in progress. Later Maldonado had difficulty in reaching Appellant at all. Ultimately, Maldonado determined that the expungement proceeding had never been filed. Appellant maintained that he did file the expungement, but the paperwork had been lost in the court system. Appellant agreed to refund the \$200 fee for the services to Maldonado, but the check bounced. Maldonado eventually filed a small claims case to obtain return of the \$200 and Appellant paid Maldonado \$200 plus the small claim filing fee following mediation. (Exhibits 9, pp. 50-51, 83-86.)

On January 23, 2003, Bar Counsel issued Appellant a private reprimand relating to his representation of Harris in a post-conviction relief proceeding. Appellant did not respond to the notice of intent to dismiss the petition and the petition was dismissed. Despite Harris' multiple efforts to contact Appellant, Appellant did not advise Harris of the dismissal and Harris was advised about the dismissal of the petition from the court. Appellant appealed the private reprimand. On August 26, 2003, the Hearing Committee changed the sanction to an informal admonition, giving significant consideration to the mitigating circumstance that Appellant had

instructed his staff to follow normal procedures to send the dismissal notice to Harris. (Exhibit 9, pp. 51-52, 78-82.)

In August 2004, Appellant resigned from the Oregon State Bar in lieu of discipline. Consistent with the Oregon bar rules, the resignation did not include an admission of any violations of the Oregon rules of professional conduct, but the Oregon bar rules prohibit Appellant from ever applying for reinstatement. If the Oregon bar rules change in the future to allow Appellant to apply for reinstatement, his application will be treated as if he had been disbarred and he will not be entitled to challenge the validity of the allegations in the Oregon bar complaints. (R., p. 185.)

In that case, the Oregon State Bar had filed two formal charge complaints. The first formal charge complaint was filed in December 2002 and charged Appellant with 21 violations of the Oregon disciplinary rules, including, among other things, two counts of engaging in dishonesty and misrepresentation, three counts of failure to cooperate and failure to truthfully respond to disciplinary authorities, seven counts of neglect of legal matters, one count of failure to deposit and maintain client trust funds, four counts of failure to prepare complete and adequate records and failure to account for client funds, and three counts of failure to promptly deliver client property. Appellant admitted that he violated the Oregon bar rules regarding cooperation and responding to disciplinary authorities. While the first complaint was pending in Oregon, a second complaint was filed in June 2004 charging Appellant with 12 violations of the Oregon disciplinary rules. Those violations included, among other things, four counts of failure to cooperate and failure to respond truthfully to disciplinary authorities, one count of neglect of a legal matter, one count of failure to prepare complete and adequate records and failure to account for client funds, one count of failure to promptly deliver client property, one count of dishonesty

or misrepresentation, one count of excessive fees, and one count of failure to deposit and maintain client funds in trust. (R., pp. 203-204.)

In June 2005, the ISB filed a reciprocal proceeding against Appellant based upon the Oregon disciplinary proceedings. In September 2005, Appellant filed a motion to dismiss the reciprocal disciplinary case, which was denied by a Hearing Committee in November 2005. The hearing on the reciprocal case was held in December 2005. Following hearing, the parties submitted proposed findings of fact, conclusions of law and recommendations. In March 2007, the Hearing Committee issued its Findings of Fact, Conclusions of Law and Recommendation. (Exhibit 9, pp. 13-73.) The Hearing Committee found that Appellant had committed multiple violations of I.R.P.C. 1.2, 1.3, 1.4, 1.16(d) and 8.4(c), and one violation each of I.R.P.C. 1.5(f) and 8.4(d). Those violations related to Appellant's representation of 7 clients in Oregon in a variety of post-conviction relief proceedings. (Exhibit 9, pp. 13-77.)

On January 17, 2008, this Court issued its Disciplinary Order in that reciprocal case. The Disciplinary Order suspended Appellant for 5 years, with 3 years of that suspension withheld. The Order specified conditions of reinstatement and a three year probation following reinstatement, upon specified terms and conditions. (Exhibit 9, pp. 9-12.) Appellant was not eligible to be reinstated until February 1, 2010.

The last instance of Appellant's disciplinary history before this case was in October 2008. Bar Counsel issued a private reprimand to Appellant relating to his representation of a client, Jensen, in an uncontested custody modification case, in which Jensen paid Appellant a fixed fee for the representation. (Exhibit 9, p. 1.) Bar Counsel determined that Appellant violated I.R.P.C. 1.2(a) and 1.4 by failing to abide by Jensen's decisions concerning the objectives of representation, failing to consult with Jensen as to the means by which his objectives would be

pursued, failing to keep Jensen reasonably informed about the status of his custody modification matter, failing to promptly comply with reasonable requests for information from Jensen and not explaining the matter to the extent reasonably necessary to permit Jensen to make informed decisions regarding the representation. (Exhibit 9, pp. 1-8.)

In March 2008, the Client Assistance Fund of the ISB paid Loretta Vermette \$7,280, following a client assistance fund matter contested by Appellant. Count One of the Complaint relates to Appellant's representation of Loretta's son Robert Illingworth and that Client Assistance Fund claim.

With respect to the allegations in Count Two of this case, an appeal was dismissed by stipulation to enable Robert Hall to pursue his ineffective assistance of counsel claim against Appellant relating to Appellant's trial representation. In March 2009, Mr. Hall's counsel filed a Stipulation for Entry of Judgment stating that substantial investigation showed the only claim for post-conviction relief that had any realistic chance of being embraced by the court was the Appellant's failure to file a Rule 35 motion for Mr. Hall. In December 2009, the Court entered an amended order granting a Rule 35 relief that concluded Mr. Hall's Rule 35 proceedings. In May 2010, the ISB filed the Complaint in this case.

The Committee noted Count Three had been dismissed. Bar Counsel and Appellant had a number of discussions relating to Count Three of the Complaint and Appellant provided Bar Counsel with letters from the supervisors of yellow page directory listings that proved that the identification of Appellant as an attorney during his suspension was the mistake of those companies. Appellant also demonstrated that his representation of the client identified in Count Three was permissible follow up to his prior representation in bankruptcy court and consequently

the parties agreed that Count Three was dismissed in its entirety for lack of clear and convincing evidence supporting the alleged violations. (R., pp. 110-111.)

The Hearing Committee found the following facts in this case. In 2005, Robert Illingworth (“Robert”) pled guilty to felony injury to a child and was sentenced. (R., pp. 188-189.) In March 2006, Robert’s parole was denied. Thereafter, he contacted Appellant to represent him in attempting to obtain an early release. (R., p. 189.) In April 2006, Loretta Vermette (“Loretta”), Robert’s mother, paid Appellant a \$2,000 fixed fee to travel to Orofino to consult with Robert. (R., p. 189.) Appellant met with Robert in Orofino and then sent him a letter discussing his proposed strategy and requesting a \$10,000 “retainer deposit” to be billed at his \$200 dollar hourly rate. In June 2006, Loretta sent Appellant the \$10,000 retainer fee. (R., p. 189.)

On July 28, 2006, Robert sent Appellant a letter terminating his representation and requesting a full refund. (R., p. 189.) On July 31, 2006, Loretta filed a disciplinary grievance and a Client Assistance Fund claim seeking reimbursement of \$12,000 based on Appellant’s alleged failure to perform the requested work on Robert’s case. (R., p. 189.)

On March 30, 2007, the Client Assistance Fund Committee (“CAF Committee”) held a hearing. Appellant submitted a copy of his time records from May through July 2006, reflecting that he performed 13.6 hours of work on Robert’s case, in addition to the Orofino consultation for which he was paid a \$2,000 fixed fee. (R., p. 189-190.) On June 27, 2007, the CAF Committee entered its Findings of Fact, Conclusions of Law and Recommendation. The CAF Committee concluded that Appellant worked 13.6 hours for a total of \$2,720 and also concluded that because Appellant failed to return the unearned portion of the \$10,000 retainer fee as

required under I.R.P.C. 1.16(d), he engaged in dishonest conduct as defined in I.B.C.R. 601(e) and recommended that Loretta be reimbursed \$7,280. (R., p. 190.)

On July 26, 2007, the Board of Commissioners of the Idaho State Bar (“Board”) issued an Order of Remand to clarify a discrepancy regarding the amount Loretta claimed to have paid Appellant. The Board ordered the CAF Committee to recommend a dismissal if Appellant reimbursed Loretta the amount determined by the CAF Committee. (R., p. 190.) On September 12, 2007, the CAF Committee held a second hearing and issued Supplemental Findings of Fact, Conclusions of Law and Recommendation. The CAF Committee concluded that Loretta submitted proof of \$12,000 in payments to Appellant and that the \$7,280 reimbursement amount was correct. The CAF Committee also stated it would recommend dismissal if Appellant refunded that amount to Loretta within 14 days. Appellant did not refund the unearned fees. (R., p. 190.)

On November 30, 2007, the Board issued its Order concluding that Appellant’s failure to refund the unearned portion of the \$10,000 retainer constituted dishonest conduct and affirmed that Loretta’s claim against the Client Assistance Fund be allowed in the amount of \$7,280. (R., p. 191.) The Client Assistance Fund paid Loretta \$7,280 on March 13, 2008. Appellant has not reimbursed the Fund for any portion of those funds. (R., p. 191.)

As a result of those admitted Count One factual allegations, Appellant admitted he violated I.R.P.C. 1.16(d) [Failure to refund unearned fees upon termination of representation] and I.R.P.C. 1.15(d) [Failure to keep property separate until a dispute between the lawyer and client is resolved]. (R., p. 110.) The parties agreed that there was not clear and convincing evidence that Appellant’s failure to return the unearned fees upon termination of representation

involved dishonesty, fraud, deceit or misrepresentation within the meaning of I.R.P.C. 8.4(c). (R., p. 196.)

The Count Two facts related to Appellant's representation of Robert Hall ("Robert"). Robert was charged with trafficking drugs in 2001. Appellant was appointed Robert's trial counsel and filed a motion to suppress, alleging that the search of Robert's mother's home was invalid for lack of probable cause. That motion was denied. (R., p. 191.) In July 2002, a jury found Robert guilty of eight felony counts and a persistent violator charge. He was sentenced in August 2002 to fixed term sentences totaling 39 years to run consecutively and indeterminate terms totaling 20 years. Robert appealed, claiming the sentence was excessive and the district court erred in denying the motion to suppress. The State Appellate Public Defender ("SAPD") appointed to Robert's appeal determined that appealing the denial of the motion to suppress would be frivolous and raised the single issue of whether the sentence was excessive. Robert's sentence was affirmed by this Court in June 2003. (R., pp. 191-192.)

On February 19, 2004, Robert filed a pro se Petition and Affidavit for Post-Conviction Relief ("Petition"). The Petition did not specify any claim, but referenced an attached Affidavit and Memorandum of Law ("Memorandum"). In the Memorandum, Robert listed a number of claims and in his Affidavit raised the claim of ineffective assistance of trial counsel based upon Appellant's failure to raise the claims outlined in his Memorandum. Robert also claimed that the SAPD was ineffective because she did not raise certain claims. (R., p. 192.)

The district court appointed Appellant to represent Robert during post-conviction proceedings. (R., pp. 192-293.) On October 14, 2004, Appellant filed a Motion for Leave to Amend the Petition for Post-Conviction Relief, which was granted. (R., p. 193.) On November 12, 2004, Respondent filed Petitioner's Amended Petition for Post-Conviction Relief ("Amended

Petition”). In the Amended Petition, Appellant presented Robert’s claims of ineffective assistance of appellate counsel and an invalid search warrant. Appellant omitted Robert’s claim of ineffective assistance of trial counsel, thereby effectively waiving that claim. The State moved for summary dismissal of the Amended Petition. (R., p. 193.)

At the May 5, 2005 hearing on the Amended Petition and dismissal motion, the district court dismissed Robert’s invalid search warrant and arrest claim, but granted a continuance on the ineffective assistance of appellate counsel claim. (R., p. 193.) On October 18, 2005, the district court held an evidentiary hearing on the ineffective assistance of appellate counsel claim and on February 13, 2006, entered an order denying that claim. Appellant filed a timely notice of appeal. (R., p. 193.)

During appeal, attorney Robin Fyffe represented Robert and requested a remand based upon Appellant’s conflict of interest. The State agreed that the case should be remanded so that Robert could reassert the claim of ineffective assistance of trial counsel, since that claim was waived because Appellant did not include it in the Amended Petition. (R., pp. 193-194.)

On March 7, 2007, the Idaho Court of Appeals remanded the post-conviction case for further proceedings. That Court noted that Appellant’s inclusion of an ineffective assistance of trial counsel claim would have required that he allege his own representation had been legally deficient and concluded that that conflict of interest directly resulted in the waiver of Robert’s ineffective assistance of trial counsel claim. (R., p. 194.) The case was remanded to the district court to appoint new counsel to litigate that claim. The denial of the claim for relief based upon the ineffective assistance of appellate counsel claim was affirmed. (R., p. 194.)

In October 2007, attorney Keith Roark filed Robert’s Second Amended Petition for Post-Conviction Relief (“Second Petition”). The Second Petition listed six grounds for relief based

upon Appellant's alleged failure to provide effective assistance as trial counsel, including Appellant's failure to file a Rule 35 motion for reconsideration of Robert's sentence. (R., pp. 194-195.)

Following the proceedings on remand, on March 9, 2009, Mr. Roark filed a Stipulation for Entry of Judgment stating that substantial investigation showed that the only claim for post-conviction relief that had any realistic chance of being embraced by the court was Appellant's failure to file a Rule 35 motion. The State did not concede that relief would be granted, but agreed that the court should grant post-conviction relief by entering a judgment permitting a hearing on the Rule 35 motion in order to avoid further lengthy, time consuming and expensive proceedings and in the interest of justice. All other grounds for relief set forth in the Second Petition were dismissed with prejudice. The court entered a judgment consistent with the stipulation. (R., p. 195.)

On July 16, 2009, Mr. Roark filed a Rule 35 motion and hearings on that motion were held in November 2009. The court entered the final order granting Rule 35 relief on December 3, 2009. Under that order, the mandatory minimum sentences of the three fixed terms ran consecutively to comprise a minimum fixed term of 18 years, as opposed to the 39 years in the original sentence. All portions of the sentences imposed on the other five counts and/or any sentence related to the persistent violator charge ran concurrently with the mandatory minimum sentences. The indeterminate portions of the sentences, totaling 20 years, were unchanged. (R., pp. 195-196.)

Appellant admitted that he violated I.R.P.C. 1.3 [Failing to act with reasonable diligence]; 1.7(a) [Conflict of interest]; and 8.4(d) [Engaging in conduct prejudicial to the administration of justice] in Count Two. (R., p. 196.)

The Committee also made additional findings of fact, which can generally be described as mitigating and aggravating circumstances relating to the Committee's recommended discipline. The Committee initially noted that Appellant had been a social studies government teacher in the Meridian School District since January 2011. (R., p. 198.)

With respect to Count One, the Committee found that Appellant believed that he was under attack by Loretta and Robert and that Loretta lied about or misrepresented certain facts, and created false evidence against him. Appellant felt he needed to defend himself from this attack. (R., p. 198.) Appellant admitted that he could have handled the claim for reimbursement of attorney fees to Loretta differently or better. (R., p. 198.) He offered to sign a promissory note in favor of the ISB after he filed for bankruptcy protection, but he has not signed a promissory note in favor of the ISB for purposes of repaying the Client Assistance Fund and although he asserted he intends to pay the ISB back for monies paid by the Fund, to date, he has taken no steps to pay back the ISB. (R., p. 198.) The Committee also found that at the time Appellant was appointed to represent Robert, he had resigned from the Oregon State Bar in the face of two formal complaints alleging multiple violations of the applicable rules of professional conduct, the ISB was investigating the imposition of reciprocal discipline, he was under investigation for a complaint made by Jensen to the Idaho State Bar in October 2004, and he had twice been disciplined by the Idaho State Bar. (R., p. 198.)

With respect to Count Two, Appellant testified that he advised Robert that there was a conflict of interest in representing him on post-conviction, as there was a potential issue regarding his own ineffectiveness as trial counsel. (R., pp. 198-199.) Although Appellant asserted that Robert orally waived the conflict of interest, the Committee found that that was not the case because Robert raised ineffectiveness of trial counsel in his Affidavit in support of his

pro se Petition for Post-Conviction Relief and the Committee did not find Appellant was credible on that issue. (R., p. 199.) The Committee found that Appellant represented Robert for 16 months without raising the issue of his own ineffective assistance as trial counsel. (R., p. 199.) The Committee found that at the time Appellant was appointed to represent Robert, he at least was the subject of one formal charge complaint in Oregon and had twice been disciplined by the ISB. (R., p. 199.)

The Committee also factually found that Appellant has repeatedly demonstrated a reluctance to fully accept responsibility for his violations of the Idaho Rules of Professional Conduct or willingness to take steps necessary to correct harm caused by his violations. (R., p. 199.) The Committee found Appellant has repeatedly demonstrated a persistent lack of care regarding compliance with the Idaho Rules of Professional Conduct by committing violations even after he had been subject to multiple client complaints and multiple bar investigations in two states, after the imposition of discipline in two separate matters, and while he was then being investigated for violations of the rules of professional conduct. (R., pp. 199-200.) The Committee found Appellant has a history of disciplinary matters which indicate a lack of recognition of the reasonable standards of conduct in the area of client communication and fee related issues and a pattern of misconduct. (R., p. 200.) The Committee found the number of disciplinary actions taken against Appellant and the number of formal charge cases against him is unusually high. (R., p. 200.) After reviewing Appellant's disciplinary history set forth above, the Committee found that over the period from approximately September 1997 to July 2006, a period of less than nine years, Appellant represented fifteen clients who ultimately filed fifteen disciplinary grievances against him. Apparently, no grievances were filed against the Appellant with any Bar association for his conduct as a lawyer for approximately nineteen months between

July 2006 and January 11, 2008, when his license was suspended. However, Appellant's wrongful conduct with respect to Loretta and Robert continued into November 2007, less than two months before he was suspended pursuant to reciprocal discipline. The Committee found that Appellant's wrongful conduct consisted of his continuing failure to repay any portion of the retainer paid by Loretta for the representation of Robert, despite several orders, findings and recommendations establishing his obligation to do so. In other words, at the same time the ISB was assessing Appellant's conduct in Oregon for purposes of reciprocal discipline, the Appellant was violating the Idaho Rules of Professional Conduct with respect to Loretta and Robert Illingworth. (R., pp. 204- 205.)

Finally, the Committee found that despite Appellant's knowledge of multiple prior bar complaints against him, he acted in ways which were clearly contrary to the rules in both Counts One and Two. (R., p. 205.)

The Committee also issued conclusions of law based upon the findings of fact set forth above. With respect to Count One, the Committee found that in violating I.R.P.C. 1.15(d) and 1.16(d), Appellant acted knowingly and intentionally, with the conscious objective or purpose to accomplish a particular result, *i.e.*, the conversion of unearned professional fees, which he continues to retain, and which caused injury to the clients, as the clients lacked the use of such funds from the date Appellant's representation was terminated, July 28, 2006 until the clients were paid from the Client Assistance Fund, March 13, 2008. (R., pp. 205-206.) The Committee also considered the ABA Standards for Imposing Lawyer Sanctions and noted that under those standards disbarment is the appropriate sanction for violation of those rules when a lawyer knowingly converts client property and causes injury or potential injury to a client. (R., p. 207, quoting ABA Standard 4.11) and that suspension is the appropriate sanction "when a lawyer

knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client.” (R., p. 207, quoting ABA Standard 4.12) The Committee concluded that before analyzing relevant aggravating and mitigating circumstances, the appropriate sanction for the rule violations in Count One was disbarment. (R., p. 207.)

With respect to its analysis of the Count Two rule violations, the Committee noted that under the ABA Standards for lack of diligence, I.R.P.C. 1.3, disbarment is an appropriate sanction if a lawyer abandons the practice and causes serious or potentially serious injury to a client. (R., p. 208, quoting ABA Standard 4.41(a)) The Committee noted suspension is an appropriate sanction if a lawyer knowingly fails to perform services for a client and causes serious or potentially serious injury to a client. (R., pp. 208-209, quoting the ABA Standard 4.42(a)). The Committee concluded that before analyzing relevant aggravating and mitigating circumstances, suspension is the appropriate sanction for Appellant’s violation of I.R.P.C. 1.3 in Count Two.

With respect to the conflict of interest violation, I.R.P.C. 1.7(a), in Count Two, the Committee concluded that before analyzing the relevant aggravating and mitigating circumstances, disbarment is an appropriate sanction when a lawyer, without the informed consent of the client, engages in representation of a client knowing that the lawyer’s interests are adverse to the client’s with the intent to benefit the lawyer and causes serious or potentially serious injury to the client. (R., p. 209, quoting ABA Standard 4.31(a)). The Committee concluded the appropriate sanction for Appellant’s violation of I.R.P.C. 1.7(a) in Count Two is disbarment. (R., p. 209.) Finally, with respect to the conduct prejudicial to the administration of justice violation, I.R.P.C. 8.4(d), in Count Two, the Committee noted that before analyzing the relevant aggravating and mitigating circumstances, disbarment is the appropriate sanction when a

lawyer, with the intent to deceive the court, makes a false statement, submits a false document, or improperly withholds material information, and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding. (R., p. 210, quoting ABA Standard 6.11.) The Committee concluded the appropriate sanction for Appellant's violation of I.R.P.C. 8.4(d) in Count Two is disbarment. (R., p. 210.)

The Committee next analyzed aggravating circumstances under ABA Standard 9.2 and considered that Appellant had been the subject of prior disciplinary actions in Oregon and Idaho and cannot claim ignorance or a lack of familiarity with the rules of professional conduct and the disciplinary process. He had been investigated by the bars of both states for violations of those rules before the conduct, which is at issue in this case, and he was under investigation for other complaints at the time of his conduct in this case. (R., p. 210.)

The Committee also concluded that the Appellant's motives with respect to Count One were primarily selfish, but not dishonest. (R., p. 210.) The Committee concluded that Appellant has demonstrated a pattern of lack of diligence and failure to return the property of clients when required, has committed multiple offenses, has demonstrated bad faith in failing to return unearned fees to Loretta and Robert and in failing to repay the Client Assistance Fund. (R., p. 210.) The Committee also found Appellant demonstrated an inability to fully accept responsibility for his actions or in acknowledging clear violations of the rules. (R., p. 211.) The Committee found Appellant's clients in Counts One and Two were particularly vulnerable as they faced criminal charges and/or were incarcerated and therefore vested considerable reliance in Appellant. (R., p. 211.) The Committee noted that Appellant had been licensed to practice law for at least 15 years and was experienced in the areas of law in those cases. Finally, the

Committee noted that Appellant has failed and continues to fail, to make restitution to Loretta or the Client Assistance Fund. (R., p. 211.)

The Committee next analyzed mitigating circumstances under ABA Standard 9.3 and determined that Appellant has been relatively cooperative in the investigation of the current disciplinary matters, appears to have a good reputation in the community, as demonstrated by witnesses with high standing in the community who testified on his behalf, is currently under suspension of significant duration, which contains adequate conditions of reinstatement and probation and displays some remorse, although the Committee determined his remorse was minimal and conditional. (R., p. 211.)

Based those findings of fact, conclusions of law, the ABA Standards and the aggravating and mitigating circumstances, the Committee recommended that Appellant be disbarred. (R., p. 212.)

Appellant then filed a Motion to Alter or Amend the Committee's Recommendation. The Appellant requested the sanction be changed to a five year suspension to run from January 31, 2008 through January 31, 2013, to be followed by a four year probation. Appellant also suggested the Committee failed to consider all of his mitigating factors. (R., pp. 214-248.)

The ISB submitted its Memorandum in Response to the Motion to Alter or Amend. The ISB argued that Appellant could have resigned in lieu of discipline in the Idaho reciprocal disciplinary case in 2005, but chose not to and chose to contest the reciprocal disciplinary case. The ISB argued that while Respondent was entitled to make the choice to contest the case, he bears the responsibility for that choice. The ISB indicated that if the Committee was inclined to retroactively begin any sanction as requested by Respondent, the date of the sanction should be either February 1, 2010, when Appellant was eligible to be reinstated from his reciprocal

suspension or May 2010, when the formal charge Complaint in this case was filed. Bar Counsel also indicated that if the Committee was inclined to reconsider the sanction, Bar Counsel would not be adverse to stipulating to a resignation in lieu of discipline. (R., pp. 249-250.)

On November 9, 2011, the Committee issued its Decision on Motion to Alter or Amend. The Committee indicated that it devoted a significant amount of time and effort in deciding the case and did not come to its decision lightly or without considering all of the facts, including those in mitigation of Appellant's conduct. (R., pp. 264-265.) The Committee concluded, after consideration of all of the mitigating evidence cited by Appellant, that it fully and fairly considered all relevant mitigating factors. The Committee still recommended that Appellant be disbarred, but believed the recommended disbarment should be served consecutively not concurrently and that a starting date of disbarment of February 1, 2010 would be "commensurate with the nature and severity of the violations committed by the Defendant and his disciplinary history." (R., p. 267.)

II.

STANDARD OF REVIEW

When the Idaho Supreme Court reviews an attorney discipline action, it independently examines the record developed before the Professional Conduct Board "to determine whether the evidence supports the findings and recommendation of the Board's hearing committee." *Idaho State Bar v. Warrick*, 137 Idaho 86, 90, 44 P.3d 1141, 1145 (2002); *Idaho State Bar v. Frazier*, 136 Idaho 22, 25, 28 P.3d 363, 366 (2001); *Idaho State Bar v. Souza*, 142 Idaho 502, 505, 129 P.3d 1251, 1254 (2006). The Court will examine the hearing committee's decision to determine if it is clearly erroneous or arbitrary and capricious. *Idaho State Bar v. Warrick*, 137 Idaho 86, 90, 44 P.3d 1141, 1145 (2002); *Idaho State Bar v. Gatenbein*, 133 Idaho 316, 319, 986 P.2d 339,

342 (1999); *Idaho State Bar v. Everard*, 142 Idaho 109, 112, 124 P.3d 985, 988 (2005). The hearing committee's findings are entitled to great weight. *Id.*

The disciplined attorney has the burden of showing the evidence does not support the hearing committee's findings and recommendations. *Idaho State Bar v. Malmin*, 139 Idaho 304, 307, 78 P.3d 371, 374 (2003). The Court independently reviews the record and assesses the evidence; nevertheless, the Court gives the hearing committee's findings of fact great weight. The ultimate responsibility for assessing the facts and ordering the sanctions to be imposed however rests with the Idaho Supreme Court. *Id.* at 307-308, 78 P.3d at 374-375 and *Idaho State Bar v. Williams*, 126 Idaho 839, 843, 893 P.2d 202, 206 (1995).

With respect to whether the Committee's recommendation is clearly erroneous or arbitrary and capricious, in *Enterprise v. Nampa City*, 96 Idaho 734, 739, 736 P.2d 729, 734 (1975), this Court reasoned:

For the City Council's actions to be deemed "arbitrary or capricious," it must be shown that its actions were done without rational basis; were in disregard of the facts and circumstances presented; or without adequate determining principles. Where there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached.

With respect to the clearly erroneous standard, since the findings and recommendation of the Committee are analogous to a district court's findings, *Caballero v. Wikse*, 140 Idaho 329, 332, 92 P.3d 1076, 1079 (2004), provides the following guidance:

This Court affirms a district court's findings of fact unless the findings are "clearly erroneous." I.R.C.P. 52(a). Findings "based upon substantial and competent, although conflicting, evidence will not be disturbed on appeal. *Bolger v. Lance*, 137 Idaho 792, 794, 53 P.3d 1211, 1213 (2002) (citing *DeChambeau v. Estate of Smith*, 132 Idaho 568, 571, 976 P.2d 922, 925 (1999)). This Court exercises free review over matters of law. *Id.* (citing *Bouten Constr. Co. v. H. F. Magnuson Co.*, 133 Idaho 756, 760, 992 P.2d 751, 755 (1999)).

Similarly, in *Muniz v. Schrader*, 115 Idaho 497, 500, 767 P.2d 1272, 1275, (Ct. App. 1989), the Court of Appeals stated:

As to the “clearly erroneous” standard under Rule 52(a), clear error will not be deemed to exist if the court’s findings are supported by substantial and competent, though conflicting, evidence. *Rasmussen v. Martin*, 104 Idaho 401, 659 P.2d 155 (Ct. App. 1983). Where evidence is conflicting, the task of weighing such evidence falls within the province of the trial court. *Id.* Finally, when a trial court’s findings of fact are challenged on appeal, the appellant has the burden of showing error, and the reviewing court will review the evidence in a light most favorable to the respondent. *Higginson v. Westergard*, 100 Idaho 687, 604 P.2d 51 (1979); *Salazar v. Tilly, supra.*

III.

ISSUES ON APPEAL

Appellant has raised the following issues on appeal:

- A. Did the Committee erroneously determine that the proper sanction for the violations was disbarment?
- B. Should the sanction imposed begin on January 31, 2008 and run concurrently with the suspension Appellant is currently serving?
- C. Is the ISB estopped from arguing against its earlier statements that the appropriate sanction is a suspension that should begin on January 31, 2008?
- D. Did the Committee ignore, or at least fail to fully acknowledge competent relevant material mitigation evidence offered at hearing?
- E. Did this Court violate Appellant’s due process rights in rejecting the initial Stipulation?
- F. Were the Committee decisions too late and therefore arbitrary and capricious?

IV.

ARUGMENT

Appellant has not satisfied his burden of showing that the evidence does not support the Committee's recommendation and that the Committee's recommendation is clearly erroneous or arbitrary and capricious. The Committee's determination that Appellant should be disbarred effective February 1, 2010, has a rational basis and is consistent with the facts and circumstances presented to the Committee and consistent with the determining principles, *i.e.*, the Idaho Rules of Professional Conduct, the ABA Standards and other disciplinary cases. The Committee's findings, conclusions and recommendation are entitled to great weight and are based upon substantial and competent evidence. As a consequence, the Court should impose the sanction recommended by the Committee.

A. The Committee's determination that the proper sanction should be disbarment was not clearly erroneous or arbitrary and capricious.

Appellant argues that the Committee's recommended sanction of disbarment was erroneous. Appellant argues that the Committee arbitrarily and capriciously ignored relevant evidence and failed to correctly apply the ABA Standards. However, the record reveals that the evidence supports the Committee's findings, conclusions and recommendation, the Committee's recommendation has a rational basis, and is consistent with the facts and circumstances presented to the Committee. In addition, the Committee properly applied the ABA Standards.

Appellant first challenges the Committee's determination that the circumstances relating to his representation of Robert Hall in Count Two merit the recommended sanction of disbarment. Appellant's challenge fails for several reasons. First, the Committee properly evaluated all three of the violations in Count Two, I.R.P.C. 1.3, 1.7(a) and 8.4(d) before

concluding that the recommended sanction for those violations was disbarment. Appellant ignores the Committee's evaluation of the violations of I.R.P.C. 1.3 and 8.4(d), choosing instead to focus solely on the conflict of interest violation, I.R.P.C. 1.7(a).

Initially, the Committee concluded that based upon ABA Standard 4.42, in evaluating the violation of I.R.P.C. 1.3, lack of diligence, suspension is an appropriate sanction when the lawyer knowingly fails to perform services for a client and causes serious or potentially serious injury to a client. The Committee concluded that, before analyzing relevant aggravating and mitigating circumstances, suspension was the appropriate sanction for Appellant's violation of I.R.P.C. 1.3. (R., pp. 207-208.)

Appellant focuses on the violation of I.R.P.C. 1.7(a), an impermissible conflict of interest, which admittedly is the focal point in Count Two. However, the Committee properly evaluated the ABA Standards in addressing that violation. The Committee analyzed ABA Standard 4.31(a) and concluded that before analyzing the relevant aggravating and mitigating circumstances, disbarment is the appropriate sanction because Appellant, without the informed consent of his client, engaged in representation knowing that his interests were adverse to the client's with the intent to benefit himself and caused serious or potentially serious injury to the client. (R., p. 209.) Based upon that, the Committee properly concluded the appropriate sanction for Appellant's violation of I.R.P.C. 1.7(a) was disbarment.

With respect to the violation of I.R.P.C. 8.4(d), conduct prejudicial to the administration of justice, the Committee concluded that disbarment was the appropriate sanction under ABA Standard 6.11, for the violation of I.R.P.C. 8.4(d) when a lawyer, with the intent to deceive the court, makes a false statement, submits a false document or properly withholds material, and causes serious or potentially serious injury to a party, or causes a significant or potentially

significant adverse effect on the legal proceeding. (R., p. 210.) The Committee recognized that the impact of Appellant's professional misconduct upon the legal proceedings involving Robert, were significant and adverse.

Appellant's conscious removal of Robert's post-conviction claim of ineffective assistance of trial counsel had an adverse effect on the administration of justice. Robert's initial post-conviction relief claims were decided by the district court in February 2006. Robert appealed and during the appeal, his new counsel requested a remand based upon Appellant's conflict of interest. The State agreed that the case should be remanded and in March 2007, the Idaho Court of Appeals remanded the post-conviction case for further proceedings recognizing that Appellant's conflict of interest directly resulted in the waiver of Robert's ineffective assistance of trial counsel claim. (R., p. 194.) Robert's new post-conviction attorney commenced the second round of post-conviction proceedings in October 2007. Following those proceedings and following more hearings, the court entered Rule 35 relief in December 2009. As noted, the minimum fixed term of 39 years was reduced to 18 years, but that fact that Robert's sentence was reduced, potentially as a result of Appellant's misconduct, is not entirely relevant to the impact Appellant's misconduct had on Robert's legal proceedings and the administration of justice. Appellant's misconduct resulted in almost four additional years of appeals and post-conviction proceedings that would have been unnecessary if Appellant did not continue to represent Robert in the face of an impermissible conflict of interest. The Committee correctly concluded that was a significant adverse effect on the legal proceedings.

Thus, Appellant's contention the recommendation of disbarment is arbitrary and capricious based solely on his analysis of the I.R.P.C. 1.7 violation fails to consider all of the Committee's rationale for its recommendation. In addition, Appellant argues that solely because

he believes Robert suffered no injury, ABA Standards 4.33 and 4.34 are applicable to the analysis of that violation. However the Committee's recommendation is based upon substantial and competent evidence, is not arbitrary and capricious, even though Appellant believes an erroneous conclusion was reached.

Appellant claims Robert suffered no damage. The Committee disagreed. In fact, at hearing, one of the Committee members indicated that while Robert may have had his sentence reduced because of Appellant's professional misconduct, employing a broader perspective of injury to consider the protection of the public, it was reasonable to consider that a reduction of a sentence for a potentially dangerous criminal defendant was injury or damage to the public and the administration of justice. (R., pp. 132-133.)

Moreover, the Committee's recommendation of disbarment in Count Two was arrived at before analyzing the relevant aggravating and mitigating circumstances under the ABA Standards. A review of the Committee's evaluation of the aggravating and mitigating circumstances, detailed at pages 20-21 above, demonstrates that the aggravating circumstances outweighed the mitigating circumstances and further supported the Committee's recommendation. For example, this is Appellant's third formal charge case in Idaho and he resigned in lieu in Oregon facing two formal charge cases. In addition, the Committee "devoted a significant amount of time and effort in deciding the case and did not come to a decision lightly or without considering all of the facts, including those in mitigation of Appellant's conduct." (R., pp. 264-265.) Thus, Appellant simply places more weight on the mitigating circumstances and less weight on the aggravating circumstances than the Committee did. As a consequence, Appellant believes that an erroneous conclusion has been reached, but even assuming the evidence is conflicting, the task of weighing the evidence and applying the ABA Standards to

that evidence falls within the province of the Committee and the Court. The Committee's recommendation of disbarment is the appropriate sanction for the Count Two violations, is not clearly erroneous or arbitrary and capricious.

Appellant also challenges the Committee's recommendation that disbarment is the appropriate sanction for the violations of I.R.P.C. 1.16(d) and 1.15(d) in Count One. Appellant's challenge fails for similar reasons. Appellant cites the same ABA Standards that the Committee considered, 4.11 and 4.12. The Committee concluded that before analyzing relevant aggravating and mitigating circumstances, the appropriate sanction for the rule violations in Count One was disbarment. (R., p. 207.) The Committee concluded that Appellant acted knowingly and intentionally, with the conscious objective or purpose to accomplish a particular result, *i.e.*, the conversion of unearned professional fees, which he continues to retain, and which caused injury to the clients, as the clients lacked the use of such funds from the date Appellant's representation was terminated, July 28, 2006, until the clients were paid from the Client Assistance Fund, March 13, 2008. (R., pp. 205-206.) Under ABA Standard 4.11, the Committee correctly concluded that disbarment was the appropriate sanction for a violation of those rules because Appellant knowingly converted Loretta's property and caused injury to Robert and Loretta. (R., p. 207.)

Appellant argues that Count One was a dispute over fees. That is incredulous and contrary to the facts. Loretta paid a \$10,000 retainer fee to Appellant in June 2006. Robert sent Appellant a letter terminating his representation on July 28, 2006. At the Client Assistance Fund hearing, seven months after Appellant was terminated, Appellant submitted a copy of his time records reflecting that he performed 13.6 hours of work on Robert's case, in addition to the Orofino consultation for which he was paid a \$2,000 fixed fee. (R., pp. 189-190.) On June 27,

2007, the CAF Committee entered its recommendation that concluded that because Appellant failed to return the unearned portion of the \$10,000 retainer fee, \$7,280, under I.R.P.C. 1.16(d), he engaged in dishonest conduct as defined in I.B.C.R. 601(e) and recommended that Loretta be reimbursed that amount. Later the Board ordered the CAF Committee to recommend dismissal if Appellant reimbursed Loretta the amount determined by the CAF Committee. The CAF Committee held a second hearing and concluded if Appellant reimbursed Loretta \$7,280 of unearned fees within 14 days it would recommend dismissal of the CAF claim. Appellant did not return the unearned fees. (R., p. 190.)

The Client Assistance Fund paid Loretta \$7,280, almost two years following Appellant's termination of representation. The circumstances reveal the failure to return unearned fees constituted a knowing conversion that caused damage to Loretta and Robert, and was more than a fee dispute. In addition, under I.R.P.C. 1.15(d), Appellant was obligated to distribute all portions of the \$10,000 retainer fee not in dispute. Clearly, the fee dispute could not be \$7,280, given Appellant's own time records. The Committee applied the appropriate ABA Standard to such misconduct.

The Committee's recommendation that disbarment is the appropriate sanction for Appellant's Count One professional misconduct is supported by the record and respects the determining principles, the ABA Standards and the Idaho Rules of Professional Conduct. Consequently, the Committee's recommended sanction for the Count One violations is not clearly erroneous or arbitrary and capricious.

B. The Hearing Committee's recommendation that the effective date of the recommended disbarment be February 1, 2010 is not clearly erroneous or arbitrary and capricious.

Appellant argues that his period of suspension should start January 31, 2008 and run concurrently with the suspension he is currently serving. In support of his argument, Appellant cites the October 6, 2010 Stipulation which was rejected by this Court in the Order to Remand. That order remanded the case to the Committee “for the reconsideration of more significant sanctions.” (R., p. 184.) That Stipulation also provided that, “if the Committee of the Professional Conduct Board or the Idaho Supreme Court declines to accept this Stipulation and/or Recommendation, each party has the right to withdraw from this stipulation and proceed to hearing on the merits.” (R., p. 38.) Appellant made this same argument to the Hearing Committee in his Motion to Alter or Amend, which was properly rejected. (R., pp. 214-248.) The Committee’s recommendation that the disbarment should be effective February 1, 2010 is sound.

Appellant’s argument is essentially that any suspension for this disciplinary case must run concurrently with his suspension in the reciprocal case. However, that is neither required, nor supported by the record.

In the Oregon disciplinary proceedings, the first formal charge Complaint was filed on December 2002 and the second Complaint was filed in June 2004. In August 2004, Appellant resigned from the Oregon State Bar in lieu of discipline. The Idaho reciprocal disciplinary proceeding was filed in June 2005. The first thing Appellant did in that case was file a motion to dismiss the reciprocal disciplinary case. That motion was denied and the matter proceeded to hearing. The hearing was required because Appellant denied all the rule violations related to his resignation in lieu of discipline in Oregon, since under the Oregon rules the resignation did not include an admission of any violations of the Oregon rules of professional conduct. In March 2007, the Committee issued its Recommendation and found that Appellant had committed

multiple violations of I.R.P.C. 1.2, 1.3, 1.4, 1.16(d) and 8.4(c) and one violation of each I.R.P.C. 1.5(f) and 8.4(d). Those violations related to Appellant's representation of seven clients in Oregon in a variety of post-conviction relief proceedings. (Exhibit 9, pp. 13-77.)

This Court issued its Disciplinary Order in the reciprocal case on January 17, 2008. That order suspended Appellant for five years, with three years of that suspension withheld. Appellant was not eligible to be reinstated until February 1, 2010.

The facts and circumstances underlying this case did not conclude until March 2008 (Count One) and December 2009 (Count Two). The Client Assistance Fund payment to Loretta was made in March 2008, and in Robert's case, the court order concluding the Rule 35 proceedings, necessitated by Appellant's conflict of interest, was entered in December 2009. In May 2010, before Appellant sought reinstatement, this disciplinary case was filed. (R., pp. 251-252.)

A consideration of the timing of the reciprocal and this disciplinary case reflects the propriety of the Committee's recommended disbarment date, February 1, 2010. The Committee rejected Appellant's request that the disbarment be retroactive to January 31, 2008, for a number of reasons. First, Appellant could have resigned in lieu of discipline in the Idaho reciprocal disciplinary case in 2005. However, Appellant chose not to and chose to contest every aspect of the reciprocal disciplinary case through hearing. That was Appellant's choice and the eventual sanction entered was less time than a resignation in lieu of discipline would have been. Appellant was entitled to choose to contest that case, but Appellant should bear the responsibility for that choice.

Second, there was no material delay between the conclusion of the Oregon disciplinary proceedings and the commencement of the Idaho reciprocal disciplinary proceedings. Third,

Appellant practiced law in Idaho from the start of the reciprocal proceeding in June 2005 until January 31, 2008. Fourth, when Appellant was eligible for reinstatement, Appellant did not submit a request for reinstatement, despite the fact that I.B.C.R. 518(b)(1) provides that a petition for reinstatement by a suspended lawyer may be filed no sooner than 90 days before the end of his suspension. Fifth, there was no material delay in this disciplinary case since the circumstances relating to the consequences of Appellant's misconduct alleged in Count Two were not known before December 2009, even though Appellant's conduct occurred well before that date. Finally, Bar Counsel agreed to stipulate to a resignation in lieu of discipline if the Committee recommended or otherwise approved that Bar Counsel do so. However, the Committee decided that disbarment was appropriate based upon the record. Consequently, Appellant has failed to satisfy his burden of establishing that the Committee's recommended effective disbarment date of February 1, 2010 is clearly erroneous or arbitrary and capricious.

C. The Idaho State Bar is not estopped from recommending that the appropriate sanction should be a suspension that should begin January 31, 2008.

Appellant argues that the Idaho State Bar cannot change its position from the October 6, 2010 Stipulation, that was rejected by this Court. That stipulation provided that if the Court rejected the Committee's recommendation, each party has the right to withdraw from the Stipulation and proceed to hearing on the merits. That provision was consistent with I.B.C.R. 514(a)(1). (R., p. 38.) The Court's Order to Remand remanded the case to the Committee for the reconsideration of more significant sanctions. The Court's remand to the Committee was consistent with I.B.C.R. 514(b)(2) and I.B.C.R. 511(k)(2). The effective date of any sanction clearly falls within the scope of a more significant sanction. Finally, even Appellant acknowledges the principle of judicial estoppel is not applicable to these circumstances and that

his real argument is that ISB cannot alter its position. (Brief, p. 33.) For these reasons and the reasons set forth in the preceding section, the ISB is not bound by the prior stipulation or estopped from arguing that the sanction should start from a different date.

D. The Committee did not ignore or fail to fully acknowledge competent relevant material mitigation evidence offered at hearing.

Appellant argues that the Committee ignored, or at least failed to fully acknowledge competent, relevant, material mitigation evidence offered during the April 4, 2012 hearing. However, Appellant's argument is contrary to the record and the Committee's decisions. In its initial decision, the Committee analyzed the aggravating circumstances under ABA Standard 9.2. The Committee then analyzed the mitigating factors under ABA Standard 9.3. The Committee considered that Appellant had been relatively cooperative in the investigation of the current disciplinary matter, appeared to have a good reputation in the community, as demonstrated by witnesses with high standing in the community who testified on his behalf, is currently under suspension of significant duration and which contains adequate conditions of reinstatement and probation and that he displays some remorse, although the Committee determined his remorse was minimal and conditional. (R., p. 211.)

Following its consideration of the ABA Standards and those aggravating and mitigating circumstances, the Committee recommended Appellant be disbarred. (R., p. 212.) Appellant then filed a Motion to Alter or Amend the Committee's Decision. In that motion, Appellant argued that the Committee failed to find all the mitigating circumstances established by the record in the case, reiterated what Appellant considered were mitigating circumstances and devoted eight pages to discussing those mitigating circumstances. (R., pp. 217-224.) Similarly, Appellant's Brief, devotes eighteen pages to a recitation of the mitigation evidence he presented

at hearing. (Brief pp. 7-24) Finally, Appellant attached fourteen mitigation evidence exhibits to his Brief.

In its decision on the Motion to Alter or Amend, the Committee initially noted that it devoted a significant amount of time and effort in deciding the case, was very aware of the import of its decision and its affect on Appellant. (R. p., 264.) The Committee said it “did not come to its decision lightly and certainly did not come to its decision without a full consideration of all of the facts, including those in mitigation of Appellant’s conduct.” (R., p. 265.) The Committee continued by referencing Appellant’s contention that the Committee “failed to find all of the mitigating circumstances established by the record in this case,” and then delineated the fourteen mitigating facts Appellant believed the Committee failed to consider. (R., pp. 265-266.) Based upon all of that, the Committee concluded that it fully and fairly considered all relevant mitigating factors. (R., p. 266.)

Moreover, in response to Appellant’s argument, that the Committee was unfair when the Committee described Appellant as being only relatively cooperative and showing only minimal and conditional remorse, the Committee said that statement only emphasized the Appellant’s refusal to accept full responsibility for his actions. Based upon those conclusions, the Committee affirmed its conclusion that disbarment was appropriate. (R., pp. 266-267.)

Thus, Appellant’s contention that the Committee failed to acknowledge mitigation evidence and ignored mitigation evidence is contrary to both of the Committee’s decisions. The Committee’s decisions did not disregard mitigating circumstances and those decisions were not clearly erroneous or arbitrary and capricious in this regard.

Apparently, as part of his contention that the Committee failed to consider mitigation and that a five year suspension is the appropriate sanction, Appellant discusses other disciplinary

cases at pages 38-42 of his Brief. While those cases address general principles relating to disciplinary cases and sanctions, their utility is limited by the different facts and disciplinary history in this case. Disciplinary cases are fact driven and the conduct and sanctions in the cases addressed are not as instructive to the appropriate sanction as the Committee's detailed factual findings and conclusions based upon the ABA Standards.

However, one case that is potentially related to this case is *Idaho State Bar v. Tway*, 128 Idaho 794, 919 P.2d 794 (1996). As Appellant points out, in *Tway*, the Court entered a five year suspension and rejected the Hearing Committee's disbarment recommendation. However, the circumstances in *Tway* are factually distinguished in one important respect. The Court recognized Tway's misconduct occurred around the same time as the conduct he had previously been suspended for and was part of an ongoing pattern of misconduct that the Court had already addressed. *Id.* at 799, 919 P.2d at 328. Unlike, *Tway*, Appellant's material misconduct in this case occurred in 2006-2008 (Count One) and in 2004-2005 (Count Two) and was not specifically within the pattern of misconduct relating to his prior public reprimand in 2001, or the Oregon representation that occurred years before that case started in December 2002 and then was amended to reflect conduct that occurred after that date and before June 2004, or the reciprocal suspension based thereon imposed January 31, 2008. Appellant's numerous instances of misconduct and the Committee's findings and conclusions differ materially from *Tway* and the other cases cited by Appellant. The reliance on those cases does not establish that the Committee's recommendation is clearly erroneous or arbitrary and capricious.

E. The Idaho Supreme Court did not violate Appellant's due process rights by rejecting the Committee's Recommendation based upon the October 2010 Stipulation.

Appellant argues that this Court violated his rights to due process by rejecting the Committee's October 27, 2010 Recommendation, which was based upon the October 6, 2010 Stipulation. The primary defect with Appellant's argument is that it fails to acknowledge that the ultimate responsibility for assessing the facts and ordering disciplinary sanctions to be imposed rests with the Idaho Supreme Court. *Idaho State Bar v. Malmin*, 139 Idaho 304, 307-308, 78 P.3d 371, 374-375 (2003) and *Idaho State Bar v. Williams*, 126 Idaho 839, 843, 893 P.2d 202, 206 (1995). The Idaho Supreme Court independently examines the record developed before the Professional Conduct Board to determine whether the evidence supports the findings, conclusions and recommendation of the Committee. *Idaho State Bar v. Warrick*, 137 Idaho 86, 90, 44 P.3d 1141, 1145 (2002); *Idaho State Bar v. Frazier*, 136 Idaho 22, 25, 28 P.3d 363, 366 (2002); and *Idaho State Bar v. Souza*, 142 Idaho 502, 505, 129 P.3d 1251, 1254 (2006). In addition, the Idaho Supreme Court's consideration and rejection of the October 2010 Recommendation based on the stipulation was consistent with its rules, I.B.C.R. 514(b)(2) and I.B.C.R. 511(k)(2).

Appellant's argument that due process was violated solely by a rejection of the Recommendation based upon a stipulation fails. Following the Order to Remand, Appellant was afforded a hearing before the Committee. The Committee issued its decision, which included detailed findings of fact, conclusions of law and a recommendation. (R., pp. 185-213.) Following that decision, Appellant, filed his motion to alter or amend the Committee's recommendation, consistent with the process permitted by I.B.C.R. 511(h)(2). That motion was fully briefed and then the Committee entered its second decision which altered its recommendation from disbarment from the date of any disciplinary order to disbarment effective February 1, 2010. (R., pp. 264-268.)

Appellant was given notice of the facts and issues regarding his professional misconduct in the Complaint. He answered that complaint and denied the misconduct. Appellant had a hearing and an opportunity to present why the Committee's initial decision following that hearing should be altered. Finally, Appellant appealed the recommendation, his appeal has been briefed, will be argued and decided by this Court. Consequently, Appellant has been afforded due process throughout these proceedings. See, *Idaho State Bar v. Everard*, 142 Idaho, 109, 124 P.3d 985 (Idaho 2005). Appellant has not stated any basis for relief based upon a deprivation of due process.

F. The Committee did not violate Appellant's due process rights by issuing decisions that were too late and therefore arbitrary and capricious.

Appellant argues that the Committee violated his due process rights by entering its first decision more than 28 days following the conclusion of the hearing and by issuing its decision on the motion to alter and amend more than 14 days following receipt of the motion under I.B.C.R. 511(h). I.B.C.R. 511(h)(1) provides that the Committee shall send its findings of fact, conclusions of law and recommendation to the Clerk within 28 days following the conclusion of the hearing and I.B.C.R. 511(h)(2) provides that the Committee shall, within 14 days of receipt of a motion to alter or amend, alter or amend its decision, deny the motion or schedule it for hearing. As an aside, the transcript of the April 4, 2011 hearing was not received from the court reporter until April 21, 2011.

However, I.B.C.R. 525(i) specifically states that, unless otherwise provided, "the time in which any act or anything is to be done or performed is not jurisdictional." Therefore, contrary to Appellant's argument, the timing of the entry of the Committee's decision following hearing

and its decision following the motion to alter or amend were not jurisdictional and the Committee did not violate due process by issuing its decisions when it did.

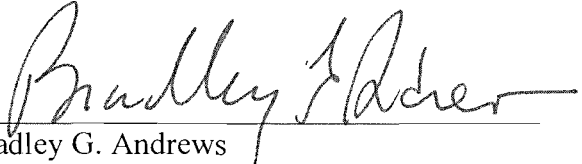
In addition, Appellant does not argue or provide any proof that the Committee's issuance of its decisions prejudiced his interests. He has not been licensed to practice law in Idaho since January 31, 2008 and even if the Court were enter the five year suspension as requested by Appellant in his motion to alter or amend, he would not be eligible for reinstatement until February 1, 2013. Therefore, the timing of the Committee's decisions did not affect Appellant's ability to practice law. He has provided no proof of prejudice in other respects. Consequently, the timing of the Committee's decisions are not jurisdictional, are not a deprivation of due process, or clearly erroneous or arbitrary and capricious.

V.

CONCLUSION

The Committee's recommendation is based upon clear, convincing, substantial and competent evidence. The Committee's findings are entitled to great weight. Appellant is unable to satisfy the burden of showing that the evidence does not support the Committee's findings, conclusions and recommendation and that the recommendation is clearly erroneous or arbitrary and capricious. The Committee's recommended sanction is appropriate and the Court should issue a discipline order consistent therewith.

RESPECTFULLY SUBMITTED this 30th day of April 2012.

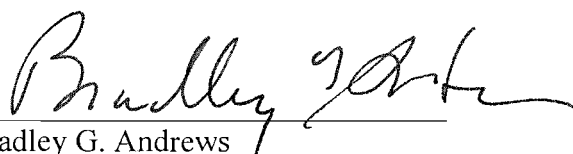


Bradley G. Andrews
Bar Counsel

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of April 2012, I served two (2) true and correct copies of the foregoing RESPONDENT'S BRIEF upon the following by U.S. mail addressed and directed as follows:

Bobby E. Pangburn
P.O. Box 2562
Eagle, ID 83616

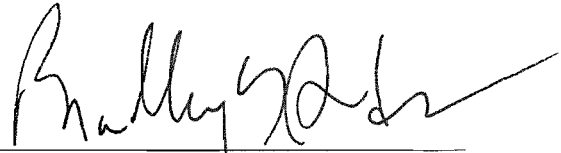


Bradley G. Andrews
Bar Counsel

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of May 2012, I served two (2) true and correct copies of the foregoing RESPONDENT'S BRIEF upon the following by U.S. mail addressed and directed as follows:

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Bradley G. Andrews
Bar Counsel