APPENDIX A - OPINIONS, ORDERS, FINDINGS OF FACT, AND CONCLUSIONS OF LAW, WASHINGTON STATE DISCIPLINE, WASHINGTON

SUSPENSION OPINION, AUGUST 16, 2018
WASHINGTON STATE SUPREME COURT

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In the Matter of the Disciplinary Proceeding Against DAVID CARL COTTINGHAM an Attorney at Law.	No. 201,704-5 En Banc File Aug 16, 2018

WIGGINS, J.—Attorney David C. Cottingham embarked on a five-year boundary line dispute against his neighbor. His pursuit involved two lawsuits, four judicial appeals, two administrative appeals, countless motions, years of delay, unnecessary and wasteful expenditure of judicial resources, injury to his neighbors, and nearly $60,000 in sanctions for CR 11 violations. As a result, the Office of Disciplinary Counsel (ODC) charged Cottingham with violating the Rules of Professional Conduct (RPC). At the conclusion of the proceedings, the Washington State Bar Association (WSBA)

Disciplinary Board (Board) recommended that Cottingham be suspended for 18 months. Cottingham appealed. We affirm the Board and suspend Cottingham for 18 months.

FACTS

David Cottingham has practiced law since he was admitted to the bar in 1979 and has had no record of prior discipline. Cottingham and his wife own two lots on Lake Whatcom, where they have lived since 1989. In 2006, Ronald J. and Kaye L. Morgan purchased a lot that shared a property boundary with the Cottinghams' land. When the Morgans purchased the lot, laurel bushes were growing near the boundary line, planted there by Cottingham before 1995. In 2007, the Morgans removed eight laurel bushes along the common boundary.

The First Lawsuit and the Trial

In June 2009, Cottingham and his wife filed a lawsuit against the Morgans, seeking title by adverse possession to a portion of the Morgans' property where the laurel bushes had been. The Morgans filed counterclaims, seeking to quiet title consistent with the platted boundary lines. The case went to trial in late 2010. Cottingham represented himself pro se and appeared as counsel for his wife. The trial judge held that Cottingham had adversely possessed 292.3 square feet of the Morgans' property and that the Morgans had wrongfully removed the laurel bushes. The judge also found that the adversely possessed land was necessary to the Morgans' use and enjoyment of their lot and comparatively insignificant and unnecessary to the Cottinghams' use and enjoyment of their land. The judge condemned the land in favor of the Morgans and ordered the Morgans to pay the Cottinghams the fair market value of the land as well as trebled

damages for the laurel bushes. The Morgans attempted to pay but Cottingham declined, so the Morgans deposited the full amount into the court registry.

After trial, Cottingham initiated and pursued repetitive and baseless legal challenges in an attempt to change the trial court's decision and to interfere with the

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Morgans' use and enjoyment of their home. Cottingham's "court filings were often, but not always, unintelligible, rife with typographic and grammatical errors ...." Hr'g Officer's Findings of Fact, Conclusions of Law, Mitigating Facts & Recommended Sanction (Recommendation) at 15.

The Appeals

In early 2012, after the trial court entered its decision, Cottingham appealed to the Court of Appeals. Before the first appeal had been completed, Cottingham filed a separate motion for discretionary review in the Court of Appeals, challenging a trial court order that required Cottingham to release a lis pendens on the Morgans' property. The Court of Appeals denied discretionary review, noting that the appeal was untimely and challenged issues not properly before the court. Cottingham filed a motion to modify, which the Court of Appeals held to be untimely and frivolous. The Court of Appeals sanctioned Cottingham $500. While the first and second appeals were pending, Cottingham filed two administrative appeals, challenging Whatcom County's 2006 decision to issue the Morgans a building permit and its 2012 decision to issue a final occupancy certificate.

The Second Lawsuit and Another Appeal

While the first, second, and administrative appeals were pending, Cottingham filed a second lawsuit against the Morgans under the Land Use Petition Act (LUPA), chapter 36.70C RCW. The trial court dismissed the LUPA lawsuit with prejudice and held that the lawsuit was frivolous, was "not supported by any fact or law or reasonable argument for any extension of existing law," and was "filed at least in part to harass and/or annoy [the] Morgans." The trial court noted that Cottingham's pleadings were "chaotic, convoluted" and "required a substantial amount of time to understand and thoughtfully respond." Accordingly, the court held that Cottingham had violated CR 11, sanctioning him just over $25,000 in attorney fees and costs for the violation. Cottingham appealed the dismissal of the LUPA petition to the Court of Appeals.

The LUPA lawsuit served as the basis for ODC's count 2, a violation of RPC 3.1, against Cottingham. The hearing officer found that the LUPA lawsuit "was frivolous and filed to harass the Morgans." Recommendation at 7-8. In support, the hearing officer noted that LUPA review "is limited to judicial review of the 'final determination by a local jurisdiction's body or officer with the highest level of authority to hear [land use] appeals." Id. (alteration in original) (quoting RCW 36.70C.020(2)). Cottingham "was aware that there had been no such determination." Id.

Court of Appeals Decisions and a Return to the Administrative Appeals

In 2013, the Court of Appeals affirmed the trial court on all grounds in the first appeal. Cottingham filed a petition for review with this court. We denied review.

In 2014, the Court of Appeals affirmed the

decision of the LUPA trial court on all grounds, including the trial court's decision to award fees for the CR 11 violation. The Court of Appeals also sanctioned Cottingham an additional. $16,683 for filing a frivolous appeal. The court noted that "an appeal is frivolous if it is so totally devoid of merit that there is no reasonable possibility of reversal" and held that the filing was frivolous because "this appeal presents no debatable issues." *Cottingham v. Morgan,*

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No. 70218-1-I, slip op. at 13 (Wash. Ct. App. Apr. 28, 2014) (unpublished), http://courts.wa.gov/opinions/pdf/702181.pdf.

The disciplinary hearing officer also found that the appeal was frivolous and was pursued to harass the Morgans, noting that the arguments Cottingham put forth were "without legal authority or good faith basis." Recommendation at 11. In its decision upholding the dismissal of Cottingham's LUPA petition, the Court of Appeals also declared that Cottingham had abandoned his administrative appeals.

Two days later, Cottingham attempted to resurrect the administrative appeals. After a series of proceedings, a hearing examiner dismissed the administrative appeals with prejudice. The attempted resurrection of the administrative appeals served, at least in part, as the basis for ODC's count 4 against Cottingham. The hearing officer noted that Cottingham's attempt to resurrect the administrative appeals falsely stated that the land-use issues remained unresolved and that the Court of Appeals had remanded the case to the superior court. Recommendation at 11-12. The hearing officer found that the "filing and pursuit of the administrative appeal after the Superior Court

had determined the issues and the Court of Appeals had affirmed was legally and factually unsupported and was made with the conscious objective of interfering with the Morgans' use and enjoyment of their premises." Recommendation at 17 (Conclusion of Law (CL) D).

More Motions

Less than two months later, Cottingham again attempted to challenge the boundary line decision. He sought leave to file a CR 60(b) motion alleging that the

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Morgans' trial testimony was false. The trial court denied the motion and found that the "motion and allegations contained therein are not supported in law or fact." The trial court found that Cottingham violated CR 11 and sanctioned him $7,500. This motion served as the basis for ODC's count 1, a violation of RPC 3.1, against Cottingham. The hearing officer found that "[t]he motion was frivolous and was filed to perpetuate inconvenience and harassment of the Morgans" because "[f]actual support, legal support and relevance were almost entirely lacking." Recommendation at 12.

In December 2014, the trial court quieted title in the Morgans and removed the cloud on the title. Despite his lack of success and the sanctions against him, Cottingham continued the campaign. In December 2014, he filed a motion for reconsideration of the Supplemental Order Quieting Title. The trial court found that the motion violated CR 11 and sanctioned Cottingham $2,500. This motion served as the basis for count 3, a violation of RPC 3.1, against Cottingham. The hearing officer agreed, quoting the largely unintelligible language of the motion and noting that it "was frivolous and was intended to harass the Morgans." Recommendation

at 13. In February 2015, Cottingham filed a notice of appeal with the Court of Appeals, seeking to reverse the Supplemental Order Quieting Title and the order denying reconsideration. In March 2015, Cottingham moved to recall the mandate issued one year earlier. The court denied the motion, found that the motion was frivolous and ordered Cottingham to pay $1,500 to the Morgans "for having to respond to a frivolous motion." Recommendation at 15.

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In August 2015, Cottingham finally moved for the release of the funds that the Morgans had paid into the court registry, and the trial court released the funds to him.

Disciplinary Proceedings

Cottingham's five-year pursuit to change the trial court's decision regarding the boundary line resulted in over 700 filings and sanctions totaling $58,115.80. These sanctions were not imposed at the outset; in fact, Cottingham's initial lawsuit was not frivolous. Rather, the judges and hearing officers found violations and imposed sanctions only as each stage of the litigation progressed. Cottingham had ample warning that his arguments were unavailing and his continued pursuit was frivolous. On November 9, 2015, ODC formally charged Cottingham with five counts of violating the Rules of Professional Conduct. The complaint alleged:

> Count 1 ... By moving to reconsider, vacate the judgment, or grant a new trial after the first appeal, which motions were frivolous, Respondent violated RPC 3.1 (frivolous litigation).
>
> Count 2 ... By filing the LUPA petition, which was frivolous, Respondent violated RPC 3.1.

> Count 3 ... By filing the motion to reconsider after the trial court quieted title to the Morgans, which was frivolous, Respondent violated RPC 3.1.
> Count 4. . . By filing one or more appeals that were frivolous and/or by attempting to pursue the administrative appeals after he abandoned them, Respondent violated RPC 3.1.
> Count 5 ... By pursuing litigation and/or appeals before the trial court, the court of appeals, and/or the Whatcom County hearing examiner with intent to harass and/or annoy the Morgans, Respondent violated RPC 4.4 (using means that have no substantial purpose other than to burden a third person) and/or 8.4(d) (conduct prejudicial to the administration of justice).
> Formal Compl. at 5-6 (formatting omitted). Cottingham denied the charges.

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At the outset of the hearing, ODC moved to prevent Cottingham from challenging or relitigating the correctness of the underlying court rulings or arguing that they were erroneously made. Cottingham agreed and did not challenge the motion. He stipulated that within the disciplinary proceedings, he was not entitled to relitigate the underlying decisions or argue that those decisions were erroneous. The hearing officer found, "The court rulings on all substantive issues in the litigation giving rise to this complaint were legally and factually correct." Recommendation at 16.

The hearing officer found that Cottingham violated RPC 3.1, 4.4(a), and 8.4(d) by knowingly and

intentionally filing frivolous pleadings, inconveniencing and injuring the Morgans, and interfering with the administration of justice by consuming substantial judicial time and resources without justification.

The hearing officer found four aggravating factors (selfish motive, pattern of misconduct, multiple offenses, and substantial experience in the law), and three mitigating circumstances (no prior disciplinary record, uncontradicted testimony of good character and reputation, and satisfaction of all sanctions ordered against him).

Guided by the American Bar Association's Standards *for Imposing Lawyer Sanctions, the hearing officer recommended that Cottingham be suspended from* practicing law for 18 months. On September 27, 2017, the Disciplinary Board unanimously adopted the hearing officer's recommendation. Cottingham appealed the suspension to this court. We now uphold the Board's unanimous decision and suspend Cottingham from practicing law for 18 months.

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ANALYSIS

I. Standard of Review

The Washington State Supreme Court is the definitive authority for attorney discipline in Washington. *In re Disciplinary Proceeding Against Kuvara, 149* Wn.2d 237, 246, 66 P.3d 1057 (2003). Unchallenged findings of fact are verities on appeal. *In re Disciplinary Proceeding Against Marshall,* 160 Wn.2d 317, 330, 157 P.3d 859 (2007). If the findings are challenged, this court will uphold findings of fact that are supported by substantial evidence. *In re Disciplinary Proceeding Against Guarnero,* 152 Wn.2d 51, 58, 93 P.3d 166 (2004). We review conclusions of law de novo, and when the Board is

unanimous with regard to the recommended sanction, we will uphold its decision absent a clear reason to depart from it. *In re Disciplinary* Proceeding *Against Fossedal,* 189 Wn.2d 222, 233, 399 P.3d 1169 (2017).

II. Findings of Facts and Conclusions of Law

A. Findings of Fact

An attorney challenging the evidence in front of this court must "present argument to the court why specific findings of fact 'are not supported by the evidence and ... cite to the record to support that argument." *In re Disciplinary Proceeding Against Haskell,* 136 Wn.2d 300, 311, 962 P.2d 813 (1998) (quoting *In re Estate of Lint,* 135 Wn.2d 518, 532, 957 P.2d 755 (1998)); *see In re Disciplinary Proceeding Against Whitney,* 155 *Wn.2d 451, 466-67, 120 P.3d 550 (2005) (declining to address* challenges to findings that were insufficiently briefed). A challenging party must provide in its opening brief a separate assignment of error for each finding of fact being challenged. RAP 10.3(a)(4).

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Here, Cottingham does not assign error to any specific finding of fact made by the hearing officer and adopted by the Board. Unchallenged findings of fact are verities *on appeal. Marshall, 160 Wn.2d at 330. Thus, we view as true the facts found by the* hearing officer and adopted by the Board.

Additionally, at the beginning of these proceedings, Cottingham stipulated that he was not entitled to relitigate the underlying property line issues or argue that the decisions by the trial and appeals courts were erroneous. The hearing officer found that "[t]he court rulings on all substantive issues in the litigation giving rise to this complaint were legally and factually correct." Recommendation at 16.

B. Conclusions of Law

Based on the findings of fact, the hearing officer and the Board concluded that Cottingham violated RPC 3.1, RPC 4.4(a), and RPC 8.4(d) by intentionally and knowingly filing frivolous pleadings with the intent to harass and annoy his neighbors. Cottingham assigns error to the conclusions of law regarding counts 1 through 5 and argues that he did not violate RPC 3.1, 4.4(a), or 8.4(d).

1. RPC 3.1 and RPC 4.4(a)

RPC 3.1 states, "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous." RPC 4.4(a) states, "In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person." This rule prohibits "conduct that has no substantial purpose other than to harass someone." ANNOTATED MODEL RULES OF PROF'L CONDUCT r. 4.4 (AM. BAR Ass'n 8th ed. 2015).

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Here, Cottingham claims that his pleadings were not frivolous because the trial court's decision improperly and harmfully subdivided the Morgans' lot and that error must be corrected through administrative action. The hearing officer rejected this argument and instead found that Cottingham filed multiple frivolous pleadings with the intent to harass the Morgans. A frivolous position is one that a lawyer of ordinary competence would recognize as being devoid of merit. *In re Disciplinary Proceeding Against Jones, 182 Wn.2d 17, 41, 338 P.2d 842 (2014). Further, findings of motivation are given great weight on review. Id. at 42. "[M]otivation is difficult to prove" and so "the hearing officer* will

generally rely on circumstantial evidence" when making a conclusion regarding motivation. *Id.* at *41.*

Here, the findings of fact support the hearing officer's conclusion that Cottingham's actions were frivolous and carried out with intent to harass and annoy the Morgans. Cottingham repeatedly filed motions and appeals that had no basis in law or fact and had already been decided by various trial and appellate courts.

Cottingham's fili consistently failed in the courts and were repeatedly declared frivolous. This put Cottingham on notice of the meritless, frivolous, and sanctionable nature of his challenges. *In re Disciplinary Proceeding Against Sanai, 177* Wn.2d *743, 769, 302 P.3d 864 (2013) (holding that a lawyer who* repeatedly *filed pleadings in* multiple courts, all of which failed and many of which resulted in sanctions, was on notice of their frivolous nature). Even so, Cottingham continued his crusade and relentlessly pursued litigation intending, at least in part, to harass and annoy the

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Morgans. For these reasons, we adopt the hearing officer and Board's conclusions that Cottingham violated RPC 3.1, and RPC 4.4(a).

2. RPC 8.4(d)

RPC 8.4(d) states that "[i]t is professional misconduct for a lawyer to: ...engage in conduct that is prejudicial to the administration of justice." This rule applies to "violations of practice norms and physical interference with the administration of justice." *In re Disciplinary Proceeding Against Curran, 115* Wn.2d 747, 766, 801 P.2d 962 (1990). Conduct that is prejudicial to the administration of justice is generally conduct carried out by an attorney in an official or advocatory role. *In re Disciplinary Proceeding Against Conteh,* 175 Wn.2d

134, 149, 284 P.3d 724 (2012). And, as ODC correctly points out, the "[p]ursuit of frivolous litigation frustrates the administration of justice by consuming substantial amounts of judicial resources and thereby violates practice norms." Answering Br. of the ODC at 39-40.

Cottingham's pleadings - repetitive, devoid of merit, and done with intent to harass his neighbors—were made in his role as an advocate for himself and his wife and were outside practice norms in violation of RPC 8.4(d). Thus, the unchallenged findings of fact support the hearing officer's conclusions of law that Cottingham engaged in conduct prejudicial to the administration of justice. We adopt the hearing officer and Board's conclusions that Cottingham violated RPC 8.4(d).

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III. Remaining Arguments

Cottingham challenges the Board's decision on a variety of other grounds.[1] Many of his arguments contend that the disciplinary charges against him must be dismissed due to irregularities and errors in the underlying proceedings. He also claims that ODC violated his due process and First Amendment rights. U.S. CONST. amend. I. We conclude that all of these arguments are without merit.

A. Validity of the underlying proceedings

At the outset of the disciplinary proceedings, Cottingham stipulated that he is not entitled to contest the underlying trial and appellate court rulings. At the conclusion of the hearing, the hearing officer found that "[t]he court rulings on all substantive issues in the litigation giving rise to this complaint were legally and factually correct." Recommendation at 16. Thus, substantive arguments regarding the underlying proceedings are

not properly before us, except to the extent that they help inform us as to the frivolousness of Cottingham's pleadings. *See Neilson v. Vashon Island Sch. Dist. No. 402, 87* Wn.2d *955, 958, 558* P.2d 167 (1976) (where a party indicates that an issue has been withdrawn from contest, the party waives the necessity of proof of that issue by the opposing party).

[1] Cottingham provided nothing more than headings in support of his first eight objections. We do not address these objections because

> "[w]here no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none. Courts ordinarily will not give consideration to such errors unless it is apparent without further research that the assignments of error presented are well taken."

State v. Young, 89 Wn.2d 613, 625, 574 P.2d 1171 (1978) (quoting *DeHeer v. Seattle* Post-Intelligencer, 60 Wn.2d 122, 126, 372 P.2d 193 (1962)).

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B. Cottingham received proper notice of the proceedings against him

Cottingham argues that ODC violated his due process rights because ODC failed to give him proper notice of the factual basis on which it would argue that Cottingham's actions were frivolous, ODC's refusal to admit that the Morgans had acted unlawfully, or the aggravating factors that ODC would seek.

First, a formal disciplinary complaint "'must state the respondent's acts or omissions in sufficient detail to inform the respondent of the nature of the

allegations of misconduct." *Marshall, 160* Wn.2d at 340 (quoting ELC 10.3(a)(3)). The formal complaint at issue gave Cottingham notice of the specific RPCs that he was charged with violating, and it is replete with specific detail as to the respondent's acts that serve as a basis for the charges. This is sufficient to satisfy the notice requirements of ELC 10.3.

Second, ODC is not required to put forth the evidence-based arguments that it intends to make on appeal. To the contrary, in the proceedings in front of the Board, ODC may argue any ground supported by the record on which the hearing officer's decision may be affirmed. *See, e.g., State v. Costich, 152* Wn.2d 463, 477, 98 P.3d 795 (2004) (reviewing court may affirm lower court's ruling on any grounds supported by the record).

Third, ODC is not required to plead aggravating factors in the formal complaint. *In re Disciplinary Proceeding Against Starczewski, 177* Wn.2d *771,* 783, 306 P.3d 905 (2013).

Accordingly, we find no merit in Cottingham's due process argument.

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C. The First Amendment does not shield frivolous litigation from discipline

Cottingham seeks dismissal of the disciplinary charges, arguing that the First Cottingham seeks dismissal of the disciplinary charges, arguing that the First Amendment right to petition for redress to the courts protects his pursuit to change the trial court's decision. It is true, as Cottingham contends, that "disciplinary rules governing the legal profession cannot punish activity protected by the First Amendment, and [the] First Amendment protection survives even when the attorney violates a disciplinary rule he swore to obey when admitted to the practice of law."

Gentile v. State Bar of Nev., 501 U.S. 1030, 1054, 111 S. Ct. 2720, 115 L. Ed. 2d 888 (1991).

However, "'baseless litigation is not immunized by the First Amendment Right to Petition." In re Yelverton, 105 A.3d 413, 421 n.8 (D.C. 2014) (quoting In re Ditton, 980 A.2d 1170, 1173 n.3 (D.C. 2009)). Once a respondent is "made aware that his motions were frivolous, their repeated assertion ... [is] no longer in good faith and could be subject to reasonable sanction in order to enforce well-established standards could be subject to reasonable sanction in order to enforce well-established standards of professional conduct." Id.; see also Bill Johnson's Rests., Inc. V. Nat'l Labor of professional conduct." Id.; see also Bill Johnson's Rests., Inc. v. Nat'l Labor Relations Bd., 461 U.S. 731, 743, 103 S. Ct. 2161, 76 L. Ed. 2d 277 (1983) ("baseless Relations Bd., 461 U.S. 731, 743, 103 S. Ct. 2161, 76 L. Ed. 2d 277 (1983) ("baseless litigation is not immunized by the First Amendment right to petition").

Here, Cottingham's initial lawsuit against the Morgans was not frivolous; there was a legitimate dispute, and it was proper to seek resolution in the court. However, Cottingham's frequent pleadings containing baseless, repetitive arguments were frivolous. The hearing officer appropriately found by a preponderance of the evidence

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that Cottingham knowingly, intentionally, and repeatedly engaged in frivolous litigation. The Board adopted these findings.

The First Amendment does not protect frivolous litigation. Thus, while Cottingham is correct that attorney discipline rules may not prohibit or punish activity protected by the First Amendment, that protection is inapplicable here.

IV. Sanction

The hearing officer recommended and a unanimous Board concluded that Cottingham should be suspended from practicing law for 18 months. "[T]he ultimate responsibility for determining the nature of discipline rests with this court." In re Disciplinary Proceeding Against Noble, 100 Wn.2d 88, 95, 667 P.2d 608 (1983). We review sanctions de novo. Jones, 182 Wn.2d at 48. Nonetheless, in fulfilling this responsibility, we are guided by and give considerable weight to the recommendation of the Board. Id. All disciplinary matters not disposed of by stipulation or resignation are heard by a hearing officer and considered by the Board. See Noble, 100 Wn.2d at 94; ELC 9.1, 9.3. In contrast, the range of disciplinary matters considered by this court is narrower: though any attorney may seek discretionary review of any disciplinary decision, ELC 12.4, only those involving suspension or disbarment are appealable as a matter of right, ELC 12.3(a). See Noble, 100 Wn.2d at 94. Because the hearing officer and Board "consider the full spectrum of disciplinary matters from the most trivial to the most serious," they have "the opportunity to develop unique experience and perspective in the administration of sanctions." Id.

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Though we are not bound by the recommendations of the Board, for several reasons we do "not lightly depart from recommendations shaped by this experience and perspective." Id. We appoint the members of the Board with the benefit of recommendations from the Disciplinary Selection Panel, which considers candidates for appointment recommended to it by the WSBA Board of Governors. ELC 2.3(b)(1). In recommending members to the Board, both the Disciplinary Selection Panel and the

Board of Governors "consider[ ] diversity in gender, ethnicity, disability status, sexual orientation, geography, area of practice, and practice experience ...." ELC 2.2(f). The care exercised in selection of members of the Board and the required attention to diversity combine to increase our confidence in the Board. Another important factor contributes to our confidence in the recommendations of the Board: the Board membership must include at least 4 nonlawyers and at least 10 lawyers. ELC 2.3(b)(1). We appoint these members as well, again based on recommendations of the Disciplinary Selection Panel and the Board of Governors. Id. One primary purpose of the attorney disciplinary system is to protect the public, and "[t)he severity of the sanction should be calculated to achieve these ends." Noble, 100 Wn.2d at 95 (noting that because "discipline is not imposed as punishment for the misconduct, ... our primary concern is with protecting the public and deterring other lawyers from similar misconduct") The presence of nonlawyer members serves to ensure the protection of the public and gives the Board's recommendations further weight and importance.

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We apply the ABA Standards in all lawyer discipline cases. Id. To arrive at the correct sanction, the court first determines the presumptive sanction and then determines whether mitigating or aggravating factors merit a departure from the presumptive sanction. Id. Then, if raised by the respondent, we consider whether the factors of unanimity and proportionality should alter the sanction. In re Disciplinary Proceeding Against Christopher, 153 Wn.2d 669, 678,105 P.3d 976 (2005).

To determine a presumptive sanction, the

court considers (1) the ethical duty violated, (2) the lawyer's mental state, and (3) the extent of the actual or potential harm caused by the misconduct. Id., Here, the hearing officer applied ABA Standards 6.22 and determined that suspension was the presumptive sanction, and the Board unanimously agreed. The hearing officer also determined that the aggravating and mitigating factors did not warrant a departure from the presumptive sanction, and the Board agreed.

We will not depart from the presumptive sanction unless "the balance of aggravating and mitigating factors is 'sufficiently compelling." In re Disciplinary Proceeding Against Del Carmen Rodriguez, 177 Wn.2d 872, 888, 306 P.3d 893 (2013) (quoting In re Disciplinary Proceeding Against Cohen, 149 Wn.2d 323, 339, 67 P.3d 1086 (2003)). Here, the hearing officer found four aggravating factors (selfish motive, pattern of misconduct, multiple offenses, and substantial experience in the law) and three mitigating circumstances (no prior disciplinary record, testimony of good character, and satisfaction of all sanctions ordered against him). These factors are not sufficiently compelling to warrant a departure from the presumptive sanction.

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Cottingham also contends that proportionality review requires us to depart from the presumptive sanction. In reviewing proportionality, "we analyze whether a presumptive sanction is proper by comparing the case at hand with other similarly situated cases in which the same sanction was approved or disapproved." In re Disciplinary Proceeding Against Miller, 149 Wn.2d 262, 285, 66 P.3d 1069 (2003). To determine whether a case is appropriately similar, we focus on "the misconduct found, the presence of aggravating factors, the

existence of prior discipline, and the lawyer's culpability." Conteh, 175 Wn.2d at 152-53.

The attorney facing discipline bears the burden of bringing to the court's attention cases that demonstrate the disproportionality of the sanction imposed. In re Disciplinary Proceeding Against Kagele, 149 Wn.2d 793, 821, 72 P.3d 1067 (2003). Here, Cottingham does not engage in any comparative analysis of similarly situated cases and thus has failed to meet his burden of proving that an 18-month suspension is disproportionate. Nonetheless, the 18-month suspension is proportionate when compared to other similarly situated cases. For example, in In re Disciplinary Proceeding Against Sanai, we held that disbarment was appropriate for Sanai's misconduct that involved repeated frivolous filings while he represented his mother in her divorce case. 177 Wn.2d 743. The hearing officer found that just 2 years after being sworn in as an attorney, id. at 759, Sanai violated the rules of professional conduct when he "filed multiple frivolous motions and claims for purposes of harassment and delay, repeatedly and willfully disobeyed court orders and rules, brought frivolous suits

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against judges who ruled against him, and filed similar claims multiple times in multiple jurisdictions for purposes of delay," id. at 746. Like Cottingham, Sanai was found to have filed frivolous pleadings in violation of RPC 3.1, burdening a third party in violation of RPC 4.4(a), and engaging in conduct prejudicial to the administration of justice in violation of RPC 8.4(d). However, unlike Cottingham, Sanai was repeatedly held in contempt during the underlying proceedings. Id. at 748, 753, 755. As a result of his contemptuous behavior in the

courtroom, the hearing officer found that in addition to filing frivolous pleadings, Sanai knowingly and willfully disobeyed court orders in violation of RPC 3.4(c) and RPC 8.4(j).2 177 Wn.2d at 746. Under RPC 3.4(c), an attorney shall not "knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists," and under RPC 8.4(j), it is misconduct for an attorney to "willfully disobey or violate a court order directing him or her to do or cease doing an act which he or she ought in good faith to do or forbear." Sanai's willful disobedience of the court heightens the seriousness of his misconduct in a manner absent in Cottingham's proceedings. Contemptuous behavior undermines the court's orderly.and effective exercise of jurisdiction. It is "essential to the efficient action of the court and the proper administration of justice" that the authority of the court be respected, and that disobedient, contemptuous, and insolent

[2] Sanai was also found to have violated RPC 3.2 (delaying litigation), RPC 8.4(a) (violating or attempting to violate the RPCs), and RPC 8.4(n) (conduct demonstrating unfitness to practice law). 177 Wn.2d at **746.**

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behavior be corrected. Blanchard v. Golden Age Brewing Co., 188 Wash. 396, 424, 63 P.2d 397 (1936).

The hearing officer recommended that Sanai be disbarred. Sanai, 177 Wn.2d at 759. The hearing officer also found that Sanai's behavior during the hearing constituted an aggravating factor. Id at 770. It is unclear whether any mitigating factors were found. Id. The Board unanimously recommended that Sanai be disbarred. Id. at 759. We agreed and disbarred Sanai. Id. at 770. Here, Cottingham's misconduct and culpability is similar to that in

Sanai. However, because Cottingham was charged with fewer violations, none of which included the willful disobedience of a court order, and had a long history of being discipline-free, an 18-month suspension is proportionate when compared to Sanai's disbarment. Similarly, in In re Disciplinary Proceeding Against Scannell, the hearing officer found three counts of misconduct: one count of failing to obtain written consent regarding a conflict of interest and two counts of filing frivolous pleadings and frustrating the disciplinary proceedings against him. 169 Wn.2d 723, 735-36, 239 P.3d 332 (2010). The hearing officer recommended suspension, but the Board recommended disbarment upon finding that the frivolous filing violations were intentional. Id. at 736. This court found that Scannell violated former RPC 1.7 by negligently failing to obtain written consent regarding a conflict of interest and that he violated RPC 3.1 and RPC 8.4(I) by intentionally filing frivolous pleadings with the purpose of frustrating

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and delaying the disciplinary proceedings against him. Id. This court disbarred Scannell, finding that intentionally violating RPC 3.1 and 8.4(*l*) warranted disbarment. Id. at 748. Scannell's behavior was especially troubling in the context of a disciplinary hearing, where it "poses a serious threat to lawyer self-regulation." Id. at 728. We noted that "[i]f every lawyer subject to a disciplinary investigation were as intransigent as Scannell has been, disciplinary proceedings would be expensive, long, and hard-fought procedural wars that might or might not be effective at uncovering wrongdoing and protecting the public." Id. at 745. Here, Cottingham's misconduct and culpability is comparable to Scannell's - both filed frivolous pleadings and did so

intentionally. However, the context of the pleadings differs significantly - Scannell filed frivolous pleadings with the purpose of frustrating the disciplinary proceedings against him, while Cottingham's misconduct took place within the context of a land dispute with his neighbor. As we noted in Scannell, the presumptive sanction for intentionally obstructing a disciplinary proceeding is disbarment. Id. at 744 (citing ABA STANDARDS 7.1 (recommending disbarment for knowing violations of ethical rules with intent to benefit the lawyer, if the violations cause serious injury to the legal system)). In contrast, the presumptive sanction for Cottingham's misconduct is suspension. See ABA STANDARDS 6.22 ("Suspension is generally appropriate when a lawyer knows that he or she is violating a court order or rule, and causes injury or potential injury to a client or a party, or causes interference or potential interference with a legal proceeding."). Additionally, there were four aggravating factors in both cases. However, Cottingham had four

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mitigating factors, while Scannell had one, which applied only to the RPC 1.7 violation. Scannell, 169 Wn.2d at 746. Thus, Cottingham's 18-month suspension is proportionate to Scannell's disbarment. Cottingham fails to engage in any comparative analysis of similarly situated cases and has failed to meet his burden of proving that an 18-month suspension is disproportionate. Nonetheless, the suspension is proportionate when compared to similarly situated cases. We suspend Cottingham from the practice of law for 18months.[3]

CONCLUSION

The unchallenged findings of fact support the conclusion that Cottingham knowingly and

intentionally violated RPC 3.1, 4.4(a), and 8.4(d) by engaging in frivolous litigation with the intent to harass his neighbors, which injured them and interfered with the administration of justice. We adopt the recommendation of the hearing officer and the Board and impose on Cottingham the 18-month suspension recommended by the hearing officer and by the Board.

S/ Wiggins, J.

[3] The Board assessed ODC's costs and expenses of $5,603.53 against Cottingham under ELC 13.9(e). Cottingham contends that this was an abuse of discretion. Under ELC 13.9(a), ODC's costs may be assessed against a sanctioned respondent attorney. Thus, the Board did not abuse its discretion by entering the ELC 13.9(e) order. We affirm the Board's assessment of costs. Cottingham also moves for an award of attorney fees under 42 U.S.C. §1983 or RCW 4.84.350. Cottingham Appeal Br. at 48-49. This action was not a civil rights action brought under 42 U.S.C. § 1983, nor was it judicial review of an agency action under RCW 4.84.350. Rather, this was a disciplinary proceeding conducted under the ELC, which does not include a provision for awarding attorney fees to respondent lawyers. See ELC 13.9. Furthermore, Cottingham did not prevail in this action. We deny the motion.

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WE CONCUR.
Fairhurst, C.J
Stephens, J
Johnson, J.
Gonzalez, J
Owens, J
McLoud, J.
Madsen, J.
Yu, J.

CORRECTION OF WASHINGTON SUSPENSION OPINION AUGUST 17, 2018

Office of Reporter of Decisions
Temple of Justice, P.O. Box 40929, Olympia, WA 98504-0929, (360) 357-2087

MEMORANDUM	FILED
DATE: August 17,2018	AUG 1 7 2018
TO: Supreme Court Clerk's Office	WASHINGTON STATE SUPREME COURT

FROM: Vikki Bayman, Interim Reporter of Decisions

SUBJECT: Correction for Opinion in In re Disciplinary Proceeding Against Cottingham, No. 201,704-5 (filed August 16, 2018)

The following correction is being made to Justice Wiggins's unanimous opinion in the above captioned case:

On page 2 of the slip opinion's concurrence, at lines 11-13, the sentence "The trial judge held that Cottingham had adversely possessed 292.3 square feet of the Morgans' property and that the Morgans had wrongfully removed the laurel bushes." is changed to read: "The trial judge held that the Morgans had adversely possessed 292.3 square feet of Cottingham's property and that the Morgans had wrongfully removed the laurel bushes."

I have notified LexisNexis in time to have the change incorporated in the advance sheets and in Lexis's online database. I have also notified West Publishing so that the change can be made on Westlaw and elsewhere in West publications.

Please add this memorandum to the file for this case and notify the parties.

Thank you very much.

c: Wiggins, J.

VACATION, CORRECTION RESCINDED, WASHINGTON SUSPENSION OPINION AUGUST 29, 2018

Office of Reporter of Decisions
Temple of Justice, P.O. Box 40929, Olympia, WA 98504-0929, (360) 357-2087

MEMORANDUM	FILED
DATE: August 29,2018	AUG 29 2018
TO: Supreme Court Clerk's Office	WASHINGTON STATE SUPREME COURT

FROM: Vikki Bayman, Interim Reporter of Decisions

Subject: Change Memorandum in In re Disciplinary Proceeding Against Cottingham, No.201,704-5

The change memorandum filed on August 17, 2018 correcting Justice Wiggins's unanimous opinion in the above captioned case is rescinded, and the opinion text shall be as it was originally filed on August 16, 2018.

I have notified LexisNexis in time to have the change incorporated in the advance sheets and in Lexis's online database. I have also notified West Publishing so that the change can be made on Westlaw and elsewhere in West publications.

Please add this memorandum to the file for this case and notify the parties.

Thank you very much.

c: Wiggins, J.

ORDER AMENDING OPINION

OCTOBER 10, 2018

FILED
OCT 10, 2018
WASHINGTON
STATE
SUPREME COURT

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In the Matter of the Disciplinary Proceeding Against DAVID CARL COTTINGHAM, an Attorney at Law.	201,704-5 ORDER AMENDING; OPINION

It is hereby ordered that the following changes be made to the unanimous opinion of Wiggins. J. in the above entitled case (page and line references are to the slip opinion filed August 16, 201S):

1. On page 15, line 21, the word "c1ear" is inserted before "preponderance."

2. On page 17, lines 3-5, the sentence "We appoint the members of the Board with the benefit of recommendations from the Disciplinary Selection Panel, which considers candidates l i appointment recommended to it by the WSBA Board of Governors. 1..ELC 2.3(b)(I)" is deleted and the following text is inserted in its place: "We appoint the members of' the; Board with the benefit of recommendations from the WSBA Board of Governors, which considers candidates for appointment recommended to it by the Disciplinary Selection Panel. ELC 2.2(e), 2.3(b),

Order Amending Opinion) 201,704-5
Page 2

3. On page 17, lines 1 3-15. the sentence "We appoint these, members as well, again based on recommendations of the Disciplinary Selection Panel and the Board of Governors." is deleted and the following text is inserted in its place: We appoint these members as well, again based on recommendations of the Board of Governors in consultation with the Disciplinary Selection Panel."

DATED this 10th day of October , 2018

Fairhurst J.
Chief Justice.

Approved:

Johnson, J	Wiggins, J
Madsen,J	Gonzalez, J
Pwens, J	McCloud, J
Stephens, J	Yu, J.

ORDER DENYING FURTHER
RECONSIDERATION

AUGUST 11, 2018

FILED
OCT 11, 2018
WASHINGTON STATE
SUPREME COURT

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In the Matter of the Disciplinary Proceeding Against DAVID CARL COTTINGHAM, an Attorney at Law.	ORDER DENYING FURTHER RECONSIDERATION 201,704-5

The court considered "ODC'S MOTION FOR RECONSIDERATION UNDER ELC 12.8 TO MODIFY LANGUAGE REGARDING THE BURDEN OF PROOF AND DISCIPLINARY SELECTION PANEL PROCESS" and David Carl Cottingham's "CORRECTED MOTION FOR RECONSIDERATION RAP 12,4. ELC 12.8". The Court entered an order amending opinion in the above cause on October 10, 2018.

Now, therefore, it is hereby

ORDERED: That further reconsideration is denied.

DATED at Olympia, Washington this 11 day of October, 2018.

For the Court s/Mary Fairhurst,
CHIEF JUSTICE

APPENDIX B COLORADO DISCIPLINE EXAMPLE

COLORADO SUPREME COURT OPINION, In Re Steven James Foster, 10SA89, 253 P.3rd 1244 (Colo. May 23, 2011)

UNPUBLISHED

SUPREME COURT OF COLORADO, En Banc.
In Re Steven James Foster, No. 10SA89,
253 P.3rd 1244 (Colo. May 23, 2011)

Office of the Attorney Regulation Counsel, Kim E. Ikeler, Assistant Regulation Counsel, Denver, Colorado, Attorneys for Complainant/Appellee. Law Offices of Gary S. Cohen, Gary S. Cohen, Denver, Colorado, Attorneys for Respondent/Appellant.

In this original proceeding in discipline, respondent/appellant attorney Steven James Foster appeals the orders of the Presiding Disciplinary Judge ("PDJ") and disciplinary Hearing Board ("Board") sanctioning Foster for allegedly filing a frivolous appeal and engaging in conduct prejudicial to the administration of justice during the course of a protracted pro se post-dissolution litigation campaign against his now ex-wife, Sherrie Nunn.

Upon review, we reject the Board's conclusion that an attorney's First Amendment right to petition pro se must unilaterally give way to the Colorado Rules of Professional Conduct. We hold that the Board's findings—which indicated that the substantial majority of Foster's conduct was both objectively non-frivolous and subjectively motivated primarily by a genuine desire to obtain favorable legal relief—do not support the Board's ruling that Foster's conduct was not protected by the First Amendment. We further conclude that the PDJ erred by failing to require the complainant/appellee Office

of Attorney Regulation Counsel ("OARC") to make a heightened showing on summary judgment that Foster's conduct was not protected by the First Amendment as required by Protect Our Mountain Environment v. District Court, 677 P.2d 1361 (Colo.1984) ("POME ").

Nevertheless, we find that Foster's claims in his sixth appeal of bias by a district court judge were so wholly duplicative of claims made and rejected in his fifth appeal that Foster cannot have had a subjectively proper motivation for making them. Thus, we conclude that Foster's bias claims in his sixth appeal constituted sham litigation unprotected by the First Amendment.

Accordingly, we affirm the determination of the Board that Foster violated Colorado Rules of Professional Conduct 3.1 and 8.4(d) by making frivolous bias claims during his sixth appeal, but reverse the remainder of the Board's determinations of misconduct. We accordingly remand to the Board for a redetermination of the appropriate sanctions for Foster's misconduct in asserting the bias claims.

I. Facts and Procedural Posture

Foster and Nunn married in 1991, the same year Foster was admitted to practice law in Colorado. The marriage later began to deteriorate, and Nunn filed for dissolution in 1999.[1]

A. Foster's Underlying Litigation Against Nunn.

Initially represented by counsel, Foster stipulated to temporary orders regarding various parenting issues. Foster's lawyer then withdrew from the case, and Foster proceeded pro se into a lengthy post-dissolution litigation campaign against Nunn, centering on the valuation of marital property, parenting decisions, and a host of other

issues. The register of actions in the district court spans some six-hundred and thirty transactions over the past twelve years. Foster also initiated probate, civil, and criminal proceedings against Nunn, and filed nine appeals with the court of appeals and several petitions for certiorari with this Court between 1999 and 2007.

B. The OARC's Investigation

In 2007, Nunn requested that the OARC investigate Foster, contending that his lengthy post-dissolution litigation against her constituted misconduct. After an investigation, the OARC recommended in 2008 that the Attorney Regulation Committee ("ARC") approve formal charges against Foster for violating Colo. RPC 3.1 (bringing a frivolous action) and Colo. RPC 8.4(d) (engaging in conduct prejudicial to the administration of justice). The ARC apparently authorized the OARC to file the charges, and the OARC did so.

C. Foster's Motion for Summary Judgment

Foster filed a motion for summary judgment in the disciplinary proceeding, alleging that his litigation against Nunn was protected by his First Amendment right to petition. Foster further argued that the OARC bore the burden of showing that his litigation was not protected by the First Amendment under the framework articulated by this Court in POME.

The PDJ held that POME, decided in the context of a civil abuse-of-process action, is inapplicable in attorney discipline proceedings. The PDJ reasoned that the underlying First Amendment concerns of POME are sufficiently vindicated by preliminary steps in disciplinary proceedings to obviate the applicability of the POME framework in the context of attorney discipline. The PDJ concluded that a full hearing would be necessary to determine

whether Foster's litigation was in fact protected by the First Amendment, and denied Foster's motion.

D. Foster's Disciplinary Hearing

After a hearing, the Board concluded that Foster violated Colo. RPC 3.1 and 8.4(d) and imposed sanctions accordingly. The Board entered findings of fact regarding Foster's nine appeals to the court of appeals and concluded that his sixth appeal was frivolous in violation of Colo. RPC 3.1 and 8.4(d) and that the remainder of his activity, though admittedly non-frivolous, reflected a desire on Foster's part to vex and harass Nunn in violation of Colo. RPC 8.4(d), notwithstanding his genuine belief that his arguments provided him with a legitimate basis to secure favorable relief.

1. Findings of Fact

The Board entered the following specific findings of fact:

1) The Board did not find clear and convincing evidence that Foster's first appeal,[2] in which he was partially victorious, was frivolous or prejudicial to the administration of justice.

2) The Board found that Foster's second appeal,[3] in which he was again partially victorious, was neither frivolous nor prejudicial to the administration of justice, but found that the appeal "demonstrate[d] [Foster]'s level of litigiousness," that Foster "contributed to the lack of cooperation that might have resolved [the case] without further litigation," and that Foster's conduct was "contrary . to the just, speedy, and inexpensive resolution of civil disputes."

3) The Board agreed with the court of appeals' specific holding that Foster's third appeal4 was neither frivolous nor groundless, and found that the appeal was not prejudicial to the administration of justice. The Board nevertheless noted that the

appeal was "yet another instance where [Foster] appealed a district court's order entered within its sound discretion."

4) The Board found that Foster's fourth appeal,5 stemming from a civil complaint against Nunn for converting funds from their daughter's bank account,6 was appropriately filed. The Board nonetheless found that the decision to file the civil complaint while issues surrounding the bank account were pending in the probate court was "consistent with [Foster]'s level of litigiousness as well as his efforts to find a tribunal that would agree with his assertion that Nunn wrongfully removed the funds."

5) The Board did not find clear and convincing evidence that Foster's fifth appeal7 was frivolous or prejudicial to the administration of justice, but noted that "the underlying facts in th[e] appeal demonstrate [Foster] was continuing to focus more upon controlling Nunn than advancing claims in good faith."

6) The Board found by clear and convincing evidence that Foster's sixth appeal8 was frivolous and, "given the frivolousness of [the] appeal, [that Foster] was more interested in vexing Nunn than advancing arguments . in good faith." The Board also noted that "as [Foster's] legal arguments wore thin, his motivation for continuing the litigation became clearer."

7) The Board found Foster's seventh appeal9 and the underlying litigation "troublesome," and acknowledged that the court of appeals deemed the appeal frivolous. The Board, however, noted that the OARC had earlier given Foster a letter explicitly declining to prosecute Foster for the appeal and noting that there was insufficient evidence to prove that the appeal was frivolous. Accordingly, the Board

found that Foster "initiated [the] appeal with the good faith belief that he was not violating the Colorado Rules of Professional Conduct."

8) The Board found that underlying statements by the district court in Foster's eighth appeal10 "corroborate[d the Board's] findings that [Foster] was extremely litigious throughout eight years of post-dissolution litigation," but heard no evidence on the resolution of the appeal itself and declined to find that the appeal was frivolous or prejudicial to the administration of justice.

9) The Board made no findings with respect to Foster's ninth appeal,11 which the court of appeals dismissed as untimely.

2. Conclusions of Law and Sanctions

The Board concluded that Foster's sixth appeal constituted a violation of Colo. RPC 3.1 and 8.4(d). Additionally, the Board found that Foster's aggregate conduct over the course of the litigation, viewed as a whole, had a cumulative effect prejudicial to the administration of justice in violation of Colo. RPC 8.4(d). The Board also rejected Foster's First Amendment defense, holding that his "freedom of speech and access to the courts . do not immunize him from the application of the Colorado Rules of Professional Conduct." The Board suspended Foster from practicing law for a year and a day, all but ninety days stayed upon the successful completion of a two-year probation period, and ordered him to pay the costs of the disciplinary proceedings. Foster appealed the Board's imposition of sanctions and the PDJ's denial of his motion for summary judgment to this Court.

II. Analysis

Foster disputes the Board's imposition of sanctions on several substantive and procedural

First Amendment grounds. As the OARC concedes, it is well-accepted that an attorney cannot be disciplined for conduct protected by the First Amendment. E.g., In re Green, 11 P.3d 1078, 1083 (Colo.2000) (citing In re Primus, 436 U.S. 412, 432–33 (1978); Bates v. State Bar, 433 U.S. 350, 355, 365 (1977)) (additional citations omitted).

In its decision, however, the Board ruled that attorneys' First Amendment protections "do not immunize [them] from the application of the Colorado Rules of Professional Conduct," intimating that attorneys may in fact be disciplined for conduct protected by the First Amendment. We categorically reject this conclusion. The U.S. Supreme Court plainly stated in NAACP v. Button that "a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights." 371 U.S. 415, 439 (1963) (citing In re Sawyer, 360 U.S. 622 (1959); Schware v. Bd. of Bar Exam'rs, 353 U.S. 232 (1957); Konigsberg v. State Bar, 353 U.S. 252 (1957)). Moreover, the rights protected by the First Amendment are at the very heart of conduct protected against regulatory infringement. See Louisiana ex rel. Gremillion v. NAACP, 366 U.S. 293, 297 (1961) ("[R]egulatory measures, no matter how sophisticated, cannot be employed in purpose or in effect to stifle, penalize, or curb the exercise of First Amendment rights."), quoted with approval in Button, 371 U.S. at 439.

Because the Board's decision implicates questions of constitutional fact and law, we must evaluate de novo whether the proceedings below properly afforded Foster the substantive and procedural protections of the First Amendment. See Kuhn v. Tribune–Republican Pub. Co., 637 P.2d 315, 318 (Colo.1981) (citations omitted). We begin with a survey of the First Amendment right to petition both

generally and in the context of attorney discipline, then turn to its application in this case.

A. The First Amendment Right to Petition

The First Amendment to the United States Constitution provides that "Congress shall make no law abridging the right of the people . to petition the Government for a redress of grievances." Under the Fourteenth Amendment to the United States Constitution, the First Amendment right to petition cannot be infringed by state government. United Mine Workers v. Ill. State Bar Ass'n, 389 U.S. 217, 221–22 & n. 4 (1967) (citing N.Y. Times v. Sullivan, 376 U.S. 254, 276–77 (1964)).

1. The Right to Petition by Litigation

Litigation is one of the essential mechanisms by which citizens can exercise their right to petition. See Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972); Button, 371 U .S. at 429–30. Thus, the right of citizens to access courts of law to resolve disputes is a fundamental tenet of the First Amendment, one of our most treasured liberties under the Bill of Rights, and a cornerstone of our republican form of government. POME, 677 P.2d at 1364–65 (quoting Ill. State Bar Ass'n, 389 U.S. at 222; Thomas v. Collins, 323 U.S. 516, 530 (1945)).

The great power to hail a fellow citizen into court, however, comes with great responsibility, and should only be exercised to facilitate the fair and efficient resolution of a legitimate legal dispute. The misuse of litigation as a weapon to baselessly harass, vex, or spite an opponent offends the First Amendment by disrupting the efficient operation of the court system and misappropriating judicial resources necessary for legitimate litigants to resolve their disputes. See Krystkowiak v. W.O. Brisben Cos., 90 P.3d 859, 865 (Colo.2004).

2. The Sham Exception to the Right to Petition

The U.S. Supreme Court recognized this principle in Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., holding that petitioning activity can be regulated by antitrust law if it is a "mere sham." See 365 U.S. 127, 144 (1961). In United Mine Workers v. Pennington, the Court contracted the "mere sham" doctrine, holding that petitioning activity cannot be regulated simply because it is motivated by a subjectively improper purpose, but must also be objectively baseless. See 381 U.S. 657, 669–70 (1965).

Subsequent holdings developed the Noerr/Pennington doctrine into what has been deemed the "sham exception," which denies First Amendment right-to-petition protection for sham litigation in other areas of law. POME, 677 P.2d at 1366. In Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc., the U.S. Supreme Court articulated a two-prong definition of the term "sham," requiring that litigation be both (1) objectively baseless and (2) based on a subjectively improper motive to fall outside the umbrella of First Amendment protection. 508 U.S. 49, 60–61 (1993). This Court expressly adopted nearly identical principles in POME, see 677 P.2d at 1369, and reaffirmed them in Krystkowiak, see 90 P.3d at 865.

3. The POME Procedural Limitations on the Sham Exception

Recognizing that indiscriminate assertions of the sham exception could have a chilling effect on legitimate litigation, this Court in POME articulated additional due process protections designed to ensure the viability of the right to petition. 677 P.2d at 1368–69. Under the POME framework, a defendant in a civil abuse-of-process action may file

a pre-trial motion to assert a First Amendment right-to-petition defense. Id.; Krystkowiak, 90 P.3d at 862, 865. The burden for surviving the motion automatically shifts to the plaintiff, who must make a sufficient showing to permit the court to reasonably conclude that the defendant's underlying lawsuit was not protected by the First Amendment. POME, 677 P.2d at 1368–69.

While the right to petition, the sham exception, and the requirements of the POME framework are well-recognized in the context of civil litigation, we have never comprehensively addressed their applicability in the context of attorney discipline for pro se litigation conduct, to which we now turn.

B. The Substance and Procedure of the Right to Petition in the Context of Attorney Discipline.

We begin with the well-established principle that attorneys are entitled to the same level of First Amendment protection as non-attorneys unless a state has a compelling interest in regulating some aspect of their speech or conduct. Button, 371 U.S. at 439 (quoting Bates, 361 U.S. at 524). The PDJ, the Board and the OARC reason that the state has several such interests in eliminating, or at least limiting, an attorney's First Amendment right to petition via pro se litigation.

More specifically, those lines of reasoning include: (1) that an attorney's pro se conduct is unprotected by the First Amendment because of the state's interest in regulating those practicing law in a representative capacity; (2) that an attorney's conduct should be subject to a more expansive definition of "sham" because of the state's interest in preventing well-trained attorneys from ensnaring hapless lay opponents in technically non-baseless but unreasonable litigation; and (3) that attorneys

should not be entitled to the procedural protections of POME in disciplinary proceedings because the First Amendment concerns underlying the POME framework are sufficiently vindicated by other safeguards in disciplinary proceedings. We find these arguments unpersuasive.

1. The State's Interest in Regulating Representative Conduct by Attorneys

The Board reasons that an attorney has no First Amendment right-to-petition protection when acting in a representative capacity—even if the attorney is representing himself. The Board noted that "[i]t matters not in our analysis that [Foster] represented himself rather than a client. [Foster] still must follow the rules normative principles [sic] expressed [in the Rules of Professional Conduct] when litigating a matter in court." That line of reasoning, however attractive, rests on a misunderstanding of the state's actual interest in regulating representative conduct.

In People v. Shell, this Court recognized that the First Amendment right to petition does not permit unlicensed individuals to represent others in legal matters. 148 P.3d 162, 174 (Colo.2006) (citing Unauthorized Practice of Law Comm. v. Grimes, 654 P.2d 822, 824 (Colo.1982); Turner v. Am. Bar Ass'n, 407 F.Supp. 451, 478 (D.Ala.1975)) (additional citations omitted). At the core of Shell is a recognition that the right to petition is personal and does not extend to petitioning activity on behalf of others. See id. The rationale for precluding First Amendment protection for representative activity on behalf of others is to "protect the public from unqualified individuals who charge fees for providing incompetent legal advice" by requiring would-be attorneys to be admitted to the bar and assume professional accountability for offering legal

services. Grimes, 654 P.2d at 826.

The state's interest in protecting clients from incompetent representation is not implicated in the same way, however, by pro se litigation conduct. See Turner, 407 F.Supp. at 478 ("For the Court to recognize the right of a defendant to defend himself in his own person is one thing. It is quite another thing to allow him to bring unqualified and untrained people off the street to conduct his defense."). All pro se petitioning activity by its very nature involves representation, albeit of the petitioner's own self. See Black's Law Dictionary 1341 (9th ed.2009) (defining "pro se"). Expanding the personal limitation on the right to petition to all representative petitioning activity would deny right-to-petition protection not just to attorneys litigating pro se, but to all pro se litigants. To do so would hamper pro se litigants' right of access to the courts solely for the sake of protecting them from their own incompetence. And an attorney, more so than any other pro se litigant, is likely to understand that he will be held fully accountable for his own incompetence by the risk of losing his case—and being held liable for his opponent's costs and fees—with no one to blame but himself.

The personal right of access to the courts is at the core of not only the First Amendment right to petition, but also the privileges and immunities and due process guarantees of the United States Constitution and the Fourteenth Amendment. See Ryland v. Shapiro, 708 F.2d 967, 971–72 (5th Cir.1983) (citing Wolff v. McDonnell, 418 U.S. 539 (1974); Trucking Unlimited, 404 U.S. 508; Chambers v. Baltimore & Ohio R.R., 207 U.S. 142 (1907)) (other citations omitted). We find the state's interest in protecting incompetent attorneys from themselves insufficiently compelling to warrant infringing that

right. Thus, we reject the proposition that an attorney lacks the First Amendment right to petition through pro se litigation simply because he is doing so in a representative capacity.

2. The State's General Interest in Regulating Pro Se Attorney Litigation Conduct.

The OARC nevertheless contends in general terms that attorneys are entitled to a lower standard of First Amendment protection of the right to petition pro se solely by virtue of the state's interest in regulating lawyers. But a state's general interest in regulating attorneys will not justify disciplinary intrusions on an attorney's First Amendment rights. See, e.g., Bates, 433 U.S. at 367–79, 384 (holding that the First Amendment precludes disciplining attorneys who truthfully advertise legal services in a newspaper despite the state's numerous vague interests in preventing such activity). Rather, the state must articulate a specific interest in mitigating a "substantive evil" that erodes the goals of "true professionalism" among lawyers. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 460–62 (1978) (citing Bates, 433 U.S. at 368) (holding that the First Amendment does not preclude discipline for an attorney's in-person solicitation of business because of the serious risk of fraud, undue influence, and intimidation inherent in such activity) (additional citations omitted).

In light of Bates, we cannot properly apply a lower standard of First Amendment right-to-petition protection for attorneys based solely on the state's general interest in regulating attorneys. Such an interest cannot overcome the steadfast adherence by the U.S. Supreme Court to the strict requirement that litigation be both objectively baseless and based on a subjectively improper motive to constitute sham litigation unprotected by the First Amendment and

thus regulable by government action. The Court recently reaffirmed the two-prong Professional Real Estate Investors sham test, holding in BE & K Construction Co. v. NLRB that even a subjectively improper retaliatory lawsuit cannot be regulated if it is not also objectively baseless. See 536 U.S. 516, 531–33 (2002). Because neither the Board nor the OARC can articulate any specific compelling interest in regulating attorney conduct that would warrant the application of a different standard, we conclude that the two-prong Professional Real Estate Investors sham test must be satisfied to impose discipline on attorneys for pro se litigation conduct.

3. The POME Framework and Attorney Discipline

Having considered the substantive application of the First Amendment right to petition to attorney discipline, we turn to the procedural protections of that right articulated in POME. The requirement of POME—that a civil abuse-of-process plaintiff make a prima facie showing that the defendant's underlying litigation is not protected by the First Amendment—is a due process protection implemented to ensure that the defendant's right to petition cannot be chilled by unsupported allegations that the litigation is a sham. Krystkowiak, 90 P.3d at 865; POME, 677 P.2d at 1368. Here, however, the PDJ ruled that POME is inapplicable in the context of pro se attorney discipline simply because POME "arose out of a motion to dismiss in a civil proceeding rather than a motion to dismiss in a disciplinary proceeding " (emphasis in original).

We find this cursory distinction unavailing. An attorney in a disciplinary proceeding is no less entitled to procedural due process than an ordinary civil litigant. In re Egbune, 971 P.2d 1065, 1072 (Colo.1999) (citing People v. Varallo, 913 P.2d 1, 3–5

(Colo.1996)); cf. Green, 11 P.3d at 1084–85 (invoking the same standard for applying the First Amendment in a civil defamation case, articulated in N.Y. Times v. Sullivan, 376 U.S. 254, in the context of an attorney discipline case). Moreover, C.R.C.P. 251.18(d) plainly requires that attorney discipline proceedings, beginning with the filing of a formal complaint by the OARC, "be conducted in conformity with . the practice in this state in the trial of civil cases," unless otherwise specified in the Colorado Rules of Civil Procedure. The well-established practice in this state in the trial of civil cases is to require a POME showing that the First Amendment is inapplicable in response to a motion to dismiss an abuse-of-process claim. The Rules make no specification that a POME showing is unnecessary simply because the OARC, rather than an ordinary civil litigant, is charging an attorney acting pro se with abuse of process.

Nevertheless, the PDJ further concluded that the requirements of C.R.C.P. 251.11 and 251.12—essentially, that the OARC conduct an investigation into the attorney's conduct and obtain authorization from the ARC to file charges by making a prima facie showing of misconduct—so thoroughly guarantee that the attorney's First Amendment right to petition is inapposite prior to the filing of formal charges that a POME showing is entirely duplicative, redundant, and unnecessary in a pro se attorney discipline proceeding. Again, we disagree.

While we acknowledge the importance of the diligent investigation by the OARC and the consideration of charges by the ARC in ensuring the due process rights of lawyers accused of misconduct, see In re Trupp, 92 P.3d 923, 930 (Colo.2004), the roles of the OARC and the ARC are akin to that of the prosecutor and the grand jury, respectively, in a

criminal case. That a prosecutor has investigated a defendant's alleged criminal activity, and that a grand jury, based on the results of that investigation, has indicted the defendant, by no means guarantees that a defendant's conduct is not protected by the First Amendment. See, e.g., Watts v. United States, 394 U.S. 705, 707–08 (1969).12 Similarly, we find no reason to suspect that the OARC's investigation and the ARC's authorization to file charges provide a sufficient guarantee that an attorney's alleged pro se misconduct is unprotected by the First Amendment.

Furthermore, we are unpersuaded by the PDJ's conclusion that attorneys are afforded a meaningful opportunity to assert a First Amendment defense prior to the OARC filing a formal complaint. Although C.R.C.P. 251.10(a) conceivably permits an attorney to present a First Amendment defense to the OARC for consideration during the OARC's investigation, the OARC is under no particular obligation to present the attorney's arguments to the ARC, the PDJ, or the Board if the OARC disagrees, as in this case, that the First Amendment protects the attorney's conduct. Moreover, the ARC is not accountable to the attorney for its failure to consider First Amendment issues sua sponte. Cf. People v. Trupp, 51 P.3d 985, 992 (Colo.2002) (holding that ARC members are not subject to sanction under C.R.C.P. 11(a) for the OARC's decision to file a deficient complaint).

The pre-complaint investigation and approval process undertaken by the OARC and the ARC simply serves a gatekeeping function, ensuring that some reasonable basis exists for the OARC to file charges against an attorney. See C.R.C.P. 251.12(e)(1). It is not designed to vindicate complex pre-hearing issues of constitutional law, which are better resolved by a neutral and detached magistrate

to whom a defendant may formally present legal argument on his own behalf. This function is expressly reserved to the PDJ under C.R.C.P. 251.18(b)(2) and must be performed accordingly.

Because the First Amendment and due process concerns underlying POME are equally applicable in the context of pro se attorney discipline as they are in a civil case and are not sufficiently vindicated by the pre-complaint investigative process, we conclude that the OARC, when charging an attorney with abusive pro se litigation conduct, must make a sufficient showing in response to the attorney's motion for summary judgment that the conduct was not protected by the attorney's First Amendment right to petition.

We note, however, that the POME framework need not be applied in an attorney discipline proceeding in precisely the same manner as in a civil litigation. Under POME, an abuse-of-process plaintiff must make a prima facie showing that the defendant's underlying litigation (1) was objectively baseless, (2) was based on a subjectively improper motivation, and (3) had the potential to adversely affect a legal interest of the plaintiff. 677 P.2d at 1369. The state's interest in protecting the public from unscrupulous attorneys is always implicated by an attorney's engagement in sham litigation conduct. Accordingly, a sufficient showing of objectively baseless and subjectively improper conduct presumptively obviates the need for the OARC to independently assert a legal interest to satisfy POME's third prong in an attorney discipline proceeding.

Bearing in mind this framework, we turn to the applicability of the First Amendment right to petition to the specific conduct and proceedings at issue in this case. In the proceeding below, the Board

imposed sanctions for two distinct instances of alleged misconduct on Foster's part: (1) that his aggregate conduct over the entire course of his litigation against Nunn constituted conduct prejudicial to the administration of justice in violation of Colo. RPC 8.4(d); and (2) that his conduct in his sixth appeal to the court of appeals was sufficiently frivolous to constitute a violation of Colo. RPC 3.1 and 8.4(d). Because the two sets of sanctions implicate the First Amendment in different ways with respect to each theory of misconduct, we address them separately here.

C. Aggregate Conduct Prejudicial to the Administration of Justice

With respect to Foster's aggregate conduct over the course of the litigation, the Board found that a large majority was either non-frivolous, or that insufficient evidence existed to conclude that it was frivolous. Moreover, the Board did not find that Foster's litigation campaign as a whole was frivolous or otherwise objectively baseless. Thus, even if the sham exception to the First Amendment supports a "mosaic" theory—namely, that several discrete instances of non-baseless conduct can collectively rise to the level of baselessness13 —that theory did not form the basis for the Board's conclusions. Accordingly, we find no basis in the Board's findings to conclude that Foster's aggregate conduct was sufficiently non-frivolous to satisfy the objective prong of the sham exception to the First Amendment. The fact that litigation conduct is not objectively baseless ends our inquiry, and we do not further consider a litigant's subjective motivation. See Prof'l Real Estate Investors, 508 U.S. at 60–61 (holding that consideration of the subjective prong of the sham exception is improper if the objective prong is not first satisfied).

Even if we were to consider Foster's subjective motivation, however, the Board's findings in this case do not support its conclusion that Foster's aggregate conduct was motivated by a desire to vex, control, and harass Nunn—a largely perfunctory conclusion unsupported by specific evidence that Foster actually desired to do so. The Board primarily based its ruling on seemingly benign attributes of Foster's conduct, such as choosing to represent himself, appealing issues requiring an abuse-of-discretion standard of review, filing several appeals, "over relying on legal citations," introducing exhibits, and engaging in a "precise" and "exhaustive[ ]" form of advocacy.14 The Board also rested its conclusion on other attributes of Foster's litigation that, while unfortunate, would aptly describe many dissolution cases: a lengthy, hotly contested, expensive, and emotional action motivated at its core by animosity between parties who may be suffering from emotional turmoil.15

While this constellation of attributes, viewed together, might have supported an inference that Foster intended to vex or harass Nunn, that possibility is wholly undercut by the Board's finding of Foster's belief that he was using legitimate legal arguments and factual assertions for the purpose of securing favorable legal relief. More specifically, the Board found that Foster "truly believe[d] that he had strong legal and factual arguments for all of the litigation he initiated." This finding does not support the Board's conclusion that Foster sought to vex Nunn by embroiling her in endless litigation without regard to the result, nor does Foster's largely uncontroverted testimony at the disciplinary hearing.

In sum, the Board's decision reflects not that Foster truly sought to abuse the dissolution process

to vex Nunn, but that he simply should have given up because his arguments were wrong, despite his belief in the legal basis for his assertions. While the pursuit of losing arguments may not be a recipe for success, neither does it bear the hallmark of punishable or necessarily undesirable litigation conduct. See BE & K Constr., 536 U.S. at 532 (citing Prof'l Real Estate Investors, 508 U.S. at 58–61; Pennington, 381 U.S. at 670; Bill Johnson's Rests., Inc. v. NLRB, 461 U.S. 731, 743 (1983)) ("[O]ur prior cases . have protected petitioning whenever it is genuine, not simply when it triumphs. [T]he text of the First Amendment [does not] speak in terms of successful petitioning. [E]ven unsuccessful but reasonably based suits advance some First Amendment interests.").

Because neither the Board's findings nor the record support a conclusion that Foster's aggregate conduct satisfied either the objective or subjective prongs of the sham exception, we hold that the conduct was therefore protected by Foster's First Amendment right to petition. We further hold that the Board erred by failing to require the OARC to make a prima facie showing under POME, in response to Foster's motion for summary judgment, that Foster's aggregate conduct was not protected by the First Amendment. Accordingly, we dismiss the charges that Foster violated Colo. RPC 8 .4(d) by engaging in aggregate conduct through the course of his litigation with a cumulative effect prejudicial to the administration of justice.

D. Foster's Sixth Appeal

The Board concluded that Foster violated Colo. RPC 3.1 and 8.4(d) twice in filing his sixth appeal by reasserting claims from earlier appeals that: (1) the district court improperly valued Nunn's marital assets; and (2) that the district court judge

should have been disqualified for bias.

Unlike with Foster's aggregate conduct, the Board made specific findings that Foster's conduct in his sixth appeal was objectively baseless. The Board, however, again made only summary and perfunctory conclusions that Foster had a subjectively improper motivation for his conduct, despite concluding that Foster genuinely believed that he was engaged in a legitimate effort to obtain favorable relief. These conclusions seem based largely on the alleged baselessness of Foster's conduct rather than any specific evidence of his subjectively improper motivation.

We acknowledge that the baselessness or frivolousness of an argument can support a circumstantial inference that the argument was subjectively motivated by an improper desire to ensnare an opposing litigant in the process of the argument's resolution. We are reluctant, however, to make such an inference, particularly in the face of evidence of a litigant's genuine desire to secure favorable relief, unless the litigant's argument is so wholly devoid of conceivable merit that the litigant's proffer of proper motivation has no credibility.16

1. The Valuation Issue

With respect to Foster's reassertion of the valuation issue in his sixth appeal, we cannot conclude that his arguments were so entirely meritless that he must have had a subjectively improper motivation for asserting them. From the record before us, it appears that Foster initially argued in his first appeal that the district court's use of so-called "minority discounts" to value some of Nunn's property was improper. The court of appeals affirmed the district court's application of minority discounts, but ordered a redivision of marital property on remand.

The district court apparently informed Foster that it would not revalue the property to which it had applied the minority discounts for the purposes of the property redivision. The district court nevertheless proceeded to revalue the property for the purpose of determining the parties' economic circumstances, reapplying the minority discounts in the process. Foster then sought to assert the impropriety of the minority discounts to the revaluation of the property in the context of the district court's reconsideration of the parties' economic circumstances, arguing that the trial court had failed to properly consider Nunn's failure to sell the property since the dissolution, which he contended rendered the reapplication of the discounts improper.

While we agree with the Board that Foster was on notice from the court of appeals that it was within the district court's discretion to apply the minority discounts in the context of the property's valuation for the purposes of the property redivision, the tenor of Foster's sixth appeal was that the district court was doing so in an entirely new context—the re-evaluation of the parties' economic circumstances. While the argument rested upon a similar line of reasoning to that of the argument in the first appeal, it was not so obviously duplicative of the first argument to support an inference, without more, that Foster must have asserted it for no other reason than to waste Nunn's time and money by forcing her to respond. While we do not dispute the Board's finding that the argument was baseless, we cannot conclude that it was so lacking in merit that Foster's proffered motivation for asserting it—namely, to win a favorable ruling on a critical issue in his case—was so wholly unbelievable or incredible that it could not have been true as a

matter of law.17

Accordingly, we hold that Foster's reassertion of the valuation issue in his sixth appeal was protected by his First Amendment right to petition, and that the Board again erred by failing to require the OARC to make a prima facie showing under POME, in response to Foster's motion for summary judgment, that the assertion was not protected by the First Amendment. Accordingly, we dismiss the charges that Foster violated Colo. RPC 3.1 and 8.4(d) by reasserting the valuation issue during his sixth appeal.

2. The Bias Issue.

We reach a different conclusion with respect to Foster's reassertion of the bias issue in his sixth appeal. Based on the record, it appears that Foster asserted in his fifth appeal that the district court judge presiding over his case was biased against Foster and erred by failing to disqualify himself sua sponte. The court of appeals held that Foster had waived the bias claims by, among other things, failing to file a C.R.C.P. 97 recusal motion. The court also broadly rejected the substance of Foster's bias claims, concluding notwithstanding the waiver that there was no evidence of bias.

Foster then filed a C.R.C.P. 97 motion, which the district court denied, and then filed his sixth appeal, in which he again contended that the district court judge failed to disqualify himself sua sponte for many of the same reasons asserted and rejected in Foster's fifth appeal. Unlike the valuation issue, this was not a situation where new circumstances or new evidence could possibly have led to a different result; Foster simply asserted the same arguments to the same court for a second time.

Given the court of appeals' ruling in the fifth appeal that the arguments were not only meritless,

but also frivolous and vexatious, we find Foster's proffered motivation for reasserting them dubious. Given the overall sophistication of Foster's arguments throughout the litigation below, Foster's suggestion that he honestly believed he could obtain favorable legal relief by flatly reasserting arguments already deemed frivolous, and for which he had already been ordered to pay Nunn's attorney fees, is implausible. Rather, as Foster himself admitted at the disciplinary hearing, he believed prior to filing the appeal that the court of appeals was "tired of hearing from [him]" and "[was] not going to rule in [his] favor no matter what the law."

While Foster may have genuinely believed that the district court judge was biased against him, he reasserted that issue on appeal without any subjectively proper motivation of obtaining favorable relief. Accordingly, we conclude that his motivation for doing so was subjectively improper as a matter of law.

We further agree with the Board's assessment of Foster's reassertion of the bias issue as objectively baseless. Foster received a fair opportunity to resolve that issue in his fifth appeal, and his failure to obtain a favorable result from the court of appeals or on certiorari review from this court or the U.S. Supreme Court exhausted his bases upon which to challenge the judge's allegedly biased conduct. His subsequent reassertion of precisely the same issue without any reason to expect a different result is the very definition of an objectively baseless claim.18

With respect to Foster's contention that the Board improperly considered the opinions of the courts in the underlying litigation in determining the frivolousness of his reassertion of the bias issue, we agree that the Board considered the opinions for the truth of the matter asserted therein when they had

not been admitted for such a purpose. For example, the Board admitted the court of appeals' opinion in Foster's sixth appeal for the narrow purpose of considering its effect on Foster—namely, to establish, in connection with the charge that Foster's aggregate conduct violated Colo. RPC 8.4(d), that Foster was aware the court had deemed his sixth appeal frivolous. Yet, the Board specifically quoted from the court of appeals' opinion in support of its conclusion that Foster's conduct was frivolous—a plain consideration of the opinion for the truth asserted therein.

We need not reach, however, whether the Board's consideration constituted error, harmless or otherwise. There is sufficient evidence to conclude that Foster's reassertion of the bias issue was frivolous in Foster's briefs in his fifth and sixth appeals, of which he stipulated to unconditional admission, and in the court of appeals' fifth opinion, which we consider only for its admitted purpose: to establish Foster's understanding that the court rejected his arguments and deemed them frivolous, and that he could obtain no further relief on the issue other than through certiorari review. Because the evidence was sufficient to support a finding of frivolousness regardless of the truth of the matter in any of the court of appeals' opinions, we also need not address Foster's contention that Board's consideration thereof constituted a burden-of-proof error under Colorado Dog Fanciers, Inc. v. City & County of Denver ex rel. City Counsel, 820 P.2d 644 (Colo.1991).

Because Foster's reassertion of the bias issue in his sixth appeal was both objectively baseless and subjectively motivated by an improper purpose as a matter of law, we conclude that it was not protected by his First Amendment right to petition regardless

of his status as an attorney.

We again acknowledge that the Board erred by failing to require the OARC to make a prima facie showing under POME, in response to Foster's motion for summary judgment, that Foster's reassertion of the bias issue was not protected by the First Amendment. Nevertheless, we conclude that the error was harmless. Under C.R.C .P. 61, an erroneous denial of summary judgment will not serve as a basis for reversal unless it affects the substantial rights of the moving party. Swan v. Zwahlen, 131 Colo. 184, 187, 280 P.2d 439, 441 (1955). The OARC's response to Foster's motion contained a copy of the OARC's investigative report, which included more than sufficient evidence to permit the PDJ to reasonably conclude that Foster's bias claims were not protected by the First Amendment. Thus, the PDJ's failure to apply POME with respect to Foster's bias claims was harmless.

Finally, we reject Foster's contention that he can only be disciplined for his entire sixth appeal, or not at all, under the court of appeals' holding in Ware v. McCutchen, 784 P.2d 846 (Colo.App.1989). An attorney cannot shield his misconduct by pointing to his legitimate activities any more than a "plagiarist can excuse the wrong by showing how much of his work he did not pirate." Cf. Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 56 (2d Cir.1936). Just as we cannot use Foster's misconduct in this limited context as a basis to condemn his entire litigation, we cannot point to the Board's failure to find a broader pattern of illegitimacy to excuse Foster from responsibility for bringing a plainly frivolous claim with no good legal reason to do so.

Accordingly, we affirm the Board's conclusion that Foster violated Colo. RPC 3.1 and 8.4(d) by asserting a frivolous claim of bias in his sixth appeal,

which constituted conduct prejudicial to the administration of justice.

III. Conclusion

By clothing some of Foster's conduct "with the mantle of the First Amendment," we neither condone it nor express any opinion with respect to the veracity of his arguments in the underlying litigation. See Green, 11 P.3d at 1087. We also acknowledge that the dissolution process often takes a great emotional and financial toll on families, and we are sympathetic to the suffering and expense imposed on Nunn in this case by the length of the litigation. Nevertheless, the First Amendment simply does not permit us to impose professional discipline on Foster for engaging in non-sham litigation.

Accordingly, we dismiss the OARC's charges that Foster's aggregate conduct violated Colo. RPC 8.4(d) and that his reassertion of the valuation issue in his sixth appeal violated Colo. RPC 3.1 and 8.4(d), and affirm the Board's conclusion that Foster's reassertion of the bias claim in his sixth appeal violated Colo. RPC 3.1 and 8.4(d). Because the Board did not apportion sanctions between the aforementioned violations, we remand for a redetermination of appropriate sanctions for Foster's single violation of Colo. RPC 3.1 and 8.4(d).

FOOTNOTES

1. In re Marriage of Foster, No. 99DR372 (Boulder Cnty. Dist. Ct., filed Mar. 26, 1999).

2. In re Marriage of Foster, No. 00CA1553 (Colo.App. Sept. 26, 2002) (not selected for official publication), cert. denied, No. 02SC770 (Colo. Apr. 21, 2003).

3. In re Marriage of Foster, No. 01CA0025 (Colo.App. Sept. 26, 2002) (not selected for official publication), cert. denied, No. 02SC771 (Colo. Apr.

21, 2003).

4. In re Estate of Foster, No. 01CA0218 (Colo.App. Mar. 14, 2002) (not selected for official publication), cert. denied, No. 02SC220 (Colo. Sept. 9, 2002).

5. Foster ex rel. Foster v. Nunn, No. 01CA1581 (Colo.App. Dec. 19, 2002) (not selected for official publication).

6. Foster ex rel. Foster v. Nunn, No. 01CV46 (Boulder Cnty. Dist. Ct., filed Jan. 15, 2001).

7. In re Marriage of Nunn, No. 04CA0710 (Colo.App. Dec. 1, 2005) (not selected for official publication), cert. denied, No. 06SC156 (Colo. May 22, 2006).

8. In re Marriage of Nunn–Foster v. Foster, No. 05CA1961 (Colo . App. Sept. 13, 2007) (not selected for official publication).

9. In re Marriage of Nunn–Foster, No. 06CA0114 (Colo.App. Sept. 13, 2007) (not selected for official publication), cert. denied, No. 07SC1008 (Colo. Feb. 25, 2008).

10. In re Marriage of Foster, No. 07CA1203 (Colo.App., dismissed Nov. 21, 2008).

11. In re Marriage of Foster, No. 07CA2334 (Colo.App., dismissed May 2, 2008).

12. The defendant in Watts was investigated and indicted for allegedly threatening the life of the President of the United States in violation of 18 U.S.C. § 871 (1964), and moved to dismiss the indictment prior to trial on the grounds that his allegedly threatening speech was protected by the First Amendment. Watts v. United States, 402 F.2d 676, 677–78 (D.C.Cir.1968). Notwithstanding the investigation and indictment, the U.S. Supreme Court agreed with the defendant that his speech was indeed protected by the First Amendment and ordered his acquittal. Watts, 394 U.S. at 707–08.

13. Cf. Prof'l Real Estate Investors, 508 U.S. at 73 (Stevens, J., concurring in the judgment) (inferring a mosaic-like theory of liability for the repetitive filings held to be illegally anticompetitive in Trucking Unlimited, 404 U.S. 508); United States v. Maynard, 615 F.3d 544, 561–62 (D.C.Cir.2010) (approving of a similar mosaic theory in the context of suppressing government surveillance under the Fourth Amendment).

14. The OARC's brief echoes many of these seemingly benign concerns, asserting in a section entitled "Facts Relevant to Culpability" that Foster, among other things: Engaged in litigation that "lasted for years"; "[A]ppealed the Magistrates' rulings"; "[F]iled requests for reconsideration and motions to set aside judgments"; "[F]iled and briefed seven appeals of the district courts' rulings to the Court of Appeals"; "[F]iled petitions for writs of certiorari"; and "[M]oved to recuse [a magistrate]."

15. The Colorado Practice Series notes that similar cases often lead to unfounded disciplinary complaints:Domestic relations cases are a common source of disciplinary complaints and claims of malpractice, not because the attorneys who handle them are unethical or careless, but because of the nature of the cases themselves. Given the emotional turmoil inherent in a dissolution, few, if any, clients are completely content with the dissolution process or the results reached.19 Colo. Prac., Family Law & Practice § 2:1 (2d ed.2009) (emphasis added).

16. This principle is particularly important in a dissolution case, where it may be tempting to infer a subjectively improper motivation from litigants' actions simply because they harbor deep and obvious animosity for each other—despite the fact that the animosity may form the very basis for the case. See discussion supra, note 15.

17. This holding in no way bears on the court of appeals' conclusion that the appeal was sufficiently frivolous to order Foster to pay Nunn's costs and fees. See BE & K Constr., 536 U.S. at 537 (the First Amendment does not undermine "common litigation sanctions imposed by courts themselves, or the validity of statutory provisions that merely authorize the imposition of attorney's fees on a losing plaintiff").

18. While we express no opinion as to whether the district court judge was in fact biased against Foster, we note Foster's apparently uncontroverted testimony at trial that an assistant regulation counsel told him just prior to filing his sixth appeal: "There is no chance that [the district court judge] is going to be ruling in your favor. He perceives you as being a problem, and he's just . not going to approach these hearings objectively." This statement, if true, is troubling in light of the OARC's characterization of Foster's claims of bias as "misguided" and "frivolous" in its brief to this court. Nevertheless, tacit agreement from the OARC that the district court judge was biased against Foster is neither evidence of the judge's bias nor an objectively reasonable basis for reasserting an already rejected argument.

Justice RICE delivered the Opinion of the Court

APPENDIX C - HEARING OFFICER PROCEEDINGS

HEARING OFFICER RECORD DECEMBER 20, 2016

Before The Disciplinary Board Of The Washington State Bar Association
Before Hearing Officer Timothy Parker

In re:	)	
DAVID C. COTTINGHAM,	)	Volume 1
Lawyer (WSB #9553)	)	
	)	
______________________________	)	

December 20, 2016
2:00 p.m.
Bellingham, WA
Reported by Toni Ziomas, CSR No. 2926
LIKKEL & ASSOCIATES (800) 686-1325
www.likkelcourtreporters.com

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A P P E A R A N C E S

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Office of Disciplinary Counsel
1325 4th Avenue, Suite 600
Seattle, Washington 98101-2539

For The Respondent: BRETT PURTZER

Hester Law Group
1008 S. Yakima Avenue,
Suite 302 Tacoma,
Washington 98405

Also Present: David Cottingham

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14 Q. What ultimately did it cost your client in terms of
15 your billings going through the entire litigation start to
16 finish?
17 A. I want to be careful. I don't know that it's cost

my
18 client anything other than the judgment. I did not bill. I
19 kept track of the time. Any fees that have been awarded
20 were paid by Mr. Cottingham. Okay? It would be impossible
21 for me to justify the time. The time I put into it has
22 exceeded $200,000.

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[WITNESS: DOUGLAS SHEPHERD]

11 Q. Well, the east point, but it goes up into the --
12 farther north and heads up into the railroad access,
13 correct?
14 A. I don't think that's correct.
15 Q. Right here. (Indicating.)
16 A. No. We never claimed that part. That got raised by
17 Cottingham. We bought it back. It didn't belong to
18 Cottingham. It was part of what we believed he thought Lot
19 11 was. It wasn't our legal description of Lot 11. We paid
20 for that portion to Cottingham. I don't believe that
21 portion was ever given to us in any of the findings of fact
22 and conclusions of law because I told the judge not to do
23 it because there may be other people that had an interest
24 in that portion and we were not going to get into
25 litigation with other neighbors when we went into a quiet

1 title action taking away their right-of-way.

9 Q. Was it true that Mr. Cottingham was concerned that
10 the court was basically making boundary line decisions that
11 didn't include all the interested parties that might have
12 an interest in that land?
13 A. I don't think it's appropriate for me to attribute
14 motive to Mr. Cottingham.
15 Q. No, no. I'm just asking did he raise that as an
16 issue; that there were other people that were interested or
17 should be interested parties in this particular area that
18 the land was being divided?
19 A. Okay. In fairness to you and Mr. Cottingham, I have
20 not read the entire transcript. He was mad at Whatcom
21 County for letting this building be built. It was clear
22 from the opening statement and arguments and pleadings they
23 were mad at Whatcom County. The person he was trying to
24 protect was he and his family. To make it broader than that
25 would be not consistent with my memory.

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[WITNESS: DAVID COTTINGHAM]

4 Q. Then you filed a motion for a new trial and to
15 vacate the judgement based upon those findings, correct?
16 A. I did.

17 Q. Supplemental findings were entered, correct?
18 A. Correct.
19 Q. Just generally what was your concern with respect to
20 the conclusion of law that the court had entered related to
21 the Lot 11?
22 A. The corner changed and we didn't know where ours
23 was.
24 Q. How does that affect you as a landowner?
25 A. It created a record that left it impossible to say
Page 47
1 where our corner was.
2 Q. In your pleadings you reference marketability. How
3 does marketability relate to this particular issue that you
4 were raising?
5 A. Land division that's unapproved by an agency isn't
6 marketable, according to the Legislature.

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1 CERTIFIED COURT REPORTER'S CERTIFICATE
2 STATE OF WASHINGTON)
3 COUNTY OF SNOHOMISH)
4 I, the undersigned Certified Court Reporter, in and for the State of Washington, do hereby certify that the
5 foregoing proceedings held on December 20, 2016, were taken stenographically by me and reduced to typewriting under my
6 direction.
7 I further certify that the proceedings as transcribed are a full, true and correct transcript,

including all objections, motions and exceptions of counsel made and taken to the best of my skill and ability.

9 In witness whereof, I have hereunto set my [seal applied]

10 and affixed my signature this 5th day of January, 2017.

12 Toni L. Ziomas, CSR No. 2926,
Washington State Certified Court

13 Reporter, residing at Snohomish, Washington, County of Snohomish

APPENDIX D - DISCIPLINARY BOARD
HEARING RECORD
BOARD HEARING SEPTEMBER 8, 2017
ORAL ARGUMENT

FILED
OCT 17 2017
DISCIPLINARY BOARD

Deanna M. E11is, CCR
Washinqton CCR No. 2577
Treece Shirley & Brodie, Inc.
(206) 624-6604
madam. reporter G gmail . com

2

Oral Argument 09-08-17
BEFORE THE DISCIPLINARY BOARD
OF THE
WASHINGTON STATE BAR ASSOCIATION

IN RE, David C. Cottingham, Lawyer.	Proceeding No 15#00059 Bar No. 9553

VERBATIM REPORT OF PROCEEDINGS
ORAL ARGUMENT
Friday, September B, 2011
11:04 to 11:35 a.m.
Held at the offices of
Washington State Bar Associatlon
7325 Fourth Avenue. Suite 600
Seattle, Washington

Reported by: Washington CCR No. 2577
Treece Shirley & Brodie, Inc.
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3

FOR THE WASHINGTON STATE BAR

ASSOCIATION:

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DISCIPLINARY BOARD MEMBERS:

Todd Startzel-, Chair, Attorney Member
Erank Cornelius, Attorney Member
Victoria Byerly, Attorney Member
Stephania Denton, Attorney Member
Hillary Graber, Attorney Member
S. Nia Cottrell-, Attorney Member
Markus Louvier, Attorney Member
Sarah Andeen, At.torney Member**
Jamie Patneaude, Attorney Member
Michael Myers, Attorney Member**
** Participating via teleconference

Treece, Shirley & Brodie, Inc (206) 624-6604

4

Oral Argument - 09-08-17
September 8, 2017, Seattle, Washington:
(Proceedings began at 11:04 a.m.)
(Teleconference initiated with participants.)

4 CHAIR CARNEY: So today is Friday,
5 September 8th, 2017, and the time is approximately
6 11:05.
7 We are now on the record in the matter of David C.
8 Cottingham, Lawyer, WSBA No. 9553, Proceeding No.
9 15#00069.
10 My name is Michele Carney, and f am Chair of

the
11 Disciplinary Board. Here today for the Disciplinary
12 Board aside from myself are other members of the Board.
13 Those members are Stephania Denton; Victoria Byerly;
14 Frank Cornelius; Mark Sllverman; Hillary Graber; Jamie
15 Patneaude; Nia Cottrell; Markus Louvier. Sarah Andeen
16 and Michael Myers are appearing by telephone.
17 We also have counsel to the Board, Kevin Bank, and
18 the court reporter.
19 Will those present to argue for the Respondent
20 please identify themselves for the record.
21 MR. COTTINGHAM: David C. Cottingham,
22 the attorney, the Respondent.
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7

Oral Argument - 09-08-17
11 We've asked that. the Board regard our response and
12 this appeal as protected activity under the First
13 Amendment right to petition government for the redress
14 of grievances, and we're asking that the conduct charges
15 be strictly construed, that. the conduct charges and
16 professional- standards not encroach upon an attorney's
17 breathing room that's necessary to insure that the
18 liberties exist under the First Amendment but also under
19 the Washington Constitution.

20 Section 27, most recently addressed by the Supreme Court
21 in DAVIS VS. KATZ -- when it struck down the Anti-Slapp
22 Statute and the federal cases cited therein that import
23 First Amendment jurisprudence into the Washington
24 Constitutional guarantee of the right of ;ury trial
25 very important here
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1 Why is that the case? Because at all times we were
2 relying heavily -- I'm prone to say "we." This
3 Washington attorney, I, was relying heavily upon the
4 answer given by the defendants ln a quiet title action.
5 That answer responded to our allegation that no one else
6 was interested, no one else was interested in the
7 property that we were seeking to quiet.
8 Important because RCW 7.28.010 specifically limits
9 standing to anyone who wants to bring a counterclaim or
10 a claim in the first -- in their own right for quiet
11 title, limits standing to those people having a valid
12 and subsisting interest in the matter -
13 You'll see in specifically at transcript Page 35
14 that the ODC witness called specifically informed that
15 they were limiting the property that they wanted; in

16 other words, platted property they did not want some of.
17 Because why? Because there were other persons who are
18 or may be interested '- excuse me are or may be
19 interested. And that was in response to
20 cross-examination, when he was asked why did you change
21 the Conclusion 8 expression that the Court. entered to a
22 supplemental Conclusion 8 that eliminated railroad
23 right-of-way as the extent to which the defendants
24 wanted to quiet title
25 Of course, you're not. here to make substantive
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9

Oral Argument - 09-08-17
1 determinations on some of these matters. But we are
2 here to talk about notice to a Washington attorney and
3 to a Washington attorney who's trying to insure that his
4 client has the opportunity to seek full First Amendment
5 protection, not just petition of government for redress
6 of grievances, but far more importantly, the preliminary
7 inquiry stage where you're trying to find out what
8 branch of government conveys finality for these
9 proceedings.
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10

Oral Argument - 09-08-17

14 Well, we're not challenging what the court has
15 said. A Washington Attorney needs notice. Which branch
16 of government is providing finality? Three have ruled
17 on this matter. I've told you about two. I've said
18 that there is a legislature, and there's a governor's
19 veto the legislature did not override And unless I'm
20 mistaken, the only case addressing such matters is
21 KATES v. SEATTLE. And the Court of Appeals in
22 KATES v. SEATTLE addressing the fact suddenly, finding
23 that there are two permits for the same property, said
24 that shows division. There can't be two
25 residential permits for the same property, said the facts
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11
Oral Argument - 09-08-17
1 are different, but the court said, well, we have to
2 remand to the agency.
3 Well, we didn't have an agency joined in our case.
4 Why was that? Back to the defendants' Answer. No one
5 else was interested. There was no reason to believe
6 that there would be any jockeying for a lot corner.
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15
Oral Argument - 09-08-17
17 Mr. Cottingham: Find -- breathing room
18 is absolutely essential as applied to these facts

when
19 you have a county code unused and a Washington Attorney
20 who has to inquire further , gets no answer from the
21 agency, the agency director says. we have no authority
22 to put a hold on your --
23 VICE CHAIR SILVERMAN: So-
24 MS. DENTON: So you're not complaining
25 about the hearing officer's sanction imposition. you're
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16

Oral Argument - 09-08-17
1 complaining about his ruling -- you're not saying the
2 sanction was inappropriate. you're saying that his
3 finding that you did anything wrong was appropriate; is
4 that accurate?
5 Both. it's discipline
6 that chills first amendment exercise on a record that
7 demonstrates that as early as December 3, 2010, the
8 defendant was administering waste, was destroying
9 property because we talked to the agency.
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22

Oral Argument - 09-08-17
15 We're not talking about finality because of a
16 Washington attorney's dogged pursuit. We're talking
17 about it because KATES v. SEATTLE does. Also because

18 comment 2 to 3.2 says that if you anticipate that you're
19 going to be able to prove something. It doesn't -- it's
20 not frivolous what you're doing when you understand that
21 that evidence might come in.

2 . . . HANNAH v. MARGITAN says that if you're
3 opposing action that is contrary to the regulations, if
4 you're opposing that, it's not frivolous. Well that's
5 not me saying the courts have made a mistake.
6 That's me saying we needed the Agency answers so that we
7 could find out whether or not the Agency was going to
8 address this. In other words, I can't craft a decree
9 for exactly what the court of Appeals remanded for the
10 Trial Court to Address. And the trial judge may have
11 been wise to say, I'm a superior court. I don't address
12 this any further. You go to the agency, Mr. and Mrs.
13 Morgan. That's what RCW 58.17.300 says.
14 He didn't say it, but you'll see April 20 we asked
15 12 or 13 different times, different ways, for what? A
16 decree. Is there a reason that Washington doesn't allow
17 a decree so that we can know as Washington attorneys
18 whether there is finality? Is there some reason

that we
19 should discipline when there is no decree, yet the Court
20 of Appeals remanded for the Trial Court to address
21 exactly that.
22 Well, I have one moment left, and I hope that I haven't
23 been too loud. I do worry about the people who are not
24 present. And I am sorry if I was loud in my initial
25 presentation.

1 But when we talk about KOBZA v. TRIPP and we read
2 HANNA v. MARGITAN, we're looking not just for whether or
3 not there's a definition of frivolous to apply the
4 comments to 3.1 RPC, RPC 3.1. We're looking at whether or
5 not there's finality. And if there isn't finality ,
6 what can we say to the nest police officer that shows
7 up? What can we say about whether or not we were on our
8 own property?
9 You should ask for the full record, everything that
10 went into the mediation or at least the post-mediation
11 discussions so that you'll understand why I was trying to
12 serve the mediators --excuse me -- the Court's Order
13 to cooperate with mediation by staking property that the

14 defendants would not. You should ask for that.You
15 should want that. Why? because you can't make a
16 decision whether or not the First Amendment right to
17 petition and the inquiry right before that, which is so
18 valuable, have been protected here in Washington State.
19 It was court ordered mediation. And if there was an
20 assault and the record shows it, then what do we do next
21 when an officer has to show up as far as pointing to any
22 staked corner?
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26

Oral Argument - 09-08-17
CERTIFICATE
STATE OF WASHINGTON)
) ss
COUNTY OF SNOHOMISH)

I, the undersigned Washington Certified Court Reporter, pursuant to RCW 5.28.010, authorized to administer oaths and affirmations in and for the State of Washington, do hereby certify: That the foregoing deposition consisting of pages 1 throuqh 27 of the testimony of each witness named herein was taken stenographically before me and reduced to typed format under my direction;

I further certify that according to CR 30(e) the witness was given the opportunity to examine, read and sign the deposition after same was transcribed, unless indicated in the record that. review was waived; I further certify that all objections made at the time of said examination to my qualifications

or manner of taking the deposition or to the conduct of any party have been noted by me upon each said deposition;

I further certify that I am not a relative or employee of any such attorney or counsel, and that I am not financially interested in the action or the outcome thereof;

I further certify that each witness before examination was by me duly sworn to testify to the truth,the whole truth, and nothing but the truth;

I further certify that the deposition, as transcribed, is a full, true, and correct transcript of the testimony , including questions and answers, and all objections, motions, and exceptions of counsel made and taken at the time of the forgoing examination and was prepared pursuant to the Washington Administrative Code 308-14-135, the transcript preparation format guidelines. I further certify that I am sealing the deposition in an envelope with the title of the above cause and the name of the witness visible, and I am delivering the same to the appropriate authority; I further advise you that as a matter of firm policy, the Stenographic notes of this transcript will be destroyed three years from the date appearing on the Certificate unless notice is received otherwise from any party or counsel hereto on or before said date;

IN WITNESS WHEREOF, I have hereunto set my hand. and affixed my official seal- this 16th day of October, 2017.

Deanna Ellis, CCR
Washington State Certified Court Reporter
License No. 2511
Treece, Shirley & Brodie, Inc (206) 624-6604

DISCIPLINARY BOARD ORDER AFFIRMING HEARING EXAMINER

Filed

DISCIPLINARY BOARD
WASHINGTON STATE BAR ASSOCIATION

In re DAVID CARL COTTINGHAM, Lawyer (WSBA No. 9553)	Proceeding No. 15#00069 DISCIPLINARY BOARD ORDER ADOPTING HEARING OFFICER'S DECISION AND DENYING RESPONDENT'S MOTION FOR NOTICE OF JUDICIAL AND LEGISLATIVE FACT

The following matters came before the Disciplinary Board at its September B, 2017 meeting; (1) Respondent's appeal of Hearing Officer Timothy J. Parker's Findings of Fact and Conclusions of Law and Recommendation of a sanction of eighteen months suspension, following a hearing; and (2) Respondent's Motion for Notice of Judicial and Legislative Fact, WCC 21.01.014, *Et Seq*.

1. Appeal of Hearing Officer's Decision

The Board reviews the hearing officer's finding of fact for substantial evidence. The Board reviews conclusions of law and sanction recommendations de novo. Evidence not presented to the hearing officer or panel cannot be considered by the Board. ELC I 1 . 12(b).

Having reviewed the materials submitted,

and considered the applicable case law and rules;

IT IS HEREBY ORDERED THAT the Hearing Officer's decision is adopted.[1]

[1] The vote to affirm the Hearing Officer's decision was 11-0. Tho se voting were; Carney, Silverman, Denton, Louvier, Audeen, Byerly, Graber, Cottrell, Patneaude, Myers and Cornelius.

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2. <u>Motion</u>

On June 28,20L7, Respondent filed a motion with the Chair of the Disciplinary Board for Notice of Judicial and Legislative Fact, WCC 21.01.010 Et. Seq. On July 10, 2017, the Office of Disciplinary Counsel filed a Response to the Motion. On August 3, 2017, the Chair of the Disciplinary Board issued an Order deferring a decision on the Motion until the Board hearing on Respondent's appeal.

Having reviewed the materials submitted, and considered the applicable case law and rules; IT IS HEREBY ORDERED THAT Respondent's Motion is Denied.

Dated this 27th day of September, 2017.

s/Michelle Carney, Disciplinary Board Chair

Certificate of Service

I certify that I caused delivery of a copy of the Order Adopting HO's decision & Denying Respondent's Motion For Notice of Legislative and Judicial Fact to be delivered tot he Office Of Disciplinary Counsel and to be mailed to David Cottingham Respondent postage prepaid on the 27th Day of Sept 2017. s/Clerk/Counsel to Disciplinary Board

APPENDIX E - **COTTINGHAM'S BRIEF ASSIGNING ERRORS TO STATE BAR'S DISCIPLINARY BOARD**

DISCIPLINARY BOARD,
WASHINGTON STATE BAR ASSOCIATION
In Re Appeal Of
DAVID CARL COTTINGHAM
Proceeding No. 15#00069
RESPONDENT'S CORRECTED OPENING BRIEF

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III. INTRODUCTION.

Title proceedings completed in conclusions with location in them, but a later amendment or supplement omitted location language for unknown reasons. These entered from chambers; pronouncement for notice was absent. When the Court of Appeals opinion remanded (April 2, 2014, WSB 179), unable to set the matter "at rest" as *Samuel's Furniture* defines the need; it was because another amendment had reversed title's proof by Cottingham. The mandate inspired no motion from the defendants. Noted by Respondent for pronouncement after several months, defendants' Order on Remand entered, again without corner location expression (WSB 198). When decree for defendants entered in a Supplemental Order Quieting Title (WSB 211), *almost* identifying its survey, only then could *Supplemental Conclusion Eight*[1] be demonstrated as a changed corner pulled away from road, creating another lot without the court's pronouncement. The delay of three years was not for lack of Respondent's effort at clarification.

Trial Judge Emails had stricken an RAP 7.2(e) hearing and refused all motions. (R.306, 307).

The examined litigation and defendants' decree on December 9, 2014 introduced plat alteration/corner adjustment, preventing timely CR 54(b) final decree for Respondent's client, and defense in these proceedings. Unadjudicated facts remain for substantive, required (RCW 58.17.030), agency determination. Area is an orphaned upland area (hereinafter "orphaned") outside "all" of Lot Eleven according to an amendment. Title is despoiled of its record corner certainty, until it can be quieted in Cottinghams after approval. New location at the *second* northeast corner of "all of Lot Eleven," required an agency determination and a better name for the Orphaned property upland, some in Remand to Cottinghams.

---

[1]. Before decreed location entered, 12/9/2014 (WSB Ex.21 1), Lot 11 first entered at railroad under Conclusion 8 (corner expression) on January 3, 2012, (9:18-24 WSB 16), then entered again under ***Supplemental* Conclusion 8** on February 1, 2012; each considered "All" of Lot 11(264: 3-6 WSB 26). Conclusion 5 (denying all proof of title) "establishing clear evidence of' (9:8-9 WSB Ex. 16) entered first in Cottinghams' favor ("have established") then without disclosure or pronouncement in error as "have not established" (3:20-21 WSB Ex. 26)

Fully revealing how nonfrivolous were the attorney services requires following the absence of due process, the notice required (RCW 90.58.140(4)), and the manner in which supplements entered. Another lot corner was slipped into conclusions by defendants' counsel, to a court likely to enter from chambers rather than in open court Pronouncement for notice. Respect for the trial judge remains deserved. His (defense counsel's) "all" of Lot Eleven

label -*as relocated*- prevents (1) naming the area that a Court of Appeals required attention to (where Cottingham had proven title) in a new lot, the area "Orphaned," (2) application for approval of the difference by defendants, and (3) Entering a decree that does not commit RPC 8.4(f) violation before an agency ruling.

A defense is premature absent exercise of agency authority over the corner adjustment/plat amendment determination (WCC 21.11.010; WCC 21.03.060(2),(4)). Its absence is highly prejudicial after litigation's value was denied by disclosure that defendants' Answer as to interested parties was false. Prediction of a favorable outcome may appear frivolous, but only before agency rules. An agency refusal to Answer during confusion over the court conclusions was reduced -for discovery- to its easiest terms, setback. The refusal to Answer was (WCC 2.80.060) due to Staff Reporting delay (R.EX.266; delayed per R.EX. 331) and a "hold" decision therein which was not reported to Respondent for notice. Twenty months delay passed before an agency Staff Report. It still reported no land division. Denial of notice, protected as an expectancy under RCW 90.58.140(4) and RCW 90.58.230 departed far from the normal course when defendants failed to Answer truthfully after land division/plat alteration/corner adjustment, still undisclosed during LUPA efforts. Discipline chilling the necessary pursuit of discovery through LUPA that is constitutionally arbitrary and capricious, burdening inquiry in the public interest that should have been satisfied such required notice. (see, RCW 90.58.230, class representation) Disciplinary proceedings for inquiry following a false Answer that added elements of land division and development beyond title *after* a title trial, without claim for exemption from notice in the shoreline

zone, raises RPC 3.1, 4.4 and 8.4 above the Law of the Land and Fourteenth Amendment Equal Protection and Due Process. The burden of these charges will last long, and spread, although procedurally suspect before the finality of required land division secures the agency determination likely to render efforts non-frivolous. The warning at 1:2-24, (WSB EX.54 Finding 21) finds support in Kates v. Seattle, where remedy was postponed considering review by the court's first proper jurisdictional effort over unapproved land division.

In the Remand Order (August 19, 2014, WSB 198) and County Appeal proceedings (November 18, 2014, WSB 201)), no decree picked from two conclusions to exclude property as Orphaned nor did any judgment describe defendants' resulting title. 12 Defendants had been attacking need of required RCW 90.58.140(4) notice, knowing they pursued private land division relief in a judicial forum, without timely entries (CR 54(a)(1), Cr 54(b), (e)(compliance "forthwith," "all parties" "15 days)").

Conduct by defendants Morgan, even their counsel, was aimed at preventing Cottinghams' inquiry and discovery (see, fn.17) of extent of agency approvals, even mediated[2] finality, and the conduct continued after trial (WSB 122) because (1) public notice was always required[3]; (2) interests of others[4] would not disclose; (3) title proceedings could be obstructed; and (4) some of the defendants' development can not reflect as permitted at all (land division/plat alteration/lot corner adjustment, and development beyond title5). Freedom from RCW 90.58.140(4) notice for private development extending to roadway (regardless of setback encroachment and mandatory enforcement language (WCC 23.50.02.B (R.EX.)), and from land division approval without compliance with WCC 21.11.010

must fail. An agency must test whether "all" of

---

[2] R EX. 34, 35, 36.

[3] A duty of RCW 90.58.140(4) notice arises if development will exceed title or involve land division.

[4] ODC witness Shepherd at 28:12-16; 29:14-18; 30:10-17, and 35:16-25, Hearing Transcript 12/20/16. 5 R.EX. 34 (site plan/Exh.A, Decl Cottingham/Deposition Exhibit), depicted the limit of application disclosure (see also, R. EX. 239, pg. 5, revealing far less fill or "pervious surface" disclosure than REX. 278a, a survey conducted including surfacing applied a year after initial permitting.

Lot Eleven, as decreed for defendants three years after trial, impermissibly creates an additional lot. (WCC 21.03.060(2), R.EX. 228).

A Land Use Permit Act review petition ("LUPA") was filed because an Agency would not Answer Cottinghams' Appeal as required and a Defendant had engaged in so much abuse that, after defendants' Answer and Conclusion Eight change (knowable from ODC witness testimony here also as contradicting defendants' Answer), purposeful avoidance of the land division laws was nearly evident without an agency record's ability to show whether corner adjustment and development beyond was within final agency approval or not.[7] WSB 13. "Project permit performance review" was specifically requested. (1:20, WSB 102).

Title proceedings had been wasted effort once title could not be cleared due to additional parties and common corner movement. The burden had turned toward what location the agency would apply in the future for defense, even whether sale or decree documents would be proposed for location (WCC 21.03.060(2)(4)(a), "Decree," and "conveyance", respectively), but defendants did not propose any. Meaningful access to the title court was denied, and

opportunity for a meaningful defense here is as well, defendant's achieving truncated adjudication of land division under protection from inquiry by LUPA in Davis v. Cox-like denial of First Amendment redress and Wash. Const. 1 §21 trial guarantees, simply by slipping conclusion Eight change in for entry

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[6] An agency Answer is required to the Board of Appeals in (Twenty (20) Days per WCC 2.80.060 (R.Ex.216) and see, 5:15-18, WSB 117 (Absence of Answer believed likely because of Trial Court adoption of a survey); and see, 54:15-21, R.EX. 291(Agency confused where setback is, by trial court's conclusions). If not within final agency approval, the matter is not set "at rest" but is outside LUPA. Samuel's Furniture, infra. Since defense counsel also slipped Supplemental conclusion Five in for signing from chambers without authorization of the change by any court pronouncement -(denying that Cottinghams proved any title and becoming the reason Court of Appeals Opinion 68202-4-I could not deliver finality)-inherent, certiorari and constitutional review authority (for which clarity must exist) became unavailable, leaving only LUPA review. Grundy, infra, and slow Washington development of whether LUPA preclusion precludes nuisance actions based upon a permit in the same twenty one days rendered it unlikely the title appeal could reach the facts the agency would or could not disclose as it denied a required Appeals Board Answer in Twenty days (WCC 2.88.060, R. EX. 216 ; 83:2 1, R.EX. 292), but also rendered pursuit of agency consideration essential. So did Norco, so did, infra, for the denial of an accrual date which is not determined by Washington law and requires pursuit of administrative remedies.

although land division was never disclosed and remained undocumented by mere elimination of "railroad" until a decree entered almost identifying

a survey had entered. LUPA alone cannot abrogate or truncate adjudication free from the First Amendment right of redress or notice of land division if a free and unfettered bar is not regulated out of its "breathing room." Equal access to meaningful records reflecting the extent of authorized development, callously allowed by Lupe's preclusion without expression of guaranteed equal access, impacted by Conclusion Five change (inadvertent error, reversed without clarifying its result, WSB 198, or disclosure that defendants' would in four months create an additional lot by decree, proving the limit of "all" lot Eleven short of railroad, short of plat description reaching railroad, omitting whether to common corner moved or split).

So LUPA effort sought a permit record, free from boundary misrepresentation between WSB 16 and WSB 26 corners, applied by [Supplemental Order Quieting Title], as does the legislature. (RCW 58.17.210 and RCW 58.17.030). It was called for in statutory and regulation-based, protected First Amendment inquiry under LUPA. (2:3-4, WSB 101) That identification would have occurred *without* trial under the RCW 90.58.140(4) notice, if provided by defendants as land division in shoreline requires. It would have followed the mediation documentation without trial that attorney/defendant Ron Morgan obstructed. Protected LUPA inquiry and challenges, uninformed by a definition from trial court or agency records, commenced after the Supplemental Conclusion disclosed defendants' effort at denial of access to the proper forum for plat alteration. Attempted clarification from Whatcom County Planning and Development ("WCPDS", the "Agency") was without success and is certainly non-frivolous inquiry given jurisprudence limiting judicial authority over land division.[8] It is not

frivolous to

[8] The legislature did not override a veto of at Ch. 134, Washington Laws 1974 1st Ex Session (43rd Legis. 3rd Ex. Sess. pg. 372), withholding judicial land division authority.

the legislature, future owners, or "public health, safety and general welfare" either. (RCW 58.17.010. Hanna v. Margitan, 193 Win. App. 596; 373 P.3d 300 (2016))

IV. ASSIGNMENTS OF ERROR

A. The Respondent assigns error to the following findings: 4, 5, 6, 8, 12, 20, 25, 30, 32, 33, 42,43, 44, 47, 45, 47,49, 54, 57, 63, 66, and 68.

B. The Respondent assigns error to the following Conclusions of the Hearing Officer. I, II, III, IV, V.

V. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Did the hearing officer's determinations relieve the Office of Disciplinary Counsel, "ODC", of the burden of proof and duty of protection to avoid chilling protected First Amendment redress inquiries following defendant's discovery violation?

B. Is discipline for using methods of obtaining evidence in the absence of any LUPA guarantee of equal access to permit enforcement decisions constitutionally arbitrary and a capricious regulation of the practice?

C. Since in these proceedings the agency director informs that the agency's specific development denial was final for lack of appeal by defendants; and defendant admitted to waste for that purpose in his deposition; defendants' attorney admits to a crafting a result that moved a corner

farther from roadway for interests of nonparties and no other interests were identified in an Answer, was LUPA filing after denial of a required Appeals Board Answer a form of protected First Amendment inquiry for which adjudging motivation is inappropriate discipline as applied?

VI. STATEMENT OF THE CASE

Resistance to informal plat alteration, grounded in regulatory support, is not frivolous. RCW 58.17.215. Hanna v. Margi tan, 193 Win. App. 596; 373 P.3d 300 (2016) (informal plat alteration argument not frivolous). Notice of the scope and duration

of development authorized in Whatcom County is not readily available. Efforts charged as frivolous or following improper motivation followed nondisclosure by defendants in litigation and under shoreline law, meaning that information necessary to a knowledgeable decision whether to appeal was withheld. Pleas to a title court to clarify with a decree failed.[9] Agency records do not allow ready public access to fill authorization's location (66:9-16 R.EX. 291). The Director of the department cannot from agency records determine the extent of approvals for fill development. 100:6-16. 106:3-20,108, R. Ex 292. Defendants gave no land division notice, and withheld interests of others from disclosure in their Answer (Para. 2.3, R. EX. 1; R. EX. 3), prolonging disclosure whether a plat amendment or lot corner adjustment was sought.

An ODC witness, attorney Shepherd, disclosed interests of others that could not be tried and quieted, but he has recommended a third lawsuit. (30:8-17; 35:22-25, 37:9-11, Hearing Transcript December 20, 2016; and see, *fn 32).*

Although corner adjustment occurs anytime it is moved further from the road and access, change expressed in WSB 16, to WSB 26, conclusion Nos. Eight was accompanied by no such disclosure, even to the court. Opportunity for trial addressing impacts of RCW 58.17.030, .195, .210, .215, and .300, could not be reached by courts or an agency charged with distributing required shoreline notice. RCW 90.58.140(4). Washington regards plat alteration and land division issues as only *reviewed* by its courts after *final* agency decisions.[10] Late disclosure of interests of others and an unarticulated land division goal, without a judgment or decree locating the result "forthwith," for "all parties," in "*15* days," (CR 54(a)(1); Cr 54(b), (e)) denied notice necessary here.

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[9] 7:11, 13:18,20,24;14:2,5,20;24:23-24;15:11,17, R.Ex 290 to Even the doctrine of res judicata barring litigation requires a final judgment by a court with jurisdiction as opposed to land division review jurisdiction (Kates v. Seattle) with agency action linked by RCW 57.17.210 to land division validity. Ensley v. Pitcher, 152 Wn. App. 891; 222 P.3d 99; 2009; Restatement of Judgments § 68, comment (a)(1942).

The need to "assist a client to make a good faith effort to determine the validity, 3 scope, meaning or application of the law" of jurisdictional conflict between due process and finality -the role of court and local agency contributions to finality- arose because defendants changed Supplemental Conclusion Eight (RPC 1.2(d)), making uncertain and impossible the naming of area orphaned before any decreed location approved by the local land use planning agency

Washington's Constitution, Art 1 §21 access,

on unreached land division and protected First Amendment inquiry stand abused by introduction of other interests the court cannot determine for lack of Answers (Defendants and the agency). Professional standards provided no hierarchy or guidance, for eliminating RPC 1.3 diligence or allowing participation in the web of nondisclosure. Application of standards without notice regulates the practice of law arbitrarily and, in litigation that turned to petition conduct seeking records of the extent of approvals, unconstitutionally burdens First Amendment petition-style redress with a reach beyond commercial practice of law into private civil litigation made essential to self defense conduct aimed at restricting First Amendment inquiry into the denial of notice also required by statute (RCW 90.58.140(4). After nondisclosure denied the value of a title trial's ability to quiet all interests, Washington's privileges and Immunities protection, (against values urged as greater support for denial of access to land division review), guarantees that the Spirit of LUPA preclusion can not extend to nondisclosure of compliance with RCW 58.17.210 shielding disclosure of corner change after a title trial.

August 19, 2014, a remand order corrected the conclusion five stating that Plaintiff's *do* have title. Because Court of Appeals opinion held Conclusion Five inconsistent with an equitable sale remedy, the title trial court reversed that entry as inadvertent. The period of error with no pronouncement denies Cottinghams' ability to show standing. Defendants did not appeal the difference between two entered conclusions Eight, resulting in an utterly confused Agency that has no person who determines whether permits are issued in violation of RCW 58.17.210. (21:15-22; 54:15-21, R.EX. 1). Perhaps chief among

these is denial of authority during appeal to address misrepresentation of material regulatory directive under CR 60(b)(4)(1 1). Well before trial defendants had prevented monumentation essential to ordered mediation consummation. Propensity to retaliate and suppress protected RCW 4.24.500 and First Amendment inquiry from an agency was already established. (22:5-11; 24:19-25:4, R.Ex.293).

Respondent pleaded[11] for opportunity to be heard clarifying location by a decree. His next opportunity to be heard, May 8, 2012, concerned the last material cause of equitable sale award for driveway, septic placement. The court struck the CR 60(b)(4)(1 1) hearing, perhaps under the old authority that required leave, but allowing no opportunity for a record despite current understanding of RAP 7.2(e) terms requiring a hearing. (R.Ex.306).

Increased inquiry of the agency became necessary to understand where the mandatory enforcement of WCC 23.50.02(B) would apply. The agency would not respond to appeal with an ordinance required Answer, or forward appellate process or Answer to inform why. A baseless counterclaim appeared from a migrating corner absent permitting.[12] A decree for Joan Cottingham resulted when migration (1) finished moving; and, (2) was approved, naming the orphaned property.

Unapproved plat alteration, land division or corner adjustment is regulated in interests of health, welfare, and safety, (RCW 58.17.010) and aids the finality of judicial proceedings after compliance, (RCW 58.17.030 and WCC 21.11.010), with RCW

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[11]7:11, 13:18,20,24;14:2,5,20;24:23-24;15:11,17, R.Ex 290

[12] There are three types of baseless litigation: first, where the lawsuit is objectively baseless and the motive to sue was unlawful; second, where the conduct involves a series of lawsuits "brought pursuant to a policy of starting legal proceedings without regards to the merits" and for an unlawful purpose; and third, if the allegedly unlawful conduct involves intentional misrepresentations to the court. Sosa v. DIRECTV, Inc., 437 F.3d 923, 938 (9th Cir. 2006); Kottle v. Northwest Kidney Centers, 146 F.3d 1056, 1060 (9th Cir. 1998) (discussing the first and second types of baseless litigation).

90.58.140(4) shoreline zone notice allowing opportunity to notify a class of persons of opportunity to record interests.

If a shared plat corner was becoming a split corner, hopefully WCC 21 (R.Ex.228) approval will inform where it lies, *i.e,* whether corner for Cottinghams is still located at railroad. An agency may well deny approval of plat alteration[14] or lot corner adjustment, except as a short plat.[15] (WCC 21.03.060(4) R.EX. 207) Valuable constitutional interests in finality and in access to the proper forum continue, standing denied by absence of disclosure, and disregard of the agency forum, (RCW 90.58.230 notice and WCC 21.03.060 compliance. R. Ex. 228).

Notice of interests of others for whom corner adjustment was introduced after trial, as decreed three years after trial, would have been disclosed if discovery were not denied by abuse of the self-applied[16] residential exemption from notice, (RCW 90.58.140(4)), to intentionally avoid such notice,[17] though disqualified by division.

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[13] A Health Officer warned of the assessors' record of lot dimension. 76:20-78:14, R.EX. 281. Defendants' attorney Shepherd (ODC witness) informed the trial court that defendants did not "want" part 57:9-10, R.EX. 288, and

"we really don't need a legal description" 63:5-6 -in title proceedings- so when Conclusion 8 with a corner "at railroad" (WSB Ex 16) became *Supplemental* Conclusion Eight "not at railroad" (WSB 26) without a court pronouncement, the permitting agency that had not completed approval was confused (54:15-21, 69:6-10, R.EX.291), until an undocumented, *ex parte* meeting with Shepherd (54:15:25, *Id)* that should, given land division and responses to notice, be public. No limited "scope of work" is allowed to eliminate of the railroad extent if the plat called for that extent in its dedication language. (50:6-14, 50:2151:8, *Id).* **The plat does.** 4:3-25, WSB 48; (location was *defendant's* choice 109:13-16, R.Ex.280; and also Show Cause Declaration, 5:9-13, WSB 48). Defendants employed such reach to railroad in their denied reconsideration motion (3:11-12, 17, WSB 10). Land division required shoreline-zone public notice. RCW 90.58.140(4).

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[14] Inquiry, even litigation regarding informality in plat alteration was held nonfrivolous in Hanna v. Margitan, 193 Wn. App. 596; 373 P.3d 300 (2016).

[15] The interest in notice of platting is fundamental as well. Gardner v. Pierce County Comm., 27 Wn. App. 241; 617 P.2d 743; (1980)(fair opportunity to exhaust the administrative process required).

[16] Whatcom County is prohibited from participating in determination of the self-applied residential exemption from public notice. Applicants alone can deny notice. WCC 23.60.02.3.C, pg. 44, R.EX. 207.

[17] Evidence in the record reflects retaliatory motive by defendant Ron Morgan, focused upon protected RCW 4.24.500 communication by Respondent, first by disclosure of an urge to make the matter of a civil complaint "personal" at the first communication of opposition to his trespass (which the title court found was

without probable cause, failing the defense in RCW 64.12.040). His counsel joined in his demonstration of the anger by justifying Morgan's retaliation as responsive to protected disclosure to a police power agency - in demonstration to Respondent as a witness-. (130:21-25; 131:4-23; 141:12-23; 142: 20-25; 143:5-16; 145:12-20; R. EX. 293). Numerous mediation resolution letters are excluded here, (withdrawn R.Ex.354-369) delivered to ODC counsel, but their exclusion is now clear prejudicial error given the Examiner's inclusion of a Finding 63 regarding mediation credibility as to Attorney Shepherd. Assault by defendant Ron Morgan prevented consummation of mediation by monumentation (WSB 11,

After pleading that the court tie its resulting location to decrees for certainty because of Conclusion Eight's change (R.Ex.290, April 20, 2012), a May 8 2012 hearing to consider misrepresentation was stricken without allowing even a record. The court refused further hearings by an unfiled email during appeal (R.Ex 307, *unfiled* 306).

Because no record was allowed, the Court of Appeals also would have no idea of the trial court position on materiality of misrepresentation. Respondent had to request leave from the Court of Appeals to proceed with a CR 60(b)(4) and (11) motion *without any* hearing or record, despite language of RAP 7.2(e). Support was crippled, as is the defense here, without the trial court position on whether development directives were substantially material to equity. The merits were never reached, while notice of conflicting standards could not be more pronounced, *e.g.* between diligence (RPC 1.3), constitutional violations. The charged standards received no trial court pronouncement. [18]

Except as mentioned at Hearing Transcript

(64:5-65:19, December 20, 2016), most effort of Respondent entered *before* defendants fixed and clarified their location of change to Supplemental Conclusion Eight's result by decree. But that decree is for *defendants'* property only. (December 9, 2014, WSB 211). Before it, "all" of lot Eleven (Finding Nos. Eight, Twenty Two, WSB 16) reached <u>the railroad plat</u> (expressly included in Conclusion Eight WSB 16, *and* that railroad was expressly made the "true point of beginning" of Cottingham's title in summary judgment. WSB EX. 9:2:8-3:3). Now what is upland from defendants' decree is "orphaned" and cannot be called "Lot Eleven." No Hearing Officer Finding addresses this lesser location down slope resulting from the Supplemental Order Quieting Title (WSB 211), or the required administrative response to the orphaned property division when the Order on Remand (WSB 198)

R.EX. 34, 36) with use of recitation of an ethical rule by Respondent (4:16, 5:18; .EX. 13) and absence of any evidence of timely monumentation assurance by Morgans' counsel not only caused trial, but caused need of self defense and defense of others, obvious prejudice to need of certainty police may act upon next time. Morgan admitted no responsive communication of ill will, harassment or unprofessional behavior by Respondent Cottingham. 117:5-19, R.EX.294.

[18] A determination under RCW 64.12.040 was made that treble damages were due since probable cause to believe property was defendants Morgans was not shown. The absence of probable cause was applied.

returned its proof of title. Since the agency denied its Answer and cooperation (Twenty (20) Days per WCC 2.80.060 (R.Ex.216), it is deserved again after Supplemental Conclusion Five correction. *Thun*,

Norco analysis (and Williamson, cited therein),applied all the while, requiring exhaustion as predicate to federal claims.

The Administrative Appeal (WSB 95) for which Answer was required -unless "unappealable" [19]and outside LUPA- is the letter to clerk Drake. (R.EX. 274) The Appeal allowed focus on fill development alone. It asserted that no safety issue appeared at initial project review (pg. 4), but need of "inspection for compliance" (pg.2), at "driveway"(pg. 1, 3), was required. The letter informed that defendants asserted to the trial judge that access for safety and firefighting was insufficient (pg.4), and that determinations did not locate a corner. Plat contradiction "of the extent" of the applicant's lot is identified (pg.3). A second appeal was immediately filed (R.Ex.263, 264) because the agency notified it claimed right to redirect Respondent's appeal (Drake letter, R.Ex.273).The agency finally had to disclose (because jurisdiction just continues per Ferguson v. City of Dayton, infra) that it had placed a "hold" on both appeals. No evidence shows notice to Respondent of a "hold." (R.Ex.266). The director testifies that there is no authority to hold appeals. (83 :21-24; 70:21-26, R.EX. 291). No idea allowed notice that a decree would be delayed by defendants while Respondent needed agency cooperation. (109:21-113:4, R.Ex.292) Only resuming the appeal obtained this disclosure.[20] The delay is regarded in Mellish[21] as "absurd," contrary to mandates, but delay only extends obligation to complete the appeal[22] despite being claimed by an agency giving no notice.

Equal access to information was being denied, impairing a protected First Amendment Right of Petition, even after the trial judge awarded area for "minimum

[19] 52:18-21, R.EX. 291.

[20] Resuming appeal also obtained disclosure that appeals are not forwarded until a Staff Report is done. R.EX. 331. If Final approval is "unappealable" the agency would have disclosed this twenty months late.

[21] Mellish v. Frog Mountain Pet Care, 154 Wn. App. 395,225 P.3d 439 (2010), overruled other grnds, reconsideration allowed), 172 Wn.2d 208; 257 P.3d 641 (2011)("absurd"...to allow a county to delay a LUPA appeal indefinitely).

[22] Ferguson v. City of Dayton, 168 Wn. App. 591; 277 P.3d 705 (2012).

setback purposes" (WSB 26 2:17-18) . Knowledge of where the mandatory expression of setback would be applied could overcome confusion introduced by defendants (Hearing Transcript 63:6 8; 63:29 (not "as platted"); 64:5 (not described in judgment)). Appeal after a Supplemental decree was required to preserve First Amendment redress with plat alteration/lot corner adjustment ahead.

No inspection of pervious surfaces occurred by the date of the Hearing Officer's Final Occupancy Finding (October 25, 2012, Finding, (see pg.2, R.EX. 238; ODC/WSB 94)). Whatcom County's attorney informs no forwarding of original appellate process, even to the Hearing Examiner, occurs until a Staff Report. (R. Ex.331 May 5, 2014). The Staff Report took twenty months. (July 8, 2014, R.Ex.266) No knowledgeable appeal could include the agency position when a LUPA position was filed November 21, 2012. The court's result confused[23] the agency, at least until ex parte communication from attorney Shepherd. *(54:20-25,* R.EX. 291) RCW 90.58.140(4) required notice and opportunity to be identified as a

party for land division. (R.Ex.222; WCC 23.50.44, pg. 22, R. EX. 207). No one informed the agency of land division. (51:5-8 R.EX. 291) Revision is required if less than the whole lot was disclosed (33: 8 - 11; 51:1-4; 50:21 - 51:4, R.Ex. 291) No one informed that the result did not abut the railroad (25: 5-11 R.EX. 291). However, equal access of third parties to due process and records necessary thereto is express or implied:

> "We apply our conventional analytic framework. See Crown Point I, LLC v. Intermountain Rural Elec. Ass'n, 319 F.3d 1211, 1217 & n.4 (10th Cir. 2003) **(rejecting distinction between inquiry** for "due process claims brought by a landowner who received an unfavorable decision on its own application for a particular land use" and **inquiry for claim brought "challeng[ing] the decision ...** to grant **[a third-party's] proposed land use")"**

Shanks v. Dressel (citations omitted) 530 F.3d 1082 (2008) (emphasis added).

> "By the time they realized that the meaning of the word "subdivision" in SMC 23.24 was in question, DCLU had already issued the permit, and litigation was underway. At that point, it would have been useless to seek an interpretation. Therefore, appellants had no administrative remedies. ... relief

[23] 54:15-21, R.EX. 291.

> must await a determination of whether there has been a substantive violation of the subdivision laws. No such

determination has yet been made. "
Kates v. Seattle, 44 Wn. App. 754; 723 P.2d *493(1986) (emphasis added).*

The defendants' Answer guided title litigation and it guided service of Respondent's Notice of Appeal. No one else was interested in the property by any conclusion of the title trial court.[24] Defendants themselves had urged need of permit completion in argument.[25] Although ODC Shepherd witness testified to two_Northeast corners, no application for exemption from required land division is of record and unapproved division impairs marketability.[26] The corner of Respondent and his client, Joan Cottingham, remains undecreed, undistinguished and the division of land unaddressed by the agency. What was a fundamental interest in notice essential to legitimate division of land,[27]denied, now impairs ability to defend with required substantive agency determinations negating the frivolous view within the limited scope of the administration of justice permitted in the judicial system. The procedural due process, and protected expectancies in agency application of existing regulatory schemes,[28] which judicial effort can only follow in *review, per Kates v. Seattle,* require substantive determination. With chance that final approval included the unapprovable movement of the common corner, Respondent sought setback enforcement as preliminary Answer to

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[24] RCW 7.28.010 standing is grounded in the assertion of a "valid and subsisting interest."R.Ex.226

[25] RCW 58.17.210 prohibits permitting for" land divided in violation of this chapter or local regulations adopted pursuant thereto unless the authority authorized to issue such permit finds that the public interest will not be

adversely affected thereby."

[26] See, also, RCW 58.17.030 and .300 (denying marketing absent compliance).

[27] WCC 21.04.020 provides that "[a]ll divisions of land into four or fewer parcels shall require short subdivision approval from Whatcom County unless: (1) The division is specifically classified as an exemption or boundary line adjustment under WCC 21.03; or [other provisions inapplicable];" and WCC 21.11.010 provides that "[n]o land comprising any part of a proposed land division in the unincorporated area of Whatcom County shall be sold, leased, or offered for sale or lease unless approved under this title. Any person being the owner or agent of the owner of such land who shall sell, lease, or offer for sale or lease any lot or portion thereof shall be guilty of a gross misdemeanor. Each sale or lease, or offer for sale or lease shall be a separate and distinct offense for each separate lot or portion of said land. (Ord. 2000-056 § 1)."

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[28] RCW 58.17.195.

the agency's reading of Supplemental Conclusion Eight without a judgment or decree's identification.

Within professional standards, no notice is provided as to whether RPC 1.3 diligence must yield when -after trial- defendants' wish to subtract area for interests undisclosed by their Answer, resulting in post-trial division of land that the court must rely upon agency approval to complete[29] which, absent compliance, prevents a decree without naming the previously platted, upland orphaned area. No notice of Supplemental Conclusion of Law No. Eight change was clear for three years.30 (WSB 211)

Respondent represented his wife Joan Cottingham31 and himself pro se, believing defendants' Answer that no others were interested in property defendants sought by counterclaim.32 Before disclosure of claim that division required

agency compliance under RCW 58.17.030 and WCC 21.11.010, safety was at risk when defendant's assault prevented mediation consummation's monument.

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[29] WCC 21.03.040; WCC 21.03.060(2),(4).

[30] When asked about a legal description in these proceedings ODC Witness Shepherd could point to none. 24:23-24 Hearing Transcript, December 20, 2016. That is because after trial he informed the title-trial court December 15, 2012 in closing "We really don't need a legal description." 63:6-7, R. EX. 288. January 3, 2012. His attention to legal description was evident however, when Supplemental Conclusion Eight dropped language calling for abutting the railroad, weeks later, presented by him February 1, 2012. Supplemental Conclusion Eight entered without disclosure that he had dropped the language to abut the railroad. No disclosure of the meaning or impact on land division regulations was raised by defendants.

[31] Respondent's client, Joan Cottingham, Respondent's wife, deserved RPC 1.3 diligence and should be under no disability because of Respondent's ownership in the property. She is entitled to protection of the First Amendment right of petition for redress in a matter introducing jurisdiction shared between two branches of government after she and her attorney were denied RCW 90.58.140(4) notice of need for lot corner adjustment/informal plat alteration/or short plat approval.

[32] Defendants Answered Respondent's pleadings, admitting no others were interested but, divided for the sake of interests of others, RCW 58.17.030 required application for agency determination and compliance with WCC 21.11.010, the adjustment for having created an additional lot. WCC 21,03.060(2). Assessor investigation of resulting lots requires careful

investigation, appraisal and creation of tax accounts. If WCC 21 procedure were to be ignored then defendants could have litigated a right to notice or application under RCW 58.17, RCW 90.58.140, and the class of interests for which standing is allowed under RCW 90.58.230. For representative illustration of a slice of analysis due the constitutionally protected expectancy in notice, and troubling to notice necessary to resolution of professional standards conflicts (but not as controlling Washington authority) , see the Dissent in Garcia v. Helens, 34189-5-III (May 9, 2017)(comparing authority).

Understanding where another assault by defendant Ron Morgan finally deserves police power response, protection and enforcement remains denied. Litigation was directly related to self defense and defense of another, awaiting a decree which may name the resulting corner for Respondent. Any notion that RPC 1.3 diligence should be retreated from, to the risk of assault without police power protection, is constitutionally arbitrary given the denial of land division notice and need of substantive agency corner.

Until required agency determinations enter, the impact of constitutionally substantive violations and procedural bad faith[33] (asserting land segregation due to the interests of others), is unavailable. Respondent cannot yet fully defend against1rofessional sanctions by asserting substantive value of agency finality, but that is the constitutional point of Norco Const., and Thun, see, 44, and since partial taking of record corner certainty and fundamental interest in substantive land division also awaits administrative results, per Kates, infra, trial court change in Supplemental Conclusions6 Five and Eight must be asserted as depriving proceedings and appeals of their

legitimacy; (Kearney, infra), pursuit of finality being substantially and constitutionally legitimate. The Whatcom County Hearing Examiner recognized the merit in the appeal saying the agency will "still have a job to do" (22:16-24; 43:22 - 44:20; R.Ex. 284). WCC 21.11.010 and RCW 58.17.030 say so as well, so finality awaits (Kates) but awaits an approved agency description if orphaned area cannot (per Supplemental Conclusion 8d the Supplemental Order Quieting Title) be "Lot Eleven." The Hearing Officer's determinations have addressed neither this remaining duty, nor the substantive constitutional impact of denied notice of proposed RCW 58.17.030 approval in the shoreline zone.

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[33] See, Hedger v. Groeschell, _ Wn.App. _ (No. 74149-7-1, May 15, 2017)(citations therein).

Notice necessary to understanding guidance of RPC 8.4, 4.4 and 3.1 must 3 recognize that retaliation for First Amendment communication necessary to inquiry, exhaustion, administrative redress, recovery from nondisclosure in defendant's Answer, and appeal was substantially urged upon the title trial court. The ODC witness knowingly, but not disclosing, that he was about to increase the need for such inquiry by introduced change away from railroad location, to a judge he had informed did not need to worry about a legal description, for resulting unapproved land division (15:10-22 WSB 23, January 26, 2012) without trial court pronouncement or any proposal for plaintiffs resulting corner. He unfairly increased cause for greater agency disclosure, Cottingham's inquiry and loss of record corner certainty for lack of a decree. Attorney Shepherd admitted disclosure of (1) his lack of response June 2011 to the need to

communicate for mediation's resulting on-site location after defendant Morgan's assault during Cottinghams' service to the court's order, and (2) his client's marginally disclosed change in corner location expression benefiting the parties he had prejudicially left undisclosed in an Answer. If failure of settlement was his point, that date brought no clarification from or disclosure to the court. Conclusion changes announced punishment for Respondent's appeal notice. Without agency approval, Washington's strong policy denies even the offer of divided land for sale. But minimal entry "into the record" (RCW 36.70c.040(4)(c)), even to enforcement decisions (RCW 36.70c.020(2)(c)), a constitutionally protected accessash. Const. Art. 1 §21) to address mandatory expressions of enforcement are at risk without any assurance of timely availability of that record, as occurred here.34 (104:22 -25, R.EX 292).

[34] Fill development all the way to the public road beyond title is depicted in R. Ex. 278a, (compared with defendants' R.EX. 239, pg. 5) the agency was not informed of this fill development. (118:24 - 119:4. R.Ex.292) It can not be shown permitted by any written record. R.Ex.291-292. The public is unable to ascertain from records the scope and duration of authorized fill development. 100:6-16,106:3 - 20,108:20

Unless RPC 1.3 should yield when enterprising efforts corrupt the public process,*(See,* Kearney, White v. Lee, and compare: Three attorneys each targeted First Amendment protected inquiry here), the record is startlingly demanding of public participation (RCW 90.58.230), for discovery of land division and segregation of interests unapproved in the shoreline zone. Substantial

evidence does not support frivolous conduct on this indelible record holding no notice, requiring trial after obstructing a mediated result, allowing no decree for Respondent or his client, no judgment defining corners of Respondent or his client, and no judicial authority over land division except as under application and approval under WCC 21. Minimal standards protect against use of LUPA preclusion in Washington Courts to arrive at color of law, loss of access and loss of required WCC 21.03.060(2) determinations. The Hearing Officer substantially relieved ODC from the burden of clear and convincing evidence in advance of agency approval

Notice as to whether permitting was limited to Fill on contiguous title was essential to appraisal of available access to an administrative forum's record as a party under RCW 90.58.140(4).[35] As the Remand Order demonstrated, August 20, 2014, development was on Cottingham property[36].

Chilling Respondent's inquiry into "Fundamental" (Kates v. Seattle) land division redress before the agency forum best able to address divided lands, is impermissible.[37]

The Director of WCPDS would not employ agency records to attempt to disclose the extent of approvals for fill development. R.Ex.292, but denial of driveway in setback, unappealed by defendants, was final. (66: 9 - 16, R.Ex. 291) The agency refused inspection of the location of Fill. (104:22-25, R.Ex.292); WSB 94.

[35] Standing in residential exemptions from notice is entirely dependent on unapproved, applicant-applied disclosures, e.g. that fill is not on title of others or land division is not involved (WAC 173-27-040(2)(g) but no statement of exemption actually enters WCC 23.60.02.3.c, pg.44, R.EX. 207.

[36] Land division and Nonownership disqualified the residential exemption from notice essential to due process. (35:19-37:9; 51:5-8, R.EX. 291 (Deposition of

agency director, 6:23-7:17, Id.))
[37] White v. Lee, 227 .3d 1214, 1227 (9th cir. 2000)(Noerr Pennington doctrine protects losing as well as winning lawsuits, so long as they are not objectively baseless; affirming denial of dismissal on qualified immunity grounds, officials argued that they were required by the Fair Housing Act to investigate whether the neighbors had filed a lawsuit in state court with an unlawful motive; "investigation by the HUD

These proceedings carry that capacity. Now, Constitutional facts[38, 39] arise to require First Amendment protection of the right of redress and, in advance of that exercise, the equally protected right of inquiry ensured by equal protection and Washington's more protective (against moneyed interests) Privileges and Immunities. Equal access to agency records reflecting actual scope of permitting and access to the proper forum was lost with loss of record of certain lot corners. Strict scrutiny of findings as well as the standard applied is essential. All standards applied to limit inquiry are inherently suspect.[40]

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officials unquestionably chilled the plaintiffs' exercise of their First Amendment rights"). Even "chilling" petition is illegal. *Id.* at 1224.

[38] The right to seek redress is guaranteed by the First Amendment. It extends to agencies as well. CA Motor Transport co. v. Trucking unlimited, 404 U.S. 508, 510 (1972). Davis v. Cox (First Amendment jurisprudence applied to Washington's constitutional right to jury trial (Art 1 sec. 21) regardless whether equity jurisprudence); White v. Lee, 227 .3d 1214, 1227 (9th cir. 2000)(affirming denial of dismissal on qualified immunity grounds, officials required by HUD to investigate whether the neighbors had filed a lawsuit in state court with an unlawful motive; "investigation by the unquestionably chilled the plaintiffs' exercise of their First Amendment

rights"). Even "chilling" petition is illegal. Id. at 1224. An injunction would be improper if there was "any realistic chance that the plaintiffs legal theory might be adopted. Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731 (1983). Immunity during state-court lawsuits that are pending is broad. Evans v. County of Custer, 745 F.2d at 1204("the first amendment's protection of the right to petition the government for redress of grievances" encompasses the right of homeowners to challenge such property-related decisions by local government as road access rules.).; Attorneys can play an important role in exposing problems with the judicial system, see Oklahoma ex rel. Oklahoma Bar Ass'n v. Porter, 766 P.2d 958, 967 (Okla.1988). The Supreme Court has held that speech otherwise entitled to full constitutional protection may nonetheless be sanctioned if it obstructs or prejudices the administration of justice. Gentile v. State Bar of Nevada, 501 U.S. 1030, 1074-75, 111 S.Ct. 2720, 2744-45, 115 L.Ed.2d 888 (1991); see Sheppard v. Maxwell, 384 U.S. 333, 363, 86 S.Ct. 1507, 1522, 16 L.Ed.2d 600 (1966). Given the significant burden RPC rules can place on otherwise protected speech, prejudice to the administration of justice must be highly likely before speech may be punished.

[39] Disciplinary rules governing the legal profession cannot lightly turn toward punishing activity protected by the First Amendment. It would be regulating the profession as a whole. See, e. g., In re Primus, 436 U.S. 412, 56 L. Ed. 2d 417, 98 S. Ct. 1893 (1978); Reed v. Gilbert, 135 S. Ct. 2218 (2015)(regarding the application of strict scrutiny to a facially content-based law). The professional standards must not encroach upon and become laws that target speech based on its communicative content. They are presumptively unconstitutional and may be justified only on proof that they are narrowly tailored to serve compelling state interests. Even where the government might have a

"benign motive" or "content-neutral justification" for the law, that law is subject to strict scrutiny if it is content based on its face. *Id.* at 2228. There is no recognized exception from strict scrutiny for regulation of professional speech. In Reed NAACP v. Button, 371 U.S. 415 (1963), predated its "more recent formulations of strict scrutiny," the Court rightly rejected the State's claim that its interest in the "regulation of professional conduct" rendered the statute consistent with the First Amendment, observing that "it is no answer.. . to say ... that the purpose of these regulations was merely to insure high professional standards and not to curtail free expression." Reed, 135 S. Ct. at 2229 (quoting Button, 371 U.S. at 438-39)

[40] "[T]he rule of independent review assigns to judges a constitutional responsibility that cannot be delegated to the trier of fact." Bose Corporation v. Consumers Union Of United States, Inc, 466 U.S. 485, 104 S.Ct. 1949, 80 L.Ed.2d 502.(1984).

Though RCW 7.28.010 limited quiet-title's standing to "valid and subsisting interest[s]," ODC witness Shepherd informs -without naming others and after serious inquiry effort- that the upland corner in Resp. Ex 278a was paid for to disseis Cottinghams for unpleaded others, and he "told the judge" defendants "did not want" this property. 24:23; 25:3-16; 28"1-7; 32: 7-10; 36:16, Hearing Transcript, December 20, 2016.41 Arguing that plaintiff Cottingham had had his chance "to get money" (19: 22-25, R.EX 283) the change was for advantage on appeal. (19:8, Id). A meaningful, constitutional appeal with due process notice required disclosure of a disseisin-for-others goal.[42] The orphaned area of the Order on Remand now requires a decree,[43] after agency approval and a name. Payment of taxes, even excise tax on any

transfer requires this. If agency review under WCC 21.03.060 discloses creation of an additional lot, and that creation was before permitting and without disclosure, then the legislature's prohibition against transfer applies, RCW 58.17.210. Safety standards of the zone apply (RCW 58.17.195) including those to creation of roadway.

RPC 1.2(d) allowed Respondent to assist challenge of the scope of permitting, lawfulness of land division for which no approval was applied, and lawfulness of lot corner adjustment, actually operating as unapproved plat alteration, upon a good faith belief that no valid LUPA preclusion exists when the judicial branch has been used to initiate and partially finalize creation of another lot. Challenge to the current complaint's elevation of RPC 4.4 and 8.4 over RPC 1.3 RPC 3.2 over the Supreme Law of the Land operates as regulation of the practice of law that suppresses, chills, and denies breathing

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[41] Nothing reveals the trial court as intending approval of land division, creating jurisdiction to do so or ignoring the governor's veto (at Ch. 134, Washington Laws 1974 1st Ex Session, pg. 372) when it enacted RCW 58.17.030 requiring compliance with local ordinances respecting land division, denying permitting of divided land, and denying offers for sale of unapproved divided land as lawful. Though legislation purporting to deny access to a constitutional court jurisdiction is void and

[42] Seisin cannot abide in two claimants at the same time. Blake v. Shriver, 27 Wash. 593; 68 P. 330 (1902).

[43] Kobza v. Tripp, 105 Wn. App. 90; 18 P.3d 621 (2001)

room. RPC 1.2 authorizes challenge to the manner of ODC regulation of the profession as applied to these facts. Without records disclosing ability to

knowledgably assert scope of land division and scope of fill authority as exceeded, access to the agency forum after required notice in the shoreline zone had been denied during erroneous denial of title's standing. A duty to "use legal procedure for the fullest benefit of the client's cause" arose.

Notice whether nuisance must employ LUPA is spotty in Washington, but progressing. Assuming that subdivision violation as a nuisance was developing due to RCW 58.17.210 9 but without the decree nearly identifying the survey (December 9, 2014) Wash. Const. Art. 1 § 21 guaranteed access to courts could be lost in 21 days (in a manner as unconstitutional as the stricken SLAPP statute, see Cox v. Davis). Tiegs v. Boise Cascade Corp., 83 Wn. App. 411, 922 P.2d 115 (1996); Grundy v. Brack Family Trust, 116 Wn. App. 625 (2005); Grundy v. Thurston County, 155 Wn.2d 1; 117 P.3d 1089 (2005); Asche v. Bloomquist, 132 Wn. App. 784 133 P.3d 475 (2006); Moore v. Steve's Outboard Serv., 182 Wn.2d 151; 339 P.3d 169 (December 11, 2014); Heller Bldg., LLC v. City of Bellevue, 147 Wn. App. 46, 55-56, 194 P.3d 264 (2008); WCHS, Inc. v. City of Lynnwood, 120 Wn. App. 668, 679-80, 86 P.3d 1169 (2004); Fn. 6, 13, Durland v. San Juan County, 174 Wn. App. 1; 298 P.3d 757 (Sept. 5, 2012). As to continuing jurisdiction if final approval is appealable but the county is confused, see Ferguson v. City of Dayton, 168 Wn. App. 591; 277 P.3d 705 (2012), error in dismissing a Land Use Petition, noting (emphasis added):

> "[F]ocus on the original building permit was misplaced because Ms. Ferguson did not challenge whether the permit should have issued. What she challenged was the changed interpretation."

For present purposes in which exemption

questions exist, Grundy is explained again in Kitsap County v. Kitsap Rifle & Revolver Club, 184 Wn. App. 252, 184 Wn.

App. 252; 337 P.3d 328 (2014), rev. denied, July 8, 2015))(finally explaining "exemption is merely one factor" in assessing reasonableness but with "no such direct authorization here. ").

Partial ripeness is disallowed when doubt exists whether the agency decision is final.[44]Administrative appeal sought Answer regarding one such control, setback, and the concern was not responded to by the permitting agency, even by the required Answer. (WCC 2.80.060, (R.EX. 216)).

RPC 4.4(a) offers a strong defense by itself. Respondent, bound to RPC 1.3 diligence with reasonable cause for the inquiry, was also directed by Washington's policy accelerating review to serve interests of developing owners expeditiously. Respondent cannot be simultaneously urged under RPC 4.4(a) to comply with the policy of expeditious review out of respect to third persons but ignore need of late-arriving land division records necessary to knowing understanding whether regulations have been dispensed with and may show that no court reached - land division.[45]

Respondent Cottingham has gone above and beyond, aiding WSB Disciplinary Board consideration by depositions of the agency director and supply of regulatory Ordinances but still cannot fully defend against the charge of frivolous conduct because the substantive WCC 21 decisions have not allowed finality. The Respondent is substantially prejudiced here by defendants' refusal to comply with WCC 21. In contrast to Hedger v. Groeschell, Wn.App. _, (No.74149-7-1 May 15,

[44] Thun v. City of Bonney Lake, 164 Wn. App. 755; 265 P.3d 207 (2011); Review Denied., Thun v. City of Bonney Lake, 173 Wn.2d 1035; 277 P.3d 669 (2012); f Constr., Inc. v. King County, 801 F.2d 1143, 1145 (9th Cir.1986)(1990).

[45] The director informs that her call did not deny obligation to enforce setback. 112:12 - 113:4, R.EX. 292; and the Hearing Examiner reflects upon enforcement and informs that the agency "still has a job to do." (22:16-24; 43:22 - 44:20; R.Ex. 284), but "[p]roject permit performance review" was specifically requested in the jurisdictional facts motion (1:20, WSB 102).

2017), Respondent could not even move for failure to give notice until a decree made surprise demonstrable.

Abuse, in retaliation for inquiry, was apparently being justified defendants by counsel, (130:21-25; 131:4-23; 141:12-23; 142: 20-25; 143:5-16; 145:12-20; R. EX. 1293), for contact with the agency. No one informed the agency of cause or exemption from notice (29:11 R.EX. 291; 111:9-18, 118:12-23, R.EX. 292) by fill, creating land division, the dedication language of the plat (extending to the railroad. (105:7-14, R.Ex.292)). No exemption was shown applied for fill beyond the proposed site. (106:14- 107:107, R.Ex.292). Road extension off-site requires return to the public notice appraisal, if disclosed. ((106: 23-25; 118:12-23, R.Ex.292), Allegra, Garrett, Weyerhauser, infra). No disclosure of fill development "extending from this site all the way to north shore road" was given. The fill development is actually surveyed as depicted in R.Ex. 278-A. (used in the present hearings with ODC witness Shepherd, infra) reflecting fill to Northshore Road.

Following the record that Attorney Shepherd informed the trial court that no legal description was

necessary (63:6 R.Ex. 288), without reference to the BLA ordinance (WCC 21.03.060(2)(4); WCC 21.04.010(1)(2)), speaking of "part" of Lot Eleven the witness frenetically testified in these proceedings as follows:

> "A. No. We never claimed ***that part.*** That got raised by Cottingham. We bought it back. It didn't belong to Cottingham. It was part of what we believed he thought Lot 11 was. It wasn't our legal description of Lot 11. We paid for that portion to Cottingham. I don't believe that portion was ever given to us in any of the findings of fact and conclusions of law because I **told the judge not to do it because there may be other people that had an interest in that portion** and we were not going to get into litigation with other neighbors when we went into a quiet title action taking away their right of way."

Clarification Testimony by Washington Attorney Doug Shepherd, Hearing Transcript 35:16-36:1. *(emphasis added here).*

The court was in fact being used for land division instead of the agency. There was no BLA approval requested and fill development was in area defendants did "not want quieted." Chelan v. Nykreim, 105 Wn. App. 339; 20 P.3d 416 (2001)(If BLA were improperly ranted LUPA would apply); Samuel's Furniture, Inc. v. Dep't of Ecology, 147 Wn.2d 440, 456, 54 P.3d 1194 (2002) (not prevented from enforcement where no application applies); Lauer v. Pierce County 173 Wn.2d 242; 267 P.3d 988 (2011) (misrepresentation of an application).

When attempting to enter a conclusion regarding "all other decisions" by Whatcom County, the witness had been corrected earlier by the LUPA

court. The interlineations by the LUPA judge are an obvious correction, striking "all other decisions," limiting its conclusion to the "**initial building permit**." (p. 5,6, WSB 130).

Appeal from the title trial resulted in opinion 68202-4-I, strongly suggesting inadvertence of the trial court by denying Cottingham's proof, so the title court reversed a conclusion that had denied proof of Cottinghams' title and disabled standing for statutory and constitutional review by record of absence of title.[46] The decree did not specify a survey but the ODC witness located what it did not include, at circled (B), (R.Ex. 278-A)(Hearing Trans. 36:4-5). A boundary line or a short plat must be approved removing defendants corner that creates area upland abutting railroad beyond circled (A) but no conclusion informs on whether Cottinghams' corner is necessarily moved also.

"[A]ll" of Lot Eleven is now at a lower waterward location (3, para. 8, WSB 26) from what was historically Lot Eleven (see, R.Ex. 242, earlier as-built septic system).[47]

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[46] Generally, Grays Harbor County v. Williamson, 96 Wn.2d 147, 150-53, 634 P.2d 296 (1981); RCW 7.16.040; Bridle Trails Community Club v. City of Bellevue, 45 Wn. App. 248, 253, 724 P.2d 1110 (1986).

[47] Disclosing that there were others interested presents jurisdictional challenge, and nondisclosure impugns legitimacy of exercise of jurisdiction, even finality. So does failure to disclose a land division goal.

Defendants developed area from which safety is also required beyond area decreed as quieted to defendants. It had not been installed within a year of the permit (R.Ex. 278-A)48 for driveway and waste.[41]

If initial permitting had not entered ex parte to public interests in notice of land division and development beyond defendants' title, a trial including condemnation would likely have been obviated by disclosures in shoreline zone permitting. But post trial regulatory decisions remain material to the cause of equity, intertwined with similar need of "marketability." (Finding 23, WSB 16, 26). RCW 58.17.300 denies marketability.[50]

Enforcing privacy of development permit conditions free from inquiry was accomplished by abuse from defendant Ron Morgan (52:16-57:5, R.EX. 295). Driveway "turn-around" was the specifically denied condition (57:3-58:10; 60:13-61:4, R.EX. 291; Exhibit G to R.EX. 34) made final by nonappeal of Morgans (66:9-16, R.EX. 291), but defendant Ron Morgan specifically wanted that "turn-around" when he committed waste without cause to believe in title (32:19-21, R.EX. 294). Since defendants also physically prevented Cottingham from locating mediated agreement's corner (15:12-17, R.EX. 36, 34), after their counsel had joined in signaling justification for abuse in retaliation for RCW 4.24.500 communication and protected inquiries, defendants' Attorney Shepherd confirmed that mediation was rejected due to such protected effort (15:12-17, R.EX.

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[48] Development beyond scope of permitting is outside LUPA (Samuel's Furniture), but ODC witness Shepherd's Response as defense counsel in LUPA proceedings, informed that defendants' footings were set no later than September 1, 2006, 5:14-15 WSB 106; Admitted to a Hearing Examiner that the agency driveway fill inspection was at the time the footings were set (45:11-18 R.Ex.284), that he is "lost in all this"). Waste for additional road/drive/access shown at R.Ex.278-A was a

year later October, 2007, Decl. David C. Cottingham, p.1 R.Ex.8).

[49] Effort was not commercial practice of law but, as admitting by ODC witness Shepherd, "protection of his family" (24:36, Hearing Trans. Dec. 20, 2016).

[50] RCW 58.17.300 provides that "Any person ...who violates any ...local regulations adopted pursuant thereto relating to ...offer for sale, ...shall be guilty of a gross misdemeanor and each sale, offer for sale...n violation of any provision of... any local regulation adopted pursuant thereto, shall be deemed a separate and distinct offense."

283), pursuit of discovery and denied public notice substantially served the administration of justice. From then on, absence of clear corners was an urgent cause for protection from future tortious behaviour because assault was connected to the purposeful ambiguity. Protected First Amendment petition was a highly legitimate pursuit of the administration of justice.

Mellish v. Frog Mountain Pet Care, 154 Wn. App. 395; 225 P.3d 439 (2010), overruled other grnds, reconsideration allowed), Mellish v. Frog Mountain Pet Care 172 Wn.2d 208; 257 P.3d 641 (2011) 51 was decided July 28, 2011, without overturning the appellate court's strong expression rejecting local agency self-dealing an extension of time ("We avoid absurd results that contradict both our legislature's intent and our Supreme Court's mandates.") Lauer v. Pierce County52 was decided the day that defendants' counsel (ODC witness here) asserted that defendants' obligation to the county permitting authorities was "not an issue" in these title proceedings (21-22:8, December 15, 2011 R.Ex.288). Ecology v. City of Spokane Valley53 was decided May 3, 2012 (five days before the title-trial court cancelled hearings May 8, 2012 by email in No 09-

2- 0 1773-1, followed by denial of all motions (R.Ex. 307, 306). Ferguson v. City of Dayton, 168 Wn. App. 591; 277 P.3d 705 (2012)54 was decided June 5, 2012, six weeks later. Five days after Respondent pleaded that the court tie its location to a decreed survey because the result was causing confusion (April 20, 2012, R.Ex. 290) review was denied

[51] 172 Wn.2d 208; 257 P.3d 641 (2011).

[52] 173 Wn.2d 242; 267 P.3d 988 (2011).

[53] Ecology v. City of Spokane Valley, 167 Wn. App. 952; 275 P.3d 367 (2012)

[54] 168 Wn. App. 591; 277 P.3d 705 (2012) ("... focus on the original building permit was misplaced.."; "There was no "land use decision" prior to the final determination by the Planning Commission, which was the entity with the last word on the permit. There also was no standing to file the LUPA petition prior to the exhaustion of the administrative review process." *Fn. 4,* "If the triggering device was the building permit rather than the review process, a government could immunize itself from LUPA petitions simply by making its administrative process last longer than 21 days.").

in Thun v. City of Bonney Lake, 164 Wn. App. 755; 265 P.3d 207 (2011); rev. den. , 173 Wn.2d 1035; 277 P.3d 669 (April 25, 2012)(partial regulatory taking is not ripe while arbitrary, unconstitutional record corner spoliation was likely delayed so long as local agency has not determined quantity and whether additional lot is created). Durland v. San Juan County55 was decided Jan. 22, 2013 three months after the Whatcom County agency director apparently decided to deny enforcement, and two months after it is understood to have decided (Staff Report R.Ex. 266) not to notify Respondent it would withhold and deny delivery of original process to two

appellate agencies, applying LUPA law. The agency had warned that redirection of appeal may occur. Expectancy of no Answer from that agency (R.Ex.273) caused 1) a second appeal to that agency to ensure Answer from the first, and, 2) proactive initiation of LUPA for knowledge of the scope of decisions in the event no answer followed. Durland v. San Juan County56 was decidedly 1, 2013 ("A superior court hearing a LUPA petition acts in an appellate capacity and has only the jurisdiction conferred by law." Durland v. San Juan County, 182 Wn.2d 55, 64, 340 P.3d 191 (2014)), while Respondent was pursuing Whatcom County's analysis of mandatory expression of enforcement (WCC 23.50.02.B) without benefit of required Answer and the current deposition testimony from Agency director Ryan.LUPA petition was unnecessary given finality. There just wasn't notice of that fact. Absent any appeal from defendants, finality already attended the agency denial of defendants' proposed setback use for driveway, now knowable as a circumstance outside

[55] 174 Wn. App. 1; 298 P.3d 757 (application of LUPA is not among the agency purposes; and see, fn. 13: setback issue which was not reached by trial court or the hearing examiner should be remanded; Hearing Examiner determined compliance plan agreements were a land use decision; Whether a land use decision under LUPA occurred is resolved by the Superior Court, not given to an agency)

[56] 175 Wn. App. 316; 305 P.3d 246 (July 1, 2013); affirmed remanded 182 Wn.2d 55, 340 P.3d 191 (December 11, 2014)(mandatory language test applied denying protectable interest)

LUPA review. Durland v. San Juan County57 was

decided December 9, 2014, reflecting the opposite of the facts here - a constitutionally protected interest in development that is not on a neighbor's property alone. Kates v. Seattle prescribed judicial delay all along for unapproved land division which defendants should have given notice of under RCW 90.58.140(4). The judicial remedy requires an agency decision as to substantive compliance or violation with RCW 58.17.030 and local regulations.[58]

Since defendants neither identify the others interested in that area, consummate alteration/corner adjustment/short plat procedure, a reasonably competent counsel would regard Kates v. Seattle; the governor's RCW 58.17 veto, infra; and Grundy v. Thurston County[59] as subordinating judicial finality to the continuing need for determination under WCC 21.03.060(2) or, if not pursued, to further judicial remedy. Defendants impaired use of inherent Wash. Const. Art. 4 §6 authority by erroneous conclusion five. Samuel's Furniture`6' holds unpermitted matters outside LUPA control.

Investigation alone can unlawfully chill exercise of First Amendment rights. (White v. Lee, 227 .3d 1214, 1227 (9th cir. 2000)). Here it occurs while defendants pursue litigation against respondent as recommended by ODC witness Shepherd, even though admitting interests of others as cause for change corner change,

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[57] 182 Wn.2d 55; 340 P.3d 191(2014)(no due process, U.S. Const. amend. XIV, § 1, Const. art. I, § 3 protected interest in permitting occurring upon neighbor's title; mandatory language requisite to cognizable property interest in enforcement).

[58] R.Ex.306, unfiled email. (Prospectively providing, in part: "I will not hear any more motions until instructed to

by the Court of Appeals"); and see, R.Ex. 307 (Providing, in part: "Independently of Mr. Shepherd's response I have reviewed RAP 7.2(e). In the interests of judicial economy and because of the impact on the appeal should Mr. Cottingham prevail, I believe that Mr. Cottingham should first seek permission from the Court of Appeals before I hear his motions.").

[59] 155 Wn.2d 1, 8, 117 P.3d 1089 (2005) (remand to accommodate due process for nuisance trial because agency was not a party in the appeal).

[60] Samuel's Furniture, Inc. v. Dept of Ecology, 147 Wn.2d 440, 456, 54 P.3d 1194 (2002) (LUPA finality and preclusion do not bar an action alleging that a person either disregarded need of a permit or violated the conditions of a permit).

VII. FINDINGS OF FACT

Finding 4. The ultimate issue concerns the one of two northeast corners an agency determination required under RCW 58.17.030: whether an additional lot was created as opposed to the ODC witness testimony as to "part". The finding is not supported by evidence of a sufficient quantity to convince an unprejudiced, thinking mind that the purchase was "as platted." The Finding ignores materiality of a common corner.

Finding 5. The building permit is distinguished from the Fill permit. The agency director's testimony establishes that driveway/road Fill permit documents allow no notice of location of Fill approvals by the agency for compliance inspection. (100:6-16. 106:3 - 108:20, R.EX.292). This fill was a year later, not in the twenty-one days of LUPA's RCW 36.70c.030-.040. See, Finding 47 error stated, infra, and fn.48. Additional road/drive/access is shown at R.Ex. 278-A, a year later[61] than initially authorized. Installation difference recognized by ODC witness Shepherd to the county hearing

examiner (43:9-46:8 R. Ex 284) The evidence is that the agency director herself could not locate Fill as authorized with agency records.[62]

Finding 6. No evidence supports a relationship as a motivating cause, but spoliation of decreed finality after common corner record movement deprives proceedings of their legitimacy. First Amendment purposes of redress are impermissibly chilled and burdened by gravitation toward acrimony in these proceedings. Bill Johnson's Restaurants v. NLRB 461 U.S. 731, 743-744 (1983). Disputes between adverse parties may generate such ill will that recourse to the courts becomes the only legal and practical means to resolve the situation. That does not mean such disputes are not genuine. As long as plaintiff's purpose is to stop conduct he reasonably believes is illegal, petitioning is

[61](Introduction, pg.1, decl. David C. Cottingham, R. Ex. 8).

[62]100:6-16;106:3-108:20, R. Ex 292. Fill development all the way to the public road is revealed in R. Ex. 278a. The agency director informs that the agency was not informed of this fill development. 24:118-119:4, R.Ex 292.

genuine both objectively and subjectively. See id., at 60-61. BE & K Constr. Co. v. Nat'l Labor Relations Bd., 536 U.S. 516, 525, 122 S. Ct. 2390, 153 L. Ed. 2d 499 (2002).

Finding 8. See, statement of error, Finding 4. Conclusion 8 contradictions (WSB 5 16, 26. See, fn. 1) demonstrate decided choice against an "as platted" result.

Finding 12. The judge informed he didn't use the eminent domain statute.63 ODC request was made to authorize such a finding. Witness Shepherd

informed the trial judge they abandoned condemnation (16:7-11, WSB Ex. 23).

Finding 20. The Finding ignores the ODC witness testimony that establishes two northeast corners, one for defendants and another further upland for others unnamed who were denied in defendants' Answer. It was admission to land division, adding land division and pulling defendants' corner further from roadway. Defendants entered Conclusion Eight at the railroad. No pronouncement allowed any notice that the court had considered lot corner adjustment requirements. Kates v. Seattle reflects how debilitating a late disclosure of land division can be. (See, quote, Finding 69). The Supplemental Conclusion Eight Change appeared after a notice of appeal was filed. These motions were brought during a period at which Substantive lot corner adjustment nuisance was arising with delay, without permitting and without notice whether inadvertence was developing into the debilitating effect of RCW 58.17.300. Notice was also sorely lacking due to absence of any pronounced decision. If there was certainty at this time, from any pronouncement, that eliminating "railroad" change to Conclusion Eight meant location change, then motion and argument would have received further clarification. But delay in seeking agency approval revealed refusal to comply with WCC 21.03.060 (2)(4). This motion ensured opportunity to determine what testimony was material to the judge, if willing to speak. The facts of record motivating its filing were:

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[63]7:13-14, WSB.Ex.23

1. Defendants' counsel had informed the court that no legal description was necessary;

2. Defendants' counsel introduced as satisfaction of permitting as equitable needT;

3. Under RCW 58.17.2 10 permit validity requires RCW 58.17.030 compliance;

4. Defendants' counsel introduced change to corner location expression away from the railroad location called out in the plat in the first Conclusion of Law No. Eight;

5. No judgment had yet incorporated a location;

6. No Decree had yet incorporated a location;

7. No agency record appeared to have entered into the substantive determination approving Supplemental Conclusion Eight, which changed expression away from the railroad location called out in the plat in the first Conclusion of Law No. Eight for permit validity that defendants' counsel had introduced for equitable need;

8. Determination of the expression due in the drafting of a Decree for plaintiffs Cottingham was dependent upon the definition in a decree for defendants, and if the Court of Appeals reversed Conclusion Five (denying that Cottinghams had proven title, a change not pronounce by the court and quite likely) area returned to Cottinghams proof would likely exceed location of Defendants' Supplemental Conclusion of Law corner at an internal plat road;

9. Waiver or abandonment of the location might result if vigilance were not shown after an appeals board clerk notified of likely redirection of an appeal to a system that required no answer in a county capable of delivering later opinion that the issue of final approval -including its required finding that all laws enforced by the jurisdiction have been complied with- (l was not appealable.

10. The plat represented the parties' lots as having a shared common corner;

11. Movement of the shared common corner had not held the corner for Respondent's client;

12. Delay in the required pursuit of WCC 21.03.060 approval tended to establish violation of RCW 58.17.030 creating delayed ability to name area within an Order on Remand for plaintiffs' decree;

13. Washington's policy in favor of expeditious appeals serves RPC 4.4, and if conclusion Five was reversed inherent certiorari authority and statutory review would be available regardless the LUPA deadline; and

14. Defendants entered no conclusion of law establishing that interests of other persons should cause change to the entry of conclusion of law dated January 3, 2012.

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[64] Ln. 23, pg 12; Ln. 2:13; Ln. 12-22, pg. 15; Ln. 9:24, WSB Ex 23.

If the corner was not at the railroad, the overwhelming evidence is that an additional lot appeared to be created. An agency lot corner or plat alteration decision appeared to be underway judicially, allowing plat alteration without or before Agency approval and violating RCW 58.17 (See, veto of judicial authority at Ch. 134, Washington Laws 1974 1st Ex Session (43rd Legis. 3rd Ex. Sess. pg. 372). Kates v. Seattle reservation of a remedy supported argument regarding jurisdictional restraint.

In regards to reargument, new evidence accompanied the motion. (4:3-25, WSB 48) Investigation of health department officers, with use of the trial transcript, ensured against bringing mere opinion. The court did not consider the motion frivolous, but asked that it be noted for hearing. (44:2-7. R.EX. 290) Substantial Evidence, un-

weighed, contradicts the Finding. (See, para. Nos. 6-8; 4:14-17, 21-23, R.EX. 73) It could not be known without pronouncement why the trial judge rejected defendants' proposed Supplemental Finding No. 22, that "[t]itle in the disputed property, and all of Lot Eleven should be quieted in Morgan" when conclusion Eight extended it to railroad from road, and rejected No. 33, that "[t]he removal of laurels when done, was necessary for Morgans to have reasonable vehicle access to Lot 11."The trial court Supplemental Findings and Conclusions could not be understood without pronouncement[65] to draft a decree. Non-condemnation equity had only become material three months earlier. Without prompt consummation of WCC 21 land division, BLA procedure counterclaim for "marketability" is a sham for its violation. (See, e.g.,"third prong," Kottle v. Northwest Kidney Centers, 146 F.3d 1056, 1062-63 (9th Cir. 1998)).

[65] Notice and knowledge necessary essential to the charges is not only impaired by conflict in standards, lack of pronouncement and absence of open court presentment, but by the trial judge's striking defendants' Finding 22 (2:11, WSB 26), denying that "all" of Lot Eleven should be quieted in Morgan.

Without a single clarifying decree or judgment, guessing was required as to Land division/Plat Alteration/Lot Corner Adjustment and the result had to be construed in WSB proceedings as well. The extraordinary testimony is that two northeast corners are involved after title court proceedings. What was proven is that construction of the court result continues to be required. Agency determination occurred while a permitting agency was lobbied exparte (50:6-14 -51:8, R.EX. 291)

without access as a party or public record assured for division (RCW 90.58.140(4).66 Nondisclosure of interests in defendants' Answer precludes the assumption of adequate opportunity to litigate against land division to prevent loss of notice fundamental to an interest in land division procedures. Declaratory judgment appeals normally review court's conclusions of law de novo and the trial court's findings of fact for substantial evidence. (Nw. Props. Brokers Network, Inc. v. Early Dawn Estates Homeowners' Ass'n, 173 Wn. App. 778, 789, 295 P.3d 314 (2013)). "Appellate courts do not make findings," (Hanna v. Margitan), without evidence of any RCW 36.70c.I 10 records, and lack of jurisdiction to hear LUPA, the Court of Appeals decision (No. 70218-1-I) must be regarded as related to Declaratory judgment showing, regarding Respondent Cottinghams' ability, with receipts, that caused the Hearing Examiner clerk[67] to make appeal *available*. Since no record was ordered in the LUPA appeal, evidence as to availability of appeal is highly material to the question whether there was opportunity to contradict any determination as to land division authority in the court. The agency director was made available to ODC counsel at her depositions (R.EX. 291, 292) yet no division approval exists. She informed that the Appeals Board clerk was gone, not replaced, and the final approval determination is unappealable, even that the agency was applying LUPA as a stay.

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[66] See, Clipper Express v. Rocky Mountain Tariff Bureau, 690 F.2d 1240 (9th cir.,) (denial of access to the forum)

[67] This was not the Board of Appeals clerk, for the entity which has rules requiring Answer, and which WCPDS clerk position was unfilled. 64:8-25 R.EX. 291.

Finding 25. Substantial evidence is absent. No Decrees located which, of two,3 conclusion Eights finally applied. If access to the agency in charge of WCC 21.11.010 (land division) were allowed by defendants' application, or if the agency response that conclusions were confusing were available, the Lis Pendens argument could have been refined. It was anticipated that the confusion would take time to develop and that the chief difficulty of describing land which has been unlawfully divided would be visited upon Respondent while trying to inform that without a decree it could not be said where the decree would locate title. Note noncompliance with timely entry of a Decree (CR 54(b),(e)). Defendants did not even want a legal description from the court, 6:63, 57:8-9; R. Ex. 288; 35:16. Hearing Transcript December 20, 2016. ("part" 30:10-11; 35:3, Id). The nonfrivolous representation was very complicated and since division is not final before WCC 21.03.060 procedure, it was expected defendants would remedy with approval and communicate finality. Motions were denied support of the forecast of unlawful division. It was clearly non-frivolous.

Finding 30. Appeal was of project compliance, and that fact has been missed. If validity is added it is because the Supreme Court's Lauer decision, supported by land division, caused substantial attention to permit application validity.

Finding 32. The motions were not knowingly frivolous from Respondent's view as to evidence necessary to understanding whether a land use decision including divisions made by the trial court and the Hearing has missed the substantial fact that the court's inquiry limited its view to the initial building permit issuance. The scope of land use decisions could not be known (Deposition of director Ryan, R. EX. 290, 291) regarding whether the agency

condition was already final (not requiring LUPA filing at all). All determinations were made before it could be shown that error had denied Cottinghams' proof of title was included within the permitting, and the Durland v. San

Juan County decisions were just arriving. The Finding is unsupported as to conflicting evidence regarding the scope of land use decisions, for which the agency had provided no evidence. It is also unsupported regarding Respondent's knowledge as to "a decision by an officer with the highest level of authority to hear land use appeals." The director of Planning and Development Services discloses when deposed that the final approval is unappealable by a neighbor. (52:18 — 20, R.Ex.291). She entered into a decision without notice: to place a hold on the Cottingham appeals (Staff Report R.Ex. 266) after an assurance from the clerk of the Appeals Board (R.Ex. 273) had raised a real possibility no information would be shared because of redirection, and an unrecorded policy of holding appeals until a Staff Report is completed.[68] Washington had no decisions allowing appeal of a Building Permit "final approval" as being a "Land Use Decision." Confusion regarding availability of appeal process does not affect availability (Ferguson v. City of Dayton [69]). If the agency decision to deny due process with a hold[70] on the Cottingham appeals had been known the court would have simply remanded. (Fn 13, Durland v. San Juan County).[71]

Finding 33. The Finding is contradicted by WSB 101, not asking to overturn the judge, but ensuring a "fully completed permit filed free from misrepresentation of boundaries." WSB 102 asked project compliance. Two conclusions Eight and now ODC witness testimony reveal two northeast corners partitioning property, delayed by the notice required

in the shoreline zone, and their decree. Notice withheld but deserved in

[68] 87:14-21, R. Ex 292

69 Ferguson v. City of Dayton, 168 Wn. App. 591; 277 P.3d 705(2012).

[70] Believing that the goal was to have a house removed, 68:2-8;69:25. R.Ex. 291 and 71:5-8 and that final approval is unappealable (52:18-20. R.Ex.291); the agency employed LUPA authority regarded appeals as not more than a "holding pad, or a holding place mat" by WCPDS Personnel. 70:21-26. R.Ex. 291; although the agency has received no authority to place a "hold" on such appeals. 83:21-24, R. Ex 292. 71174 Wn. App. 1; 298 P.3d 757 (application of LUPA is not among the agency purposes; and see, fn.13: setback issue which was not reached by trial court or the hearing examiner should be remanded; hearing examiner determined compliance plan agreements were a land use decision; Whether a land use decision under LUPA occurred is resolved by the superior court, not given to an agency)

the shoreline, precludes knowing frivolity while catching up to the violation. Project permit performance review is pursued. (WSB 102.)

FINDING 39. The petition would disclose interests that defendants had not, per ODC witness Shepherd. First Amendment protected petition activity was not protected but held "at least in part" to harass and annoy as to its focus on initial building permit issuance, without finding regarding what it may have regarded as legitimate First Amendment inquiry, if that could even have been the question posed. The question is not legitimate given First Amendment breathing room, and immunity. The judge struck "all other decisions," and limited its reference to the "initial building permit." (WSB

130,p.5). Judicial determinations never addressed land division (See, Interlineation, para.3, page 5, 6, not Respondent's Motion clearly identifying "project permit performance" ODC WSB 102), and on which substantive determinations are required in another agency forum. The result would assist this defense if defendants seek the clearly required approvals of land division that, per ODC witness Shepherd, currently hold out two Northeast corners before a Decree locating Plaintiff Cottinghams' corner. The contradictory evidence that a substantial, legitimate performance review purpose was arising from late disclosure of land division that confounds entry of a resulting decree for Respondent's client, prevents any inference of finding here of harassment or vexing motive relating to the motion (WSB 102). Nondisclosure of land division delayed due process, First Amendment inquiry and availability of a defense requiring the substantive land division violation that fundamentally impaired required RCW 90.58.140(4) notice. 5 Pursuit of marketability of resulting lot area defendants did not want (35:16, Hearing Transcript December 20, 2016), required exercise of jurisdiction shared with an agency, by design of the legislature, for finality, a substantially non-harassing, legitimate goal.

Finding 41. The finding does not recognize that the protected inquiry by petition proceeded without assistance from agency records allowing understanding whether land division approval was dispensed with. Land division was not yet admitted to by location of a decree. Whether one location or another conclusion eight without a location would result was unknowable. Respondent could not announce what was not been determined yet by an agency. The finding erroneously regards land division as final in a trial court regardless of WCC

21.11.010, 21.03.060, RCW 58.17.030, RCW 58.17.210, and RCW 58.17.300, in jurisdictions shared with an agency according to the design of the legislature. A substantially legitimate goal is marketable title allowing a marketable decree for Respondent's client. Corner movement without open court pronouncement allowing understanding of the agency or trial judge's intended decree impacted protected First Amendment inquiry. The finding departs from the substantial evidence of effort necessary to recovery of notice denied, respecting scope of permitting and land division.

Finding 42. It is correct that the court so held, after applying heightened declaratory Judgment relief standards, but without reaching beyond initial permitting decisions into land division and lot corner adjustment and the fundamental interest in notice accompanying it. No evidence reveals the division and adjustment as either applied for or within LUPA, or the subject of any notice. One of the corner locations aims without a decree would create another lot, which WCC 21.03.060 informs would be disallowed. Since there is a fundamental interest in land division creating another lot, the petition and appeal were filed before it could be shown that division would be decreed, but promptly upon the October 25, 2012 call from the agency director tending to reflect refusal of enforcement. It would not have been filed at all without, 1) agency withholding an Appeals Board Answer; 2) appearance of refused enforcement WCC 23.50.02(B) guarantees in mandatory terms; and 3) likelihood the agency would be able to claim a Final Approval decision was unappealable. If a declaratory judgment precluded return to unfulfilled administrative appeal procedure it would contradict the Restatement of Judgments and Ferguson v. City of Dayton. A

declaratory judgment entered before a Staff Report's unauthorized "hold," with land division undisclosed at the LUPA level. Heightened declaratory standards are held inappropriate to review of efforts grounded in pursuit of constitutionally protected notice.[72] See, comment c.§ 33, Restatement of Judgments, infra. Since permit approval finality necessarily follows entry of the decree according to WCC 21.03.060(2) at that point judicial proceedings are made dependent on BLA approval by RCW 58.17.030 and WCC 21.03.060 otherwise what point is there to the language and the Governor's veto?[73] WCC 21.01.150 required notice, as does RCW 90.58.140(4). Understanding which of two conclusions Eight are "all" of Lot Eleven required the use of review to obtain discovery of the scope and nature of approvals involving land division and fill location by a denied but required Answer. Obtaining written entry should not be regarded as determined frivolous when grounded in a higher standard, and no avenue was available for inquiry.

Finding 42. The frivolous determination could not reach land division. It was not 20 yet fully apparent without a decree, approved, or within LUPA, for lack of opportunity to try the cause due to defendants Answer withholding that others were interested.

Finding 43. The preexisting appeal was obstructed. It is error of law to regard Agency procedure, underway and incomplete, as entirely within LUPA. A Court without LUPA jurisdiction may have inherent authority, but that was precluded by erroneous standing denial (Conclusion Five), and does not control other proceedings.

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[72] Empress LLC v. City and County of San Francisco; San Francisco Planning Department, 419 F.3d 1052

(citation)(2005)(citations omitted).

[73] The legislature did not override a veto of at Ch. 134, Washington Laws 1974 1st Ex Session (43rd Legis. 3rd Ex. Sess. pg. 372), withholding judicial land division authority.

As observed in Ferguson v. City of Dayton, 168 Wn. App. 591; 277 P.3d 705(2012), the relief remains to be applied at the agency. If the court had been aware of agency denial of due process remand would have been requested and would have been accorded.

Finding 44. The report should have said jurisdiction remained. The Finding is not supported by substantial evidence in this regard. As with declaratory judgments, collateral effect and res judicata do not apply absent compelling circumstances. Respondent's "remand" remark was to recognize continuing appellate agency jurisdiction as discussed in Ferguson v. City of Dayton. Opinion 70218-1-I concluded that the "The Cottinghams' LUPA petition was, however, filed within the 21 days of the October 25, 2012, final occupancy approval." Discussion regarding abandonment either is or is not controlling if obstruction of the right of petition occurred. The county allowed a hearing, probably because of the substantial effort Respondent employed to avoid waiver, substantial communication to the agency, as well as the Drake letter assurance (R.Ex. 273). The Staff Report allowed the notion that appeals were unlawfully placed on hold employing the strong Mellish[74] court language ("We avoid absurd results that contradict both our legislature's intent and our Supreme Court's mandates")[75].

Finding 45. The frivolous determination is a conclusion unsupported by substantial evidence, inferring improper purpose from protected petition

conduct necessary to achieve marketability (RCW 58.17.300), self defense and defense of others, weighing no contradictory evidence. Defendant's counsel admits Respondent's authority

[74] 154 Wn. App. 395; 225 P.3d 439 (2010) , overruled other grnds (reconsideration allowed), 172 Wn.2d 208; 257 P.3d 641 (2011).

[75] 154 Wn. App. 395; 225 P.3d 439 (2010)("We avoid absurd results that contradict both our legislature's intent and our Supreme Court's mandates, "Overruled other grnds (reconsideration allowed), 172 Wn.2d 208; 257 P.3d 641 (2011).

to address fraud under RAP 12.9 (9-18, R.Ex.286) but the trial court had denied the opportunity for a record May 8 and denied all motions (R.Ex.306 unfiled, 307). No exemption from land division approval -the predicate to permit validity and trial court finality- was addressed (e.g., land division and required RCW 58.17.2 10 and .195 findings and WCC 21.03.060 approval. In the time that has passed without BLA or short plat approval property corner record spoliation continues, no BLA has been shown, and drafting a decree by Respondent for area no longer called Lot Eleven above the internal plat road will continue to be improper without lot adjustment/alteration or short plat approval resulting in a name for orphaned property. On the record of inadvertence, without agency attention to a resulting location as land division and common corner movement qualifying as plat amendment, and deserving application of RCW 58.17.195 land use control safety standards, CR 54(b) finality is denied and manifest injustice under RAP 2.5c protection against arbitrary unconstitutional spoliation of the corner record was proper. Protection of the integrity of proceedings was fully sought in a state which has

not attended to the confusion which Justice Durham notified of regarding RAP 7.2(e)76 within a record revealing that LUPA may obscure and allow truncated merits determinations. Finding 47. The finding is contradicted and unsupported. As to its "duly" filed component. Overwhelming evidence of agency denial of opportunity to be heard in a timely fashion includes the Drake Letter (R.EX. 273) following denial of required opportunity to be heard as a part under RCW 90.58.140(4) for nondisclosure of land division. Appeals Board rules require an Answer in twenty days, (R.Ex.216,) not Twenty Months cited in the Finding (or none at all) (Hearing Examiner Rules R.Ex.218).

[76] Concurring in State v. J-R Distribs, 111 Wn.2d 764; 765 P.2d 281 (1988) (" ...the language of RAP 7.2 is confusing by its use of the phrase" [i]f the trial court determination will change a decision then being reviewed by the appellate court...")

Evidence reflects immediate filing of appeal to the Hearing Examiner to obtain prompt understanding of the trial court's corners-or-confusion impact by Appeals Board clerk direction to both deliveries (she is not the Examiner clerk mentioned in opinion 70218-1- I). Drake's warning of redirection[77] of original appellate process, hostile to LUPA deadlines LUPA time frames in a county regarding final approval as unappealable, caused an Appeal was filed at $750.00 for Hearing Examiner procedure. The change from WSB 16 need of review of unapproved land division, its recognition and its impact, was to interruption of a decree's remedy for Respondent's client by an agency's ability to reject division proposed by defendants.

The Answer due under R.EX.216 is in the

Director's deposition. It overwhelmingly contradicts the Staff Report, not considered in this regard: The agency director, under, oath, informed the inspection did not occur[78] and the Building Inspection Record, with its blank for "impervious surfaces" reflects that she is correct therefore no inspection occurred. (63:5-11, R.EX.291; 54:15-21, R.EX. 291) Revealing that a second driveway required a second approval (33:8-11; R.EX.291), notice the Answer to the Hearing Examiner's question. In administrative proceedings, after ODC witness Shepherd attempted to exclude consideration of fill development later than thirty days from the permit (43:14-15, R. Ex 284), he was corrected by the Examiner (43:22, infra) who determined that violation of the county code based upon location of the driveway was stated. At the Examiner's further interest in the agency's position on later-installed compliance (43:14), witness Shepherd Answered for the agency, unopposed by the agency attorney:

> "That would have to be the location of the driveway at the time of the issuance of the permit or the proposed at issuance of the permit. Just like the location of the -- footings of the house..." (44:14-20, R. Ex 284).

[77] REx. 273 (Drake Letter)

[78] 63:5-11; REx. 291; 98:14-16; R.Ex.292; 104:22-25;116:4-10, Id.

One permitted driveway could not be moved without additional permitting. (33:8-3 11, R.Ex.291, Deposition of J.E. "Sam" Ryan). But fill development all the way to the public road is revealed. (R. Ex.

278a). The permitting agency was not informed of this fill development nor was a permit shown on any written record. (118:24-119:4, 2016, R. Ex 6 292). The footings date Shepherd spoke of was not later than September 1, 2006, (5:14- 7 15, WSB 106). Waste for additional road/drive/access was a year later October, 2007 (R.EX. 8, pl.). LUPA proceedings had restricted their view to initial permit issuance.

As to final inspection, the agency director's statements are the only evidence under oath twice (98:16-19; 104:22-25; 116:4-10; 118:24-119:4, R.EX. 292) and WCPDS registered confusion regarding where the setback was supposed to be for the inspector to honestly sign off. (54:15-21, R.EX.29)1, until Shepherd offered a construction.

Finding 49. The Examiner also did not attend to, comment upon or apparently consider the agency decision to deny due process (83 :21-24, R.Ex.291) shown in the Staff Report.(R.EX. 266). Once the Remand Order determined that Cottinghams did actually prove title, (the obverse of the Durland[79]) due process applied.

Finding 54. CR 65(d) provides that "Every order granting an injunction ...shall be specific in terms; shall describe in reasonable detail, ... the act or acts sought to be restrained..." By this time the agency should have returned the anticipated report if defendants sought alteration or lot adjustment approval. The agency director now informs that Morgans did not appeal the denial of driveway in setback and therefore the condition was final. Therefore, LUPA did not need to be filed for protection. If the Agency had filed its required Answer to that effect (WCC 2.80.060, R. EX. 216) the matter would not have needed to have been regarded as within LUPA. (66:9-16, R.EX.

[79] 182 Wn.2d 55; 340 P.3d 191(2014)(permitting occurring upon neighbor's title includes no due process, U.S. Const. amend. XIV, § 1, Const. art. I, § 3 protected interest).

291). Respondent could not demonstrate that completed review of the denied fundamental interest in notice of land division allowed crafting a decree. Need for the finality of agency division approval is fundamental and effects manifest, constitutional injustice. Finding 54 willfully disregards evidence that is customarily crippling if arriving late (Kates v. Seattle) and that delays consideration of finality. Sworn testimonial evidence now contradicts administrative finality revealing finality as a substantially legitimate objective. Land division is not regarded as if it were in the pleadings along. Dewey v. Tacoma School Dist. No. 10, 95 Wn. App. 18; 974 P.2d 847 (1999). Respondent anticipates a favorable determination on the segregation of land and interests. Nondisclosure contributing to property spoliation is precisely the damage that leads the Ninth Circuit to decide Kearney and Norco Freedom to speak, unrestrained once land division is considered will be necessary to application of safety standards. RCW 58.17.195. CR 65(d) requires tailoring of injunctive relief

Finding 57. The Finding is substantially contradicted by testimony from the Agency Director as to need for disclosure and review of access that does not abut the road and WCC 21.03.060 approval. A continuing need to maintain a personal right to be heard when fixed, agency approved corners receive attention of RCW 58.17.195 findings would otherwise be challenged by overbroad CR 65(d) relief. And the appeal was not pursued. Recall was. RAP 12.9 supported its filing as defendants' counsel

informed (9-18, R.EX 286). No harassment motivated the appeal nor was it frivolous.

Finding 63. Mediation was ordered twice. Settlement was spoiled at the effort of monumenting it, by assault of defendant Ron Morgan. WSB 35, 36. Litigation and its

[80] CR 65(d) provides in part as follows: "Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained."

expenses were conducted by the witness for "others" for whom he caused entry of corner movement for land division. No segregation of fees was considered for litigation for others, or for effort planning avoidance of land division review. Segregation of fees was not considered for conflicting litigation for unidentified others; effort at corner movement away from railroad in the interests of others; modification by Supplemental Conclusions solely out of concern for an appeal; confusion referred to as admitted by defendants in opinion 68202-4-I; attempt to bring damages within a pure petition action; or RCW 58.17 and WCC 21 compliance, although the witness admitted to interests of others that defendants' Answer denied and facts that still require an agency approval or exemption remedy from BLA approval and admitted interests of others in the area of development. Abuse of the residential exemption from notice by development beyond title even beyond desired by his client, is stated. Effort serving beyond the "valid and subsisting interest" standing required to quiet title according to the legislature in RCW 7.28.010 was included in the fees mentioned.

Attribution of these efforts to LUPA permit review is unsupported by evidence of the quality regarded as substantial.

Finding 66. It should not surprise that Respondent cannot respond well to assured abuse, or with perfect clarity to denied notice of land division and interests of others. The assurance of abuse is sufficiently detailed and had its effect. Deprivation of notice of the remedy by corner movement creates significant demand for attorney time and ability. It was necessary for Respondent attempt to address issues which might arise in appeal without knowing at all whether the agency disregarded RCW 58.17, RCW 90.58, or WCC 21 and 23. These disciplinary proceedings allowed substantial information which was unavailable before. If this were a charged count, notice would enable response. The Finding is not relevant to merit of First Amendment inquiry after belated disclosure.

Finding 68. The finding is of mixed law and fact, unsupported by evidence of the quality regarded as substantial, ignore material evidence to the contrary demonstrating prompt payment of fees, and must be reviewed de novo. Substantial evidence does not reflect the fact of damage and injury. As a matter of law, injury or damage results from defendants' avoidance of required truthful disclosure in the defendants Answer; delivery of unnamed others as alleged but unproven causes of land division; and failure to seek approval of land division by Whatcom County Planning and Development Services as required by RCW 58.17.030, triggering RCW 58.17.2 10 and .300 (unlawful to offer sale of unapproved divisions) and WCC 21.11.010, and avoidance of notices due for land division in the shoreline zone and as far as development extends RCW 90.58.140(4). WCC 23.60.02.2(G), with abuse of the

residential exemption, WAC 173-27-040(2)G); WCC 23.60.02.2(G); Allegra Dev. Co. v. Wright Hotels, SHB 99-09 (shoreline zone extension to development); and, see, Garrett v. Ecology, SHB S 03-031. Injuries specified are paid and see Hearing Transcript December 20, 2016: 15:17-19; See also RCW 4.56.100("either the payment to such clerk ... or the filing with such clerk "); and RAP 2.5(b); Buckley by Belcher v. Snapper Power Equipment Co., 61 Wn. App. 932,19 813 P.2d 125 (1991)(acceptance of the benefits of a trial court decision is a waiver of the right to appeal).Direct causation was according to RCW 58.17.300. No inconvenience or injury is distinguished or distinguishable from the legislature's denial of marketability and defendants' delay in resolving it.

Finding 69. Judicial resources were exposed to delayed finality that only the project applicant could control. Entry of change without judicial pronouncement of cause frustrated agency response, required attendance of defendants' counsel for construction and efforts of all requiring clarity. The petition was due in twenty-one days in which time two administrative appeals were filed earlier. Prompt filing occurred without notice of
division, Defendants' application omitted division and thereby abused the residential 3 exemption Defendants raised need of public participation and redress which notice under RCW 90.58.140(4) would have avoided.

VIII. CONCLUSIONS OF LAW

The premise of the Complaint here declared that the efforts served no substantial purpose. The title proceedings served the interest in recovery from denial of discovery, due under RCW 90.58.140(4), notice required in the shoreline zone, arriving late

and including development beyond title and therefore abuse of the residential exemption from public notice. Title proceedings disclosed discovery fraud, denying legitimacy of the proceedings and despoiling record corner certainty, because the divided land result documents frustration of effort to quiet title by withholding parties in interest. Discovery that defendants' false Answer denied ability to fully quiet the title within the Remand Order to the railroad -area defendants did not want-makes postappeal effort most valuable First Amendment inquiry, engaged in to recover More than unlawful, late-discovered, informal plat alteration for unnamed others, but abusive discovery fraud denying legitimacy of the proceedings. First Amendment protected petition conduct was pursuit of recovery from statute-based misrepresentation. Cottinghams won title after appeal No. 68202-4-I. The defendants have an equitable remedy that is not as extensive. Agency proceedings required for finality still require clarity the defendants do not wish to provide by WCC 21.03.060 compliance.

LUPA was applied as speech regulation targeted at specific subject matter and to prevent guaranteed access to proper forums necessary to address the extent to which land development in the shoreline zone violated WAC 173-27-040(2)(G) and WCC 23.50.02.2(g) development of appurtenant access beyond title. It is content-based even if

it does not discriminate among viewpoints within that subject matter. It guarantees no equal access to records and is therefore impermissibly hostile to First Amendment redress and review. It was applied impermissibly, to the point of dismissal in the LUPA matter even *after* disclosure that defendants

withheld notice of all real parties interested and used the nondisclosure for substantive land division. It was used to prevent examination of the extension of the self-applied exemption to persons unknown after discovery fraud.

"The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic." Consolidated Edison Co. of N. Y. v. Public Serv. Comm'n of N. Y., 447 U. S. 530, 537 (1980). The topic is not who gets a permit but whether litigation may be abused by it to cause land division under umbrella of its preclusive effect while denying identification for whom and nondisclosure that defendants do not want title as extensive as their development. That is called sham litigation. The discipline pursued here is aimed at protection of sham litigation.

Frivolous litigation is undefined in RPC 1.3. The standard of conduct which it specifies is dependent upon each person's sensitivity and therefore vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all.

An agency's violation of the rules which govern its exercise of discretion is certainly contrary to law and, just as the right to be free from arbitrary and capricious action, the right to have the agency abide by the rules to which it is subject is also fundamental. Leonard v. Civil Serv. Comm'n, 25 Wn. App. 699, 701-02, 611 P.2d 1290 (1980); Wilson v. Nord, 23 Wn. App. 366, 373, 597 P.2d 914 (1979), cited with approval in Williams, at 222; Tacoma v. Civil Serv. Bd., 10 Wn. App. 249, 250-51, 518 P.2d 249 (1973). The agency restrained and chilled

Respondent's inquiry of and contribution to agency proceedings after refusing its required Answer and before considering the informal plat alteration/land division/lot corner adjustment. An agency claimed right to apply a judicial LUPA preclusion function, and right to delay its report. Loveless v. Yantis, 82 Wn.2d 754, 763, 513 P.2d 1023 (1973) (judicial review is not even possible "unless all the essential evidentiary material ... is in the record"). A Washington attorney's diligence should at least extend to inquiry necessary to secure some sort of record of the process denied so that there is a record. The record knowable before the Staff Report showed no pervious surface [fill] inspection. pg.2,R. EX 238/WSB EX.94 No record reflected land division.

Protected property interests include "reasonable expectations of entitlement derived from independent sources such as state law." Mission Springs, Inc. v. City of Spokane, 134 Wn.2d 947, 962, 954 P.2d 250 (1998) "Property' under the Fourteenth Amendment encompasses more than tangible physical property," Durland v. San Juan County, 182 Wn.2d at 70; U.S. Const. Amend. XIV; A "legitimate claim of entitlement" to a specific benefit." Nieshe v. Concrete Sch. Dist., 129 Wn. App. 632, 641-42, 127 P.3d 713 (2005). Procedural due process is incomplete. Respondent's client has an interest not only in judicial but administrative finality, and notice thereto. With two northeast corners revealed in WSB Hearing Transcript December 20, 2016, and admission by defendants' counsel that land should be divided for others, doubt as to the quantity of loss even prevents ripening of constitutional claims until agency completion, therefore continuing effort at exhausting remedies is required professional effort.

Integrity of the process prevents abandoning misuse by defendants, but the present discipline

operates as prior restraint of first amendment participation. 8' Substantive judicial corner change[82] entered after appeal without authority, by a decree naming the area where and as surveyed instead of to the railroad. The change was still not represented as one of two corners but as "all" of Lot Eleven (Conclusion Eight, WSB EX 26), yet area of remand, extending further, concerns persons unknown, per the ODC witness. Building permit authority and its limited notice is not land division. A substantive federal right of inquiry, with expectancy of a record, followed process depriving of pre-judicial access to a forum, its record, and state and federal access to court guarantees. Constitutional claims arising are cognizable and compounded here, including challenges to disciplinary process, as a whole, and discrete practices therein. c.f. Eugster v. WSBA (No. 34345-6-III, published May 2, 2017). It is doubtful that disciplinary jurisdiction should wrest control claimed by Whatcom County agency appraisal still due under WCC 21, since it does not wrest control from the Superior Court, Id., and Washington has recognized that judicial remedies await substantive determination by the agency where land division regulations are concerned. Kates v. Seattle. These proceedings have identified even more cause for LUPA and inherent authority review, not Respondent's abuse of the First Amendment right of redress. The

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[81] Thun v. City of Bonney Lake, 164 Wn. App. 755; 265 P.3d 207 (2011); Review Den., 173 Wn.2d 1035; 277 P.3d 669 (April 25, 2012); Norco Constr., Inc. v. King County, 801 F.2d 1143, 1145 (9th Cir.1986)(1990); See, also, United States in Barbier v. Connolly, 113 U.S. 27,5 S. Ct. 357,28 L. Ed. 923; cited in Patton v. City of Bellingham, 179 Wash. 566, 38 P.2d 364 (1934)(unconstitutional

arbitrary
spoliation).
[82] See, State v. Friedlund 182 Wn.2d 388, 393, 341 P.2d 280 (2015).

disciplinary Board administers the Supreme Court's exclusive jurisdiction. Id., but a state ELC rule does not supercede the Supreme Law of the land, i.e. federal law dictates. *Id* A state may not employ a jurisdictional rule to undermine federal law. *Id.* Use of the discipline system on facts that denied notice of what was permitted, where, and to whom, after judicial and administrative denial of clarification (without even Answer by an agency) denied RCW 90.58.140(4) notice, a timely forum, a judgment setting corners for the plaintiff, and a timely decree doing so in the Remand area, under circumstances raising demonstrated risk of assault by defendant Ron Morgan. Protected inquiry, and a substantive interest in what ownerships destroyed value of the litigation and changed Supplemental Conclusion Eight so that WCC 21.03.060 procedure is required justified the efforts charged. See, Haywood v. Drown, 556 U.S. 719 (1009) (cited in Eugster, Id. invalidating the exceptional preclusion of 42 USC § 1983 claims as invalid challenge to the Supremacy clause, because "may not relieve whole categories of federal claims from their courts merely to avoid congestion"). The LUPA decision was grounded in a building permit and says so. Due process requires heightened procedure and standards. Clear guidance and fair notice as to the reach of the standards and grievance procedure into liberty interests -including right of defense of family and property, not primarily included in the practice of law but requiring access to courts without preclusion truncated by nondisclosure of the interested parties- is absent.

Although state preclusion rules govern whether a plaintiffs § 1983 claim is barred by a state court judgment they do not control date of accrual of the cause. The LUPA judge commented on notice of the building permit only and statute of limitations. (But see, Thun v. City of Bonney Lake, 164 Wn. App. 755; 265 P.3d 207 (2011); rev. den., Thun v. City of Bonney Lake, 173 Wn.2d 1035; 277 P.3d 669 (2012)) (partial regulatory taking is not even ripe while arbitrary, unconstitutional record corner spoliation was delayed and local agency has not determined quantity and whether additional lot is 5 created).

A. Conclusion of Law Regarding Count I.

1. The conclusion erroneously interpreted or applied the law, Alpine Ind. v. Gohl, 101 Wn. 2d 252, 676 P.2d 488 (1984) defendants' counsel agreed identifies the rule applied, and the arbitrary by ignoring the obligation to identify fraud impairing integrity of the court process.

2. The conclusion is premature. A defense available from agency proceedings is regulatory misrepresentation, validity of which was not susceptible of proof and defense in the judicial proceedings, and discipline unfairly and capriciously denies due process in advance of opportunity to secure the defense. As soon as the substantive plat alteration/land division/lot corner adjustment approval, for which notice in the shoreline zone was required and is a constitutionally protected substantive expectancy, allows a decree finalizing record corner certainty to which quiet title parties are each entitled complete defense will be available.

3. Substantial evidence supports only one conclusion, that the Respondent had cause to believe that misrepresentation of a regulatory directive was highly material after the court denied wrongful waste as reasonably necessary to driveway access.

4. The conclusion is error for failure to apply First Amendment protection in the face of a sham counterclaim that prevented access to identification of parties and interests requiring plat alteration and the "conscious objective of harassing Morgans" conclusion does not does not flow from the facts found which are largely unsupported by substantial evidence and do not reflect weighing of evidence or even application of evidentiary standards.

B. Conclusion of Law Regarding Count 2.

The conclusion LUPA Petition and Complaint for Declaratory Judgment Was Caused By Land Division And Agency Decisions Denying Notice. LUPA was filed according to the following facts of record:

1. Defense counsel had informed the court no legal description was necessary;

2. Opposing counsel introduced change to corner location expression;

3. No judgment incorporated a location;

4. No Decree incorporated a location;

5. No agency record appeared to approve any expression away from the railroad location in the first Conclusion of Law No. Eight;

6. Delay in the required pursuit of WCC 21.03.060 approval tended to establish violation of RCW 58.17.030 would delay ability to name area within an Order on Remand; and,

7. Defendants entered no conclusion of law establishing that for the sake of other persons the entered conclusion of law should change from the entry dated January 3, 2012.

9 Evidence is insufficient. Evidence of an agency decision to obstruct due process is clear, i. e, that an undisclosed agency decision (Staff Report R.Ex. 266) was actually entered to deny delivery of the required Answer after Appeals Board clerk

Drake described delivery to another agency. Opportunity to contest the finding by the LUPA court was also denied by 1) denial of a required Board of Appeals Answer with which to defend against the finding by the LUPA court; 2) absence of written records that can reliably inform the public (or the agency director); and 3) restriction of the LUPA court focus to the scope of the initial building permit issuance and administration through the title-trial closing date, to the exclusion of other agency decisions.

Judicial finality can not be shown before completion of WCC 21.11.010 procedure results in Agency approval of the judicial lot corner adjustment or plat alteration is evidence essential to defensive argument regarding frivolous litigation charges, and the agency determination is essential to appraisal whether land division justified first amendment petition effort. Substantive determination finality will likely reveal defense that comment against another licensee over whom WSB has control. The defense is not ripe for presentation. Procedural due process cannot attend these proceedings until finality can be shown regarding judicial and administrative practice by the corner adjustment or plat alteration admitted by ODC witness Shepherd in these proceedings. Absence of fair notice as to the reach of the grievance procedure violates an attorney's due process rights. In re Ruffalo, 390 U.S. 544, 552, 88 S. Ct. 1222, 20 L. Ed. 14 2d 117 (1968).

By filing for LUPA review without knowing whether lot corner adjustment approval was underway or safety standards were enforced under WCC 21, Respondent was "employing constitutionally privileged means of expression to secure constitutionally guaranteed civil rights." See, NAACP v. Button, 371 U.S. 415, 442, 83 S.Ct. 328,

343, 20 L.Ed.2d 405 (1963); see In re Primus, 436 U.S. 412, 98 S.Ct. 1893, 56 L.Ed.2d 417. where "political expression and association" are involved, 436 U.S., at 438, 98 S.Ct., at 1908, "a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights." NAACP v. Button, 371 U.S., at 439, 83 S.Ct., at 341. Under RPC 1.2(d) a lawyer may "... may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law."

C. Conclusion of Law Regarding Count 3.

The motion for reconsideration of a supplemental order and amendment providing injunctive relief (WSBA Exhibits 212-214) were supported by CR 65(d) and the need to preserve liberty to speak in support of upcoming CW 58.17.195 proceedings. The motion was made to ensure against overbreadth impermissibly burdening first amendment exercise.

Without clarification, it cannot be ascertained that the court actually restrained the personal rights of the un-appealed setback condition because it was not as specific as CR 65(d) calls for. Clarification effort is determined as frivolous. By the motion Respondent asked not to confuse and burden the personal right of petition further as though safety were not personal right for which redress is allowed. The trial court had specifically set out grant of area for minimum setback standards. Finding 23 (WSB 16, 26). The Court of Appeals affirmed. More importantly, the setback condition was unappealed by defendants and final. Enjoining administration regarding the unappealed condition either was or was not the court's aim. Disregard for the effort to clarify is arbitrary. An injunction would be improper if there was "any realistic chance that the plaintiffs legal theory might be adopted. (Bill Johnson's

Restaurants, Inc. v. NLRB, 461 U.S. 731 (1983))

No substantial evidence reflects perpetuating interference with title. The order's broad injunction commanded the response reflected in the motion without regard for CR 65(d) restrictions. The court's Order was nonspecific but caused dismissal of proceedings before the Whatcom County Council relating to agency withholding of process. A court of equity became the last resort before a Motion to Recall, and had authority to consider the manifest injustice of overbreadth. No fact distinguished petitioning and public participation from wrongful conduct is alleged by defendants, and no fact except for protected petitioning and public participation of record supports an objective of interfering. No analysis is provided on which clear preponderance may be based.

> "Because CR 11 sanctions have a potential chilling effect, the trial court should impose sanctions only when it is patently clear that a claim has absolutely no chance of success. The fact that a complaint does not prevail on its merits is not enough." Loc Thien Truong, 151 Wn. App. at 208.

In re Disciplinary Proceeding Against Whitney, 155 Wn.2d 451, 461, 120 P.3d 550 (2005).

1. Conclusions of Law Regarding Count 4.

The conclusion commits error of law. Administrative appeal effort was engaged for the pursuit of safety and development beyond scope of permitting as well as pursuit of knowledge where setback beyond title would be fixed and certain. Res judicata does not apply to declaratory judgments. See, comment c. 33, Restatement of Judgments:

> "When a plaintiff seeks solely declaratory relief, the weight of authority does not view him as seeking to enforce a claim against the

> defendant. Instead, he is seen as merely requesting a judicial declaration as to the existence and nature of a relation between himself and the defendant. The effect of such a declaration, under this approach, is not to merge a claim in the judgment or to bar it. Accordingly, regardless of outcome, the plaintiff or defendant may pursue further declaratory or coercive relief in a subsequent action...."

Comment § 33 *cmt.* c., Second Restatement of Judgments:

Administrative appellate process was substantially burdened, not abandoned. The LUPA statute was not cited for any authority to stay administrative proceedings. They remained. See, Ferguson v. City of Dayton, 168 Wn. App. 591; 277 P.3d 705(2012)

E. Conclusion of Law Regarding Count 5.

First Amendment inquiry and petition immunity applies. See BE & K Const.,

The evidence supports only one conclusion, that defendants delayed discovery disclosure after denying public RCW 90.58.140(4) notification, and that inquiry regarding a fundamental interest in land division still requiring agency approval is statutory based, non-frivolous effort unequivocally required in pursuit of the administration of justice. The Conclusions of Law and findings in support with respect toounts 2, 3 and 4 Should not be regarded as violation of RPC 4.4(a)(use means that have no substantial purpose other than to embarrass, delay, or burden a third person) and 8.4(d)(conduct that is prejudicial to the administration of justice). First, 8.4(d) is normally reserved for the physical interference. As with pretrial motions in general, effort had to depend on absence of discovery due to

sudden disclosure of others as cause to divide land without agency review was a remedy pursued. Defendants had never identified other parties, and they had never pleaded permitting directives or land division as cause for discovery. When a court summarily finds a matter frivolous and advanced without reasonable cause but does not specify why the counterclaims were baseless, reviewing courts do not rely upon the finding, being unable to determine whether the trial court abused its discretion. Under North Coast Elec. Co. v. Selig 136 Wn. App. 636, 650, 151 P.3d 211 (2007) a bare finding of frivolousness is insufficient. Substantial evidence does not support the findings, which necessarily imply that ODC had no rational argument to make. Rational argument only supports the claim that need for additional permitting was underway or established. A rational argument supported Respondent's claim that permitting's scope could not actually be known for the scope and extent of fill authorization.

Streater v. White, 26 Wn. App. 430,434-435,613 P.2d 187 (1980). The Examiner's conclusions do not meet the standard applied to courts, in fact no standard is stated as met Hanna v. Margitan, 193 Wn. App. 596; 373 P.3d 300 (2016).

Hannas sued to quiet title alleging that short plat representations contained invalid easements. Dismissing, the trial court held that "no appeal, under LUPA, was made of the land use decision approving the Short Plat" and LUPA precluded relief, holding further that claims asserted by the Hannas "were frivolous and advanced without reasonable cause." Their argument had been that easements cannot be added to a short plat because aparty cannot alter the subdivision by granting a private easement without formally amending the short plat, citing RCW 58.17.215. Reversing the

determination, the court of appeals explained:

> "The Hannas' RCW 58.17.215 argument has some statutory support. RCW 58.17.215 requires an alteration to a short plat to be made through a formal short plat amendment. Adding an easement that is not depicted on a short plat is arguably an "alteration." Because the Hannas' argument was supported by a rational argument on the law and facts, we hold that the trial court abused its discretion when awarding attorney fees and costs to Inland Power & Light, and similarly vacate the award of fees and costs under RCW 4.84.185.
>
> "To permit one to informally change short plat depictions risks an illegal use that otherwise would be caught by an agency charged with reviewing the short plat. Even more obvious, to permit one to allow a use expressly prohibited by the notes contained on the short plat results in an illegal use. We therefore hold that changes to something depicted on a short plat, or changes that permit something expressly prohibited by the notes on the short plat, are ineffective unless the plat is formally amended as provided for in RCW 58.17.215."

Hanna v. Margitan, 193 Wn. App. 596; 373 P.3d 300 (2016).

The Hearing Officer's Finding cannot be found substantial when based upon a record of determination that omits the required finding. *fn.* 2, Hanna v. Margitan.

Whether pursuit of the approval of land division was frivolous is not capable of determination

judicially until after agency determination regarding its approval.

Physical interference with the lawful ends of justice never occurred. Rule 8.4 allows no guide whatsoever to apply during this period of undecreed loss of record corner certainty and absence of finality. There is no nexus between representing a family member at home against abuse and risk of assault by pursuit of corner adjustment finality and marketability and the standards protecting the community. In Re Discipline of Curran, 115 Wn.2d 747; 801 P.2d 962(1990).

IX. AGGRAVATING AND MITIGATING CIRCUMSTANCES

1. MITIGATING CIRCUMSTANCES ABA 9.32

Factor (a) applies. Absence of a prior disciplinary record;

Factor (b) applies. Absence of a dishonest or selfish motive, shown by absence of charges pressed for assault that ended mediation while in service to the court order, a "stalking" event under RCW 9A.46.110(5)(b)(v)(A) and(B)(iv),(vii) and RCW 11 9A.46.060(33) against an attorney in service to two orders to mediate. Effort has been selfless, exposing counsel to ire of local agencies to ensure access to records by depositions allowing ODC access that respondent did not even enjoy during the appeals and petition. Not a single instance of abuse other than charged petition effort is found after serious provocation.

Factor (d) applies. A timely good faith payment of sanctions and fee awards.

Hearing Transcript December 20, 1016);

Factor (e) applies. A full and free disclosure to the disciplinary board and cooperative attitude toward proceedings with land use development regulation research, and two depositions of the

agency director;

Factor (g) applies. A positive character or reputation (Hearing Transcript December 20, 1016);

Factor (l) applies. Imposition of other penalties *and* sanctions.

2. AGGRAVATING CIRCUMSTANCES

None. Seeking protected disclosure is in no way an aggravating factor or part of a pattern except as pursuit of a lawful decree denied by final land division approval.

IX. RESPONSE TO RECOMMENDED SANCTION

The professional standards provide little notice of how to obey the conflicting purposes when the scope of permitting information is not available and abuse appears related to the use of the judicial branch for intentional misrepresentation to a court.

Protected First Amendment inquiry for access to records satisfying a fundamental interest in land division/plat alteration/Lot corner adjustment or exemption therefrom by an agency can be prejudiced in Washington by withholding required agency Answer; witholding delivery of original appellate process; even withhholding a clarifying decree.

The proper response is First Amendment Right of petition for redress, application of RPC 1.3 diligence, absent a WCC 2.80.060 Board of Appeals Answer in a county regarding the final approval as unappealable. See, Davis v. Cox, 183 Wn.2d 269 (2015)

Count I — Suspension is an improper sanction, See, Response to Conclusion Five, incorporated here as if set out in full.

Count 2 — Suspension is an improper sanction, See, Response to Conclusion Five, incorporated here as if set out in full.

Count 3 -- Suspension is an improper sanction, See, Response to Conclusion Five, incorporated here as if set out in full.

Count 4— Suspension is an improper sanction, See, Response to Conclusion Five, incorporated here as if set out in full.

Count 5— Suspension is an improper sanction. Respondent and client are already effectively sanctioned by three years without definition in a defendants' decree. Sanctions have already issued by the respective courts. They were immediately complied with by payments and satisfaction. Respondent has been responsive to the authority of the court and made payments to defendants' counsel. Dismissal of two appeals resulted. (to Whatcom County Council; to Court of appeals for relief from overbreadth of the Supplemental Order Quieting Title to ensure opportuni6ty to speak further). Suspension is an improper sanction and is also premature, considered before an enterprising use of judicial branch efforts has been validated by required agency determination for a lawful and legitimate result.

Application of any sanction is constitutionally arbitrary. It elevates Washington's preclusion of its courts' review jurisdiction over highly valuable First Amendment Right of Petition for Redress and inquiry to avoid loss of the required agency determination on a resulting record's location and certainty has raised Fifth Amendment denial, with Respondent's efforts intertwined with the obligation to exercise RPC 1.3 diligence. The charged RPC conduct standards are unconstitutionally vague applied under the circumstances. The proper purpose of a sanction does not apply here. As is

abundantly clear, and as should be expressed with confidence by the board: Respondent labored at his home, not commercial practice, after nondisclosure. A substantial service to the constitutional right of redress and Fifth and Fourteenth Amendment, Washington's privileges and immunities clause and professional standards inspired Respondent to endure the challenge. In these proceedings, the supply of documents and briefing eliminated necessity of similar preparation by the Office of Disciplinary counsel, costs for which would have been substantial.

CORRECTION. MOTION FOR DISMISSAL. These proceedings substantially deny due process by determining the breadth of permissible conduct necessary to integrity of inchoate administrative proceedings and determinations required under RCW 58.17.030 and WCC 21.11.010. To secure First Amendment inquiry essential to breathing room necessary to prevention of sham counterclaim litigation, this matter must be dismissed.

Testimony in these proceedings and defendants' Answer reveal that notice of substantive rights, held fundamental and cause for interruption of judicial remedies in Kates v. Seattle, occurred well after a title trial as land division requiring an approval process. Inquiry into quality of agency approval of plat alteration, preceded by no notice in defendants' Answer or definition for three years from trial, is statute-based, nonfrivolous, protected use of First Amendment redress pursuing recovery from loss of notice, discovery necessary to fair trial, record certainty of a common corner, access to the proper forum, value of process obstructed when aimed at securing that access, and decreed finality. When Washington's LUPA statute carries colorable

potential for denial of Wash. Const. Art 1 § 21 Jury trial including equitable proceedings (Davis v. Cox), ODC and Board proceedings carry substantial capacity to chill that investigation and chill response to new, additional litigation mentioned in these proceedings. Land division formality is not shown as having been reached in any proceeding investigated. Maintenance of these proceedings operates as procedural due process denial before opportunity for the substantive nonfrivolous dimension of land division approval is addressed in agency proceedings, causing regard for judicial proceedings as final without RCW 58.17.030, notice, substantive formality, and availability of the agency approval as defense in these proceedings. A right to agency finality and decreed finality concerning the substantive determinations necessary to a fundamental interest in corner movement as plat alteration is manifest, prejudiced by these proceedings while that finality is inchoate, such that these proceedings deprive of the opportunity to defend before availability of that agency evidence while they chill First Amendment inquiry for redress, expression and participation at agency, judicial and appellate levels, and risk chilling defense in the third round of litigation. Fourteenth Amendment procedural due process guarantees, equal protection guarantees, Washington's privileges and immunities guarantee, First Amendment guarantees necessary to redress, public participation and Wash. Const. Art.1 §21 guarantee of access require application of the 42 USC § 1983 remedy of dismissal the formal complaint is required.

CORRECTION, MOTION: Request is made under 42 U.S.C. § 1983 for remedial award of fees for the defense.

CORRECTION, ARGUMENT: Request is made for Argument.

MOTION: Request is made that the board take judicial notice of WCC 21.11.010, et seq. attached, as well as all statutes and regulations offered and considered by the Hearing Officer.

MOTION: Request is made that Exhibit Nos. 359-369 regarding mediation communication which were withdrawn before notice of the hearing examiner's reliance upon ODC witness testimony (Finding No.63), be admitted.

MOTION: Request is made for award of attorney fees under RCW 4.84.350 for response to the Formal Complaint, substantially unjustified, recognizing circumstances since its commencement render discipline unjust.

Respectfully submitted, this 9th of June, 2017

s/David C. Cottingham Respondent WSB 9553

APPENDIX D - HEARING OFFICER FINDINGS OF FACT, CONCLUSIONS OF LAW, MITIGATING FACTS, AND RECOMMENDED SANCTION

HEARING OFFICER FINDINGS OF FACT, CONCLUSIONS OF LAW, MITIGATING FACTS, AND RECOMMENDED SANCTION

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BEFORE THE DISCPLINARY BOARD
OF THE
WASHINGTON STATE BAR ASSOCIATION

In re DAVID CARL COTTINGHAM Lawyer (Bar No. 9553).	Proceeding No. 15#00069 FINDINGS OF FACT, CONCLUSIONS OF LAW, MITIGATING FACTS AND RECOMMENDED SANCTION

Pursuant to ELC 10.13, a hearing was held on December 20 and 21, 2016. Special Disciplinary Counsel Douglas Fryer represented the Bar Association and Brett Purtzer represented the Respondent.

I. FORMAL COMPLAINT

Respondent was charged by Formal Complaint dated November 9, 2015, with five counts of violating the Rules of Professional Conduct. The Formal Complaint alleges:

COUNT 1

45. By moving to reconsider, vacate the judgment, or grant a new trial after the first appeal, which motions were frivolous. Respondent violated RPC 3.1 (frivolous litigation).

COUNT 2

46. By filing the LUPA petition, which was frivolous, Respondent violated RPC 3.1.

COUNT 3

47. By filing the motion to reconsider after the trial court quieted title to the Morgans, which was frivolous, Respondent violated RPC 3.1. (frivolous litigation).

COUNT 4

48. By filing one or more appeals that were frivolous and/or by attempting to pursue the administrative appeals after he abandoned them, Respondent violated RPC 3.1.

COUNT 5

49. By pursuing litigation and/or appeals before the trial court, the court of appeals, and/or the Whatcom County hearing examiner with intent to harass and/or annoy the Morgans, Respondent violated RPC 4.4 (using means that have no substantial purpose other than to burden a third person) and/or 8.4(d) (conduct prejudicial to the administration of justice).

II. HEARING

At the hearing on December 20 and 21, 2016, witnesses were sworn and gave testimony, exhibits were admitted into evidence and counsel provided argument. Having considered the evidence and argument of counsel, the undersigned Hearing Officer makes the following Findings of Fact, Conclusions of Law and Recommended Sanction.

III. FINDINGS OF FACT

1. Respondent was admitted to the bar on October 30, 1979. He has no record of prior discipline.
2. Respondent has practiced law

continuously since 1979 in Whatcom County. Initially he worked for ten years at the Whatcom County Prosecuting Attorney's Office in the criminal and civil divisions. For approximately the past 28 years he has had a general private practice in Whatcom County.

3. In 1989 Respondent and his wife purchased Lots 9 and 10 of the Nixon Beach Tracts ("plat") at Lake Whatcom, Whatcom County, and resided there at material times thereafter.

4. In 2006 Ronald J. and Kaye L. Morgan ("Morgans") purchased Lot 11 in the Nixon Beach Tracts. Lots 10 and 11 have a shared boundary. At that time laurel bushes were growing in the vicinity of the boundary line. Respondent had planted the laurel bushes no later than 1995.

5. On August 17, 2006, the Morgans obtained a building permit with construction of a home on Lot 11 beginning soon thereafter. Respondent maintained his residence on Lot and was on notice of issuance of the building permit to the Morgans at that time.

6. In September 2007, the Morgans removed eight laurel bushes along the common boundary. This gave rise to an acrimonious relationship that motivated Respondent to initiate and pursue numerous and repetitive legal challenges to the Morgans' use and enjoyment of the home they constructed on Lot 11.

7. On October 4, 2007, Respondent sent a letter to the Whatcom County Planning and Development Services requesting that it review the Morgans' building permit application for omissions, (WSBA Exhibit 3)

8. On June 24, 2009, Respondent and his

wife filed a lawsuit against the Morgans seeking title to a portion of the Morgans' platted property adjacent to the common boundary by way :)f adverse possession and damages for trespass, conversion, nuisance and outrage.(WSBA Exhibit 5) The Morgans counterclaimed, seeking to quiet title consistent with the platted boundary between Lots 10 and 11 or, in the alternative, private condemnation. (WSBA Exhibit 7)

9. The claims and counterclaims were vigorously litigated and tried over for four days in November and December 2010 before the Honorable John Meyer -visiting judge from Skagit County (Whatcom County Superior Court No. 09-2-01773-1). Among Respondent's contentions were that the Morgans' building permit had expired and that the Morgans had violated septic system and setback requirements under the Whatcom County building code.

10. Respondent appeared pro se and as counsel for his wife and ably prosecuted their claims at trial.

11. On January 3, 2012, Judge Meyer entered Findings of Fact and Conclusions of Law determining that plaintiffs had adversely possessed 292.3 square feet in a triangular deviation from the platted common boundary between Lots 10 and 11. (WSBA Exhibits 16 and 221). Plaintiffs' argument for a larger area of adverse possession, which Judge Meyer had originally found on pretrial motion for partial summary judgment, was rejected. Respondent prevailed on his claim that the laurel bushes were wrongfully removed. The laurel bushes were found to have a fair market value of $4,342.98, which sum was trebled. Respondents

other claims were dismissed.

12. Judge Meyer found that the triangular 292.3 square feet were necessary to the Morgans' use and enjoyment of Lot 11 and were comparatively insignificant and unnecessary to Respondent's use and enjoyment of Lot 10. Exercising equitable and statutory authority Judge Meyer privately condemned the 292.3 sprivately condemned the 292.3 square feet in favor of the Morgansquare feet in favor of the Morgans conditioned on their paying plaintiffs the reasonable market value of that property determined by the court to be $8,216.55. (WSBA Exhibits 16 and 17) The Morgans promptly tendered the amount of the judgment to Respondent. Respondent declined, and the Morgans deposited the full sum into the court registry where it remained until August 20, 2015. (Hearing Transcript 12/20/16,19:16-20:7; WSBA Exhibit 220)

13. On January 13, 2012, Respondent moved to vacate the Judgment, Findings and Conclusions *and sought a* new trial. The motion was argued on January 26, 2012, and taken under advisement. (WSBA Exhibit 23) On January 30, 2012, Respondent filed a Notice of Discretionary Review in the Court of Appeals contending, inter *alia,* the Superior Court's Findings of Fact, Conclusions of Law and Judgment violated federal and state constitutions (WSBA Exhibit 24)

14. The Superior Court retained jurisdiction to deny Plaintiffs' motion and enter Supplemental Findings of Fact and Conclusions of Law stating in part:

The lis pendens tiled herein was substantially justified. It should now be removed

from the public record.

WSBA Exhibit 26, p. 4.

15. The court set supersedeas at $750,000 for the Cottinghams' appeal, finding that "Defendants have suffered and will continue to suffer substantial economic loss during the pendency of these proceedings." (WSBA Exhibit 34) On February 15, 2012, the Morgans filed a Notice of Appeal regarding the adverse possession finding (Court of Appeals No.68202-4). (WSBA Exhibit 39) The appeals were consolidated. (WSBA Exhibit 43)

16. On February 13, 2012, Respondent filed a motion in the Court of Appeals to stay the Superior Court judgment. (WSBA Exhibit 37)

17. On February 16, 2012, Respondent wrote to the Whatcom County building department advising that he had prevailed in part and that trial testimony demonstrated that the Morgans' site description in their permit application contained material omissions. (WSBA Exhibit 40)

18. On March 23, 2012, the Court of Appeals denied Respondent's motion challenging the supersedeas order. (WSI3A Exhibit 45) Respondent filed a Motion to Modify which was denied by a Court of Appeals panel on July 25, 2012. (WSBA Exhibit 82).

19. On April 9, 2012, the Morgans filed a Motion for Contempt in Superior Court (WSBA Exhibit 46) premised on Respondent's failure to remove the lis pendens pursuant to the court's Supplemental Findings of Fact and Conclusions of Law (WSBA Exhibit 26 Amended Conclusions of Law (¶ 11) and Order Determining Finality (WSBA Exhibit 27, ¶ 3).

19 On April 26, 2012, Judge Meyer entered

orders stating that Respondent was "not now in contempt" but would be if the lis pendens was not lifted by May 15, 2012. The order further authorized the court commissioner to execute a release of the lis pendens after that date if Respondent failed to do so. Judge Meyer conditionally imposed $2,500 sanctions and $1,500 attorney's fees if Respondent failed to act with respect to the lis pendens by May 15, 2012. (WSBA Exhibits 52 and 53).

20. On April 19, 2012, Respondent filed a motion in Superior Court seeking to compel the Morgans to appear and show Cause why the Judgment should not be vacated "as resulting from misrepresentation of theory of counterclaims" (sic). (WSBA Exhibit 47) The motion reargued the merits addressed at trial and in Respondent's Motion to Vacate (WSBA Exhibit 23) and was frivolous.

21. On April 27, 2012, Respondent filed in Superior Court a "Motion for Dismissal for Lack of Jurisdiction" arguing that the Superior Court lacked jurisdiction over the claims adjudicated in the November and December 2011 trial because it was a land-use decision and "LUPA is the exclusive means of judicial review." (WSBA Exhibit 54, p. 4, line8:17) 22. Judge Meyer declined to hear Respondent's motions absent authorization from the Court of Appeals. (WSBA Exhibit 59)

23. On May 10, 2012, Respondent filed in the Court of Appeals a "Motion For Order Granting Leave to Enter Consider Motions Which May Modify The Result at Trial" (sic) and seeking "an Order Granting Leave To Proceed To Consider And Enter Findings And Conclusions pursuant RAP 7.2(e)(1) according to the accompanying

Plaintiffs Motion For Order To Show Cause For Relief From Judgment CR 60(b)(4)(11) to pursue and enter the accompanying Proposed Order Granting Relief from Judgment following hearing in the trial court" (sic) premised on "misrepresentation at trial" and "failure to invoke LUPA" and seeking an "immediate stay of enforcement of the Contempt Order below." (WSBA Exhibit 60)

24. The Court of Appeals, after striking Respondent's reply brief as not compliant with the Rules on Appeal, denied Respondent's motions. (WSBA Exhibit 83)

25. On May 29, 2012, Respondent filed a Notice of Appeal and Notice of Discretionary Review in the Court of Appeals appealing Judge Meyer's order requiring release of the us pendens and arguing the merits of the case. (WSBA Exhibit 73 and 74)

25 Review was denied on December 10, 2012 (WSBA Exhibits 104 and 105) Respondent filed a tardy Motion to Modify on January 10, 2013 (WSBA Exhibit 113) and a Motion for Relief From RAP 17.7 Deadline (WSBA Exhibit 114). The motions were denied and sanctions imposed for a frivolous motion. (WSBA Exhibit 131)

26. The appeal of the trial court's Findings, Conclusions and Judgment was affirmed on October 14, 2013, with several of Respondent's assignments of error rejected for failure to offer argument in support. (WSBA Exhibit 171)

27. Respondent filed a Motion for Reconsideration on November 4, 2013. It was denied on November 18, 2013. (WSBA Exhibits 173 and 176)

28. Respondent filed a Petition for Discretionary Review with the Supreme Court

on January 2, 2014, and it was denied on March 5, 2014. (WSBA Exhibits 177 and 178)

29. On October 25, 2012, the Whatcom County Planning and Development Services approved occupancy of the Morgan house. (WSBA Exhibit 96)

30. On November 5, 2012, Respondent filed an administrative appeal to the County Board of Appeals of the Morgans' August 17, 2006, building permit. (WSBA Exhibit 96).

31. On November 8, 2012, Respondent filed an administrative appeal of the county's final occupancy approval with the Whatcom County Planning and Development Services hearing officer. (WSBA Exhibit 97)

32. On November 15, 2012, during pendency of the appeals, Respondent filed a new lawsuit against the Morgans (and Whatcom County) titled Land Use Petition and Complaint for Declaratory Judgment (Whatcom County Superior Court No. 12-2-03029-1)(WSBA Exhibits 98 and 99) The remedies included invalidation of the Morgans' building permit and a declaratory judgment establishing a common boundary consistent with Respondent's contention at trial (contrary to Judge Meyers' Judgment) and prohibiting or invalidating the Morgans' certificate of occupancy. The pleaded jurisdictional basis was RCW 36.70C, which is limited to judicial review of the "final determination by a local jurisdiction's body or officer with the highest level of authority to hear [land use] appeals." RCW 36.70C.020(2). Respondent was aware there had been no such determination as evidenced by his November 5, 2012, and November 8, 2012, filings with Whatcom County Planning and Development

Services, (WSBA Exhibits 96 and 97) The lawsuit was frivolous and filed to harass the Morgans.

33. On November 20, 2012, six days after filing the LUPA lawsuit, Respondent filed motions titled Motion for Order on Preliminary Matters and Motion for Order Determining Jurisdictional Facts. (WSBA Exhibits 101 and 102) The motions were supported by the Declaration of David Cottingham (WSBA Exhibit 100) citing testimony from the adverse possession/quiet title trial. Respondent argued that the rulings by Judge Meyer should be overturned, the boundary line between Lots 10 and 11 established in accordance with Respondent's argument and the Morgans' occupancy be denied. (WSBA Exhibit 100)

34. On December 17, 2012, the Morgans filed their Answer and Counterclaims alleging the Petition was "frivolous and advanced without reasonable cause." (WSBA Exhibit 108, p.4, ¶J 12 and 13)

35. On January 3, 2013, the Morgans filed a Motion for Summary Judgment and a Motion to Dismiss. (WSBA Exhibits 109, 110, 111) Respondent filed lengthy opposition. (WSBA Exhibits 118-124, 126-127 and 132-134)

36. Judge David Needy, Skagit County visiting judge, reviewed the 26 pleadings and "all pleadings and proceedings in Whatcom County Superior Court 09-02-01773-1 which matter was heard and decided by the Hon. John Meyer." Judge Needy made findings and conclusions including the following.

> 7. Cottinghams' LUPA Petition, brought under RCW 36.70C is not timely.

8. The final occupancy permit or decision by Whatcom County does not initiate the 21 day limitation time period for the LUPA appeal process. The LUPA 21 day time frame, as it relates to Cottinghams, started upon notice to Cottinghams of Whatcom County's issuance of Morgans' building permit. In this matter it does not matter if Cottinghams were entitled to statutory or actual notice, because Cottinghams had actual notice within 10 days of the issuance of the building permit in 2006.

9. This Court does not have subject matter jurisdiction over Cottinghams Land Use Petition.

10. Plaintiffs/Petitioners Cottinghams' November 15, 2012, Land Use Petition, LUPA action, against Defendants/Respondents Morgan, Costello, Whatcom County Planning, and Whatcom County should be dismissed with prejudice.

...[sic]

The Courts' findings and conclusions entered in Cause Number 09-2-01773-1 demonstrate that all issues raised and claims made by Cottinghams in this matter, were raised by Cottinghams, litigated by Cottinghams and Morgans, previously decided by Judge Meyer and are now the subject matter of several appeals.

13. If any new claims are raised in this matter by Cottinghams, those claims, while difficult if not impossible to determine from their pleadings, would be subject to a three year statute of

limitations and would have been known to Cottinghams by December 30, 2007 and clearly would have been known to Cottinghams, under any conceivable factual situation, by June 30, 2009, a date after which Cottinghams' Complaint was filed and served in Cause Number 09-2-01773-1, and therefore should have been raised in the prior matter.

WSBA Exhibit 130,

37. Judge Needy dismissed all claims of Respondents with prejudice. (WSBA Exhibit 130)

38. On April 11, 2013, Respondent appealed Judge Needy's order. (WSBA Exhibits 142 and 143)

39. On June 20, 2013, Judge Needy entered an order on cross-motions for fees and sanctions with findings including the following:

1. Cottinghams' Land Use Petition and Complaint for Declaratory Judgment was filed and advanced in violation of CR ii and is not supported by any fact or law or reasonable argument for any extension of existing law.

2. Cottinghams have attempted, in this matter, to re-litigate the issues raised and decided against Cottinghams in the previous litigation under Whatcom County Superior Court Cause No. 09-2-01773-1, which matter resolved after a four-day bench trial.

3. This Court previously entered Findings and Conclusions as follows and incorporates that finding into this order:

13. The Courts' findings and conclusions entered in Cause Number 09-201773-1 demonstrate that all issues raised and claims made by Cottinghams in this matter, were raised by Cottinghams, litigated by Cottinghams and Morgans, previously decided by Judge Meyer and are now the subject matter of several appeals.

Findings of Fact and Orders on All Pending Motions, Dkt. No. 74, page 4, 23 ¶13.

5. Cottinghams' pleadings in this matter have been chaotic, convoluted, and difficult to understand, which pleadings required a substantial amount of time to understand and thoughtfully respond. (sic)

6. Cottinghams' arguments in this matter have not been supported by fact or law.

8. Cottinghams' pleadings in this matter, which pleadings are not *supported* by fact or law, were filed at least in part to harass and/or annoy Morgans.

9. Cottinghams' pleadings in this matter were frivolous and advanced without reasonable cause in violation of RCW 4.84.185.

WSBA Exhibit 167.

40. The court dismissed the LUPA lawsuit and awarded the Morgans $29,282.80 in attorney fees and costs for Respondent's violation of Civil Rule 11. (WSBA Exhibit 167, p.

5)

41. Respondent appealed the dismissal of. the LUPA lawsuit (Court of Appeals No. 70218-1-i) with Respondent arguing that the trial court lacked jurisdiction and rearguing the merits of the boundary dispute issues adjudicated by Judge Meyer. (WSBA Exhibits 169 and 172) As with many of the briefs and memoranda prepared by and filed by Respondent in the Superior Court, Court of Appeals and state Supreme Court proceedings, the briefing was in large part unintelligible and well below the capability Respondent demonstrated in other contexts. *See e.g.,* WSBA Exhibit 100. As in other pleadings and venues, Respondent referenced "Morgans' unsuccessful private condemnation counterclaim," (WSBA Exhibit 169, p. "2") This and the other arguments advanced in appeal of Judge Needy's Order were frivolous and pursued to harass the Morgans. Respondent fixated on the pretrial partial summary judgment order revised by Judge Meyer after the four-day trial, arguing, without legal authority or good faith basis, that Judge Meyer had no jurisdiction to revisit his interlocutory order.

42. On April 28, 2014, the Court of Appeals affirmed Judge Needy in all respects including res judicata, the passage of six years between Respondent's *notice* of issuance of the Morgans' building *permit* and filing the LUPA Lawsuit and abandonment of administrative proceedings insofar as the Morgans' certificate of occupancy was concerned. The court upheld Judge Needy's imposition of sanctions and ordered additional sanctions against Respondent in the amount of $16,683 finding that the appeal was frivolous.

(WSBA Exhibits 181 and 185)

43. Two days later, on April 30, 2014, Respondent filed an Amended Statement in Support of Appeal with Whatcom County Planning and Development Services, arguing, among other things, that "it was error to fail to enforce Shoreline Exemption Setback Condition controlling [Morgan's] driveway placement within the setback." (sic) (Respondent Exhibit 265, P. 2) The Amended Statement stated at footnote 7, "the Court of Appeals recognized the Petition as timely but without the essential jurisdictional prerequisite of a decision at the highest level offered by Whatcom County, concluding therefore that no jurisdiction to proceed existed under RCW 36.70C. No 70218-1. Morgans requested immunity in that action for the alleged misconduct of Morgans' in Cottingham's boundary litigation and their proposed findings and conclusion in that regard was denied by the court." (Respondent Exhibit 265, p. 7).

44. On May 6 2014, Respondent wrote to the Whatcom County Planning and Development Services Board of Appeals responding to its inquiry regarding Respondent's Statement in Support of Appeal, stating that land-use issues remained unresolved and that the case was remanded by the Court of Appeals to the Superior Court ruling that "the administrative remedy of appeal to the hearing examiner had not been exhausted." (WSBA Exhibit 182, p. 2 "Note") The only "remand" by the Court of Appeals was for the sole purpose of correcting a scrivener's error in the trial court's conclusions of law. (WSBA Exhibit 171, pp. 5 and 6) (The scrivener's error was corrected by the trial court

on August 20, 2014. (WSBA Exhibit 198))

45. On June 12, 2014, Respondent filed a Motion for Order Granting Leave to File a CR 60(b) Motion in the Superior Court alleging that the Morgans' trial testimony was false.(WSBA Exhibits 186-188) Respondent had filed a similar motion in 2011 (WSBA Exhibits 47-49 and 65), but it was not heard. The June *12, 2014,* Motion and Declaration of David C. Cottingham re: CR 59(), and Cottingham's Memorandum re: CR. 59(j) Cause for Leave to Refile CR 60(h) Motions seem to rely on "misrepresentation, misconduct and fraud" and "discovery misconduct" by Morgan in the adverse possession litigation. E.g., WSBA Exhibits 186, p. 1, and 188, pp. 1-2. Factual support, legal support and relevance were almost entirely lacking. The motion was frivolous and was filed to perpetuate inconvenience and harassment of the Morgans.

46. On July 17, 2014, Judge Meyer entered an order denying Respondent's motion and imposing CR 11 sanctions of $3,750 and an additional $3,750 in attorney fees. (WSBA Exhibit 190)

47. On July 8, 2014, Whatcom County Planning and Development Services duly filed its response to Respondent's amended administrative appeal stating, among other things, that the agency had inspected the Morgans' setback and found it compliant. (Respondent Exhibit 266, p. 4)

48. On September 3, 2014, Whatcom County filed a Motion to Dismiss the administrative appeal. (Respondent Exhibit 267) A hearing on the motion was held November 10, 2014, and taken under advisement.

49. On November 18, 2014, the hearing officer made Findings of Fact, Conclusions of Law and dismissed the appeal stating:

> The Whatcom County Hearing Examiner hereby grants the Motion to Dismiss the above referenced Appeals on the grounds of Res Judicata. The Appellants, having abandoned the above referenced appeals by failing to diligently pursue them after filing in 2012, and instead taking the matter to court in the form of a Land Use Act Petition, abandoned and relinquished all rights to pursue said Appeals.

WSBA Exhibit 201, p. 11.

50. On December 1, 2014, Respondent appealed the dismissal to the Whatcom County Council. (WSBA Exhibits 204 and 205) On December 9, 2014, Respondent dismissed the appeal. (WSBA Exhibits 207 and 210) This dismissal was in response to ongoing Superior Court proceedings initiated by the Morgans on November 14, 2014..

51. On November 14, 2014, the Morgans filed a Motion to Quiet Title. (Respondent Exhibit 165)

52. The motion sought to remove the cloud on title created by Respondent's proceedings and noted Respondent's refusal to withdraw the money from the court registry paid by the Morgans to satisfy the trial court's judgment quieting title to the disputed 292.3 square feet conditioned upon Morgan's payment of the judgment sum. (Respondent Exhibit 165)

53. On December 9, 2014, Judge Meyer entered a Supplemental Order Quieting Title to Morgans removing the cloud on title pursuant to

the court's earlier rulings and the Court of Appeals affirmance. (WSBA Exhibit 211)

54. On December 19, 2014, Respondent filed a Motion for Reconsideration of Supplemental Order and Amendment Providing Injunctive Relief seeking reconsideration of Judge Meyers' December 9, 2014, Order. The motion argued, among other things, that under Civil Rule 60(b)(6) "it is no longer equitable that the judgment should have prospective application" and that the "Supplemental Order interfered in bad faith interference with an administrative appeal (sic)." (WSBA Exhibit 212, p. 2) Respondent further argued that the Morgans' setback constituted a "nuisance." (WSBA Exhibit 212, p. 3) This motion was frivolous and was intended to harass the Morgans.

55. On January 22, 2015, Judge Meyer denied Respondent's Motion for Reconsideration finding in part:

> 01. Plaintiffs' motion and allegations contained therein are not supported in law or fact;
>
> 02, Plaintiffs' motion was brought for the improper purpose of harassment, to cause unnecessary delay, and/or increase the costs of litigation;
>
> 03. Plaintiffs').notion violated CR 11;
>
> 04. Defendants are entitled to CR 11 Sanctions for plaintiffs' violations of CR 11;
>
> 05. Defendants are entitled to reasonable attorney fees and costs incurred in defending plaintiffs motion.

WSBA Exhibit 214, p. 3.

56. The court imposed CR 11 sanctions of $1,250 as well as reasonable attorney fees and costs in the Morgans' favor in the amount of

$1,250. (WSBA Exhibit 214)

57. On February 18, 201.5, Respondent filed a Notice of Appeal with the Court of Appeals seeking reversal of the December 9, 2014, order quieting title in the Morgans and the January 22, 2015, order denying reconsideration. (WSBA Exhibit 215) The appeal was frivolous and was filed in order to harass the Morgans.

58. On March 26, 2015, Respondent filed a Motion to Recall Mandate issued March 28, 2014 (WSBA Exhibit 179) by the Court of Appeals stating in part:

> This motion asserts the frustration of Shoreline Management Act setback enforcement and denial of administrative due process furthering nuisance and abusive use of process.... "Minimum setback purposes" was affirmed by this court
> WSBA Exhibit 216.

59. On June 19, 2015, a panel of the Court of Appeals issued an Order Denying Motion to Recall Mandate and ordered $1,500 terms against Respondent payable to the Morgans "for having to respond to a frivolous motion." (WSBA Exhibit 219)

60. On August 20, 2015, an Order Releasing Funds in Court Registry to Respondent was entered, (WSBA Exhibit 220)

61. The evidence reflects no further legal proceedings. *But see* Hearing Transcript 12/20/16, 37:9-38:10.

62. Prior to trial, attorney Douglas Shepherd substituted as counsel for the Morgans and remained of counsel throughout the balance of the proceedings. Mr. Shepherd is an experienced civil litigator with a history of service to the bar

and the community and gave credible testimony.

63. Upon substituting as counsel, Mr. Shepherd reviewed the matter and concluded the amount in controversy was in the range of $10-$15,000. He estimated his fees would be in the range of $25-$30,000 and unsuccessfully sought to settle the dispute through mediation.(Hearing Transcript 12/20/16, 15:6-13) Mr. Shepherd's attorney fees ultimately exceeded $200,000 although he did not bill the Morgans. (Hearing Transcript 12/20/16, 15:14-22)

64. Over the course of the legal proceedings, a total of $58,115.80 in sanctions and attorney fees was imposed by various courts against Respondent.

65. The Superior Court docket for the adverse possession case (Whatcom County09-2-01773-1) has 414 filings dating from June 24, 2006, to August 28, 2015. The docket for the Whatcom County Superior Court LUPA case (Whatcom County Superior Court 12-2- 03029-1) has 160 filings. (WSBA Exhibits 4 and 98)

66. Respondent's court filings were often, but not always, unintelligible, rife with typographic and grammatical errors - in contrast to other of his filings and his testimony at the hearing of this matter where he was lucid, responsive and clearly able to assist in his defense.

67. Witnesses gave testimony to Respondent's character. The character witnesses, all attorneys, were consistent in describing Respondent as possessing a good reputation, integrity and good character. None had litigated with or against Respondent in recent years.

68. Respondent's conduct caused

inconvenience and injury to the Morgans. (WSBA Exhibits 29, 30 and 34)

69. Respondent's conduct interfered with the administration of justice in consuming substantial judicial time and resources without justification.

IV. CONCLUSIONS OF LAW
RELATING TO ALL COUNTS

The court rulings on all substantive issues in the litigation giving rise to this complaint were legally and factually correct. (Parties stipulated; Hearing Transcript 12/20/16,4:11-5:21)

A. Conclusions of Law Regarding Count 1.

Respondent's Motion for Order Granting Leave to File CR 60(b). Motion (WSBA Exhibit 186) was frivolous. The Motion was filed with the conscious objective of harassing the Morgans and thereby violated RPC 3.1.

B. Conclusions of Law Regarding Count 2.

The filing of the Land Use Petition and Complaint for Declaratory Judgment (WSBA Exhibit 99) on November 15, 2012, was legally and factually unsupported and was made with the conscious objective of causing distress and interference with the Morgans' use and enjoyment of their premises and thereby violated RPC 3.1.

C. Conclusions of Law Regarding Count 3.

The filing of the Motion for Reconsideration of Supplemental Order and Amendment Providing Injunctive Relief (WSBA Exhibits 212-214) was legally and factually unsupported and was made with the conscious objective of perpetuating interference with the Morgans' use and enjoyment of their premises and thereby violated RPC 3.1.

D. Conclusions of Law Regarding Count 4.

The filing and pursuit of the administrative appeal after the Superior Court had determined

the issues and the Court of Appeals had affirmed was legally and factually unsupported and was made with the conscious objective of interfering with the Morgans' use and enjoyment of their premises and thereby violated RPC 3.1.

E. Conclusions of Law Regarding Count 5.

The Conclusions of Law and findings in support with respect to Counts 2, 3 and 4 also constitute intentional violations of RPC 4.4(a) and knowing violations of 8.4(d).

V. AGGRAVATING AND MITIGATING CIRCUMSTANCES

Respondent's professional misconduct is aggravated by the fact that he acted out of selfish motive and engaged in a pattern of misconduct with multiple offenses notwithstanding extensive experience in the practice of law. ABA Standards for Imposing Lawyer Sanctions, Section 9.2 (b, c, d and i).

Respondent's professional misconduct is mitigated by the absence of prior disciplinary record, the uncontradicted testimony to his good character and reputation and the satisfaction of court-ordered terms and sanctions totaling $58,115.80. ABA 9.32 (a, g and k).

VI. RECOMMENDED SANCTION

ABA Standard 6.2 provides that suspension is generally appropriate when a lawyer knows he is violating a court rule and causes interference with a legal proceeding.

Count I — Suspension is the presumptive sanction for Respondent's violation of RPC 3.1 in filing a frivolous Motion for Order Granting Leave to File CR 60(b) Motion. Count 2 — Suspension is the presumptive sanction for Respondent's violation of RPC 3.1 in pursuing a frivolous LUPA

petition.

Count 3 -- Suspension is the presumptive sanction for Respondent's violation of RPC 3.1 in filing a Motion for Reconsideration of Supplemental Order Quieting Title (WSBA Exhibits 211 and 212).

Count 4 - Suspension is the presumptive sanction *for* Respondent's violation of RPC 3.1 in filing and pursuing administrative appeals after the issues had been judicially finally determined and after the Court of Appeals determined the administrative appellate process had been abandoned.

Count 5 — Suspension is the presumptive sanction for Respondent's violations of RPC 4.4 and 8.4(d) in pursuing frivolous litigation and administrative proceedings for improper purpose.

It is recommended that Respondent be suspended for eighteen (18) months.

RESPECTFULLY SUBMITTED this 20th day of January, 2017.

CARNEY BADLEY SPELLMAN, P.S.
s/Timothy J. Parker, Hearing Officer

CERTIFICATE OF SERVICE

I certify that I caused a copy of the FF, COL, & HO's Recommendation to be delivered to the Office of Disciplinary Counsel [unintelligible] to be mailed to Brett Purtzer Respondent's Counsel at 1008 Yakima Street, Tacoma Washington 98405 certified/first class mail, postage prepaid on the 23rd day of January, 2017.

s/Clerk Counsel to the Disciplinary Board

APPENDIX E - DISCIPLINE PLEADINGS
COTTINGHAM MOTION TO DISMISS

FILED
DEC 07 2016
DISCIPLINARY
BOARD

DISCIPLINARY BOARD
WASHINGTON STATE BAR ASSOCIATION

In re DAVID CARL COTTINGHAM, WSB 9553	No. 15#00069 RESPONDENT COTTINGHAM'S MOTION TO DISMISS

I. MOTION.

Respondent Cottingham moves for dismissal and requests the use of Summary Judgment procedure as protection that will not further burden the exercise of First Amendment redress.

II. BASIS.

This Motion Incorporates and accompanies Respondent Cottingham's

Prehearing Memorandum, and all exhibits submitted to date. Summary Judgment analysis is required to apply strict scrutiny to the proceedings to avoid imposition of an unconstitutionally impermissible burden upon the protected and fundamental rights below. Strictly applied protection against a chilling impact upon future loss of redress and First Amendment access to administrative and judicial procedure, under authorities protecting such right as follow:

B. A. Washington Constitution Art. 1 §21.

C. Washington separation of powers doctrine under Putman v. Wenatchee

Valley Medical Center, PS, 166 Wn.2d 974, 979-85, 216 P.3d 374 (2009)

D. Washington right of access to courts under Putman, 166 Wn.2d at 979;
E. The petition clause of the First Amendment to the United States Constitution;
F. Authority: Davis v. Cox, 183 Wn.2d 269; 351 P.3d 862; 2015;
G. Kates v. Seattle, 44 Wn. App. 754; 723 P.2d 493 (1986).
H. RCW 58.17.300.

III. Remedy Sought. Summary Judgment Procedure.

IV. Evidence. In particular, the following, and including exhibits proposed to date:

A. Respondents Exhibit No.266, July 8, 2014 Staff Report WCPDS Findings, Conclusions, and Determination APL 2012-00019 & 20 Admitting "hold" on administrative appeals;.
B. Respondents Exhibit No. 277, Report of Larry Stoner, Development Consultant;
C. Respondents Exhibit No. 269a 1 and 2.
D. Opinion No 70218-1-I, Cottingham v. Morgan, Washington Court of Appeals;
E. Opinion 68202-4-I Cottingham v. Morgan, Washington Court of Appeals;
F. Respondents Exhibit No. 291, Deposition of Whatcom County Planning and Development Director J. E. "Sam" Ryan. February 25, 2016;

G. Respondents Exhibit No. 292, Deposition of Whatcom County Planning and Development Director J. E. "Sam" Ryan June 20, 2016;

H. Respondents Exhibit No. 194 Deposition of David C. Cottingham, December 3, 2010.

I. Respondents Exhibit No. 296. Enforcement Decision, Denial of Action, Whatcom County Planning and Development Director J. E. "Sam" Ryan transcribed voice mail record, transcribed by David C. Cottingham on October 26, 2012 from record of October 25, 2012

V. Supporting Argument.

In addition to Cottinghams' Prehearing Memorandum herewith, this motion asserts that the Complaint challenges effort made necessary in response to pursuit of an informed basis for safety enforcement denial. The complaint asserts violations which are fully disproved if unapproved land division disqualified permitting under RCW 58.17.300. The effort complained of was exercise of the right to First Amendment redress after preclusive jurisdictional effect of LUPA-impaired review.

Evidence at the scheduled hearing will support the following conclusion:

The efforts of Cottingham in the pursuit of misrepresentation and hearing as to permissible jurisdiction were denied a Superior Court forum for record and redress .May 8, 2012, and also denied a forum for redress when Cottinghams' original appellate process was withheld by an agency, acting without authority, in derogation of its duty to make

delivery of that process to two appellate agencies able to address validity of permitted project development location as well as permit enforcement interpretation, and which if completed, would have resolved the appeals without necessity of the efforts charged in the complaint.

To avoid the capacity of the complaint to impair the First Amendment right of redress including access the complaint should be dismissed without necessity of calling all witnesses to achieve the dismissal, absent strong showing described below. The forgoing evidence, and in particular the Opinion of Larry Stoner will be submitted in Declaration form by Cottingham and establish that land division by defendants violates RCW 58.17.300 without approval; that project permitting is not final; and that finality for Cottingham is unachieveable without agency approval, establishing at once that "No building permit, septic tank permit, or other development permit, shall be issued for any lot, tract, or parcel of land divided in violation of this chapter or local regulations adopted pursuant thereto..." RCW 58.17.210. *Kates v. Seattle.*

No court has excused defendants from compliance with RCW 58.17.030 and WCC 21 (WCC 21.03.040, (certificate of exemption); WCC 21.04.020 (short subdivision approval(R.Ex. 228).

The formal have already chilled necessary relief. The drafting in title litigation complicated and confused an agency to avoid its duty under RCW 58.17.300 and RCW 90.58.140(4)(notice) for the pursuit of marketability that, nevertheless, remains subject to the legislature's declaration prohibiting marketing and still requires defendants' permit applications.

Uncontradicted, the following conclusion should be regarded found:

Cottinghams efforts as nonfrivolous, likely supported in fact and law and fully serving the ends of justice.

The obligation to raise the confusion of an agency to setback inspection demand is a great burden upon free exercise of the right to defend against its loss. Strict scrutiny requires such procedure to avoid impermissible chilling and restraint of First Amendment right of redress. This motion should be governed by the principles set forth in Young v. Key Pharmaceuticals, 112 Wn.2d 216, 770 P.2d 182 (1989)(citing with approval Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)).

The Hearing Officer should impose this burden-shifting standard according to summary judgment procedure. The factual evidence represented preliminarily above reveals land division as unlawful if unapproved. *Kates v. Seattle. This* state of affairs could not have been considered but is highly material to disproving any charge that Cottinghams efforts at seeking basis for the agency denial were not supportable in law and fact. Pursuit of both review and inspection were substantially in pursuit of the interests of justice for a whole class of persons in the platted lots (RCW 90.58.230). If no evidence can be shown that land division was approved or was not involved, these proceedings are unjust and an agency with authority will likely later reveal them as such, according to the Kates v. Seattle analysis.

In the absence of sufficient evidence which does not consist of Cottingham's efforts and which does in fact demonstrate permit validity, then WSB charges are not supportable and should be dismissed without imposing the burden of full hearing on merits and which will again impose a

presumed burden of permit validity.

WSBA has the initial burden of going forward and of proof. This burden should be regarded as triggered by moving to consider evidence that requires such an initial showing by WSBA, pointing triable facts to the Hearing Officer.' The Hearing Officer should impose a burden before testimonial hearing to WSBA because of its burden of proof at hearing[2] requiring that WSBA respond with specific facts supporting the elements and a genuine issue for hearing. WSBA should not be allowed to rely on judicial determinations of frivolous conduct that do not address RCW 58.17.300. If the WSBA fails to make a showing sufficient to establish RCW 58.17.300 as inapplicable to requisite land division approval then the [Hearing Examiner] should grant the motion.[s3] If the WSBA fails to show exercise of the right of redress did not pursue RCW 58.17.300 and/or RCW 98.58.230, and/or RCW 58.17 then it will fail to make a prima facie case on each and every burden of proof at hearings.

Respectfully submitted this December 5, day of 2016.

s/David C. Cottingham
WSB 9553

[1] *Id, at fn. 1.*

[2] *Id, at 225.*

[3] *Id, at 225* (internal citations omitted), citing *Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)

DISCIPLINARY COUNSEL RESPONSE TO COTTINGHAM MOTION TO DISMISS

FILED DEC 12 2016
DISCIPLINARY
BOARD

BEFORE THE DISCIPLINARY BOARD OF THE WASHINGTON STATE BAR ASSOCIATION

In re Proceeding No. 15#00069 DAVID CARL COTTINGHAM, Lawyer Bar No. 9553	SPECIAL DISCIPLINARY COUNSEL'S RESPONSE TO MOTION TO DISMISS

Respondent's Motion to Dismiss is untimely and unauthorized. Any motion to dismiss for failure to state a claim upon which relief may be granted must be filed within the time for filing the Answer. ELC 10.10c. The Answer was required to be filed within 20 days of the complaint which was served on November 17, 2015. (Acknowledgment of service attached). The Answer is dated November 30, 2015, over a year ago.

A motion to dismiss may not present factual materials outside the Complaint and Answer. ELC 10.10 (d). The respondent's motion includes citation to many such materials and seeks "Summary Judgment analysis". (Motion p. 1). Summary judgment procedure is specifically prohibited. ELC 10.1 (a) "A party may not move for summary judgment..."

Accordingly the motion should be denied.

RESPECTFULLY SUBMITTED this 12th day of December, 2016.

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APPENDIX
DISCIPLINARY COUNSEL'S FORMAL COMPLAINT

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BEFORE THE
DISCIPLINARY BOARD
OF THE
WASHINGTON STATE BAR ASSOCIATION

In re Proceeding No. 15#00069 DAVID CARL COTTINGHAM	FORMAL COMPLAINT Lawyer (Bar No. 9553).

Under Rule 10.3 of the Rules for Enforcement of Lawyer Conduct (ELC), the Office of Disciplinary Counsel (ODC) of the Washington State Bar Association charges the above-named lawyer with acts of misconduct under the Rules of Professional Conduct (RPC) as set forth below.

ADMISSION TO PRACTICE

1. Respondent David Carl Cottingham was admitted to the practice of law in the State of Washington on October 30, 1979.

FACTS REGARDING COUNTS 1, 2, and 3

1 Respondent and his spouse are residential neighbors of Ron Morgan and his spouse; they own

adjacent lots on Lake Whatcom.

2 In August of 2006, after Whatcom County issued necessary building permits, the

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Morgans began building a house on their lot.

3. The Cottinghams did not seek administrative review of the issuance of the 2006 building permits.

4. In 2007, the Morgans completed construction and moved into their new house.

5. Also in 2007, the Morgans removed some bushes along the shared property line between their lot and the Cottinghams' lot and installed a driveway.

6. In 2009, acting as a lawyer for the marital community, Respondent filed a complaint alleging that he and his spouse had acquired title to a portion of the Morgans' lot by adverse possession and asked that the trial court quiet title to that portion in the Cottinghams.

7. Respondent also alleged that the Cottinghams owned a maintenance easement over part of the Morgans' lot.

8. Respondent sought damages against the Morgans for trespass, conversion, outrage, and nuisance, and asked for an injunction.

9. The Morgans counterclaimed, asking the trial court to quiet title to all of their lot in them.

10. Trial was held in December 2011.

11. The court dismissed Respondent's claims for a maintenance easement, injunctive relief, nuisance, and outrage.

12. The court found that Respondent proved his claim to adverse possession of a portion of the Morgans' lot, and quieted title of that portion in them upon payment by them of $8,216.55 to the Cottinghams.

13. The court found the Morgans improperly converted the bushes and ordered them to pay the Cottinghams treble damages for the bushes.

14. The Morgans delivered a check for $21,245.49, which constituted payment for the property portion and the bushes, to Respondent.

15. Respondent returned the check.

16. The Morgans deposited the funds in the registry of the court.

17. Respondent appealed the trial court's decision and the Morgans cross-appealed.

18. The Court of Appeals affirmed the trial court's decision.

19. The Washington Supreme Court denied review.

20. Respondent then moved the trial court to reconsider, vacate the judgment, or grant a new trial under CR 59 and CR 60.

21. Respondent's motions were frivolous.

22. The trial court denied Respondent's motions, finding that his allegations were not supported by law or fact, and that the motion violated CR 11.

23. The court ordered Respondent to pay $7,500 in sanctions, attorney fees and costs.

24. On October 25, 2012, Whatcom County granted final occupancy approval under the Morgans' 2006 building permit.

25. In early November 2012, Respondent filed two administrative appeals from the occupancy approval, but then abandoned the appeals.

26. On November 15, 2012, Respondent filed a

"Land Use Petition and Complaint for Declaratory Judgment" (LUPA petition) in superior court against the Morgans and Whatcom County.

27. Respondent raised arguments in the LUPA petition that mirrored arguments he raised in the first adverse possession case, which had already been decided, and raised in his abandoned administrative appeals,.

Formal Complaint Page 3

28. The LUPA petition was frivolous.

29. The Morgans moved for summary judgment.

30. The trial court granted summary judgment and dismissed the LUPA petition finding that it was not supported by fact or law or reasonable arguments for extension of existing law, that the arguments were filed in part "to harass and/or annoy" the Morgans, and were frivolous and advanced without reasonable cause in violation of RCW 4.84.185.

31. The court entered an order imposing $25,432.80 in sanctions, attorney fees and costs against Respondent under CR 11 and RCW 4.84.185.

32. Respondent appealed.

33. The.appeal was frivolous.

34. The Court of Appeals affirmed the trail court's dismissal of the LUPA petition.

35. The Court of Appeals also affirmed the trial court's ruling that Respondent violated CR 11 and RCW 4.84.185, and further found under Rules on Appeal (RAP) 18.9 that Respondent's appeal presented no debatable issues and was frivolous.

36. The Court of Appeals also found that Respondent had abandoned his administrative appeals.

37. The Court of Appeals awarded fees and costs on appeal to the Morgans.

38. Two days after the Court of Appeals filed its opinion, Respondent requested that the Whatcom County Planning and Development Services Department move forward on the administrative appeals that the Court of Appeals had deemed abandoned.

39. Respondent's request was frivolous.

40. The hearing examiner dismissed the appeals with prejudice, concluding that since the courts had concluded that Respondent had abandoned the administrative appeals, he had no right to attempt to reassert them.

41. On December 9, 2014, after the Morgans' funds in the court registry were paid to the Cottinghams, the trial court entered an order quieting title to all of the Morgans' lot in them and enjoining the Cottinghams or anyone claiming under them from asserting any right or title to that property.

42. Respondent filed a motion to reconsider, claiming that he had inadequate notice of the injunction included in the order, that the Morgans' driveway violated setback requirements and was therefore a nuisance, and that the order improperly interfered with his abandoned administrative appeals.

43. The motion to reconsider was frivolous.

44. The court denied the motion finding that his claims were supported by neither law nor fact, were brought for purposes of harassment, violated CR 11, and merited an award of sanctions, attorney fees and costs totaling $2,500 against Respondent.

COUNT 1

45. By moving to reconsider, vacate the judgment, or grant a new trial after the first appeal, which motions were frivolous, Respondent violated RPC 3.1 (frivolous litigation).

COUNT2

46. By filing the LUPA petition, which was frivolous, Respondent violated RPC 3.1.

COUNT3

47. By filing the motion to reconsider after the trial court quieted title to the Morgans, which was frivolous, Respondent violated RPC 3.1.

COUNT 4

48. By filing one or more appeals that were frivolous and/or by attempting to pursue the administrative appeals after he abandoned them, Respondent violated RPC 3.1.

COUNT 5

49. By pursuing litigation and/or appeals before the trial court, the court of appeals, and/or the Whatcom County hearing examiner with intent to harass and/or annoy the Morgans, Respondent violated RPC 4.4 (using means that have no substantial purpose other than to burden a third person) and/or 8.4(d) (conduct prejudicial to the administration of justice).

THEREFORE, Disciplinary Counsel requests that a hearing be held under the Rules for Enforcement of Lawyer Conduct. Possible dispositions include dismissal, disciplinary action, probation, restitution, and assessment of the costs and expenses of these proceedings.

Dated this 9th day of November, 2015.

s/M Craig Bray, Bar No. 20821 Disciplinary

COTTINGHAM ANSWER TO FORMAL COMPLAINT

NOV 30 2015

DISCIPLINARY BOARD
WASHINGTON STATE BAR ASSOCIATION

In re DAVID CARL COTTINGHAM, Lawyer_Bar No. 9553	Proceeding No. 15#00069 ANSWER OF RESPONDENT COTTINGHAM TO FORMAL COMPLAINT

Respondent Attorney Cottingham hereby responds to the Formal Complaint dated November 9, 2015, as follows:

ADMISSION TO PRACTICE.

1. Admitted.

FACTS REGARDING COUNTS 1, 2, and 3.

1. Admitted.
2. Admitted.
3. Admitted.
4. Admitted.
5. Admitted, except that the driveway was installed as permitted before waste of Cottingham property. A second, unpermitted driveway was installed after opportunity for review had passed.
6. Admitted in part. Denied only that that Cottinghams filed the complaint through respondent attorney Cottingham, and the allegation that adverse possession was

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the only or even the main theory of the complaint. *Complaint* Para. 2.5 and 217, asserted as *correct* the shared corner location of B.N.R.R. Lot Sixteen located where depicted and staked in combined plat and shared Lot Corner plat representation. Admitted that summary judgment' established that same location employing Para .2.18 adverse possession, as affirmed in Court of appeals opinion No. 682202-4-I.

7. Admitted.

8. Admitted

9. Admitted

10. Admitted, however trial commenced November 30, 2011.

11. Admitted.

12. Admitted except as follows: Denied in part. February 1, 2012 through August 19, 2014, no Order Quieting Title had entered and conclusion no. 5 denied proof by Cottinghams. The now-quieted title is area "as surveyed," (not any longer "essentially to .... the B.N. R.R. Right-of-Way," former Findings and Conclusions of Jan. 3, 2012, Dkt. 15 199). The definition February 1, 2012 (Supplemented Amended Findings and Conclusions) and on December 9, 2014 (Supplemental Order Quieting Title), has located

corners where and "as surveyed" (ln. 16-17. pg 2, Dkt. 377). Compared with summary judgment area (Dkt. 81A legal description, after Remand Order2, Dkt. 367, reversing denial) it these are not coextensive.

13. Admitted.

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[1] Exhibit I, hereto.

[2] Exhibit G hereto.

14. Admitted, except that payment was also for punitive wrongful waste damages, trebled because Morgans failed the minimal probable cause defense (belief that that the land on which such trespass was committed was Morgans. RCW 64.12.040).

15. Admitted. Pursuant to the "acceptance of benefits rule RAP 2.5(b).

16. Admitted..

17. Admitted.

18. Admitted, however the Court of Appeals could not finalize proceedings due to the need to address the inconsistency caused by Morgans' introduction of Conclusion No 5, (pg. 3, line 20, Dkt. 239)

19. Admitted.

20. Denied. The Motion sought leave to refile such motions.

   A. Admitted that Respondent Cottingham sought such motions. RAP 7.2(e) had not resulted in any required hearing and decision,

21 Denied.

22 Admitted.

23. Admitted.

24 Admitted.

25. Admitted in part. No abandonment of administrative remedies occurred whatsoever and the allegation of abandonment is denied as to such..

26. Admitted.

27. Denied entirely. Arguments had not already decided. As the opinion in No. 68202-4-I reveals, the trial court had not finally decided Cottinghams' title. No Order Quieting Title had entered.

28. Denied. The LUPA petition was required in pursuit of the First Amendment Exercise of the Right of Redress of Grievances addressing Shoreline Management Act compliance and WCC 23.50.02.B enforcement of Shoreline Exemption conditions including denial of driveway in the setback. The LUPA petition was also required in a good faith argument for the extension of Washington law to achieve regard for any intrusion into setback in the shoreline zone as substantial change in a permit application under RCW 19.27.095 and Lauer v. Pierce County

29. Admitted.

30. Admitted in part. The determination recited was made without trial and was dependent upon determination that the matter of 09-2-01773-1 was final, although finality was not possible because of the presentation of conclusions by Morgans leaving open a determination as to what of Cottinghams title remained after final determination.

31. Admitted.

32. Admitted.

33. Denied that the LUPA Appeal was frivolous.

34. Admitted.

35. Admitted.

36. Admitted.

37. Admitted.

38. Admitted.

39. Denied. Cottinghams still had need of setback enforcement which could not have been enforced without knowing whether setback was eliminated to accord a health department decision not disclosed at any time and which RCW 36.70c allowed no redress for until a final decision.

40. Admitted.

41. Admitted, except that the property quieted is the area "as surveyed" without conforming to the platted lot "as platted" See two different conclusion Nos. 8.

42. Admitted.

43. Denied.

44. Admitted.

45. Count One. Denied.

46. Count Two. Denied.

47. Count Three. Denied.

A. Count Four. Denied.

B. Count Five. Denied.

III. Factual Allegations In Support Of Affirmative Defenses.

3.1 Defendant Ron Morgan and his counsel suggested that Ron Morgan's anger as reasonable retaliation for Respondent Cottingham's protected report to Whatcom County Planning And Development Services (hereinafter "WCPDS).

3.2 Ron Morgan committed an unjustified act of assault upon Respondent Cottingham when Respondent Cottingham, protected by court order and summary judgment to conduct staking, was locating the corner point of area to satisfy Morgan's counsel of location of conveyance from Cottingham to defendants Morgan.

3.3 Ron Morgan delivered proof that he would employ destruction of Respondent Cottingham property to frustrate boundary location.

3.4 July 2011 Respondent Cottingham gave clear notice, specifically citing RPC 4.2 to communicate that all contact with RM is unwanted and reminding RM that he is represented by counsel.

3.5 Ron Morgan retaliates against Respondent Cottingham for his service as witness and counsel in 09-2-01773-1 by a pattern of yelling profanity having no legitimate purpose and beyond the rule of law causing loss of use of property. His conduct reached such severity that it caused request for continuance of a deadline for appeal 68202-4-I briefing, after he recited his specific hope that his profanity could be heard within the Cottingham home. It also assured of the necessity of well-defined title.

3.6 Ron Morgan retaliation meets the definition of 42 U.S.C. §§ 1983 and 1985 retaliation for Cottingham's protected complaint to WCPDS and protected testimony in proceedings under Cause No. 09-2-001773-1.

3.7 Morgans' use setback for driveway traffic in the newly awarded dimension. If Morgans signaled they refused to obey the setback or disclosed desire to make use of setback an RCW 90.58 hearing would have resulted.

3.8 No. 68202-4-I proceeded on pleadings and discovery from defendants Morgan which disclosed no need of regulation review as cause for an equitable remedy while WCC 23.50.02.B assured Cottinghams of setback enforcement.

3.9 Breach of the RPC 3.4(d) duty to make reasonably diligent effort to comply with Respondent Cottingham's legally proper discovery request impaired integrity and fairness of title-trial proceedings and denied discovery of equitable remedy potential based upon land use decision directives. It also denied opportunity to prepare to

be heard in defense against setback loss.

3.10 No RAP 7.2(e) hearing was held in the title trial court allowing understanding as to whether, or to what extent, the trial court should be regarded as having exercised and use decision jurisdiction or protection against discovery abuse, the court having stricken Respondent Cottinghams' May 8, 2012, 2012 CR 60(b)(4)(1 1) Motion, without a required RAP7.2(e) hearing. No hearings were allowed thereafter (unfiled email record, attached as Exhibit C). (noted, Dkt. 288 and 289, stricken "before" hearing Dkt. 294, May 8, 2012).

3.11 The title trial court ordered RAP 7.2(e) leave be pursued in May 2012 without a hearing record that would have allowed development of a record considering potential for loss of First Amendment Exercise redress resulting from lack of clarity as to setback in administrative proceedings, or even agreeable invocation of RCW 3 36.70c.030 proceedings, standing and jurisdiction.

3.12 Washington State has at all times pertinent hereto incorporated local lot division regulations rendering participation in "sale, offer for sale, lease, or transfer of any lot, tract or parcel" without approval of division or adjustment as a gross misdemeanor. RCW 58.17.300.

3.13 The trial court entered findings and conclusions without open court pronouncement allowing drafting findings and conclusions conforming thereto with the clarity and the precision necessary to quieting title and understanding whether land use review jurisdiction was employed. Knowing whether presentations conformed to trial court intention, as by pronouncements, was not possible.

3.14 Opinion 68202-4-I could not deliver finality in the title trial to support the LUPA matter as

final, because the "disputed area" judgment was unsupportable without addressing inconsistency between the remedy and supplemental or amended conclusion No. 5 in which Cottingham title was denied to have been proven.

3.15 Opinion 68202-4-I March 28, 2014, mandated "further proceedings in accordance with" the decision and therefore signified grant of authority to do as the court needed.

3.16 Remand did not direct resolution of the conflict and left the trial court able to resolve the judgment for sale of the disputed area as inconsistent. Cottingham's proof of title was not yet known likely to be reinstated.

3.17 No Order Quieting Title had entered, and no Motion had been filed to address inconsistency of the mandate when Respondent Cottingham filed a CR 59(j) Motion For Order Granting Leave To File CR 60(B) Motion, Dkt. 333, referenced at Count 1, para. 45, Formal Complaint). To that time no hearing had been had on the CR 60(b)(4) and (11) motion, and RAP 7.2(e) had only been employed in denying any hearing and decision.

3.18 When Morgans did finally present an Order Quieting Title it adopted the as surveyed" location. The survey is attached hereto as Exhibit D3 hereto, revealing it does not include the upland dimension to the B.N. R. R. Right-Of-Way4 which was used earlier in January 2012, Findings and Conclusions.5 However, Cottinghams' Summary Judgment and its description does begin at, and does include, abutting location of Lot Eleven abutting the B.N.R.R. Right-Of-Way. (Dkt. 81 A).Exhibit I.

3.19 The Order Quieting Title did not enter until December 9, 2014,

3.20 Title was quieted January 11, 2011 in

Cottinghams and December 9, 2014 in Morgans. The descriptions are not coextensive RCW 90.58.210(2) mandates enforcement of terms of permits, and .220 renders violation of master program rules and regulations a gross misdemeanor. WCC 23.50.02.B.

3.21 WCPDS denied the appropriate process due under Fourteenth amendment and First Amendment exercise of redress for any defense of a plan by RM to violate the exemption condition (driveway use in setback),6

3.22 No "abandonment" of administrative remedies determination would have been supportable had a record been ordered which would have allowed proof that

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[3] The exhibit reveals outlining applied by Morgans' counsel, presumably applied for clarity.

[4] The pertinent portion of the B.N.R.R. Right-Of-Way plat is Exhibit E hereto; Exhibit F is the Nixon Beach Tracts Plat.

[5] See, Finding 4 ([Morgans acquired]"title by deed...also ...subject to inter alia, the Larry Steele survey...");finding 22 ("all of Lot 11"), and compared with conclusion 8 ("essentially ... to ...B.N.R.R. Right-of-Way")

[6] Exhibit A is true and correct copy of the Shoreline Exemption Form and Exhibit B is a page of the Case Activities revealing enforcement as to the Morgan setback free from driveway.

WCPDS made a decision to deny notice of its hold (Exchibit H) on Cottinghams' administrative appeals.

3.23 The opinion in no 70218-1-I operated beyond ability to cite a record. An RCW 36.70c.110 record was not ordered by the trial court, although necessary under RCW 36.70c.110, and would have

revealed the "hold" on Cottinghams administrative appeals.

3.24 Use of setback for driveway operates as nuisance per se which continues and for which RCW 90.58.230 allows action.

3.25 Use of setback for vehicular traffic is endangerment operating as nuisance in fact, raising obligation of Respondent Cottingham to exercise diligence to seek exhaustion of First Amendment Redress in prevention of endangerment by RM to persons and property through both abuse, retaliation as well as vehicular endangerment and also in exhaustion before claim under 42 USC § 1983.

3.26 42 U.S.C. §1983 and §1985 remedies for violation of fundamental rights including federal First Amendment redress of grievances require full use and exhaustion of remedies in state court resulting from application of RCW 36.70c.020-.040 to deny standing and jurisdiction.

3.27 Mrs. Cottingham required and deserved counsel willing to exercise RPC 1.3 diligence in this difficult regulatory arena to overcome loss of access to courts while she is unable to review the land use decisions causing need of her property.

3.28 Under WAC 173.27.100(2)(c) a permit revision is required anew whenever the applicant proposes substantive changes to the design, terms or conditions of a project from that which is approved in the permit, but may not alter or intrude into setback.

3.29 Morgans had, by conduct and retaliation, caused Respondent Cottingham to engage in professional effort protective of title and safety.

3.30 Respondent Cottingham was professionally required to exercise diligence under RPC 1.3 after presentation of a regulatory need at trial by Ron

Morgan testimony for the court to satisfy. Protection of his client, Mrs. Cottingham, from unlawful harassment and the consequence of a future clouded by title clarification was the least effort required. "A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor [and] should carry through to conclusion all matters undertaken for a client" Comments one land four.

3.31 Testimony at trial by Ron Morgan caused entry of a remedy, during a time at which Cottinghams were prohibited from review of land use decisions under RCW 36.70c.020-.040.

3.32 RAP 7.2(e) was applied in a Superior Court forum to strike opportunity to be heard, denying a record of response from both parties to a post trial motion properly noted; and denying a decision by entry of an order requiring Respondent Cottingham to seek leave to proceed without benefit of a record in the trial court. The order was complied with fully.

3.33 By email the Superior Court department charged with hearing No. 68202-4-I pronounced that it would entertain no motions after receiving the CR 60(b)(4) and (11) motion and striking the hearing. Exhibit C. Whether regulatory conflicts entered into appraisal of an equitable remedy was not reviewable.

3.34 Trial disclosed that defendant Morgans' survey was not only used for permitting but was a representation which controlled corners of the sale to defendants Morgan without the added area called by the plat.

3.35 Basing their purchase upon a partial survey, Morgans had tied their purchase thereto

without seeking approval, violating RCW 58.17.300, rendering participation in "sale, offer for sale, lease, or transfer of any lot, tract or parcel" a gross misdemeanor.

3.36 Seeking leave to refile under CR 59 (j) was the proper method applicable to discovery of evidence of concerted action seeking denial of First Amendment exercise of right of redress.

3.37 Seeking leave to refile was the most proper and professional method of seeking cure for denial of First Amendment right of redress; Denial of right of redress attending loss of setback security is best cured by attempt at redress.

3.38 Good faith argument exists that RAP 7.2(e) required a hearing and was fundamental to First Amendment Exercise of Redress of Grievances in a trial which Defendants Morgan had caused to turn toward a regulatory cause for application of equity, and that all motion hearings which may have allowed opportunity for clarification had been improperly denied. Cottinghams had to attempt to seek redress without any hearing and factual development for record of need of Redress which RCW 19 36.70c.020-.040 denied standing to present.

3.39 During appeal No. 68202-4-I from No. 09-2-03029-2-I, party Ron Morgan, by aggression and introduction of frivolous conclusions created substantial need for certainty as to property corners and area of setback therefrom.

3.40 The LUPA and Declaratory judgment matter (12-2-03029-1) proceeded without trial of facts; any conclusion that Cottinghams proved title; without evidence that Whatcom County's agencies had denied exercise of First Amendment Redress; and without evidence that no notice attended the WCPDS decision to place Cottinghams'

administrative appeals on hold.

IV.AFFIRMATIVE DEFENSES.

4.1 First Amendment exercise of the right to seek redress of grievances is essential to due process. Timing of notices is also essential to procedural due process and the opportunity to be heard. King County Pub. Hosp. Dist. No. 2 v. Dep't of Health, 178 Wn.2d 363,380,309 P.3d 416 (2013). Notice must be reasonably calculated to inform interested parties of an action against them and give them the ability to make an appearance on their own behalf. Mullane v. Cent. Hanover Bank &Trust Co., 339 10 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865 (1950). A party's opportunity to be heard must be meaningful both in time and manner. Mathews v. Eldridge, 424 U.S. 319, 333, 12 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). No administrative burden attends giving of notice of a "hold" on an administrative appeal. No great burden would result from providing notice ensure that landowners know of reasons for delay in processing an appeal, and it is not frivolous for Washington Counsel to attempt litigation to recover from delay. Loss of setback enforcement is loss of an expectancy that is constitutionally protected. *See,* Sintra. Inc. v. City of Seattle. 119 Wn.2d 1, 11, 829 P.2d 765 (1992). Land use disputes are an appropriate subject of § 1983 actions,*id.* The County was violating Cottinghams' right to procedural due process. RAP 7.2(e) was applied to deny a hearing to Cottingham. Effort at recovery of lost process and preventing such an action is not frivolous.

4.2 Denial of opportunity to seek redress of grievances operated as a denial of first amendment exercise and fourteenth amendment due process under color of law, violating 42 USC 1983. Every professional effort was required in advance of the

completion of denial of first amendment exercise coupled with denial of discovery of the Health Department Land Use Decision disclosed at trial by party Ron Morgan, raising the identification of additional parties from whom such a decision arrived as the Health Department Land Use Decision disclosed at trial by party Ron Morgan, raising the identification of additional parties from whom such a decision arrived as persons acting in concert with Morgans in deprivation of the first amendment right to seek redress and the denial of RAP 7.2(e) opportunity for hearing and decision before persons acting in concert with Morgans in deprivation of the first amendment right to seek redress and the denial of RAP 7.2(e) opportunity for hearing and decision *before* need of appeal.

4.3 Knowing that two or more persons were engaged in concerted action to employ changing legal description and their on-ground location, and that setback was threatened, resulting in denial of equal protection, privileges and immunities, and First Amendment exercise of opportunity to seek redress of grievances, Respondent Cottingham was duty-bound to seek security in the in new area.

4.4 Denied. Count One. RCW 36.70C.020-.040 and RAP 7.2(e) and policies of WCPDS were employed to deny a record in separate proceedings, jeopardizing opportunity to be heard and any decision regarding the scope of preparation for a fair trial - unjustly protecting Morgan's denial of discovery as to health department conflict causing need of Cottingham property.

A. Respondent Cottingham had a duty under RPC 1.3 to diligently pursue, remedy, recover and protect against of loss of notice, procedural due process, First Amendment redress,

privileges and immunities and equal protection which was being denied to Mrs. Cottingham regardless of consequence to him personally.

B. As WCPDS reported July 8, 2015, Whatcom County placed a hold on review of Cottinghams' appeals for lack of judicial branch finality. Whether Exhaustion and primary jurisdiction doctrines should prevent use of equity during development decisions appears to be a matter of first impression in Washington.

C. Count 1 motions were not reconsideration, but proper CR 59(j) procedure serving a substantial purpose See alpine Industries v. Gohl, 101 Wn.2d 252, 676 P.2d 488(1984).'

D. Procedural permission to refile the motions was meant to aid recovery of First Amendment redress and procedural due process, access to courts for the necessary record and finally allow an RAP 7.2(e) decision. The result to be achieved would be some clarity as to use of jurisdiction over administrative regulations conflicts (health and shoreline setback), when other avenues of redress were foreclosed.

E. Good faith argument supports the position that after a mandate directing proceedings in conformity, the constitutional issues raised and considered were not challenged by addressing the CR 59(j) motion or by question whether the scope of injunctive relief should extend to curtail administrative proceedings. A public hearing was administratively denied without clarification of the required CR 65 scope of equitable relief.

F. Denial of the RAP 7.2(e) hearing and decision denied hearing on a matter affecting the appearance of judicial integrity, in which an attorney's oath was used differently in a

discovery deposition from his testimony at trial.

G. The morning of anticipated hearing May 8, 2012, the trial court struck the following motions noted by Respondent Cottingham, so no determination of the court could be included in request for leave under No. 68202-4-I despite specific

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[7] Rules of Appellate Procedure are to be "liberally interpreted to promote justice and facilitate the decision of cases on the merits." RAP 1.2(a); SEE MILLIKAN v. BOARD OF DIRECTORS, 92 Wn.2d 213, 595 P.2d 533 (1979); FOX v. SACKMAN, 22 Wn. App. 707, 591 P.2d 855 (1979).

language of RAP 7.2(e)(Memorandum From Judge Meyer, Skagit County Judge Re Hearing, Dkt. 294):

April 27, 2012, Motion For Order Dismissing Counterclaims For Lack Of Jurisdiction, Dkt. 284 April 19, 2012, Plaintiffs Motion For Order To Show Cause For Relief From Judgment, Dkt. 271.

H. By striking the hearing of the Cottingham motions for which RAP 7.2(e) required hearing and decision, no result of the rule's instruction to decide the matter could be delivered to the Court of Appeals, resulting in an inability to determine applicable procedure going forward. There *is no rule regarding an RAP 7.2(e) motion that has not been heard.*

RAP 7.2(e) required, in part, that, "The postjudgment motion or action shall first be heard by the trial court, which shall decide the matter. If the trial court determination will change a decision then being reviewed by the

appellate court, the permission of the appellate court must be obtained prior to the formal entry of the trial court decision."

I. The trial court refused to hear any motions by emailed notice May, 2012.

J. Thereafter, the motion sought permission for filing but sanctioned as if it were a reconsideration motion. (6/12/2014 Dkt. 335).

K. A good faith argument holds that for newly discovered evidence impairing the integrity of the proceedings by revealing that a Washington Attorney denied discovery, it is denial of constitutionally protected due process and First Amendment Redress and Access to Courts to regard RAP 7.2(e) as denying a post-mandate hearing.

L. RAP 7.2(e) should not be construed to limit appealate procedure by denying a record below. Approach to the Court of Appeals for leave was impaired by absence of a hearing and consideration requiring that diligent counsel pursue a hearing, at least under under CR 59(j).

M.. A good faith argument exists that when regulatory need is introduced as cause for neighboring property and use in the setback is contemplated a public hearing was required, notice allowing opportunity to defend against loss of setback -particularly in a county in which enforcement is mandated by ordinance is required under the Fourteenth Amendment to the Constitution, and if a public hearing is denied, a judicial remedy must cease, because the condition exempting it was impossible and plan for its violation was not disclosed in a shoreline permit application. Loss of First Amendment Exercise of Redress of Grievances requires the result as a matter of procedural due

process. Mathews v. Eldridge.

N. Pursuit of integrity of the judicial process was required of Respondent Cottingham in exercise of RPC 1.3 diligence.

O. RPC 1.3 Diligence was required in the pursuit of recovery of hearings necessary to prevent loss of constitutionally protected setback.

P. Lack of clarity exists as to availability of equitable remedy during ongoing administrative proceedings.

Q. Notice and opportunity to be heard was denied by use of unreviewed conflicting land use development decisions and regulations affecting a judicial remedy.

R. Cottinghams expected to develop evidence by discovery enabled in remedy of sanctionable discovery denial by Morgans since neither pleadings nor defendant Ron Morgan testimony had notified of need to pursue any regulatory directive as basis for need of Cottinghams' property and RCW 36.70c.020-.040 denied opportunity to review any plan to use setback for driveway.

4.5 Denied. Count Two. LUPA Petition.

S. Priority of the action applied under cause 09-2-01773-1 and finality had not developed. Respondent Counsel's performance was substantially impaired by entry without open-court pronouncements to better protect a client and judicial integrity before WCPDS.

T. Exhibit H, Pg 4 revealed a "hold" on Cottinghams' appeals. As a matter of law, considering the role of a hold on appeals, Cottinghams' administrative appeal was not abandoned, but was subject to indifference to

need for notice of the hold and need for any procedure for unlocking the hold, which procedural indifference to notice in the face of loss of constitutionally protected right of first amendment redress and an expectancy in setback enforcement operated as denial of right protected under 42 USC §1983 and 1985.

U. Mitigation and exhaustion in cure of loss of First Amendment right to be heard was required of Respondent Cottingham in exercise of RPC 1.3 diligence.

V. Litigation' result was confounded by Morgans' presentation of findings and conclusions and a lack of pronouncements which prevented WCPDS enforcement of setback prior to Morgans choice between two legal descriptions and locations, represented in Conclusion Nos. 8, until December 9, 2014.

W. Determination that the LUPA matter was filed "at least in part" to harass or annoy, was rendered without knowledge of the hold on administrative appeals,.

X. Determination that the LUPA matter was filed "at least in part" to harass or annoy, was rendered without knowledge of the lack of finality in the forum having priority of the action (No. 09-2-01773-1).

4.6 Denied. Count Three. Motion After The Trial Court Quieted Title.

Y. CR 65 (d) requires, in part, that "[e]very order granting an injunction ... shall be specific in terms [and] shall describe in reasonable detail ... the act or acts sought to be restrained." The clarity required should not have been the burden of Respondent Cottingham. Prudence alone

required the motion. Although sanctioned, the injunctive *relief potentially* retrained conduct in another forum. The rule had been violated by entry of the injunction.

4.7 Denied. Count Four. One or more administrative appeals, as frivolous filings and as pursued after abandoned.

Z. Priority of the Action Doctrine Applies. The tribunal first gaining jurisdiction of a matter retains exclusive authority over it until it is resolved, and applies as between an administrative agency and a court until the matter is final.

AA. Law Of The Case Doctrine Applies. With or without administrativ appeal by Cottinghams, once set and unappealed the denial of driveway in the setback is the law of the case, albeit confused by the erratic application of two different conclusion Nos. 8 until the December 9, 2015 Supplemental Order Quieting Title employed one of them.

BB. Substantial Basis In Fact. The Administrative appeal request wassubstantially tailored by Respondent Cottingham to seek setback enforcement as required in the administration of the Shoreline Management Act Exemption and as is a guaranteed expectancy under WCC 23.50.02.B. Unappealed, the denial of driveway therein remains. Morgans should however apply for change in the permit after the August 19, 2014 Remand Order Establishing Title followed by December 9, 2014 Order Quieting Title.

CC. Abandonment theory proceeded on a Summary Judgment record allowing no record from WCPDS. Good faith argument holds that

Absentevidence of abandonment, a WCPDS Report dated July 8, 2015 revealed a decision by WCPDS impairing Cottingham pursuit of the administrative appeals by placement of a hold" on delivery of appeals to the examiner. A practice of withholding appeals from the Hearing Examiner until a Staff Report is readied also impaired Cottingham pursuit of the appeals. Lack of judicial finality also caused the "hold"$, because of chaotic Findings and conclusions but just as likely due to Morgan's conflicting conclusion Nos. 8, raising violation within prohibitions of RCW 58.17.2 10 (no permit for divided land) and RCW 7 58.17.300 (sale after unapproved lot division is gross misdemeanor).

DD. No notice of the hold was given Cottinghams.

EE.No opportunity to try the fact or question of abandonment arose. No record was ordered despite the RCW 36.70c.110 statutory record review scheme but if ordered and returned as allowed under RCW 36.70c.080(3)-.110 the record would have disclosed the WCPDS decision to place Cottingham appeals on hold, and would have been followed by motion for stay allowing resort to administrative process. The priority of action doctrine allowed the agency to proceed regardless of RCW 36.70c.020-.040 procedure. Absent notice there can be no abandonment.

FF. First Amendment exercise of redress, and Fourteenth Amendment due process require notice allowing opportunity to be heard. Abandonment, asserted only by the court of appeals in 70218-1-I could not have been defended against without notice of from WCPDS that it placed the appeals "on hold."

GG. RPC 1.3 Diligence was required of Respondent Cottingham and that diligence had resulted in a filing to preserve every right of Mrs. Cottingham to a

[8] Exhibit H is a true and correct copy of the July 8, 2014 WCPDS Staff Report, page four of which reflects a "hold" on the Cottingham administrative appeals (arrow indicators added here).

hearing to enforce setback during the period in which it could not be knowable hearing to enforce setback during the period in which it could not be knowable what exactly the trial court had and had not determined.

4.8 Count Five. Harass and Annoy.

A. Service to substantial purposes far beyond effort to harass or annoy was underway, including,

a. Effort to determine whether the trial court entered into land use underway, regulation satisfaction without the exclusive jurisdiction to do so and without allowing discovery necessary to presentation of regulatory conflicts

b. Effort to seek review at lower administrative levels,

c. Effort at discovering all potential for truthful testimony or particularized high quality proof in transcript form for review by the health officers before requesting their opinions .

B. RPC 8.4(d) (conduct prejudicial to the administration of justice by pursuing litigation and/or appeals).

a. The conduct which was prejudicial to administration of justice and which Respondent Cottingham was required to pursue remedy of for client protection from abuse, and for the integrity of proceedings, involved denial of notice of trial entering into regulatory directives without notice in pleadings, during a statutory review disability (RCW 36.70c.020-.040). It followed specific sworn denial by attorney Morgan of any regulatory directive in pretrial discovery, and was followed in turn by sworn testimony by the same witness at trial (that a regulatory directive supported need of neighboring pretrial discovery, and was followed in turn by sworn testimony by the same witness at trial (that a regulatory directive supported need of neighboring property).

b. Denial of an open hearing as required under R.AP7.2(d) added prejudicial impact to the effort. impact to the effort.

PRAYER

Wherefore, having fully answered the Formal Complaint, Respondent Attorney Cottingham requests that the complaint be dismissed without hearing, recognizing that RPC 1.3 required diligent efforts at mitigating damage from and recovering loss of First Amendment Redress recognizing that Findings and Conclusions themselves were frivolously presented and entered at least in part under cause no. 09-2-01773-1 for the improper purpose of a record denying title to frustrate setback despite ordinance-supported enforcement of setback title, in an action carrying priority over all proceedings under and after Cause 12-2-03029-1; and which has not only actually succeeded in frivolously denying client Cottingham's title, but in denying protected First Amendment Redress of

Grievances in retaliation for Cottingham having testifying to and reported facts having capacity to demonstrate unlawful conduct of Morgan.

Dated This 30 day of November, 2015.
s/David Cottingham
WSB 9553, Respondent

APPENDIX F - CONDEMNATION AND LUPA LITIGATION

PRETRIAL TITLE JUDGMENT, COMPLETE LEGAL DESCRIPTION, January 11, 2011

Scanned 4
FILED
Jan 11, 2011
Whatcom County Clerk by s/

IN THE SUPERIOR COURT OF
WASHINGTON FOR WHATCOM COUNTY

DAVID C. COTTINGHAM and JOAN S.COTTINGHAM, Plaintiffs, vs. RONALD J. MORGAN and KAYE L. MORGAN, husband and wife, Defendants.	Cause No: 09-2-01773 ~~PROPOSED~~ PARTIAL SUMMARY JUDGMENT

THIS MATTER coming on regularly for hearing in open court this date on motion of plaintiff for summary judgment on plaintiffs' claim quieting title, and the court having considered the motion, heard argument and considered the following:

1. Plaintiffs' Motion for Partial Summary Judgment Quieting Title and Granting Ejectment;

2. Plaintiffs Memorandum of Authorities in Support of Motion for Partial Summary Judgment Quieting Title;

3. Declaration of David C. Cottingham, with Exhibits;

4. Declaration of Richard Koss, with Exhibit;

5. Declaration of Steven Often, with Exhibits;

6. Plaintiffs' Memorandum of Authorities;

7. Defendants' Response to Plaintiffs' Motion for Partial Summary Judgment Quieting Title and Granting Ejectment;

8. Declaration of David Anderson;

9. Declaration of Ronald Morgan;

10. Plaintiffs' Rebuttal;

11. Declaration of Bruce Ayers PLS [interlineation follows in quotes:] "The Court finding no prejudice in allowing same."

[*interlineation follows in quotes*:] "* Page 4."

Based upon the forgoing and CR 56, the court finds no material issue of fact remains requiring trial on plaintiff's first and second causes of action; that plaintiffs claims there under are entitled to relief as pleaded and supported,

The court further finds that summary judgment quieting title and granting ejectment is appropriate. Now, Therefore,

It Is Ordered, adjudged and decreed that judgment shall enter against defendants as follows

1. Decree should enter quieting title in plaintiffs to Nixon Beach Tracts Lot Ten including within the legal description of such lot all area south to and including the Maintenance Line from the Iron Pipe to the South Shoreland Alder according to Exhibit E (Decl. David C. Cottingham) designated therein as "Occupation and Maintenance Line as Per Cottingham (Request Dated 7/21/2008) S 59°04'35" W, 251.13", including area of the ten

foot road found platted within Nixon Beach Tracts plat where abutting such Lot Ten and south to such Maintenance Line between such decreed legal description and Burlington Northern Railroad Along Lake Whatcom Division One Lot Sixteen described as follows:

All that part of Tract 11, "Nixon Beach Tracts" Whatcom County, Washington as per the map thereof, recorded in Book 7 of Plats, Page 71 in the Auditor's Office of said County and State being a portion of the Northeast Quarter of the Northeast Quarter (Government Lot 1) of Section 5, Township 37 North, Range 4 East of W.M., Whatcom County Washington, being more particularly described as follows:

Commencing at the Northeast Section Comer of said Section 5, thence South 89032'30" West, for a distance of 1110.20 feet along the North line of said Section 5 to a point of intersection with the centerline of North Shore Drive; thence South 12°3529" East, for a distance of 375.34 feet to the Southeast comer of Lot 16, "Plat of Burlington Northern, Inc., Railroad Right-of-Way, along Lake Whatcom, Division No. 1", as per the map thereof, recorded in Volume 13 of Plats, Pages 60 through 65, records of Whatcom County Washington and the true point of beginning:

Thence South 29°25'37" West, for a distance of 0.40 feet (an existing iron rod); thence South 59°04'35" West, for a distance of 251.13 feet to a point on the common line between Tract 10 and Tract 11 of said "Nixon Beach Tracts"; Thence along said common line North 57°48'12" East for a distance of 232.18 feet to the Westerly line of a 10' Plat Road; Thence continuing North 57°48'12" East, for a

distance of 19.47 feet to a point on the Westerly line of Lot 16 of said "Plat of Burlington Northern"; Thence along a curve to the right and concave to the Northeast, having a radial bearing of North 60°24'07" East, a radius of 1750.23 feet, a delta angle of 00°10'36" and a length of 5.40 feet to the point of beginning. Containing 703 Square Feet

All Situate in Whatcom County, Washington

2. Decree should enter ejecting defendants, their heirs, successors assigns and agents from entry within the above property ~~with order affirmatively commanding that they remove within seven days all gravel, fencing, ribbons, stakes posts, wires and any other item installed by them therefrom~~, and

~~Protective Penumbra Area. Decree should enter granting plaintiffs' area south of the above-described :Occupation and Maintenance Line" onto, over, across, and through Nixon Beach Tracts Lot Eleven, surrounding and protective of plaintiff's vegetation, plants and improvements, and order should enter, enjoining and prohibiting defendants, their heirs, successors and assigns, to any interest in such lot from the following: a. interfering with plaintiff's effort at staking such line; b. Trimming vegetation closer to such line; c. Interference with maintenance of vegetation; d. Interference with plaintiff's restoration to the land, gardens and vegetation therein;~~ [Initialed]

4. Decree should enter ejecting and excluding defendants, their heirs, successors and assigns and improvements forever, from

the above described area ~~and Protective Penumbra area~~; [initials applied]

5. Plaintiffs may stake and record this order with the Office of the Whatcom County Auditor without delay.

Dated this 11th day of January, 2011.

s/ John M. Meyer visiting judge

[interlineations follow in original:] 'The Court notes Def's motion to strike. These are granted to the extent that the preferred declarations would violate either hearsay or deadman's statute provisions of the ER's. The defense has raised disputed legal conclusions but no relevant issues of material fact. The adverse possession lasted well in excess of the statutory requirement." [initials applied]

~~Proposed~~ Partial Summary Judgment [initials applied]

Presented by:

David C. Cottingham,
WSBA #9553 Attorney
for Plaintiffs

Copy received:

Copy received
and Approved
for entry:
Attorneys for
David
Anderson, WSB
Attorney for
Defendants

LUPA PETITION FINDINGS OF FACT AND ORDERS ON ALL PENDING MOTIONS

IN THE SUPERIOR COURT OF WASHINGTON FOR WHATCOM COUNTY

DAVID C. COTTINGHAM and JOAN S. COTTINGHAM, Plaintiffs and Petitioners, vs. RON MORGAN and KAYE MORGAN, Defendants and MARK COSTELLO, WHATCOM COUNTY and WHATCOM COUNTY BUILDING SERVICES DIVISION OF PLANNING AND DEVELOPMENT SERVICES	Case No: 2-2-03029-1 FINDINGS OF FACT AND ORDERS ON ALL PENDING MOTIONS

I-BACKGROUND

This matter, having come before the Court on the following motions:

1. Plaintiff/Petitioner Cottinghams' Motions For Order Determining Jurisdictional Facts, filed November 26, 2012;

2. Plaintiff/Petitioner Cottinghams' Motion for Order on Preliminary Matters;

3. Defendant/Respondent Morgans' Motions to Dismiss For Failure to State a Claim Upon Which Relief Can Be Granted pursuant to CR 12(b)(6); and

4. Defendant/Respondent Morgans' Motion for Summary Judgment pursuant to CR 56.

Defendant/Respondent Whatcom County and Whatcom County Building Services Division of Planning and Development Services filed pleadings which opposed Cotttnghams' Motions and concurred

In Morgans' dispositive Motions. Cottinghams appeared through their counsel David Cottingham; David Cottingham appeared Pro Se; Morgans appeared through their counsel Douglas R. Shepherd of Shepherd and Abbott; Whatcom County did not appear at oral argument; and, defendant/respondent Mark Costello appeared through his attorney James Doran.

The Court having heard oral argument of counsel and being otherwise fully Informed, and the Court having reviewed the pleadings and papers filed, and exhibits attached thereto, in support of the motions and against the motions, including but not limited to:

1. Cottinghams' Land Use Petition/Complaint, filed November 15, 2012 (DKT #1);

2. Cottinghams' Dedaration of David C. Cottingham, filed November 26, 2012 (DKT #11A);

3. Cottinghams' Motion For Order on Preliminary Matters, filed November 26, 2012 (DKf #11B);

4. Cottinghams' Motion For Order Determining Jurisdictional Facts, filed November 26, 2012 (DKT #11C);

5. Dedaration of David C. Cottingham Re: Jurisdictional Facts, filed December 3, 2012 (DKT #14);

6. Morgans' Response to Plaintiffs/Petitioners' Motion For Order on Preliminary Matters and Determining Jurisdictional facts, filed December 17, 2012 (DKT #26);

7. Morgans' Dedaration of Ron Morgan, filed December 17, 2012 (DKT #27);

8. Morgans' Answer, Affirmative Defenses and Counterclaims, filed December 17, 2012 (DKT #28);

9. Cottinghams' Reply to Morgans' Response to Motion for Order on Preliminary Matters and Jurisdictional Facts, filed December 20, 2012 (DKT #32);

10. Cottinghams' Dedaration of David C. Cottingham In Support of Reply to Morgan Response, Preliminary Hearing, filed December 20, 2012 (DKT #33);

11. Morgans' Motion and Memorandum for Summary Judgment — CR56, filed January 3, 2013 (DKT #36);

12. Morgans' Motion and Memorandum to Dismiss for Failure to State a Claim on Which Relief Can Be Granted CR12(b)(6), filed January 3, 2013 (DKT #37);

13. Morgans' Declaration of Douglas R. Shepherd In Support of Morgans' Dispositive Motions, fIled January 3, 2013 (DKT #38);

14. Whatcom County's Memorandum Concuning with Defendant Ron and Kaye Morgan's Motion for Dismissal, filed January 8, 2013 (DKT #42);

15. Cottinghams' Petitioners' Response to Whatcom County's Concurring Memorandum, filed January 29, 2013 (DKT #43);

16. Cottinghams' Declaration of David C. Cottingham re Exhaustion of Administrative Remedies, filed January 29, 2013 (DKT #44);

17. Cottinghams' Petitioners' Response to Morgans CR12 B Motion to Dismiss and CR 56 Summary Judgment Motions, fIled January 29, 2013 (DKT #45);

18. Cottinghams' Dedaration of David C. Cottingham In Defense of Motion for Partial Summary Judgment, filed January 29, 2013 (DKT #46);

19. Cottinghams' Declaration of David C.

Cottingham Re: Unavailability of Record in Response to Summary Judgment, filed January 29, 2013 (DKT #47);

20. Cottinghams' Motion for Relief from CR 6(a), CR 56(c), fIled January 29, 2013 (DKT #49);

21. Cottinghams' Declaration of David C. Cottingham Re: Motion for Relief, filed January 29, 2013 (DKT #50);

22. Morgans' Reply In Support of Summary Judgment — CR 56, filed February 4, 2013 (DKT #54);

23. Morgans' Second Declaration of Ron Morgan, filed February 4, 2013 (DKT #55);

24. Morgans' Second Declaration of Douglas R. Shepherd in Support of Defendants Morgans' Dispositive Motions, flied February 4, 2013 (DKT #56);

25. Cottinghams' Supplemental Authorities, filed February 5, 2013 (DKT#58);

26. Cottinghams' Petitioners' Supplemental Whatcom County Authorities, filed February 7, 2013 (DKT #59);

27. All pleadings and proceedings in Whatcom County Superior Court Case Number 09-2-01773-1, whIch matter was heard and decided by the Honorable Judge John Meyer (visiting judge); and,

28. (Other listed below if any)

FINDINGS OF FACT [interlineations follows in quotes:] And CONCLUSIONS OF LAW AND THE COURT HAVING FOUND, after full consideration of the above pleadings submitted by the parties that:

1. Cottinghams seek review of Whatcom County's approval of a five foot side-yard setback on July 25, 2006, as part of the County's Shoreline Exemption review; the County's issuance of a building permit on August 17, 2006 to Morgans for a residence on Lot 11, immediately south of

Cottinghams' Lot 10 and Cottinghams home on Lot 10; and, the County's approval of final occupancy issued October 25, 2012.

2. Cottinghams were not personally served with written notice of [interlineation follows quotes:] "any decision of" Whatcom County's ~~issuance of the 2006 building permit~~ [sic] [initials applied]

3. It is likely that written notice of the building permit ~~and all other~~ decisions of Whatcom County required no written or actual notice to Cottinghams, [initials applied]
pursuant to RCW 36.70C.040(4)(c) and time for Cottinghams to seek judicial review of ~~any~~ the County's [interlineations in follows quotes:] "building permit decision" ~~action~~ began to run on August 17, 2006. [initials applied]

4. Cottinghams were aware of the construction of Morgans' home. Morgans' foundation footprint and foundation walls were completed by Morgans before August 30, 2006. The footings were poured before and approved by Whatcom County on August 23, 2006. The Stem Walls were poured before and approved by Whatcom County on August 30, 2006.

5. The bushes removed by Morgans, in order to relocate their driveway, were removed before September 30, 2007.

6. The driveway location, complained of by Cottinghams, was installed and known to Cottinghams before September 30, 2007.

7. Cottinghams' LUPA Petition, brought under RCW 36.70C is not timely.

8. The final occupancy permit or decision by Whatcom County does not initiate the 21 day limitation time period for the LUPA appeal process. The LUPA 21 day time frame, as it relates to Cottinghams, started upon notice to Cottinghams of

Whatcom County's issuance of Morgans' building permit In this matter it does not matter if Cottinghams were entitled to statutory or actual notice, because Cottinghams had actual notice within 10 days of the issuance of the building permit in 2006.

9. This Court does not have subject matter jurisdiction over Cottinghams Land Use Petition.

10. Plaintiffs/Petitioners Cottinghams' November 15, 2012, Land Use Petition, LUPA action, against Defendants/Respondents Morgan, Costello, Whatcom County Planning, and Whatcom County should be dismissed with prejudice.

11. In June of 2008, Cottinghams, under Whatcom County Superior Court Cause Number 09-2-01773-1, filed a Complaint against Morgans.

12. In November and December of 2011, visiting Judge John Meyer held a four day bench trial in Cause Number 09-2-01773-1. Findings of Facts and Conclusions of Law were entered in Cause Number 09-2-01773-1 on December 30, 2011.

13. The Courts' findings and conclusions entered in Cause Number 09-2- 01773-1 demonstrate that all Issues raised and claims made by Cottinghams in this matter, were raised by Cottinghams, litigated by Cottinghams and Morgans, previously decided by Judge Meyer and are now the subject matter of several appeals.

14. If any new claims are raised in this matter by Cottinghams, those claims, while difficult If not Impossible to determine from their pleadings, would be subject to a three year statute of limitations and would have been known to Cottinghams by December 30, 2007 and clearly would have been known to Cottinghams, under any conceivable factual situation, by June 30, 2009, a date after which Cottinghams' Complaint was filed and served

in Cause Number 09-2-01773 [interlineations follow in quotes:] "and therefore should have been raised in the prior matter." [initials applied]

15. ~~If any new matters are raised in this matter by Cottinghams, those claims, while difficult if not impossible to determine from their pleadings. could have and should have been discovered before the prior litigation, cause number 09-2-01773-1, and therefore should have been raised in the prior matter~~. [initials applied]

16. ~~Any allegations regarding the alleged misconduct of Morgans during the prior litigation are immune from claims~~. [initials applied]

III. -ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

A. There are no disputed issues of material fact and under Washington law defendant/respondent Morgans' are entitled to Summary Judgment of dismissal on all claims advanced by Cottinghams herein and Morgans' Motion for Summary Judgment is GRANTED as to all defendants/respondents.

B. Plaintiffs/Petitioners Cottinghams' November 15, 2012, Complaint for Declaratory Judgment Is dismissed, with prejudice.

DONE IN OPEN COURT THIS 12th. day of March 2013.

s/HONORABLE DAVE NEEDY

Submitted by:
SHEPHERD and ABBOTT
s/ Douglas Shepherd, WSBA #9514
Bethany C. Allen, WSBA #41180
Attorneys for Defendants Morgans
s/David Cottingham WSBA#9553
Attorney for Plaintiffs
Copy received; approved for entry:

Approved by email s/ Douglas Shepherd, WSBA #9514
Royce Buckingham, WSBA #22503
Attorney for Defendants Whatcom County
James M. Doran, WSBA #5104
Attorney for Defendant Costello
Copy received;

ORDER, LUPA COURT, GRANTING TERMS AND SANCTIONS

FILED SCANNED
County Clerk
2013 Jun 20 PM 12:13
Whatcom County
Washington
By s/____

IN THE SUPERIOR COURT OF WASHINGTON FOR WHATCOM COUNTY

DAVID C. COTTINGHAM and JOAN S.COTTINGHAM, Plaintiffs and Petitioners, vs. RONALD J. MORGAN and KAYE L. MORGAN, MARK COSTELLO, WHATCOM COUNTY AND WHATCOM COUNTY BUILDING SERVICES DIVISION OF PLANNING AND DEVELOPMENT SERVICES, DEFENDANTS AND Respondents.	Cause No: 12-2-03029-1 ORDER ON: 1) DEFENDANT MORGANS' MOTION FOR FEES AND TERMS - RCW 4.84.185 AND CR 11 2) PLAINTIFF/ PETITIONERS' MOTION TO STRIKE COUNTERCLAIMS, DETERMINE FINALITY, GRANTING TERMS AND SANCTIONS

THIS MATTER having come before the Court on Defendant Morgans' Motion and Memorandum for Fees and Terms — RCW 4.84.185 and CR 11 and on Plaintiff Cottinghams' Motion to Strike Counterdaims, Determine Finality, Granting Terms and Sanction, defendants Morgan (Morgans) appearing by and through their attorney Douglas R. Shepherd of Shepherd and Abbott; plaintiffs

Cottingham (Cottinghams) appearing through their counsel David C. Cottingham; the Court having reviewed the pleadings and papers filed in support of the motion and against the motion; the Court having heard oral argument of counsel and being otherwise fully informed, including but not limited to:

1. Cottinghams' Motion to Strike Counterclaims, Determine Finality, Granting Terms and Sanction, tiled March 28, 2013;

2. Cottinghams' Declaration of David C. Cottingham in Support of Motion for Order Striking Answer, Determine Finality, Granting Terms and Sanction, filed March 28, 2013;

3. Cottinghams' Memorandum In Support of Motion to Strike Morgan Counterclaims, filed March 28, 2013;

4. Morgans' Response to Cottinghams' Motion to Dismiss Morgans' Counterclaims and for Terms, filed April 4, 2013;

5. Morgans' Motion and Memorandum for Fees and Terms - RCW 4.84.185 and CR 11, filed April 8, 2013;

6. Morgans' Dedaration of Douglas R. Shepherd re: Fees and Costs, filed April 8, 2013;

7. Morgans' Second Declaration of Douglas R. Shepherd re: Fees and Costs, filed April 8, 2013;

8. Morgans' Dedaration of Bethany C. Allen re: Fees and Costs, filed April 8, 2013;

9. Cottinghams' Dedaration of David C. Cottingham re: Fees - Motion to Dismiss Counterclaims, filed April 18, 2013;

10. Cottinghams' Petitioner's Responsive Memorandum re: Morgans' Motion for Award of Terms and Fees, filed AprIl 24, 2013;

11. Morgan's Response to Petitioner's (Cottinghams) Motion for Fees Award, filed April 29, 2013; and

12. Morgans' Supplemental Dedaratlon of Douglas R. Shepherd re: Fees and Costs, filed herewith.

The COURT FINDS, after full consideration of the evidence submitted by the parties as follows:

1. Cottinghams' Land Use Petition and Complaint for Declaratory Judgment was filed and advanced In violation of CR 11 and is not supported by any fact or law or reasonable argument for any extension of existing law.

2. Cottinghams have attempted, in this matter, to re-litigate the issues raised and decided against Cottinghams In the previous litigation under Whatcom County Superior Court Cause No. 09-2-01773-1, which matter resolved after a four-day bench trial.

3. This Court previously entered Findings and Condusions as follows and Incorporates that finding into this order:

> 13. The Courts' findings and conclusions entered in Cause Number 09-201773-1 demonstrate that all Issues raised and c/aims made by Cottinghams in this matter, were raised by Cottinghams, litigated by Cottinghams and Morgans, previously decided by Judge Meyer and are now the subject matter of several appeals.

Findings of Fact and Orders on All Pending Motions, Dkt. No. 74, page 4, 2313.

4. ~~The remainder of Cottingham's pleadings filed and advanced herein were filed and advanced in violation of CR 11 and were not supported by fact or law.~~

5. Cottnghams' pleadings In this matter have been chaotic, ~~poorly drafted~~., convoluted, and difficult to understand, which pleadings required a substantial amount of time to understand and

thoughtfully respond.

6. Cottinghams' arguments in this matter have not been supported by fact or law

7 ~~Cottinghams' pleadings in this matter have routinely violated the Court rules including overlength and untimely pleadings~~.

8. Cottinghams' pleadings in this matter, which pleadings are not supported by fact or law, were filed at least in part to harass and/or annoy

9. Cottinghams' pleadings In this matter were frivolous and advanced without reasonable cause in vidatlon of RCW 4.84.185.

10. Attorneys Shepherd and Allen's time, rates and costs as submitted, inclusive of staff time and rates, are reasonable and appropriate any and all time spent and costs advanced on defendants' counterclaims, totaling $721, and by reducing the total Legal Intern rate billed by $850.

THE COURT FURTHER FINDS,

11. Morgans' counterclaims were filed and advanced in violation of CR 11 and were not warranted by existing law or a good faith argument for the extension, modification or reversal of existing law or the establishment of new law.

8. Cottinghams' pleadings in this matter, which pleadings are not supported by fact or law, were filed at least In part to harass and/or annoy Morgans.

12. Attorney Cottingham's time and rate submitted, in defending against Morgans' counterdaims, are reasonable and appropriate.

IT IS HEREBY ORDERED, ADJUDGED and DECREED that Morgans and the law firm of Shepherd and Abbott are awarded their reasonable attorney fees and costs, in the defense of the Cottinghams' claims, totaling $29,282.80.

IT IS FURTHER ORDERED ORDERE

ADJUDGED and DECREED that Morgans' counterclaims be and hereby are stricken. Cottinghams are awarded their reasonable attorney fees and costs In the defense of Morgans' counterclaims, totaling $3,850.

An offset judgment shall be entered in favor of Morgans and the law firm of Shepherd and Abbott In the amount of $25,432.80. The judgment creditor may not seek to enforce the judgment until sIx (6) months after the Court of Appeals Issues their opinion in any and all appeals arising out of this matter.

DONE IN OPEN COURT this 19. day of June 2013.

HONORABLE DAVE NEEDY

Submitted by:
SHEPHERD and ABBOTT
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~~ORDER ON REMAND~~
Page 2 of 2

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ORDER ON REMAND [From Opinion 68202-4-I, Court of Appeals]

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Whatcom County
Washington by s/_

IN THE SUPERIOR COURT OF WASHINGTON FOR WHATCOM COUNTY

DAVID C. COTTINGHAM and JOAN S.COTTINGHAM, Plaintiffs, vs. RONALD J. MORGAN and KAYE L. MORGAN, husband and wife, Defendants.	Cause No: 09-2-01773 ORDER ON REMAND

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This matter having come on before this Court on the motion of Cottinghams and the Court, being otherwise fully advised, and after finding that the Court's January 31, 2012 Amended Conclusion of Law number 5 was a Scribner's error, makes and enters the following Order:

The Court's January 31, 2012 Amended Conclusion of Law number 5, which reads: "The Cottinghams have not established all elements of adverse possession by clear, cogent and convincing evidence as to any portion of Lot 11" shall be amended to read: "The Cottinghams have established all elements of adverse possession by clear, cogent and convincing evidence as to the disputed area." Which Conclusion is consistent with the Court's December 30, 2011 Conclusion of Law number 5.

DONE IN OPEN COURT this 19 day of August 2014.

s/Judge John M. Meyer

Presented by:
SHEPHERD and ABBOTT
s/ Douglas R. Shepherd, WSBA #9514
Bethany C. Allen, WSBA #41180
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REVISED CODE OF WASHINGTON
RCW 4.64.030(2)(b)

RCW 4.64.030(2)(b) Entry of judgment—Form of judgment summary.

(1) The clerk shall enter all judgments in the execution docket, subject to the direction of the court and shall specify clearly the amount to be recovered, the relief granted, or other determination of the action.

(2)(a) On the first page of each judgment which provides for the payment of money, including foreign judgments, judgments in rem, mandates of judgments, and judgments on garnishments, the following shall be succinctly summarized: The judgment creditor and the name of his or her attorney, the judgment debtor, the amount of the judgment, the interest owed to the date of the judgment, and the total of the taxable costs and attorney fees, if known at the time of the entry of the judgment, and in the entry of a foreign judgment, the filing and expiration dates of the judgment under the laws of the original jurisdiction.

(b) If the judgment provides for the award of any right, title, or interest in real property, the first page must also include an abbreviated legal description of the property in which the right, title, or interest was awarded by the judgment, including lot, block, plat, or section, township, and range, and reference to the judgment page number where the full legal description is included, if applicable; or the assessor's property tax parcel or account number, consistent with RCW 65.04.045(1) (f) and (g).

(c) If the judgment provides for damages

arising from the ownership, maintenance, or use of a motor vehicle as specified in RCW 46.29.270, the first page of the judgment summary must clearly state that the judgment is awarded pursuant to RCW 46.29.270 and that the clerk must give notice to the department of licensing as outlined in *RCW 46.29.310.

(3) If the attorney fees and costs are not included in the judgment, they shall be summarized in the cost bill when filed. The clerk may not enter a judgment, and a judgment does not take effect, until the judgment has a summary in compliance with this section. The clerk is not liable for an incorrect summary.

[2003 c 43 § 1; 2000 c 41 § 1; 1999 c 296 § 1; 1997 c 358 § 5; 1995 c 149 § 1; 1994 c 185 § 2; 1987 c 442 § 1107; 1984 c 128 § 6; 1983 c 28 § 2; Code 1881 § 305; 1877 p 62 § 309; 1869 p 75 § 307; RRS § 435.]

REVISED CODE OF WASHINGTON RCW 84.40.042

RCW 84.40.042 - Valuation and assessment of divided or combined property.

(1) When real property is divided in accordance with chapter 58.17 RCW, the assessor shall carefully investigate and ascertain the true and fair value of each lot and assess each lot on that same basis, unless specifically provided otherwise by law. For purposes of this section, "lot" has the same definition as in RCW 58.17.020.

(a) The assessor must establish the true and fair value by October 30th of the year following the recording of the plat, replat, or altered plat. The value established must be the value of the lot as of January 1st of the year the original parcel of real property was last revalued.

(b) For purposes of this section, "subdivision" means a division of land into two or more lots.

(c) For each subdivision, all current year and delinquent taxes and assessments on the entire tract must be paid in full in accordance with RCW 58.17.160 and 58.08.030 except when property is being acquired by a government for public use. For purposes of this section, "current year taxes" means taxes that are collectible under RCW 84.56.010 subsequent to completing the tax roll for current year collection.

(2) When the assessor is required by law to segregate any part or parts of real property, assessed before or after July 27, 1997, as one parcel or when the assessor is required by law to combine parcels of real property assessed before or after July 27, 1997, as two or more parcels, the assessor must carefully

investigate and ascertain the true and fair value of each part or parts of the real property and each combined parcel and assess each part or parts or each combined parcel on that same basis.

[2017 c 109 § 3; 2009 c 350 § 1; 2008 c 17 § 1; 2002 c 168 § 8; 1997 c 393 § 17.]

REVISED CODE OF WASHINGTON RCW 58.17.010
[Public Concern, Safety Regulation]

RCW 58.17.010 public health, safety and, plat regulation

Revised Code of Washington, RCW 58.17.010

The legislature finds that the process by which land is divided is a matter of state concern and should be administered in a uniform manner by cities, towns, and counties throughout the state. The purpose of this chapter is to regulate the subdivision of land and to promote the <u>public health, safety and general welfare</u> in accordance with standards established by the state to prevent the overcrowding of land; to lessen congestion in the streets and highways; to promote effective use of land; to promote safe and convenient travel by the public on streets and highways; to provide for adequate light and air; to facilitate adequate provision for water, sewerage, parks and recreation areas, sites for schools and schoolgrounds and other public requirements; to provide for proper ingress and egress; to provide for the expeditious review and approval of proposed subdivisions which conform to zoning standards and local plans and policies; to adequately provide for the housing and commercial needs of the citizens of the state; and to require uniform monumenting of land subdivisions and conveyancing by accurate legal description.

[1981 c 293 § 1; 1969 ex.s. c 271 § 1.]

REVISED CODE OF WASHINGTON, RCW 58.17.040(6) [Governor's Statement Of Intent]

RCW 58.17.040(6) and Governor's Veto, chapter 134, Washington Laws 1974

[Pertinent Parts and Veto Message]

WASHINGTON LAWS. 1974 1st Ex.Sess. (43rd EX.S.) Ch 134, p. 371, CHAPTER 134
[Second Substitute House Bill No. 3831
PLATS AND SUBDIVISIONS

AN ACT Relating to plats and subdivisions; amending section 3, chapter 271, Laws of 1969 ex. Sess. And RCW 58.17.030; amending section 4, chapter 271, Laws of 1969 ex. Sess. And RCW 58.17.040; amending section 6, chapter 271, Laws of 1969 ex. Sess. And RCW 58.17.060; amending section 9, chapter 271, Laws of 1909 ex. Sess. And RCW 58.17.090; amending section 11, chapter 271, Laws of 1969 ex. Sess. And RCW 58.17.110; amending section 12, chapter 271, Laws of 1969 ex. Sess. And RCW 58.17.120; amending section 13, chapter 271, Laws of 1969

[p. 371]

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

Section 1. Section 3, chapter 271, Laws of 1969 ex. Sess. And RCW 58.17.030 are each amended to read as follows:

Every subdivision shall comply with the provisions of this chapter. Every short subdivision as defined in this chapter shall comply with the provisions of any local regulation ((~~as may be~~)) adopted pursuant to RCW 58.17.060.

Sec. 2. Section 4, chapter 271, Laws of 1969 ex. Sess. And RCW 58.17.040 are each amended to read

as follows: The provisions of this chapter shall not apply to:

(1) Cemeteries and other burial plots while used for that purpose;

(2) Divisions of land into lots or tracts ((~~where the smallest lot is twenty acres or more and not containing a dedication of a public right-of-way;~~

~~(3) Divisions of land into lots or tracts none~~)) each of which is ((~~are smaller than~~)) one-one hundred twenty-eighth of a section of land or larger or five acres or larger ((~~and not containing a dedication~~)) if the land is not capable of description as a fraction of a section of land, unless the governing authority of the city, town, or county in which the land is situated shall have ((~~by ordinance provided otherwise.~~

~~(4)~~ adopted a subdivision ordinance requiring plat approval of such divisions: PROVIDED, That for purposes of computing the size of any lot under this item which borders on a street or road. The lot size shall be expanded to include that area which would be bounded by the center line of the road or street and the side lot lines of the lot running perpendicular to such center li nel

(3) Divisions made by testamentary provisions, or the laws of descent((~~or upon court order~~));

[*("V") [sic] is a marginal notation. Box[sic] in original text of bill*]

"V"(4) Divisions made by court order: PROVIDED. That this exemption shall not apply to land divided pursuant to dissolution or partition proceedings of a corporation, joint venture, or trust. Unless the local government wherein the land is located is made a party to the proceedings and

[p. 372]

"V"proposed has rendered its advice to the court in respect of the division" to be included within such order;

[*Sections deleted from this representation: (5) – (14)*]

Filed In Office of Secretary of State February 26, 1974.

Note: Governor's explanation to partial veto is as follows:

"I am returning herewith without my approval as to certain
items House Bill No. 383 entitled: **Veto Message**
"AN ACT Relating to plats and subdivisions" in House Bill No. 383 as originally introduced certain subdivisions were existed from the bill when made pursuant to a court order if (a) such division were exempted under another portion of the bill or (b) prior to the court order the division had been granted final plat approval; or (c) the court. order was conditioned on the division receiving final plat approval. Subsequently the language on the hill was amended so that language in the bill presented to me provided that exemption should not apply "unless the local government wherein the land is located is made a party to the proceedings and has rendered its advice to the court in respect

[p. 377-378]

of the division proposed to be included within such order." **Veto Message**

Under present legislation some developers who have subdivided without receiving an approved plat have gone to court asked for and received a dissolution and have thus been able to subdivide

without any action by the county in which the land is located. The language in the original version of HB 393 would have prevented this practice. The language in section 2, subsection 4 of the bill now before me would put the county in an advisory capacity only and would afford no real protection against the kind of land development practices which are so destructive of county land use planning. Accordingly, I have vetoed that item.

[Remainder of Governor's Veto Message Deleted

Revised Code of Washington, RCW 58.17.215
[Public Concern Legislation]

RCW 58.17.215 Alteration of subdivision—Procedure.

When any person is interested in the alteration of any subdivision or the altering of any portion thereof, except as provided in RCW 58.17.040(6), that person shall submit an application to request the alteration to the legislative authority of the city, town, or county where the subdivision is located. The application shall contain the signatures of the majority of those persons having an ownership interest of lots, tracts, parcels, sites, or divisions in the subject subdivision or portion to be altered. If the subdivision is subject to restrictive covenants which were filed at the time of the approval of the subdivision, and the application for alteration would result in the violation of a covenant, the application shall contain an agreement signed by all parties subject to the covenants providing that the parties agree to terminate or alter the relevant covenants to accomplish the purpose of the alteration of the subdivision or portion thereof.

Upon receipt of an application for alteration, the legislative body shall provide notice of the application to all owners of property within the subdivision, and as provided for in RCW 58.17.080 and 58.17.090. The notice shall either establish a date for a public hearing or provide that a hearing may be requested by a person receiving notice within fourteen days of receipt of the notice.

The legislative body shall determine the public use and interest in the proposed alteration and may deny or approve the application for alteration. If any land within the alteration is part of an assessment district, any outstanding assessments

shall be equitably divided and levied against the remaining lots, parcels, or tracts, or be levied equitably on the lots resulting from the alteration. If any land within the alteration contains a dedication to the general use of persons residing within the subdivision, such land may be altered and divided equitably between the adjacent properties.

After approval of the alteration, the legislative body shall order the applicant to produce a revised drawing of the approved alteration of the final plat or short plat, which after signature of the legislative authority, shall be filed with the county auditor to become the lawful plat of the property.

This section shall not be construed as applying to the alteration or replatting of any plat of state-granted tide or shore lands.

[1987 c 354 § 4.]

Revised Code of Washington, RCW 58.17.300
[Criminal Declaration - Prohibition Of Sale]

RCW 58.17.300 misdemeanor violation of plat regulations

Any person, firm, corporation, or association or any agent of any person, firm, corporation, or association who violates any provision of this chapter or any local regulations adopted pursuant thereto relating to the sale, offer for sale, lease, or transfer of any lot, tract or parcel of land, shall be guilty of a gross misdemeanor and each sale, offer for sale, lease or transfer of each separate lot, tract, or parcel of land in violation of any provision of this chapter or any local regulation adopted pursuant thereto, shall be deemed a separate and distinct offense.

[1969 ex.s. c 271 § 32.]

Chapter 232, Washington Laws 2002, Revised Code of Washington [Protecting Advocacy To Government, Regardless Of Content Or Motive]

CERTIFICATION OF ENROLLMENT
SUBSTITUTE HOUSE BILL 2699
Chapter 232, Laws of 2002
57th Legislature
2002 Regular Session
COMMUNICATIONS WITH GOVERNMENT AGENCIES--IMMUNITY
EFFECTIVE DATE: 6/13/02
BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

NEW SECTION. Sec. 1. Strategic lawsuits against public
participation, or SLAPP suits, involve communications made to influence a government action or outcome which results in a civil complaint or counterclaim filed against individuals or organizations <u>on a substantive issue of some public interest</u> or social significance. SLAPP suits are designed <u>to intimidate the exercise of First Amendment rights</u> and rights under Article I, section 5 of the Washington state Constitution.

Although Washington state adopted the first modern anti-SLAPP law in 1989, that law has, in practice, failed to set forth clear rules for early dismissal review. <u>Since that time, the United States supreme court has made it clear that, as long as the petitioning is aimed at procuring favorable government action, result, product, or outcome, it is protected</u> and the case should be dismissed. This bill amends Washington law to bring it in line with these court decisions which <u>recognizes that the United States Constitution protects advocacy to government, regardless of content or motive, so long</u>

as it is designed to have some effect on government decision making.

Sec. 2. RCW 4.24.510 and 1999 c 54 s 1 are each amended to read as follows:

A person who ((~~in good faith~~)) communicates a complaint or information to any ~~branch or~~ agency of federal, state, or local government, or to any self-regulatory organization that regulates persons involved in the securities or futures business and that has been delegated authority by a federal, state, or local government agency and is subject to oversight by the delegating agency, is immune from civil liability for claims based upon the communication to the agency or organization regarding any matter reasonably of concern to that agency or organization. A person prevailing upon the defense provided for in this section ((~~shall be~~)) is entitled to recover ((costs)) expenses and reasonable attorneys' fees incurred in establishing the defense and in addition shall receive statutory damages of ten thousand dollars. Statutory damages may be denied if the court finds that the complaint or information was communicated in bad faith.

Passed the House March 11, 2002.

Passed the Senate March 5, 2002.

Approved by the Governor March 28,

Filed in Office of Secretary of State March 28, 2002.

SHB 2699 p. 2

Chapter 234, Washington Laws 1989, pg. 1120 [Providing immunity for report to any agency of federal, state, or local government regarding any matter reasonably of concern to that agency.]

[Substitute House Bill No. 12541]

IMMUNITY FROM CIVIL LIABILITY-
REPORTS OF POSSIBLE WRONGDOING
TO GOVERNMENT AGENCIES

AN ACT Relating to immunity from civil liability; and adding new sections to chapter 4.24 RCW.

Be it enacted by the Legislature of the State of Washington:

NEW SECTION. Sec. 1. <u>Information provided by citizens concerning potential wrongdoing is vital to effective law enforcement and the efficient operation of government</u>. The legislature finds that the threat of a civil action for damages can act as a deterrent to citizens who wish to report information to federal, state, or local agencies. The costs of defending against such suits can be severely burdensome. The purpose of sections 1 through 4 of this act is to protect individuals who make good-faith reports to appropriate governmental bodies.

NEW SECTION. Sec. 2. A person who in good faith communicates a complaint or information to <u>any agency of federal, state, or local government regarding any matter reasonably of concern to that agency</u> shall be immune from civil liability on claims based upon the communication to the agency. A person prevailing upon the defense provided for in this section shall be entitled to recover costs and reasonable attorneys' fees incurred in establishing the defense.

*[omitted here] *Sec. 3 was vetoed, see message at end or chapter.

NEW SECTION. Sec. 4. In order to protect the free flow of information from citizens to their government, an agency receiving a complaint or information under section 2 of this act may intervene in and defend against any suit precipitated by the communication to the agency. In the event that a local governmental agency does not intervene in and defend against a suit arising from any communication protected under this act, the office of the attorney general may intervene in and defend against the suit. An agency prevailing upon the defense provided for in section 2 of this act shall be entitled to recover costs and reasonable attorneys' fees incurred in establishing the defense. If the agency fails to establish the defense provided for in section 2 of this act, the party bringing the action shall be entitled to recover from the agency costs and reasonable attorney's fees incurred in proving the defense inapplicable or invalid.

NEW SECTION. Sec. 5. Sections 1 through 4 of this act are each added to chapter 4.24 RCW.

Passed the House April 22, 1989.

Passed the Senate April 22, 1989.

Approved by the Governor May 5, 1989, with the exception of section 3, which is vetoed.

Filed in Office of Secretary of State May 5, 1989.

Note: Governor's explanation of partial veto is as follows:

"I am returning herewith, without my approval as to section 3, Substitute House Bill No. 1254, entitled:

"AN ACT Relating to immunity from civil liability.'

This bill was introduced as a Governor and Attorney General request bill to address concerns which arose out of a specific factual situation. A

citizen reported the violation of a tax law to a state agency, the agency took enforcement action, and the party who was alleged to have violated the law sued the citizen for slander and libel even though the information reported was factual. Truth is a defense to any slander or libel lawsuit; however, the request bill allows citizens to be represented and protected against the financial cost of defending against frivolous suits. Sections I, 2 and 4 address this situation and provide appropriate protection so citizens can feel secure in reporting possible violations of the law to regulatory agencies. The agency then can verify the facts and take appropriate action.

Section 3 was added to Substitute House Bill No. 1254 late in the session and was not subject to thorough legislative discussion and standing committee review. It provides that if an agency fails to respond to a complaint regarding a matter of concern to the agency, the person filing the complaint would be immune from civil liability on claims arising from the communication of the complaint. I understand that the intent of this section is to ensure that good faith citizen complaints are acted upon by governmental agencies by providing immunity from suit to people who may choose to go public with their concerns. That is an admirable purpose which I support. However, I am concerned that the language used in this section could be interpreted to mean that immunity would be conferred even when statements are made that go beyond the original communication to the agency, such as inferences made about the character of an individual. These claims may arise from the communication and therefore be subject to the immunity provisions. That broadened immunity from civil action is more than what is needed in these

instances. In addition, under section 3, if an agency failed to reasonably respond to a complaint, the complainant would be granted immunity to communicate to other persons information about a private individual that was actually false and damaging to the individual's reputation, as long as the complainant claimed he reasonably believed the information was truth. Unfortunately, proving or in this case disproving, the complainant's state of mind is not easy. The injured individual would be precluded from taking action against the person who disseminated the false information, Also, section 3 fails to indicate what is meant by 'if an agency failed to reasonably respond to a complaint'. Citizens often expect immediate responses to their complaints regardless of the complexity of the issue or the capacity of the agency to respond. The Legislature should discuss whether this kind of immunity to make false charges is good public policy or if additional safeguards or standards should be included before this provision becomes law.

With the exception of section 3, Substitute House Bill No. 1254 is approved."

Chapter 118, Washington Laws of 2010 [Protection Of Public Interest Participation In Matters Of Public Concern By Informing Public Entities And Citizens On Public Issues That Without Fear Of Reprisal Through Abuse Of The Judicial Process.]

CERTIFICATION OF ENROLLMENT
SUBSTITUTE SENATE BILL 6395
Chapter 118, Laws of 2010
61st Legislature
2010 Regular Session
PUBLIC PARTICIPATION LAWSUITS--SPECIAL MOTION TO STRIKE CLAIM
EFFECTIVE DATE: 06/10/10
SUBSTITUTE SENATE BILL 6395
Passed Legislature - 2010 Regular Session
State of Washington 61st Legislature 2010 Regular Session

By Senate Judiciary (originally sponsored by Senators Kline, Kauffman, and Kohl-Welles)

READ FIRST TIME 01/25/10.

AN ACT Relating to lawsuits aimed at chilling the valid exercise of the constitutional rights of speech and petition; adding a new section to chapter 4.24 RCW; creating new sections; and prescribing penalties.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

NEW SECTION. Sec. 1. (1) The legislature finds and declares that:

(a) It is concerned about lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances;

(b) Such lawsuits, called "Strategic Lawsuits Against Public Participation" or "SLAPPs," are typically dismissed as groundless or unconstitutional, but often not before the defendants

are put to great expense, harassment, and interruption of their productive activities;

(c) The costs associated with defending such suits can deter individuals and entities from fully exercising their constitutional rights to petition the government and to speak out on public issues;

(d) It is in the public interest for citizens to participate in matters of public concern and provide information to public entities and other citizens on public issues that affect them without fear of reprisal through abuse of the judicial process; and

(e) An expedited judicial review would avoid the potential for abuse in these cases.

(2) The purposes of this act are to:

(a) Strike a balance between the rights of persons to file lawsuits and to trial by jury and the rights of persons to participate in matters of public concern;

(b) Establish an efficient, uniform, and comprehensive method for speedy adjudication of strategic lawsuits against public participation; and

(c) Provide for attorneys' fees, costs, and additional relief where appropriate.

NEW SECTION. Sec. 2. A new section is added to chapter 4.24 RCW to read as follows:

(1) As used in this section:

(a) "Claim" includes any lawsuit, cause of action, claim, cross- claim, counterclaim, or other judicial pleading or filing requesting relief;

(b) "Government" includes a branch, department, agency, instrumentality, official, employee, agent, or other person acting under color of law of the United States, a state, or subdivision of a state or other public authority;

(c) "Moving party" means a person on whose

behalf the motion described in subsection (4) of this section is filed seeking dismissal of a claim;

(d) "Other governmental proceeding authorized by law" means a proceeding conducted by any board, commission, agency, or other entity created by state, county, or local statute or rule, including any self- regulatory organization that regulates persons involved in the securities or futures business and that has been delegated authority by a federal, state, or local government agency and is subject to oversight by the delegating agency.

(e) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, or any other legal or commercial entity;

(f) "Responding party" means a person against whom the motion described in subsection (4) of this section is filed.

(2) This section applies to any claim, however characterized, that is based on an action involving public participation and petition. As used in this section, an "action involving public participation and petition" includes:

(a) Any oral statement made, or written statement or other document submitted, in a legislative, executive, or judicial proceeding or other governmental proceeding authorized by law;

(b) Any oral statement made, or written statement or other document submitted, in connection with an issue under consideration or review by a legislative, executive, or judicial proceeding or other governmental proceeding authorized by law;

(c) Any oral statement made, or written

statement or other document submitted, that is reasonably likely to encourage or to enlist public participation in an effort to effect consideration or review of an issue in a legislative, executive, or judicial proceeding or other governmental proceeding authorized by law;

(d) Any oral statement made, or written statement or other document submitted, in a place open to the public or a public forum in connection with an issue of public concern; or

(e) Any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern, or in furtherance of the exercise of the constitutional right of petition.

(3) This section does not apply to any action brought by the attorney general, prosecuting attorney, or city attorney, acting as a public prosecutor, to enforce laws aimed at public protection.

(4)(a) A party may bring a special motion to strike any claim that is based on an action involving public participation and petition, as defined in subsection (2) of this section.

(b) A moving party bringing a special motion to strike a claim under this subsection has the initial burden of showing by a preponderance of the evidence that the claim is based on an action involving public participation and petition. If the moving party meets this burden, the burden shifts to the responding party to establish by clear and convincing evidence a probability of prevailing on the claim. If the responding party meets this burden, the court shall deny the motion.

(c) In making a determination under (b) of this

subsection, the court shall consider pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

(d) If the court determines that the responding party has established a probability of prevailing on the claim:

(i) The fact that the determination has been made and the substance of the determination may not be admitted into evidence at any later stage of the case; and

(ii) The determination does not affect the burden of proof or standard of proof that is applied in the underlying proceeding.

(e) The attorney general's office or any government body to which the moving party's acts were directed may intervene to defend or otherwise support the moving party.

(5)(a) The special motion to strike may be filed within sixty days of the service of the most recent complaint or, in the court's discretion, at any later time upon terms it deems proper. A hearing shall be held on the motion not later than thirty days after the service of the motion unless the docket conditions of the court require a later hearing. Notwithstanding this subsection, the court is directed to hold a hearing with all due speed and such hearings should receive priority.

(b) The court shall render its decision as soon as possible but no later than seven days after the hearing is held. (c) All discovery and any pending hearings or motions in the action shall be stayed upon the filing of a special motion to strike under subsection (4) of this section. The stay of discovery shall remain in effect until the entry of the order ruling on the motion.

Notwithstanding the stay imposed by this subsection, the court, on motion and for good cause

shown, may order that specified discovery or other hearings or motions be conducted.

(d) Every party has a right of expedited appeal from a trial court order on the special motion or from a trial court's failure to rule on the motion in a timely fashion.

(6)(a) The court shall award to a moving party who prevails, in part or in whole, on a special motion to strike made under subsection

(4) of this section, without regard to any limits under state law:

(i) Costs of litigation and any reasonable attorneys' fees incurred in connection with each motion on which the moving party prevailed;

(ii) An amount of ten thousand dollars, not including the costs of litigation and attorney fees; and

(iii) Such additional relief, including sanctions upon the responding party and its attorneys or law firms, as the court determines to be necessary to deter repetition of the conduct and comparable conduct by others similarly situated.

(b) If the court finds that the special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award to a responding party who prevails, in part or in whole, without regard to any limits under state law:

(i) Costs of litigation and any reasonable attorneys' fees incurred in connection with each motion on which the responding party prevailed;

(ii) An amount of ten thousand dollars, not including the costs of litigation and attorneys' fees; and

(iii) Such additional relief, including sanctions upon the moving party and its attorneys or law

firms, as the court determines to be necessary to deter repetition of the conduct and comparable conduct by others similarly situated.

(7) Nothing in this section limits or precludes any rights the moving party may have under any other constitutional, statutory, case or common law, or rule provisions.

NEW SECTION. Sec. 3. This act shall be applied and construed liberally to effectuate its general purpose of protecting participants in public controversies from an abusive use of the courts.

NEW SECTION. Sec. 4. This act may be cited as the Washington Act Limiting Strategic Lawsuits Against Public Participation.

NEW SECTION. Sec. 5. If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

Passed by the Senate February 16, 2010.

Passed by the House February 28, 2010.

Approved by the Governor March 18, 2010.

Filed in Office of Secretary of State March 18, 2010.

Revised Code of Washington,
RCW 36.70C.020(2)(a) [Definition of "Land Use Decision Including "Other Governmental Approval Required By Law" Before Property May Be Sold.]

RCW 36.70C.020 Definitions.

Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1) "Energy overlay zone" means a formal plan enacted by the county legislative authority that establishes suitable areas for siting renewable resource projects based on currently available resources and existing infrastructure with sensitivity to adverse environmental impact.

(2) "Land use decision" means a final determination by a local jurisdiction's body or officer with the highest level of authority to make the determination, including those with authority to hear appeals, on:

(a) An application for a project permit or other governmental approval required by law before real property may be improved, developed, modified, sold, transferred, or used, but excluding applications for permits or approvals to use, vacate, or transfer streets, parks, and similar types of public property; excluding applications for legislative approvals such as area-wide rezones and annexations; and excluding applications for business licenses;

(b) An interpretative or declaratory decision regarding the application to a specific property of zoning or other ordinances or rules regulating the improvement, development, modification, maintenance, or use of real property; and

(c) The enforcement by a local jurisdiction of ordinances regulating the improvement,

development, modification, maintenance, or use of real property. However, when a local jurisdiction is required by law to enforce the ordinances in a court of limited jurisdiction, a petition may not be brought under this chapter.

Where a local jurisdiction allows or requires a motion for reconsideration to the highest level of authority making the determination, and a timely motion for reconsideration has been filed, the land use decision occurs on the date a decision is entered on the motion for reconsideration, and not the date of the original decision for which the motion for reconsideration was filed.

(3) "Local jurisdiction" means a county, city, or incorporated town.

(4) "Person" means an individual, partnership, corporation, association, public or private organization, or governmental entity or agency.

(5) "Renewable resources" has the same meaning provided in RCW 19.280.020.

[2010 c 59 § 1; 2009 c 419 § 1; 1995 c 347 § 703.]
(*emphasis added*)

Revised Code of Washington,
RCW 36.70c.030 [Exclusive Means Of Appeal Of Land Use Decisions]

RCW 36.70c.030

(1) This chapter replaces the writ of certiorari for appeal of land use decisions and shall be the exclusive means of judicial review of land use decisions, except that this chapter does not apply to:

(a) Judicial review of:

(i) Land use decisions made by bodies that are not part of a local jurisdiction;

(ii) Land use decisions of a local jurisdiction that are subject to review by a quasi-judicial body created by state law, such as the shorelines hearings board or the growth management hearings board;

(b) Judicial review of applications for a writ of mandamus or prohibition; or

(c) Claims provided by any law for monetary damages or compensation. If one or more claims for damages or compensation are set forth in the same complaint with a land use petition brought under this chapter, the claims are not subject to the procedures and standards, including deadlines, provided in this chapter for review of the petition. The judge who hears the land use petition may, if appropriate, preside at a trial for damages or compensation.

(2) The superior court civil rules govern procedural matters under this chapter to the extent that the rules are consistent with this chapter.

[2010 1st sp.s. c 7 § 38; 2003 c 393 § 17; 1995 c 347 § 704.](emphasis added)

Revised Code of Washington,
RCW 36.70c.110 [Agency Records Return In Petition Actions]

RCW 36.70c.110

(1) Within forty-five days after entry of an order to submit the record, or within such a further time as the court allows or as the parties agree, <u>the local jurisdiction shall submit to the court a certified copy of the record for judicial review of the land use decision</u>, except that the petitioner shall prepare at the petitioner's expense and submit a verbatim transcript of any hearings held on the matter.

Revised Code of Washington,
RCW 36.70c.040 [Timing of Bar Against
Access To Court For Review Of Agency Records]

RCW 36.70c.040 Commencement of review—Land use petition—Procedure.

(1) Proceedings for review under this chapter shall be commenced by filing a land use petition in superior court.

(2) A land use petition is barred, and the court may not grant review, unless the petition is timely filed with the court and timely served on the following persons who shall be parties to the review of the land use petition:

(a) The local jurisdiction, which for purposes of the petition shall be the jurisdiction's corporate entity and not an individual decision maker or department;

(b) Each of the following persons if the person is not the petitioner:

(i) Each person identified by name and address in the local jurisdiction's written decision as an applicant for the permit or approval at issue; and

(ii) Each person identified by name and address in the local jurisdiction's written decision as an owner of the property at issue;

(c) If no person is identified in a written decision as provided in (b) of this subsection, each person identified by name and address as a taxpayer for the property at issue in the records of the county assessor, based upon the description of the property in the application; and

(d) Each person named in the written decision who filed an appeal to a local jurisdiction quasi-judicial decision maker regarding the land use decision at issue, unless the person has abandoned the appeal or the person's claims were dismissed

before the quasi-judicial decision was rendered. Persons who later intervened or joined in the appeal are not required to be made parties under this subsection.

(3) The petition is timely if it is filed and served on all parties listed in subsection (2) of this section within twenty-one days of the issuance of the land use decision.

(4) For the purposes of this section, the date on which a land use decision is issued is:

(a) Three days after a written decision is mailed by the local jurisdiction or, if not mailed, the date on which the local jurisdiction provides notice that a written decision is publicly available;

(b) If the land use decision is made by ordinance or resolution by a legislative body sitting in a quasi-judicial capacity, the date the body passes the ordinance or resolution; or

(c) If neither (a) nor (b) of this subsection applies, the date the decision is entered into the public record.

(5) Service on the local jurisdiction must be by delivery of a copy of the petition to the persons identified by or pursuant to RCW 4.28.080 to receive service of process. Service on other parties must be in accordance with the superior court civil rules or by first-class mail to:

(a) The address stated in the written decision of the local jurisdiction for each person made a party under subsection (2)(b) of this section;

(b) The address stated in the records of the county assessor for each person made a party under subsection (2)(c) of this section; and

(c) The address stated in the appeal to the quasi-judicial decision maker for each person made a party under subsection (2)(d) of this section.

(6) Service by mail is effective on the date of

mailing and proof of service shall be by affidavit or declaration under penalty of perjury.
[1995 c 347 § 705.] (emphasis added)

REVISED CODE OF WASHINGTON
RCW 2.48.190 Preserving Petition Access Without Licensing

RCW 2.48.190 QUALIFICATIONS ON ADMISSION TO PRACTICE.

No person shall be permitted to practice as an attorney or counselor at law or to do work of a legal nature for compensation, or to represent himself or herself as an attorney or counselor at law or qualified to do work of a legal nature, unless he or she is a citizen of the United States and a bona fide resident of this state and has been admitted to practice law in this state: PROVIDED, That any person may appear and conduct his or her own case in any action or proceeding brought by or against him or her, or may appear in his or her own behalf in the small claims department of the district court: AND PROVIDED FURTHER, That an attorney of another state may appear as counselor in a court of this state without admission, upon satisfying the court that his or her state grants the same right to attorneys of this state.

[1987 c 202 § 107; 1921 c 126 § 4; RRS § 139-4. Prior: 1919 c 100 § 1; 1917 c 115 § 1.]

REVISED CODE OF WASHINGTON
RCW 2.48.210 Oath Of Admission To The Washington Bar

RCW 2.48.210 OATH ON ADMISSION.

Every person before being admitted to practice law in this state shall take and subscribe the following oath:

I do solemnly swear:

I am a citizen of the United States and owe my allegiance thereto;

I will support the Constitution of the United States and the Constitution of the state of Washington;

I will maintain the respect due to courts of justice and judicial officers;

I will not counsel or maintain any suit or proceeding which shall appear to me to be unjust, nor any defense except such as I believe to be honestly debatable under the law of the land, unless it be in defense of a person charged with a public offense; I will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honor, and will never seek to mislead the judge or jury by any artifice or false statement of fact or law;

I will maintain the confidence and preserve inviolate the secrets of my client, and will accept no compensation in connection with his or her business except from him or her or with his or her knowledge and approval;

I will abstain from all offensive personality, and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged;

I will never reject, from any consideration personal to myself, the cause of the defenseless or

oppressed, or delay any person's cause for lucre or malice. So help me God.
[2013 c 23 § 1; 1921 c 126 § 12; RRS § 139-12. Prior: 1917 c 115 § 14.]

REVISED CODE OF WASHINGTON
RCW 2.48.060 [Board Of Governors Authority To Investigate, Prosecute And Hear Discipline, Disbarment, Suspension.]

RCW 2.48.060

Admission and disbarment.

The said board of governors shall likewise have power, in its discretion, from time to time to adopt rules, subject to the approval of the supreme court, fixing the qualifications, requirements and procedure for admission to the practice of law; and, with such approval, to establish from time to time and enforce rules of professional conduct for all members of the state bar; and, with such approval, to appoint boards or committees to examine applicants for admission; and, to investigate, prosecute and hear all causes involving discipline, disbarment, suspension or reinstatement, and make recommendations thereon to the supreme court; and, with such approval, to prescribe rules establishing the procedure for the investigation and hearing of such matters, and establishing county or district agencies to assist therein to the extent provided by such rules: PROVIDED, HOWEVER, That no person who shall have participated in the investigation or prosecution of any such cause shall sit as a member of any board or committee hearing the same.

[1933 c 94 § 8; RRS § 138-8.]

APPENDIX I - RULES OF PROFESSIONAL CONDUCT
RPC 3.1 AND COMMENT TWO [Nonfrivolous Effort While Anticipating Discovery, Anticipating Failure.]
(*emphasis added)*

RPC 3 MERITORIOUS CLAIMS AND CONTENTIONS

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.
[Originally effective September 1, 1985; amended effective September 1, 2006.]

Comment_ [1] The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

Comment [2] The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and

the applicable law and determine that they can make good faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

[Comments adopted effective September 1, 2006; amended effective April 14, 2015.]

WASHINGTON ENFORCEMENT RULES
ELC 10.1(a) [Denying Summary Judgment In Discipline]

ELC 10.1(a)

GENERAL PROCEDURE

(a) Applicability of Civil Rules. The civil rules for the superior courts of the State of Washington serve as guidance in proceedings under this title and, where indicated, apply directly. A party may not move for summary judgment, but either party may move at any time for an order determining the collateral estoppel effect of a judgment in another proceeding. Motions for judgment on the pleadings and motions to dismiss based upon the pleadings are available only to the extent permitted in rule 10.10.

[Adopted effective January 1, 2014.]

WASHINGTON ENFORCEMENT RULES
ELC 10.10 [Motion For Failure To State Claim Only If Before Filing Of The Answer]
ELC 10.10
PREHEARING DISPOSITIVE MOTIONS

(a) Respondent Motion. A respondent lawyer may move for dismissal of all or any portion of one or more counts of a formal complaint for failure to state a claim upon which relief can be granted.

(b) Disciplinary Counsel Motion. Disciplinary counsel may move for an order finding misconduct based on the pleadings. In ruling on this motion, the hearing officer may find that all or some of the misconduct as alleged in the formal complaint is established, but will determine the sanction after a hearing.

(c) Time for Motion. A motion under section (a) of this rule must be filed within the time for filing of the answer to a formal complaint or amended formal complaint, and may be filed in lieu of filing an answer. If the motion does not result in the dismissal of the entire formal complaint or amended formal complaint, the respondent must file and serve an answer to the remaining allegations within ten days of service of the ruling on the motion.

A motion under section (b) of this rule must be filed within 30 days of the filing of the answer to a formal complaint or amended formal complaint.

(d) Procedure. Rule 10.8 and CR 12 apply to motions under this rule. No factual materials outside the answer and complaint may be presented. If the motion results in dismissal of part but not all of a formal complaint, the Board must hear an interlocutory appeal of the order by either party. The appeal must be filed within 15 days of service of the order.

[Adopted effective January 1, 2014.]

WASHINGTON ENFORCEMENT RULES
ELC 10.11 [Discovery By Permission Only]

ELC 10.11

DISCOVERY AND PREHEARING PROCEDURES

(a) General. The parties should cooperate in mutual informal exchange of relevant non-privileged information to facilitate expeditious, economical, and fair resolution of the case.

(b) Requests for Admission. After a formal complaint is filed, the parties may request admissions under CR 36. Under appropriate circumstances, the hearing officer may apply the sanctions in CR 37(c) for improper denial of requests for admission.

(c) Other Discovery. After a formal complaint is filed, the parties have the <u>right to other discovery</u> under the Superior Court Civil Rules, including under CR 27-31 and 33 -35, <u>only on motion and under terms and limitations the hearing officer deems just or on the parties' stipulation</u>.

(d) Limitations on Discovery. The hearing officer may exercise discretion in imposing terms or limitations on the exercise of discovery to assure an expeditious, economical, and fair proceeding, considering all relevant factors including necessity and unavailability by other means, the nature and complexity of the case, seriousness of charges, the formal and informal discovery that has already occurred, the burdens on the party from whom discovery is sought, and the possibility of unfair surprise.

[Adopted effective January 1, 2014.]

WASHINGTON ENFORCEMENT RULES
ELC 10.14 [Burden By A Clear Preponderance]

ELC 10.14

EVIDENCE AND BURDEN OF PROOF

(a) Proceedings Not Civil or Criminal. Hearing officers should be guided in their evidentiary and procedural rulings by the principle that disciplinary proceedings are neither civil nor criminal but are sui generis hearings to determine if a lawyer's conduct should have an impact on his or her license to practice law.

(b) Burden of Proof. Disciplinary counsel has the burden of establishing an act of misconduct by a clear preponderance of the evidence.

[Adopted effective January 1, 2014.] (Emphasis added)

WASHINGTON ENFORCEMENT RULES
ECL 12.1 [Applicability Of Rules Of Appellate Procedure]

ELC 12.1

The Rules of Appellate Procedure serve as guidance for review under this title except as to matters specifically dealt with in these rules.
[Adopted effective January 1 2014.]

WASHINGTON ENFORCEMENT RULES
ELC 12.6 [Objections To be Stated In Brief To Supreme Court]

ELC 12.6 BRIEFS

(a) Brief Required. The party seeking review must file a brief stating his or her objections to the Board's decision.
[Adopted effective January 1, 2014.]

WASHINGTON ENFORCEMENT RULES
ELC 12.9 [Sanction For Violation Of Rules]

ELC 12.9

Sanctions for violation of these rules may be imposed on a party under RAP 18.9. Upon dismissal under
that rule of a review sought by a respondent lawyer and expiration of the period to file objections under RAP 17.7,
or upon dismissal of review by the Court if timely objections are filed, the Board's decision is final.
[Adopted effective January 1, 2014.]

WASHINGTON ENFORCEMENT RULES
ELC 12.3 [No Other Appeal]

ELC 12.3 APPEAL

(a) Right to Appeal. The respondent lawyer or disciplinary counsel has the right to appeal a

Board decision recommending suspension or disbarment. There is no other right of appeal.
[Adopted effective January 1, 2014.]