WSBA

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April 9, 2015

Mark DeCoursey
8209 172nd Ave NE
Redmond, WA 98052

Re: Grievance of Mark DeCoursey against Grant Degginger
ODC File No. 14-01156

Dear Mr. DeCoursey:

This letter is to advise you that we have completed our investigation of your grievance against lawyer Grant Degginger 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. Degginger 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. Degginger. 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 Simerly & 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, in 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.

Lane Powell v. DeCoursey

On October 5, 2011, about a month before the Windermere lawsuit and judgment was satisfied, LP filed a lawsuit against you for its fees. King County Superior Court, Case No. 11-2-34596-3-SEA. The complaint alleged breach of contract, quantum meruit and foreclosure of LP's attorney lien. At the same time, LP served you with Interrogatories and Requests for Production, and Notice of a Videotaped deposition to take place on November 22, 2011. LP was represented by Robert Sulkin and Malaika Eaton of the law firm McNaul Ebel, Nawrot, & Helgren. Judge Richard Eadie was assigned to the case.

On October 25, 2011, you filed your answer and counterclaims. You were appearing *pro se* in the law suit. On November 3, 2011, you filed a motion for discovery protection and for sanctions under CR 26(i). LP opposed your motion. On November 17, 2011, the Court denied your motion. You filed a Motion for Reconsideration and Clarification, which was also denied. On December 21, 2011, you were ordered to deposit funds into the court registry.

You again moved for a discovery plan, which the court denied.

On January 24, 2012, LP filed a motion to compel, and on February 3, 2012, the Court entered an order compelling you to respond to Plaintiff's first Discovery Requests, and ordering you to provide full and complete responses to Plaintiff's First set of Interrogatories and Requests for

Production no later than 10 days from the entry of the order. Your refusal to comply with the discovery requests was based, in part, on your position that the requests required disclosure of attorney-client privileged material. You filed a Motion to Reconsider, which was denied. You were ordered to respond to the discovery requests in accordance with the court's February 3, 2012 order.

On February 29, 2012, the court entered an Order on Motion for Reconsideration of Motion to Compel. The order required you to respond to the discovery requests in full.

On March 8, 2012, LP's lawyer filed a Motion for an Order of Contempt for your failure to respond to plaintiff's first set of discovery requests as ordered. On April 25, 2012, you were ordered to comply with the Court's December 21, 2011 order to deposit funds into the Court Registry and to provide full and complete answers to Plaintiff's First Set of Discovery Requests.

Addressing your issue concerning attorney-client privilege, the Court stated that your answers to LP's discovery requests should be made on the basis that attorney-client privilege between you and LP as it relates to the Windermere lawsuit had been waived. You were warned that your refusal to comply with the Court's orders was without reasonable cause or justification and it was therefore willful and deliberate. LP was awarded attorney fees and expenses related to the motion for contempt. You were also cautioned that more serious sanctions might follow from further failure to abide by the court orders or rules.

You did not comply. Lane Powell filed another motion for contempt and discovery sanctions. In its order, the court stated:

> The discovery violations by Defendants are substantial and have been repeated despite this court's orders to compel. The imposition of further deadlines would not be likely to result in meaningful compliance. The discovery sought by Plaintiff is clearly material to its case and to its defense of defendant's counterclaims and affirmative defenses.

The order granted the motion for contempt.

Your counterclaims and defenses were stricken, and LP was awarded attorney fees and expenses.

In August 2012, you filed a motion to have Judge Eadie recused after you discovered that his wife is a Windermere agent. Judge Eadie denied your motion for recusal on the grounds that Windermere was not a party to LP's action against you.

LP subsequently filed a Motion for Partial Summary Judgment. A hearing was held on November 16, 2012. The Motion for Summary Judgment was granted in favor of LP and against you for breach of contract. The court found that you had entered into a binding written fee agreement with LP on September 19, 2007, which was amended on December 30, 2008. The Court found that the hourly rates of the LP staff were reasonable, based on the timekeeper's skill, experience, reputation, and ability, and those customarily charged in the locality for similar legal services. The Court stated that it especially reviewed the rates charged by Mr. Degginger and

Mr. Gabel. The court also found that the terms of the fee agreement between you and LP were reasonable.

Judgment was entered against you in the amount of $422,675.45. The clerk was directed to disburse the balance of $384,881.66 held in the Court Registry to LP and you were ordered to release $37,793.79 of the amount held in the supersedeas bond to cover accrued interest.

In addition, a judgment on the sanctions in the amount of $25,439.52 was entered against you.

You filed a Notice of Appeal on January 28, 2013. Lawyer James Lobsenz represented you on the appeal. You wanted the Court of Appeals to reverse the judgment, vacate all of the orders, and remand the case for a new trial before a different judge. Alternatively, you sought reversal of the summary judgment. You contended that you did not breach your contract with Lane Powell.

The Court of Appeals's decision dealt mostly with the issue of Judge Eadie's recusal. The Court rejected your due process argument, stating that Windermere had no interest in the litigation between you and LP. The Court also found that four years after winning the Windermere case for you and two years after being fired was a reasonable time to forbear collection efforts. The Court concluded that Judge Eadie did not err in granting the Motion for Summary Judgment. You subsequently filed a Petition for Review with the Supreme Court. Your Petition for Review was denied on October 8, 2014.

Your Grievance

Your grievance raises a number of issues about lawyer Grant Degginer's conduct.

You allege that Lane Powell, and Grant Degginger in particular, had a conflict of interest in representing you and they failed to disclose that conflict of interest when you hired them to represent you. Mr. Degginger was the Chair of Lane Powell's Construction and Environmental Practice Group, Mayor of Bellevue from 2006-2010, and Bellevue City Council member from 1999-2012. You state that Mr. Degginger "was presiding over the biggest real estate/construction boom in Bellevue's history." You describe LP as a pro business law firm. You assert that because of their representation of businesses, they did not vigorously represent you in the Consumer Protection Act lawsuit against Windermere because to do so would be against the interests of their business clients and the firm. In other words, you believe their loyalties were to their business clients and/or the firm and not to you.

Your grievance describes the conflict as positional and political. You assert that Mr. Degginger's pro-development mindset and LP's pro-business client base meant that it was not in favor of expanding the Consumer Protection Act because to do so would hurt LP's other clients, who are more likely to be parties against whom CPA claims would be asserted rather than consumers such as you.

You provided us with information about an event that occurred in May 2011 that supports your position. The event concerned 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 and Mr. Degginer refused to include the argument. You asked LP to get an extension of time so you could consult another lawyer to evaluate Mr. Degginger's statement that there is no support in law or precedent for your argument. You state Mr. Degginger told you that if you wanted to change the law, you should go to the legislature.

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.

There is no direct evidence to support your assertion that Mr. Degginger or LP took these positions in furtherance of their business client's interests rather than yours. There is evidence to the contrary. LP vigorously represented you in the Windermere law suit. In your November 7, 2010 letter to Mr. Degginger, you stated how pleased you were with LP's handling of discovery, trial, and appeal of your case. Even though you have inferred from Mr. Degginger's actions that his loyalties were to LP's business clients rather than to you, that inference is not sufficient to support a finding that his actions violated the Rules of Professional Conduct.

You also raise a concern about a $1,500 campaign contribution made in 2007 to Mr. Degginger's election campaign by the Washington Association of Realtors. You have stated that Windermere was a member of that organization. It is not known if Windermere made a contribution, and if so, how much. Total contributions to Mr. Degginger's campaign totaled $37,676.60, so the Association's Realtors' contribution represented less than 4% of the total contributed to his campaign, not a significant amount.

RPC 1.7(a) provides that a lawyer shall not represent a client if the representation involves a conflict of interest, which exists if there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibility to another client or by a personal interest of the lawyer.

The rule requires that there be ***significant*** risk that representation will be materially limited by the lawyer's responsibilities to another client or the personal interest of the lawyer. Furthermore, the representation of the client must be ***materially*** limited by the lawyer's responsibilities to another client. In other words, even if there is some risk that the representation of the client will be limited, in order to establish an RPC 1.7(a) violation, the risk must be significant and the limitations on the lawyer's representation must be material.

Our review of the evidence indicates that LP vigorously represented your interests. As such, it appears we would be unable to meet our burden of proof in establishing that LP's conduct violated the RPCs in this regard.

You also raise issues concerning the rate of interest on the judgment obtained against

Windermere. First, you assert that LP agreed to accept an interest rate of 3.49% even though the judgment originally provided for interest at 12%. You believe the 3.49% interest rate was not correct. You also objected to having to pay LP 9% interest on the fees you owed them, as provided in your contract with LP, while Windermere only had to pay 3.49% interest on the attorney fees award. In an August 5, 2010 letter to LP, you asked that LP "confirm your understanding that LP will be statisfied with the interest rate Windermere pays (3.49%)." On August 30, 2010, Degginger provided a written explanation, stating that the interest rate was correctly set and that LP expected you to abide by the terms of your contract with LP.

RPC 1.2 provides that a lawyer shall abide by a client's decisions concerning the objectives of the representation, and shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of a client as is impliedly authorized to carry out the representation.

In this case, Mr. Degginger explained to you that the interest rate was based upon the predominant basis for the damage award, which in this case was tort. The Amended Final Judgment entered in the Windermere case stated that "The parties have agreed to interest from 10/31/2008 until paid at 5.25% per annum." The Amended Final Judgment was not presented by LP, but by your new lawyer, Michelle Earl-Hubbard.

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, the manner in which to proceed, or in this case, the determination of the interest rate, we generally are not in a position to reassess or "second guess" a lawyer's professional judgment. Determining the interest rate on a judgment appears to be a matter that is within the scope of the lawyer's duties and, as such, is a matter that is impliedly authorized to carry out the representation.

Your grievance also enumerates a number of issues relating to fees and other amounts you believe LP failed to pursue in the Windermere case. For example, you notified Mr. Degginger that there were missing line items in the Motion for Attorney fees. You also refer to the fact that LP did not seek triple damages under the CPA.

Again, generally, we are not in a position to assess the quality of a lawyer's representation. Many of the issues you raise in your grievance 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. Degginger on this issue. Therefore, we believe we would be unable to establish by a clear preponderance of the evidence that Mr. Degginger's conduct in this regard violated the Rules of Professional Conduct.

You also raise an issue concerning the disclosure of what you believe was attorney-client privileged material in the *Lane Powell v. DeCoursey* lawsuit. You describe this issue as "Extortion Under Color of Law: Threat to Reveal Attorney-Client Confidences." As described above, you repeatedly refused to comply with discovery requests based on your position that the requests required disclosure of attorney-client privileged material. However, Judge Eadie had

ruled that the answers you were to provide to the discovery requests should be made on the basis that attorney-client privilege between you and LP as it relates to the Windermere lawsuit had been waived. Because of your refusal to comply with the discovery requests, Judge Eadie struck your counterclaims and affirmative defenses, which meant that you had no chance to assert a number of the claims against LP that you raise in your grievance.

As stated above, 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. Generally, a lawyer has the right to control the tactics and procedural elements of a case. Lawyers are not bound to a regimented approach to presenting a case. The lawyer uses his or her experience, training, and personal creativity in making strategy decisions.

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: Malaika Eaton, counsel for Grant Degginger