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ALEXANDER, J. (dissenting)—I disagree with the majority's determination that John Scannell should be disbarred for not cooperating in the disciplinary process. In my judgment, the hearing officer's recommendation that Scannell be suspended from the practice of law for a period of time is a more appropriate sanction under the circumstances, and I would have concurred in a decision imposing a suspension for a reasonable period. Since that is not the will of the majority, I dissent.

I reach the conclusion that I do because the sanction the Washington State Bar Association Disciplinary Board has recommended to this court for Scannell's underlying misconduct, i.e., negligently failing to obtain written informed consent to conflicts of interest arising from common representation of multiple clients,[1] is a mere reprimand. The majority accepts that portion of the Disciplinary Board's recommendation and yet disbars Scannell. To disbar Scannell for noncooperation in the disciplinary process that has led to imposition of the relatively minor sanction of reprimand strikes me as

[1]The proof of the other underlying count against Scannell, allegedly aiding another person in the practice of law, was so lacking that the hearing officer dismissed it.

excessive.

It is significant that almost all of the conduct by Scannell that is characterized by the majority as abuse of the discipline system is conduct that Mr. Scannell engaged in pursuant to the Enforcement of Lawyer Conduct Rules and Washington court rules. Although this activity was for the most part misguided, frivolous, and undoubtedly irritating to the bar, as well as the hearing officer and Disciplinary Board, it is apparent to me that Scannell was sincere in his efforts and was not engaging in this activity simply for the purpose of obstructing the process. While I agree with the majority that disbarment is a sanction that may be imposed for intentional failure to cooperate in disciplinary proceedings, it is only a presumptive sanction. In my view, this most severe of sanctions, disbarment, should be reserved for cases where the noncooperation is egregious and engaged in solely for the purpose of obstructing the system. For example, disbarment would appear to be appropriate in cases where an attorney intentionally makes himself or herself scarce and repeatedly fails to appear for depositions or hearings. The complaint against Scannell, when it is reduced to its essence, appears to be that he was too persistent a presence, asserting multiple objections to the proceedings against him and arguing for delays and rescheduling. I have no doubt that this conduct was irksome and caused the bar to view Scannell, in plain terms, as "a pain in the neck."

It is my belief after reviewing the record and observing Mr. Scannell during his argument before this court that although most of his allegedly noncooperative activity

was akin to "tilting at windmills,"[2] it was based on his sincere belief that the positions he took were meritorious and were properly asserted against what he deemed, albeit wrongly, an oppressive disciplinary process. Although I agree with the majority that this court must be concerned about efforts one might take to undermine the disciplinary process, I am hopeful that it will agree with me that we must also be careful to not convey the impression that an attorney's vigorous defense against allegations of misconduct is noncooperation per se. Much of what Scannell did during the long history of this case was certainly unreasonable, but it was largely conducted under the rules governing the disciplinary process. For the portion of those activities that he should have known were totally without merit, a suspension is an adequate sanction.

[2]Miguel de Cervantes Saavedra, Don Quixote de La Mancha (Samuel Putnam trans., Modern Library 1998) (1615). Don Quixote mistook windmills for giants and attacked them.

AUTHOR:
Justice Gerry L. Alexander

WE CONCUR:

Justice James M. Johnson

Justice Richard B. Sanders