WSBA

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April 9, 2015

Mark DeCoursey
8209 172nd Ave NE
Redmond, WA 98052

Re: Grievance of Mark DeCoursey against Robert M. Sulkin
ODC File No. 14-01158

Dear Mr. DeCoursey:

This letter is to advise you that we have completed our investigation of your grievance against lawyer Robert M. Sulkin 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. Sulkin 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. Sulkin. 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, 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 LP.

The Court of Appeals' 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 regarding Mr. Sulkin's conduct in the LP v. DeCoursey lawsuit.

You raise a concern about statements allegedly made by Mr. Sulkin to lawyer Paul Fogarty. In an October 6, 2011 email to you, Mr. Fogarty related a telephone conversation he had with Mr. Sulkin. In that call, Mr. Fogarty said that Mr. Sulkin told him "LP does not settle cases when it believes it did nothing wrong, that it believes it did nothing wrong in this case, and that 'it would pay $800,000 in fees in this suit to recover $300,000.' " This conversation took place one day after LP had filed its law suit against you.

You characterize Mr. Sulkin's statement as extortion and a threat. You also state that you raised the issue to the Court numerous times and provided Judge Eadie with documentation that supported your position. You described Mr. Sulkin's statement in your Answer and your December 19, 2011 Response to Plaintiff's Motion to Require Deposit of Additional Funds into Court Registry and Request for Court to Sanction Lane Powell for CR 11 Violations. Although the issue of Mr. Sulkin's comment was not addressed by the Court, the Plaintiff's motion was granted.

Our review of the evidence on this point indicates that it is likely that Mr. Sulkin was informing Mr. Fogarty about LP's position on the case. To rephrase, LP doesn't think it did anything wrong, we're not going to settle, and we're willing to spend what it takes to prove our point. In other words, Mr. Sulkin was communicating his client's level of commitment to pursuing the

case to Mr. Fogarty.

As a general rule, the fact that a lawyer acts in a way that another person perceives to be rude or uses harsh language is not a matter over which we have any authority. Our authority does not extend to dealing with this type of situation. Based on our review of the evidence on this issue, we believe we would be unable to prove by a clear preponderance of the evidence that Mr. Sulkin's conduct violated the Rules of Professional Conduct.

You also allege that Mr. Sulkin misrepresented the contents of the Court's February 29, 2012, order by incorrectly misquoting what the order said. Specifically, the language "…in accordance with CR 26(b) and ER 502" was omitted. You filed a Motion to Impose Sanctions against LP's attorneys on this issue. Judge Eadie stated that the inclusion or omission of the specific words that were omitted did not change the meaning. The Judge went on to say that as quoted, the quotation should not have ended with a period, but should have ended with an ellipsis. Based on our review of the evidence on this issue, including Judge Eadie's Order denying CR 11 Sanctions, we believe we would be unable to prove by a clear preponderance of the evidence that Mr. Sulkin's conduct violated the Rules of Professional Conduct.

You raise several other instances where you believe Mr. Sulkin lied to the court. RPC 3.3 provides, in pertinent part, that a lawyer shall not ***knowingly*** make a false statement of fact or law to a tribunal. We have reviewed all of the instances you cited and where you believe Mr. Sulkin lied to the Court. Based on our review, we do not believe that we could meet our burden of proof in establishing that Mr. Sulkin knowingly made false statement to a tribunal.

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