**WASHINGTON STATE BAR ASSOCIATION**
**DISCIPLINARY BOARD POLICIES**

1. **Documents Supporting Stipulations**. The Board reviews stipulations based only on documentation agreed upon by the parties.

2. **Scope of Review**. ELC 11.12 (b) prescribes the standard of review by which the Disciplinary Board reviews the decisions of hearing officers:

> The Board reviews findings of fact for substantial evidence. The Board reviews conclusions of law and recommendations de novo. Evidence not presented to the hearing officer or panel cannot be considered by the Board.

The intent of this Rule was clearly to impose an appellate standard of review as used by the appellate courts.

The Board follows appellate case precedent in implementing the standard of review. The modern era of substantial evidence review of findings of fact begins with *Thorndike v. Hesperian Orchards*, 54 Wn.2d 570,343 P.2d 183 (1959). *Thorndike* explains that a statute in place from 1893 to 1951 required the Supreme Court to review judicial findings de novo when the entire record was appealed. But the statute was repealed in 1951, returning Washington to the prior rule that the appellate court does not review factual findings de novo. The *Thorndike* opinion explains that henceforth appeals from judicial findings are governed by RCW 4.44.60: "The findings of the court upon the facts shall be deemed a verdict, and may be set aside in the same manner and for the same reasons as far as applicable, and a new trial granted." The Court also quotes from early cases explaining the standard:

This is a territorial statute first appearing in the Laws of 1869, chapter 17, SS 251, p. 60. In construing this statute, the court said in *Reynolds v. Dexter Horton & Co., 2 Wash. 185, 26 Pac. 221:*
*"*. . .Unless the finding was so clearly unfounded that it should have been set aside had it been made by the jury, we should not disturb it. It stands as a special verdict, and must be so treated.

In *Graves v. L.H. Griffith Realty & Banking Co.*, 3 Wash. 742, 29 Pac. 344, the court explained the effect of the section in these words:

> The main contention here is that the evidence does not support the findings. An appellate court in a law case will not usurp the functions of a jury, or of a judge acting in the capacity of a jury, and reverse the judgment because the weight of testimony seems to be on the other side, or because, in the case of a conflict of testimony, the jury believed the testimony of witnesses that it does not believe. This doctrine is so elementary and so universally pronounced by the courts that it would be idle to enlarge on it or to discuss it further. It is sufficient to say that the

> jury is the judge of the facts. If the testimony on which the judgment is based is competent, and is legally introduced, and if conceded to be true would sustain the judgment, the appellate court will not inquire further as to its sufficiency. . ."

54 Wn.2d at 573.

The first sentence of this quote provides a good guideline for the substantial evidence standard: "If the testimony on which the judgment is based is competent, and is legally introduced, and if conceded to be true, would sustain the judgment, the appellate court will not inquire further as to its sufficiency. . . "

Other cases have added other formulations of the substantial evidence standard. For Example:

> If there is substantial evidence supporting the verdict of the jury, as distinguished from a mere scintilla of evidence, the verdict must stand. By "substantial evidence" is meant that character of evidence which would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed.

*Grange v. Finlay*, 114 Wn.2d 737, 745, 790 P.2d 1227 (1990).

This standard of review places a high premium on drafting and entering specific and defensible findings of fact. The Supreme Court has directed that Hearing Officers, the Board and the parties must focus on specific findings of fact and conclusions of law:

> We have previously approved the American bar Association's ABA Standards for Imposing Lawyer Sanctions (Approved Draft 1986). In determining an appropriate disciplinary sanction, we apply the analytical framework provided by the Standards. Neither the Hearing Officer nor the Disciplinary Board followed the framework provided by the ABA Standards. We necessarily must extract the information from the limited record and perform the ABA analysis ourselves. To avoid this problem in the future, hearing officers and the Disciplinary Board will be required by this Court in every case to indicate clearly in their findings: (1) the formal complaint; (2) findings of fact; (3) conclusions indicating violations of specific provisions of the Rules of Professional Conduct; (4) the sanction suggested by the ABA Standards; (5) weighing of any aggravating or mitigating factors, based upon the ABA Standards, considered in determining what sanction to recommend; and (6) the sanction recommended by the Hearing Officer or Board.

*In re Johnston*, 114 Wn.2d 737, 745, 790 P.2d 1227 (1990)
Adopted March 27, 1998.

3. **Presentation of cases on appeal**. The Hearing Officer is in the best position to determine credibility and make findings. A party challenging a hearing officer's findings shall identify with

specificity the findings to which exception is taken and discuss the lack of evidence in support. A party defending a hearing officer's findings shall marshal the evidence supporting the finding. The parties cannot expect the Disciplinary Board to sift through the record without guidance. But, the Board has the power to sift through the record for substantial evidence whether or not the parties argue the standard of review with any specificity.
Adopted March 27, 1998.

4. **Preparation and Filing of Briefs by Parties**. The text of all briefs must appear double spaced and in 12 point font or larger, except that footnotes may appear in 10 point font. The text shall not be reduced or condensed by photographic or other means. The opening brief [ELC 11.8(c)(2) or 11.9(b) (1)] shall not exceed 35 pages. The responsive brief shall not exceed 35 pages. Any allowed reply brief shall not exceed 10 pages. In calculating the page limits appendices, tables of contents, title sheets and tables of authorities shall not be included. For compelling reasons the Board Chair may grant a motion to file an over-length brief. The Clerk to the Disciplinary Board shall return over-length briefs presented for filing without a motion to the Chair. The Clerk shall provide a copy of this policy to the party with the original un-filed brief.

5. **Oral Argument**. Each party shall have 15 minutes to present oral argument if requested as provided in ELC 11.12(c). The Board may ask questions during the oral argument. All oral arguments are recorded by a court reporter. For compelling reasons the Board Chair may grant a motion for additional oral argument time. This motion should be filed with the request for oral argument. If either party fails to appear for argument at the scheduled time, the Board may consider the case without oral argument.

6. **Case Scheduling Orders**. The Board may issue a case scheduling order. The parties must comply with the deadlines in the order, file a written agreement to an extended schedule, or file a motion to request an extension. The Board might not consider documents filed after the deadline on the scheduling order. All pleadings must be filed by the posted agenda date.