WSBA

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April 9, 2015

Mark DeCoursey
8209 172nd Ave NE
Redmond, WA 98052

Re: Grievance of Mark DeCoursey against Ryan P. McBride
ODC File No. 14-01157

Dear Mr. DeCoursey:

This letter is to advise you that we have completed our investigation of your grievance against lawyer Ryan P. McBride and to advise you of our decision. The purpose of our review has been to determine whether sufficient evidence exists on which to base a disciplinary proceeding. Under the Rules for Enforcement of Lawyer Conduct (ELC), a lawyer may be disciplined only on a showing by a clear preponderance of the evidence that the lawyer violated the Rules of Professional Conduct (RPC). This standard of proof is more stringent than the standard applied in civil cases.

Based on the information we have received, insufficient evidence exists to prove unethical conduct by Mr. McBride by a clear preponderance of the evidence in this matter. Therefore, we are dismissing the grievance. Based on the information we have received, insufficient evidence exists to prove unethical conduct by Mr. McBride by a clear preponderance of the evidence in this matter. Therefore, we are dismissing the grievance. Our decision to dismiss the grievance is based on a review of your original grievance received on June 24, 2014, which consisted of six large binders of materials. Lawyer Malaika Eaton responded on August 15, 2014 on behalf of Mr. McBride. You also provided us with many additional documents, including submissions dated September 8, 2014, September 10, 2014, March 10, 2015, March 12, 2015, March 16, 2015, and March 30, 2015. We also reviewed the court files in the two lawsuits related to your grievance, *V&E Medical Imaging Services, Inc., dba Automated Home Solutions v. Mark and Carol DeCoursey, et al v. Richard Birgh, Home Improvement Help Construction Credit Corporation, Herman Recor Araki Kaufman Simmerly & Jackson, PLLC, Paul H. Stickney, and Windermere Real Estate S.C.A. Inc.,* King County Superior Court Case No. 06-2-24906-2 SEA

(The Windermere Lawsuit), and *Lane Powell, PC, v. Mark and Carol DeCoursey*, King County Superior Court Case No. 11-2-34596-3SEA. We also reviewed the pleadings in the appellate cases that arose from the two cases. ODC Investigator Vanessa Norman and I also interviewed you and your wife, Carol DeCoursey.

The Windermere Lawsuit

You and your wife, Carol, hired Windermere real estate agent Paul Stickney to assist you in locating a home to purchase. You found a house, and Stickney advised you that you could buy the property, renovate the house, and have a home that was to your liking. Stickney recommended contractor Richard Birgh and Birgh's company, Home Improvement Help, Inc. (HIH), to do the work. In June 2004, you hired HIH to renovate your newly purchased home.

As it turned out, Stickney and Birgh were not only friends, they also were business partners in several ventures, including HIH. Their relationship was not disclosed to you. HIH went ahead and did the work. The result is that the house is now structurally unsound, electrically unsafe, and structural renovations have failed. The house requires massive remediation.

On August 2, 2006, V & E Medical Imaging, dba Automated Home Solutions, filed suit against you and HIH. King County Superior Court Case No. 06-2-24906-2 SEA. You appeared *pro se* and filed an answer, counterclaim, cross claim, and third party claims against Stickney and Windermere Real Estate (Windermere). You alleged fraud, breach of contract, negligence, and violation of the Consumer Protection Act.

It appears that the litigation was contentious and heated. The case was vigorously litigated. You have described Windermere's approach as "scorched earth litigation tactics." For example, on May 7, 2007, an order was entered granting your motion to strike and to amend, granting you additional time to answer the cross claim, and ordering you to desist from harassing conduct. The order, in part, signed by Judge Spearman, states:

- All contact with the Court shall be thru the bailiff and copies of any written material shall be provided to all parties and/or their attorneys.
- The DeCourseys shall refrain from name-calling and any other harassing, annoying, vexatious conduct or behavior directed at any party or attorney in this matter.
- Failure to comply with this Order may result in the imposition of up to and including dismissal of claims.

During discovery, you filed a motion for a protective order related to questions asked in a deposition, including questions about which attorneys you had consulted and paid. A hearing took place before Judge Erlick. The defendants claimed you were required to disclose the attorneys you had contacted and how much you had paid them. You responded that although you had contacted "lawyers," those lawyers were not attorneys. You told the judge that you were not claiming attorney fees other than statutory attorney fees. The judge's order stated that

you were not required to testify regarding attorney fees incurred and that you were not pursuing any claim for attorney fees beyond the statutory fees of $250. You moved for reconsideration, which was denied.

The case was set for trial, and you decided you needed a lawyer to represent you. You wanted to hire Brent Nourse. Mr. Nourse had recently joined the Lane Powell PC law firm. On September 19, 2007, you hired the law firm of Lane Powell PC (LP) to represent you and entered into a written fee agreement with the firm. You paid an advance fee deposit of $5,000. Your agreement with LP provided that the hourly rates for those performing work would be reviewed annually and adjusted without notice. As to payment, the agreement provided that invoices would be sent monthly and that any bills not paid within 30 days would accrue interest at the rate of 9% per annum. The agreement provided that both you and the firm had the right to terminate the attorney-client relationship at any time, but such termination did not eliminate your responsibility to pay for work performed prior to termination. The agreement also stated that if an estimate of the amount of fees and costs was given, it was not a guaranteed maximum, especially in matters involving litigation. We understand that you asked for an estimate and Mr. Nourse quoted you $100,000.

Mr. Nourse filed an appearance in the Windermere lawsuit on September 21, 2007, and shortly thereafter, filed a Motion for Summary Judgment seeking dismissal of HIH's claim against you. The motion was granted. Birgh and HIH settled with you and paid you $275,000. You agreed to release $200,000 to LP in payment of their outstanding bill, and you received the remaining $75,000.

You entered into a revised fee agreement with LP. You agreed that LP would be paid first out of any settlement and judgment, and LP agreed to forbear collection for a "reasonable time."

All of the parties except Stickney and Windermere were dismissed from the law suit. At trial, your remaining claims were for breach of fiduciary duty, fraud, and Consumer Protection Act violations. The jury returned a verdict in your favor for breach of fiduciary duty and violation of the CPA, but not for fraud. You were awarded $515,900 in damages for Stickney's breach of fiduciary duty and $6,300 for the CPA violation, for a total damage award of $522,200. You moved for an award of attorney fees and were awarded $356,142[1] for fees reasonably incurred. The attorney fee award was increased by a 30% multiplier, resulting in a total attorney fee award of $482,985. You were awarded $45,442 in costs.

Stickney filed an appeal in the Court of Appeals, Division One, Case No. 62912-3-1. LP lawyers Ryan McBride and Andrew Gabel represented you on the appeal. For the most part, you were successful on appeal. The Court specifically addressed the attorney fees award made by the trial court and concluded that the trial court made specific findings that the number of hours expended and the billing rates charged by the LP lawyers were reasonable. The court also held that segregation of the fees by claim was impracticable.

[1] This amount is based on the trial court's oral statements, which differs from the amount shown on the judgment summary by $442.00.

In addition, the Court upheld the 30% multiplier applied to the attorney fees and stated:

> Here, there was a possibility that no fees would be obtained. At the time that the Decoursey's attorneys appeared on the DeCourseys' behalf, the DeCourseys had limited finances and there was a significant risk that the attorneys would never recover their fees if the DeCourseys did not prevail in the lawsuit. The trial court recognized that the legal implications of Stickney's failure to disclose 'were strenuously fought.' Moreover, the attorneys accepted the DeCourseys' representation shortly after Judge Erlick's order. The uncertainty caused by Judge Erlick's ruling made it a possibility that the DeCourseys would not be able to recover any attorney fees. Thus, the trial court did not abuse its discretion in deciding to award a 30 percent multiplier."

However, the court also found that the award of costs was in error and remanded the case to correct the cost award.

You also sought attorney fees on appeal and were awarded fees to the extent the fees were related to the CPA claim, with the amount to be set by the commissioner. LP lawyer Ryan McBride subsequently filed an application for attorney fees on appeal on your behalf.

A Petition for Review was filed in the Supreme Court by Stickney on January 24, 2011. Mr. McBride represented you on the appeal. Based on the emails you provided to us, it appears that up until this point, the relationship between you and the LP lawyers had been a positive one. However, at about this time, it appears that the relationship between you and Mr. McBride began to be less than copacetic. For example, in an email you wrote to Mr. McBride dated May 16, 2011, you state that you instructed Mr. McBride to argue Windermere's litigation history as it concerns the CPA and attorney fees. You indicate you drafted text, but Mr. McBride and Grant Degginger "refused" to include it in your argument. You "begged" Mr. McBride to get an extension of time so you could have another lawyer evaluate a statement Mr. Degginger had made that there was no support in law for the argument you made. Mr. McBride responded by correcting some of the statements you had made in your email. It appears from the tone of these emails that you and Mr. McBride were not in agreement on what arguments to make in the case and whether it was your decision or Mr. McBride's decision.

On April 27, 2011, The Petition for Review was denied and your request for attorney fees was granted, the amount to be determined by the Supreme Court Clerk. Mr. McBride moved for an award of attorney fees and expenses, asking for $16,718.46. Stickney objected, and on May 25, 2011, you were awarded $11,978.89 in attorney fees.

On July 8, 2011, you hired lawyer Michelle-Earl Hubbard to represent you. On August 2, 2011, Mr. McBride sent you an email telling you that Windermere was contemplating making a partial payment on the judgment. The purpose of the partial payment was to cut off interest accruing on the judgment while you were waiting for the Supreme Court to rule on the fees and the mandate to issue.

On August 3, 2011, you terminated Lane Powell's representation. On the same day, Lane

Powell filed an attorney lien for unpaid fees in the amount of $384,881.66, which was in addition to the $313,253 you had already paid them. On August 17, 2011, Grant Degginger sent you a final bill showing a total due of $386.623.46.

The LP lawyers filed their Notice of Intent to Withdraw on August 4, 2011, and Michele Earl-Hubbard and Chris Roslaniec substituted in as your lawyers.

You subsequently hired lawyer Paul Fogarty to represent you. On September 22, 2011, Mr. Fogarty wrote a 19 page letter to LP, outlining your concerns about their representation. On September 23, 2011, Mr. Fogarty wrote a second letter to Lane Powell concerning the funds that the insurer for Windermere was attempting to pay. This letter states that you objected to LP's lien amount and LP's right to receive payment of the amount they claimed. The letter goes on to state that you were entitled to receive the undisputed funds. According to that letter, LP was insisting that the money be placed in LP's trust account. Mr. Fogarty demanded that LP immediately withdraw its objection to the payment to you of the uncontested monies.

LP responded by letter dated September 28, 2011. In that letter, LP offered several solutions to the issue and offered to work with Mr. Fogarty to resolve the issues.

On October 12, 2011, the mandate in the appeal was issued. On November 3, 2011, an order was entered allowing $384,881.66 to be deposited into the registry of the court, pending resolution of the dispute over who was entitled to the funds. An amended final judgment in the amount of $1,211,028.64, with interest at 5.25% was entered on November 3, 2011. The judgment was satisfied on November 10, 2011.

Your Grievance

Your grievance raises a number of issues about lawyer Ryan McBride's conduct. In particular, you take issue with his handling of the appeal to the Court of Appeals.

You identify several issues relating to the Court of Appeals appeal. You allege that Mr. McBride failed to include in the Court of Appeals brief the bases for the award of attorney fees and costs. You also allege that the Court of Appeals misunderstood the "RESPA foundation for fees and costs" and Mr. McBride "should have asked for a Modification to correct the Court." You also allege that Mr. McBride should have noticed that the standard for award of fees and costs was incorrect and he should have "asked for Modification to correct the Court." And, you allege that Mr McBride should have filed a cross appeal to the Supreme Court to correct the misunderstandings of the Court of Appeals.

It appears that your allegations concerning Mr. McBride's conduct arise from a disagreement between you and the LP lawyers, and Mr. McBride in particular. The disagreement centered on what issues to raise in the appeal and how to best raise those issues.

For example, you and Mr. McBride engaged in an exchange of emails concerning whether attorney fees should be awarded for the entire suit or just those related to the CPA claim. Mr. McBride advised you that your interpretation of the CPA was too broad and that, in his opinion,

you were only entitled to a recovery based on the CPA claim. You disagreed with that position.

In May 2011, an issue arose concerning whether to argue Windermere's litigation history in relation to the CPA and attorney fees in your Supreme Court brief. This issue concerned whether an award of attorney fees and costs should be awarded for attorney fees incurred in the suit, not just those relating to the CPA claim. You drafted text to be used, but Mr. McBride refused to include the argument. You asked LP to get an extension of time so you could consult another lawyer to evaluate statements made by Mr. Degginger.

As part of an email string you provided, Mr. McBride offered corrections to your email. First, he said that you did not instruct LP to argue about Windermere's litigation history, you demanded LP cross petition for review. He said LP told you they would not do that as it was not in your best interest. Mr. McBride disputed your version of the facts and stated he told you he would seek an extension of time so LP could withdraw and you could hire new counsel.

Generally, we do not review the quality of a lawyer's representation. Although you may disagree with a lawyer's advice on the merits of a case or the manner in which to proceed, we generally are not in a position to reassess or "second guess" a lawyer's professional judgment.

Many of the issues you raise in your grievance concerning Mr. McBride's conduct are best resolved by a tribunal that is in a position to hear the evidence presented by both sides. Because your counterclaims and affirmative defenses were stricken in the LP v. DeCoursey lawsuit, these issues were not resolved by the court. It does not appear that there has been a judicial finding of impropriety by Mr. McBride. As such, we believe we would be unable to establish by a clear preponderance of the evidence that Mr. McBride's conduct in this regard violated the Rules of Professional Conduct.

For the reasons stated above, we are dismissing this matter under ELC 5.7(a). If you do not mail or deliver a written request for review of this dismissal to us within **forty-five (45) days** of the date of this letter, the decision to dismiss your grievance will be final. Dismissal of a grievance constitutes neither approval nor disapproval of the conduct involved and should not be taken as the position of the Office of Disciplinary Counsel with respect to any other matter.

Sincerely,

Debra Slater
Disciplinary Counsel

cc: Ryan P. McBride