

No. 32024-3

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

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Division III
State of Washington

In re the Matter of:

JAMES D. CUDMORE, Alleged Vulnerable Adult,
SHEA C. MEEHAN, Respondent,
and
JOHN C. BOLLIGER, Appellant

APPELLANT'S REPLY BRIEF

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A. There Does Not Exist Clear, Cogent, And Convincing Evidence That Mr. Cudmore Was Even A “Vulnerable Adult” In The First Place¹

Mr. Meehan wrongly claims that clear, cogent, and convincing evidence “shows that Cudmore was a vulnerable adult as defined in RCW 74.34.020(17).”

1. Review Of The Question – Of Whether Mr. Cudmore Was A “Vulnerable Adult” – Is De Novo

“Vulnerable adult” is defined in RCW 74.34.020(17). Questions of statutory construction are reviewed de novo. Fast v. Kennewick Hosp. Dist., 2015 WL 3485915, 345 P.3d 858 (Div. 3 2015).

2. Where Mr. Cudmore Was Opposed To A VAPO Being Entered Against Mr. Bolliger, Entry Of The VAPO Against Mr. Bolliger Was Error In The Absence Of Clear, Cogent, And Convincing Evidence That Mr. Cudmore Was A “Vulnerable Adult”

In his appellant’s brief (“AB”), Mr. Bolliger discussed the decision in Matter of Knight, 178 Wn.App. 929, 317 P.3d 1068 (2014). Knight holds that, where an AVA is opposed to a VAPO being entered against the respondent – clear, cogent, and convincing evidence must exist in order to conclude that the AVA is even a “vulnerable adult” in the first place. That approach by the Knight Court is thoughtful. On the one hand, if the AVA is not opposed to the VAPO being entered, the court need only determine whether one of the subsections of RCW 74.34.020(17) applies, in order to conclude that the AVA is a “vulnerable adult.” However, where a **mentally competent** AVA opposes the VAPO being entered, the court may conclude that the AVA is a “vulnerable adult” only if there exists clear, cogent, and

¹ Mr. Bolliger uses the phrase “in the first place” because a court’s decision whether to enter a VAPO logically is a two-step inquiry: (1) is the alleged vulnerable adult (“AVA”) actually a “vulnerable adult” and, (2) if so, did the VAPO respondent do something wrong enough toward the vulnerable adult to warrant the entry of a VAPO? If the answer to either question is “no,” no VAPO should be entered. E.g., if a 60-year-old widower has a 30-year-old girlfriend who is spending a lot of his money, his adult children would not be entitled to entry of a VAPO against the girlfriend – regardless of how much of his money she is spending – if the widower is not a “vulnerable adult.” If the widower is mentally competent and aware of (consents to) the amount of his money his girlfriend is spending, it would be wrong to enter a VAPO against the girlfriend.

convincing evidence to overcome the AVA's opposition to the VAPO.²

3. Mr. Cudmore Obviously Was Opposed To A VAPO Being Entered To "Protect" Him From Mr. Bolliger

In his AB, Mr. Bolliger presented the abundance of evidence (summarized again in fn. 6 toward the end of this section), which dispositively establishes that Mr. Cudmore was opposed to a VAPO being entered to "protect" him from Mr. Bolliger. Mr. Meehan responds with 4, meritless inventions.

First, Mr. Meehan proffers GAL Mr. May's allegation that, at The Manor one day, Mr. Cudmore "tried to unrobe, undress in the dining facility. They had to stop him." However, that dining facility is huge and has several dozen people (i.e., plenty of witnesses) in it at meal times – and, yet, Mr. Meehan and Mr. May did not provide a single, corroborating declaration from any witness to that alleged event, not even from one of the "they" who "had to stop him." Moreover, in his AB, Mr. Bolliger fully explained how, in the related guardianship case – Mr. Meehan, Mr. May, and Ms. Woodard were

² As Mr. Bolliger explained in his AB (fn. 14, pp. 41-43), the Knight case contains a great deal of egregious facts which, at first blush, might seem to support a conclusion that Ms. Knight was susceptible of being overcome by her son, Tor (the VAPO respondent therein) – both with respect to (1) her physical and medical well being and (2) the preservation of her finances. Also, the Knight Court considered the definition of "vulnerable adult" set forth in RCW 74.34.020(17):

.... [Ms. Knight] and Tor further argue that Eric failed to prove by clear, cogent, and convincing evidence that [Ms. Knight] is a vulnerable adult . . . as defined by RCW 74.34.020 . . . (17).

Id. at 937. Moreover, the facts showed that Ms. Knight met subsections (a) and (f) of the RCW 74.34.020(17) definition for "vulnerable adult." Notwithstanding those facts, the Knight Court held as follows (with emph. added):

We hold the standard of proof for proving **whether the adult is a vulnerable adult** in a case contested by the alleged vulnerable adult is clear, cogent, and convincing evidence.

Id. Thus, because Ms. Knight was opposed to a VAPO being entered to "protect" her from Tor, the Knight Court remanded the case, because the record did not indicate that the trial court concluded Ms. Knight was a "vulnerable adult" by the required clear, cogent, and convincing evidence – even though Ms. Knight already met subsections (a) and (f) of the RCW 74.34.020(17) definition of "vulnerable adult." (In other words, if testimony from Ms. Knight would establish both that (1) she was mentally competent and (2) she had authorized Tor to spend her money and care for her to the extents that he did, then the proper conclusion would be that there does not exist clear, cogent, and convincing evidence that Ms. Knight was even a "vulnerable adult" in the first place – thereby rendering Tor's apparently egregious actions vis-a-vis Ms. Knight actually innocuous and irrelevant.) Here, as in Knight, the record does not indicate that the trial court concluded Mr. Cudmore was a "vulnerable adult" by the required clear, cogent, and convincing evidence. Indeed, the pre-printed form which the trial court used for its VAPO order does not express any findings or conclusions that Mr. Cudmore was a "vulnerable adult."

tacitly working together to impose an unneeded and unwanted guardianship over Mr. Cudmore. Finally, Mr. May's allegation comes unaccompanied by **any other** similar allegation about Mr. Cudmore. Mr. May's wording of his allegation realistically might have been describing nothing more than Mr. Cudmore loosening his trousers to re-tuck his shirt. Therefore, the weight of Mr. May's allegation is only slight – and does not preponderate to anything.

Second, Mr. Meehan would have this Court believe that Mr. Cudmore's mindset in September of 2013 shows he was a "vulnerable adult." To puff that notion, Mr. Meehan improperly directs this Court to inadmissible hearsay statements.³ Mr. Bolliger objected to the hearsay statements at the 9/27/13 VAPO hearing – and repeatedly argued that Mr. Cudmore was statutorily entitled to an evidentiary hearing to provide his own testimony. [See AB, Fact ¶ 29, pp. 23-26 and CP 175] However, the court erroneously refused to rule on Mr. Bolliger's hearsay objection and his assertion of Mr. Cudmore's entitlement to testify. Being legally inadmissible, those hearsay statements do not amount to even a preponderance of evidence, they amount to "no evidence."

³ From Mr. Lamberson's 9/13/13 Declaration: "Cudmore would wake up in the middle of the night and think about 'legal issues,'" "Cudmore also believed that everyone at the assisted living facility was spying on him and taking notes to determine whether he was incapacitated," "Lamberson continued to visit Cudmore at the facility . . . [h]owever, after meeting with Bolliger, Cudmore would become agitated and argumentative," "Cudmore also wanted to report one of the caregivers who he had to call to his room after breaking a glass because Cudmore thought that the caregiver 'wrote him up' and that the incident would be reported to the court to show he was incapacitated," "Cudmore called Lamberson saying that he would no longer visit Annette with or without Lamberson until he 'dropped the charges against him,'" and "Cudmore refused to attend doctor's appointments with Lamberson." From Mr. Lamberson's 9/20/13 Declaration: "[T]he assisted living facility called Lamberson because Cudmore was lashing out at the caregivers," "Cudmore wanted a caregiver to enter '911' on his phone so he could call the police if 'somebody' came to see him," "Cudmore made threatening comments towards one of the staff members," "Cudmore told Lamberson that 'they' told him that he should not go anywhere with Lamberson and that Cudmore should call the police if Lamberson came to see him," and "Cudmore still believed he was not allowed to go anywhere with Lamberson." From the 9/27/13 VAPO Hearing RP: Mr. Cudmore "took multiple visits before he remembered attorney, would call attorney by her maiden name, did not remember signing a recent declaration," "[w]hen discussing the incident with the guardian ad litem, Cudmore didn't understand why . . .," "Cudmore did not recall signing the declaration," "Cudmore's opinion on Bolliger would swing to extremes," "sometimes he would express that he wanted Bolliger as his attorney while other times he would be 'very extremely upset' at Bolliger," and "Cudmore told Woodard that he did not want to come to the VAPO hearing."

At the times of the foregoing, Mr. Cudmore very recently had been declared by his Dr. Vaughn to be **mentally competent** – and it was months before he was adjudicated as incapacitated. Thus, Mr. Cudmore could provide his own testimony. Mr. Meehan knows it is improper for him to offer this Court those hearsay statements as "evidence."

Third, Mr. Meehan asserts that “Bolliger attempts to argue for the first time on appeal that the trial court failed to use the [clear, cogent, and convincing evidence] standard of proof. . . . The Court should reject this argument as Bolliger failed to preserve the issue for appeal. RAP 2.5.” Mr. Meehan adds “[n]owhere in his petition has Bolliger asserted a constitutional injury to himself as appellant that would excuse his failure to preserve the issue for appeal.” Mr. Meehan is prevaricating. In Matter of Knight, *supra*, the Court noted that “The [Abuse of Vulnerable Adults] Act, however, does not state the necessary standard of proof for a vulnerable adult protection order.” *Id.* at 938. The Court then became the first appellate court to hold that – in order to find an AVA to be a “vulnerable adult” where the AVA opposes the entry of a VAPO against the respondent – the clear, cogent, and convincing evidence standard of proof must be applied. Significantly, the Matter of Knight decision was issued on 6/14/14 – i.e., 7½ months **after** Mr. Bolliger filed his *Notice of Appeal* for this case (on 10/28/13).⁴ Thus, Mr. Bolliger could not possibly have cited to the trial court (preserved for appeal) the new rule which was first announced in Matter of Knight many months later.

Fourth, Mr. Meehan disingenuously suggests that, because Mr. Cudmore was not at the 9/27/13 VAPO hearing, “Mr. Cudmore did not advise the trial court **at the hearing** that he did ‘not want all or part of the protection sought in the petition.’ RCW 74.34.135.” (Emph. added.) With that pretense, Mr. Meehan wants this Court to reward him for his own wrongdoing: Mr. Meehan successfully prevented Mr. Cudmore from attending the 9/27/13 VAPO hearing. [See AB, Fact ¶ 20, pp. 16-17]

In other words, if Mr. Meehan wanted to have the same judge review his

⁴ Nevertheless, the Matter of Knight holding applies retroactively to this case, as Mr. Bolliger explained in fn. 13 (p. 38) of his AB.

allegations that Mr. Bolliger was doing something untoward to Mr. Cudmore, he could have sought an order to show cause therefor in Mr. Cudmore's open Guardianship case. If that had happened, Mr. Bolliger would have been able to bring Mr. Cudmore to the hearing to provide his own testimony that he didn't want or need any "protection" from Mr. Bolliger. (Remember, Mr. Cudmore and Mr. Bolliger had been trying to get a hearing calendared with that same judge for about 2 months, so that Mr. Cudmore could self testify.)

However, not wanting Mr. Cudmore to speak to the judge, Mr. Meehan instead personally brought a VAPO case against Mr. Bolliger – because the pre-printed language on the temporary VAPO order (which Mr. Meehan improperly obtained ex parte on 9/13/13) **expressly prohibited Mr. Bolliger from having any contact with Mr. Cudmore “until the end of the [VAPO] hearing” itself.** Thus, because of that language in the temporary order, **Mr. Cudmore was prohibited** (1) from consulting with Mr. Bolliger about Mr. Meehan's VAPO case and (2) from having Mr. Bolliger bring him to the 9/27/13 VAPO hearing itself, so that Mr. Cudmore could express directly to the judge that he did not want or need a VAPO against Mr. Bolliger. (Mr. Meehan knew that neither he, Mr. Lamberson, Mr. May, nor Ms. Woodard would bring Mr. Cudmore to the 9/27/13 VAPO hearing.)⁵

⁵ Acknowledging that Mr. Cudmore was **mentally competent** at the time, Mr. Meehan represents to this Court that Mr. Cudmore did not want to attend the 9/27/13 VAPO hearing because he was not opposed to a VAPO getting entered against Mr. Bolliger. To advance his narrative, Mr. Meehan provides an incomplete excerpt from the 9/27/13 hearing transcript, in which Mr. Bolliger was inquiring of Ms. Woodard. Ms. Woodard indicated that she spoke with Mr. Cudmore just two days before the hearing, i.e., on 9/25/13. The proper context of that can be understood only by recalling (or re-reading) Mr. Bolliger's AB, Fact ¶ 22 (pp. 18-19), please.

Thus, by the time Ms. Woodard spoke with Mr. Cudmore (on 9/25/13) about the upcoming 9/27/13 VAPO hearing, Mr. Cudmore had every reason to believe that Mr. Bolliger had just silently quit Mr. Cudmore's case and abandoned him nearly 2 weeks earlier. Ms. Woodard told Mr. Cudmore about the upcoming 9/27/13 as follows (with emph. added): **“I told him he did not have to come but I was going to go and I would call him and let him know what had happened at today's hearing.”** [9/27/13 RP, p. 15] However, Mr. Meehan withheld from this Court the follow-on question that Mr. Bolliger put to Ms. Woodard, as follows (with emph. added): [9/27/13 RP, p. 16]

MR. BOLLIGER: Did Mr. Cudmore say anything to you that he would not want to come to today's hearing, even if I could bring him?

Thus, with Ms. Woodard's coax ("I told him he did not have to come" to the 9/27/13 VAPO hearing), Mr. Meehan's VAPO case against Mr. Bolliger was **the very instrument** via which Mr. Meehan dishonestly prevented Mr. Cudmore from ever testifying to the judge. This Court therefore should decline to reward Mr. Meehan on his deceptive pretense that "Mr. Cudmore did not advise the trial court **at the hearing** that he did 'not want all or part of the protection sought in the petition.' RCW 74.34.135." (Emph. added.)

In sum, in his brief, Mr. Meehan pitched 4, meritless inventions to try to say that Mr. Cudmore was not opposed to a VAPO being entered to "protect" him from Mr. Bolliger. Contrasted with those is the record's abundance of evidence which dispositively establishes that Mr. Cudmore clearly **was opposed** to a VAPO being entered to "protect" him from Mr. Bolliger.⁶

MS. WOODARD: I did not ask him that, but when I asked him specifically if he wanted to come, he said no.

Given that Mr. Cudmore and Mr. Bolliger had been trying to get Mr. Cudmore into court for nearly 2 months to provide his own testimony to the same judge, the only fair conclusions which can be drawn from the foregoing are that (1) Mr. Cudmore believed his legal defense against the guardianship case had been abandoned by Mr. Bolliger and, as such, (2) Mr. Cudmore perceived no benefit in going to court with Ms. Woodard, who was not helping him in it. That is not even a preponderance of the evidence that Mr. Cudmore was unopposed to a VAPO against Mr. Bolliger.

Because Mr. Cudmore was **mentally competent** at the time, Mr. Meehan also argues that Mr. Cudmore could have come to the 9/27/13 VAPO hearing on his own, via Dial-A-Ride. Whereas it is true that Mr. Cudmore on occasion used Dial-A-Ride to go to the familiar location of his personal physician of 14 years (Dr. Vaughn), there is no evidence in the record indicating either (1) that Mr. Cudmore ever had used Dial-A-Ride to travel to unfamiliar places or (2) that Mr. Cudmore ever had been to the courthouse before. A solo, first-time visit to the crowded and unfamiliar courthouse can be daunting for anybody – let alone an 85-year-old man who believes his attorney (Mr. Bolliger) has abandoned him, is hard of hearing, and walks only hesitantly with a walker. [AB, App., p. 2] Mr. Meehan's Dial-A-Ride argument, too, preponderates to nothing.

⁶ The following examples of evidence were set forth in Mr. Bolliger's AB, **none** of which evidence Mr. Meehan contested in his respondent's brief:

- the summary paragraph (¶ 1) from Mr. Bolliger's AB, which demonstrates Mr. Cudmore's appreciable **physical independencies and mental competence** "at all times material hereto." Mr. Cudmore took care of his own hygiene, shopping, and exercise wants and needs. [CP 142-49]
- Mr. Cudmore came to Mr. Bolliger's offices on 4 occasions (7/2/13, 7/4/13, 7/8/13, and 7/26/13) – totaling approximately 6½ hours – specifically to direct, discuss, review, and sign new estate planning documents which he wanted Mr. Bolliger to prepare for him – and, on 7/4/13, Mr. Cudmore hired Mr. Bolliger with a written fee agreement expressly for those purposes. [CP 8, 14-22, 106, 115, 120-22, and 124]
- On 7/18/13, Mr. Cudmore hired Mr. Bolliger – with a second written fee agreement – expressly to defend him against the guardianship case. [CP 106, 117, 121-22]

- In his own declaration, Mr. Lamberson admitted that Mr. Cudmore's Alzheimer's diagnosis is at only "Level II." [CP 97]
- Mr. Cudmore wanted a declaration from his personal physician since 1999, Dr. Vaughn, addressing Mr. Cudmore's **mental competence** and, on 7/18/13, he accompanied Mr. Bolliger to Dr. Vaughn's office to be present while Dr. Vaughn reviewed, provided his own typewritten exhibit thereto, and signed his declaration – providing his medical opinion that Mr. Cudmore was **mentally competent** to direct that new estate planning documents be prepared for him. [CP 122-23; AB, App., pp. 2-9]
- Mr. Cudmore wanted the judge to reconsider his decision to deny Mr. Cudmore his statutory right – under RCW 11.88.045(1)(a) – to be defended against Mr. Meehan's guardianship case by his chosen and hired attorney (Mr. Bolliger), so Mr. Bolliger filed Mr. Cudmore's *Motion for Reconsideration* on 7/24/13. [AB, Fact ¶ 17; CP 9]
- In his 7/26/13 *Declaration of James D. Cudmore*, Mr. Cudmore explained how **GAL Mr. May tried to dissuade Mr. Cudmore from keeping Mr. Bolliger as his attorney in the guardianship case – and how Mr. May directed Mr. Cudmore to choose one of two other attorneys (one of which was Ms. Woodard)**. Mr. Cudmore further declared about Ms. Woodard, "I don't want her to be my attorney in this case." Mr. Cudmore further declared, "I have told Mr. Bolliger at least 20 times that I want him to be my attorney for this case. I ask the judge to appoint Mr. Bolliger to be my attorney for this case, not Rachel Woodard. I'm not sure why people keep telling me that the judge won't let Mr. Bolliger be my attorney in this case." [CP 124, emph. added]
- Mr. Cudmore directed Mr. Bolliger not to provide a copy of his 7/26/13 Will to Mr. Lamberson or Mr. Meehan. [CP 124]
- In his 8/18/13 handwritten statement, Mr. Cudmore wrote "I, James Cudmore, want John Bolliger for my attorney and not Rachel Woodard." [CP 125, emph. added]
- In his 9/12/13 *Declaration of James D. Cudmore*, Mr. Cudmore declared "I want Mr. Bolliger to be my attorney – and not Rachel Woodard." Mr. Cudmore also set forth his understanding of his rights in the guardianship case: to a jury trial, to have his Dr. Vaughn prepare the statutory medical report, to a court-ordered mediation, and to have the court review all power of attorney documents at issue – and Mr. Cudmore asserted that he wanted to exercise all of those rights. Mr. Cudmore elaborated that **Ms. Woodard had been doing nothing to explain or advance any of those rights on his behalf**. Finally, Mr. Cudmore explained that he wanted the guardianship case to be resolved with the "least restrictive alternative" for his ongoing care and decision making assistance, asserting that "I want that to continue to be provided by The Manor, and be provided as set forth in my power of attorney documents prepared by Mr. Bolliger – without the need for a guardianship." [CP 142-49, emph. added]
- Mr. Cudmore wanted the judge to revise his decision to deny Mr. Cudmore his statutory right – under RCW 11.88.045(1)(a) – to be defended against Mr. Meehan's guardianship case by his chosen and hired attorney (Mr. Bolliger), so Mr. Bolliger filed Mr. Cudmore's CR 54(b) motion for revision on 8/19/13. **Mr. Cudmore was looking forward to providing his own, personal testimony to the judge on the subject**, at the calendared 9/20/13 hearing on his CR 54(b) motion for revision. [AB, Fact ¶ 19 and fn. 7]
- Two days after Mr. Meehan served his stack of VAPO paperwork on Mr. Cudmore – i.e., on 9/15/13 – Mr. Cudmore left the following voice message on Mr. Bolliger's phone, showing that **Mr. Cudmore still was seeking legal advice from Mr. Bolliger**, even while the 2-week temporary VAPO restrained Mr. Bolliger from communicating any further with Mr. Cudmore: [CP 154]

Hey, John. This is Jim Cudmore. Dona Belt's here with some paperwork – and she's on her way to bring it to your office, so, I'd appreciate if you would read this paperwork and determine it and help me out on it because its really complex. Thank you, John. This is Jim Cudmore. Have a good day. Bye-bye.

- At the 9/27/13 hearing on Mr. Meehan's VAPO against Mr. Bolliger, **even Ms. Woodard corroborated Mr. Cudmore's choice to have Mr. Bolliger defend him against the guardianship case**. Ms. Woodard asserted to the judge that Mr. Cudmore "feel[s] like he needs to find ways to get here to yell at the court for what they have done, because he has said that he would like [Mr. Bolliger] to be his attorney." Ms. Woodard also asserted to the judge that "[t]here's been multiple occasions where [Mr. Cudmore]'s expressed that he

Therefore, Mr. Meehan failed to show that Mr. Cudmore was unopposed to a VAPO getting entered against Mr. Bolliger. As such, Mr. Bolliger respectfully submits that this Court should hold that clear, cogent, and convincing evidence was required to find that Mr. Cudmore was even a “vulnerable adult” in the first place. Matter of Knight, *supra*.

And yet, the 5-year VAPO entered against Mr. Bolliger does not contain **any** finding that Mr. Cudmore was a “vulnerable adult” – and it does not use the words “clear, cogent, and convincing” anywhere. That might suggest a remand on this issue could be appropriate. However, Mr. Bolliger respectfully submits that a remand is not necessary, for 3 reasons. **First**, the subject judge no longer sits on the superior court. **Second**, Mr. Cudmore later was adjudicated as incapacitated and, so, he now is legally unable to provide any testimony on this subject at a first-ever evidentiary hearing on remand. **Third**, the record’s evidence (just summarized in fn. 6) plentifully enables this Court to hold, de novo, that Mr. Meehan failed to present even a preponderance of the evidence – let alone the required clear, cogent, and convincing evidence – that Mr. Cudmore was a “vulnerable adult” in the first place (i.e., in September of 2013, when the judge erroneously entered the 5-year VAPO to “protect” Mr. Cudmore from his chosen and hired attorney in the guardianship case, Mr. Bolliger).

B. Clear, Cogent, And Convincing Evidence Also Does Not Exist To Support The Judge’s Conclusory Finding That Mr. Bolliger “Committed Acts Of Abandonment, Abuse, Neglect, And/Or Financial Exploitation” Of Mr. Cudmore⁷

would like [Mr. Bolliger] to still be his attorney.” [9/27/13 RP, pp. 10-11, *emph. added*]

- At the 9/27/13 hearing on Mr. Meehan’s VAPO against Mr. Bolliger, even Mr. Meehan effectively corroborated the fact that **Mr. Cudmore was expressing to their side that he did not want or need a VAPO against Mr. Bolliger.** [9/27/13 RP, pp. 3-4]

⁷ The Matter of Knight Court also held as follows: [*Id.* at 940]

... Thus, because a contested vulnerable adult protection order case **implicates the vulnerable adult’s**

Mr. Bolliger explained in his AB (pp. 43-44) as follows about the record's evidence in this case (with original emph.):

The record in this case is very, very clear. There is **nothing** in the record which supports a finding that Mr. Bolliger committed an "abandonment" of Mr. Cudmore. There is **nothing** in the record which supports a finding that Mr. Bolliger committed an "abuse" of Mr. Cudmore. There is **nothing** in the record which supports a finding that Mr. Bolliger committed a "neglect" of Mr. Cudmore. There is **nothing** in the record which supports a finding that Mr. Bolliger committed a "financial exploitation" of Mr. Cudmore. Mr. Bolliger never did any of those things – never, never, never – not even once.

1. Mr. Bolliger Never Took/Used Any Of Mr. Cudmore's Property

Mr. Meehan cites Gradinaru v. DSHS, 181 Wn.App. 18, 325 P.3d 209 (2014). "[Ms.] Gradinaru was the co-owner of an adult family home in Bellevue. Elaine, one of the residents of the home, was in hospice care and had been prescribed 'comfort medications,' including morphine, for end of life treatment." Ms. Gradinaru took some of Elaine's morphine and used it in a failed attempt to commit suicide. DSHS therefore found that Ms. Gradinaru had financially exploited vulnerable adult Elaine. The Gradinaru Court affirmed. (All id. at 20.) Mr. Meehan concludes that "[f]inancial exploitation is broadly defined." Okay, however, there is **no evidence** in the record even suggesting that Mr. Bolliger ever took or used any of Mr. Cudmore's property. That is because Mr. Bolliger never did so – not even a paper clip or a rubber band – not even once. The 5-year VAPO the judge entered against Mr. Bolliger expresses **no finding** that Mr. Bolliger ever took or used any of Mr. Cudmore's property. Gradinaru therefore is inapposite to this appeal.

2. Mr. Cudmore And Mr. Bolliger Never Had A Single Argument

liberty and autonomy interests like a guardianship case does, the standard of proof for a vulnerable adult protection order contested by the alleged vulnerable adult is **clear, cogent, and convincing evidence**, as it is with a guardianship. We remand to the superior court to determine if Eric proved by clear, cogent, and convincing evidence that [Ms. Knight] is a vulnerable adult **in need of a protection order** under chapter 74.34 RCW.

Mr. Meehan cites Goldsmith v. DSHS, 169 Wn.App. 573, 280 P.3d 1173 (2012). Mr. Goldsmith's dad was Thomas Sr. In 2006, "Thomas Sr. executed a durable power of attorney naming [Ms.] Camerota, Executive Director of CGS [Capital Guardianship Services], as his attorney-in-fact, and granting her power over his assets and liabilities." Id. at 576. "Goldsmith and his father had heated discussions about finances in person and by phone that deteriorated into yelling. According to one caregiver, these fights caused Thomas Sr. to cry, refuse to take his medication, and otherwise become non-compliant with caregiver instructions. The stress would become so great that the caregivers themselves felt threatened." By April of 2008, Thomas Sr. "was 98 years old and suffered from several physical ailments, including a heart condition. He . . . required 24-hour home care." Id. at 575-76. In 2008, Mr. Goldsmith's "constant financial pressure" on Thomas Sr. led CGS Director Ms. Camerato and CGS Assistant Director Ms. Franklin "to file a declaration ... in support of a [VAPO]. Their declaration described Thomas Sr. as becoming visibly shaken when [Mr. Goldsmith] would not honor his request to stop arguing about financial matters." Id. at 577. At a DSHS administrative hearing in June of 2009, CGS Assistant Director "Franklin testified that she witnessed heated exchanges between Goldsmith and his father about finances.... Franklin testified that all five caregivers reported yelling between Goldsmith and his father." Id. at 578. "Caregiver [Ms.] Bryl testified that Goldsmith would have daylong visits with his parents that included verbal fights about their finances. Thomas Sr. would be very upset after his son left. On one occasion, a 'very angry' Thomas Sr. told Goldsmith to leave or he would call the police. When Goldsmith stayed and continued to argue, Bryl persuaded him to leave, after which Thomas Sr. was 'really upset.' Thomas Sr. would display anger and anxiety only after arguing

with Goldsmith; he was otherwise calm.” *Id.* Nursing Assistant [Ms.] League, who also cared for Thomas Sr., “testified that . . . Thomas Sr. and his son would argue ‘a lot,’ sometimes for up to two hours, and Thomas Sr. would cry and become noncompliant afterward.” *Id.* CGS Director Camerota “testified that ... [s]he overheard a heated conversation between Thomas Sr. and Goldsmith, during which Thomas Sr. slammed the table. She also saw Thomas Sr. become withdrawn and acquiescent to Goldsmith’s demands.” *Id.* 578-79. “Goldsmith ... did admit to yelling at his father.” *Id.* at 579. The DSHS ALJ and the Goldsmith Court therefore both affirmed DSHS’ finding that Mr. Goldsmith mentally abused his vulnerable adult father, Thomas Sr.

Mr. Meehan concludes that “[c]hanges in the vulnerable adult’s mood and increases in stress and anxiety manifesting in erratic behavior is evidence of injury caused by abuse.” Okay, however, all of the testimonies against Mr. Goldsmith were “real time” descriptions – i.e., personally witnessed (both seen and heard) by Thomas Sr.’s caregivers (because he required 24-hour care, one always was in attendance), his Nursing Assistant, his AIF, and his AIF’s colleague. They actually heard and saw the yelling, crying, arguing, table slamming, anger, and stress – and they personally attested to the great lengths of time during which some of those outbursts occurred. Therefore, their descriptions of Thomas Sr.’s anguish “after” Mr. Goldsmith’s visits were attributed *directly* to his visits – because they were present (1) *while* Mr. Goldsmith was arguing with his dad and (2) *still after he had departed*.⁸

⁸ On that latter point, neither Mr. Lamberson nor Ms. Woodard ever was present when Mr. Cudmore would meet with Mr. Bolliger. That is why, when speaking of their own meetings with Mr. Cudmore (at which they allege he was upset), neither of them was able to assert how long it had been since Mr. Cudmore had last met with Mr. Bolliger. They just say it was “after.” Well, Mr. Cudmore first came to Mr. Bolliger’s office on 7/2/13 – so, technically, every time Mr. Lamberson or Ms. Woodard met with Mr. Cudmore after that date was also “after” Mr. Cudmore had met with Mr. Bolliger. Likewise, Ms. Woodard first met with Mr. Cudmore a few days after the 7/19/13 initial guardianship hearing – so, every time Mr. Lamberson met with Mr. Cudmore after that date was also “after” Mr. Cudmore had met with Ms. Woodard. Likewise again, Mr. Lamberson had known Mr. Cudmore for decades – so, every time Ms. Woodard ever met with Mr. Cudmore was “after” Mr. Cudmore had met with Mr. Lamberson. Thus, when Mr. Meehan argues that Mr. Cudmore was upset when he met with Mr. Lamberson or Ms.

In this case, however, there is **no evidence** in the record that Mr. Cudmore and Mr. Bolliger ever had any argument, disagreement, anger, anxiety, or stress exist between them – or that either ever yelled, cried, or raised their voice at the other – about any subject whatsoever.⁹ That is because it never happened – not even once. The friendly, last communication Mr. Cudmore made to Mr. Bolliger was his 9/15/13 still-preserved voice message:

Hey, John. This is Jim Cudmore. Dona Belt's here with some paperwork – and she's on her way to bring it to your office, so, I'd appreciate if you would read this paperwork and determine it and help me out on it because its really complex. Thank you, John. This is Jim Cudmore. Have a good day. Bye-bye. [CP 154]

Indeed, the 5-year VAPO the judge entered against Mr. Bolliger expresses **no finding** that Mr. Cudmore ever became upset with Mr. Bolliger. Thus, whereas the Goldsmith decision might be supportive of a VAPO against Mr. Lamberson or Ms. Woodard, Goldsmith is inapposite to this appeal.

3. Factually, Not One Of Mr. Meehan's Eight Residual Theories Even Preponderates To Support The Judge's Conclusory Finding That Mr. Bolliger "Committed Acts Of Abandonment, Abuse, Neglect, And/Or Financial Exploitation" Of Mr. Cudmore

Woodard "after" meeting with Mr. Bolliger – really, all Mr. Meehan is showing is that Mr. Cudmore on those occasions actually was upset only with Mr. Lamberson or Ms. Woodard (i.e., the person with whom he then was meeting). See, e.g., Mr. Cudmore's 9/12/13 *Declaration of James D. Cudmore*, ¶ 14, in which Mr. Cudmore declared: [CP 79, emph. added]

.... Over time, however, our relationship has deteriorated. Tim Lamberson now complains whenever I spend any money whatsoever. He opens my mail without my permission. He checks my cell phone without my permission. He comes into my room uninvited. He ridicules and berates me, saying things to me like "you can't even add 2 plus 2!" He treats me as if I'm no more than a potted plant over in the corner. Things had gotten so bad between us that, a while back, I decided I didn't want anything to do with Tim Lamberson anymore and I didn't want him managing my finances anymore.

Again, Mr. Meehan never did produce any historic power of attorney document purporting to give the Mr. Lamberson authority for Mr. Cudmore's financial decision making. [AB, Fact ¶ 7] See, also, Mr. Cudmore's declared dissatisfaction with Ms. Woodard, as follows: [CP 147, emph. added]

I am unaware of any effort attorney Rachel Woodard has made to inform me of my rights just mentioned or do anything about advancing them for me.

Also, see Mr. Cudmore's multiple declarations, in which he specifically declared he did not want Ms. Woodard as his attorney – as well as her own, in-court admission of that fact. [CP 124, 125 and 147; 9/27/13 RP, pp. 10-11]

⁹ See fn. 3 and its accompanying text, above.

First, Mr. Meehan goads this Court to believe that Mr. Bolliger solicited Mr. Cudmore for financial gain. That notion is expressly contradicted by the record.¹⁰ So, Mr. Meehan's slant, that Mr. Bolliger trolled Mr. Cudmore for financial gain, is entirely without merit. **After** Mr. Cudmore insisted (with a couple of days' deliberation) that he wanted Mr. Bolliger to administer his estate plan, Mr. Bolliger gave Mr. Cudmore a 25% reduction in his years-old, standard hourly billing rate. [CP 115]

Second, in an effort to avoid the actual evidence in the record, Mr. Meehan poses that this Court should regard declarations prepared by Mr. Bolliger as "self serving." Well, why not stop there? Under Mr. Meehan's theory, the courts could (1) regard every declaration prepared by every attorney to be "self serving" and (2) reject the evidentiary worth of all declarations. (Mr. Meehan hasn't thought that through. Obviously, the declarations prepared by **him** would have to be rejected, as well.) The simple fact is that Mr. Bolliger always prepares declarations with great integrity. Before having

¹⁰ See, e.g., Mr. Cudmore's 9/12/13 *Declaration of James D. Cudmore*, in which he declared: [CP 146]

15. **I asked** my friend of 35 years, Dona Belt, if she knew of an attorney who could prepare new estate planning documents for me. She suggested Mr. Bolliger. So, **I went** to visit Mr. Bolliger. **I told** Mr. Bolliger I wanted new power of attorney documents drawn up, with a new person to help me manage both my health care decision making and my financial decision making – not Tim Lamberson. Mr. Bolliger asked me if **I have** another family member or friend who **I would like** to provide me that help. I told him **I don't**, but that **I want** him to do it for me. Mr. Bolliger explained he could do that, but he'd have to charge me his standard hourly attorney rate to do it. He told me to think about it some more and we could talk about it again on a subsequent occasion. A couple days later, **I went** to see Mr. Bolliger again. When **I arrived**, Mr. Bolliger asked me "Have you decided who you would like to give power of attorney to?" **I told** him "You." He reminded me he would have to charge me his standard hourly attorney rate to do it. **I told** him "I know, but that's OK with me." Mr. Bolliger later prepared the power of attorney documents **I requested**, we went over them together, **I was** satisfied he wrote them as **I wanted** him to, and **I signed** them.

16. As **I stated** above, my every daily need is provided by The Manor. **I recognize** [that] **I have** some physical and recollection limitations at my age of 85, so **I decided** to have Mr. Bolliger help me with my health care decision making and my financial decision making as my power of attorney. Between The Manor, Mr. Bolliger's help as my power of attorney, and my own capacities, **I am** more than adequately living my life. **I do not need**, and **I do not want**, a guardianship. **I definitely do not want** Tim Lamberson to be my guardian. **I want** nothing further to do with Tim Lamberson. [Emph. added]

See, also, the 7/17/13 *Declaration of John C. Bolliger*, wherein Mr. Bolliger provided his own rendition of the events just described by Mr. Cudmore. [AB, App., pp. 2-9] Significantly, ¶ 3 of that declaration describes a contemporaneous example where Mr. Bolliger declined to prepare power-of-attorney documents for potential clients, because Mr. Bolliger suspected the potential clients' elderly father already was mentally incapacitated.

his clients and witnesses review their declarations for final wording and signature, Mr. Bolliger **always** tells them “This is your declaration. You’re the one who’ll be signing, under penalty of perjury, that the facts are true and correct. So, you have total editorial control over the wording of your declaration. If you want anything added, deleted, or changed – just let me know, and we’ll do it.” Mr. Bolliger does not put words into a declarant’s mouth.

Third, Mr. Meehan cites “CP 28,” wherein – in his guardianship petition, which he signed under penalty of perjury – Mr. Lamberson asserted:

Even though [Mr. Cudmore] made alternative arrangements [i.e., the power-of-attorney documents Mr. Cudmore had Mr. Bolliger prepare for him], I believe a guardianship is still necessary because: [Mr. Cudmore] has purported to **revoke Mr. Lamberson's power of attorney** due to **undue influence** by executing new ... Power of Attorney documents

However, with respect to the two bolded portions of that quotation, (1) again, Mr. Lamberson never had any pre-existing power of attorney for Mr. Cudmore [AB, Fact ¶ 7] and (2) the subject of “undue influence” never was litigated in the guardianship case.

Fourth, Mr. Bolliger explained in his AB (Fact ¶¶ 13-15, pp. 8-9) how, in the guardianship case, Mr. Meehan wrongfully got his team member (Mr. May) appointed as GAL for Mr. Cudmore – and how Mr. May, in turn, wrongfully got Ms. Woodard appointed to their team to pretend-defend Mr. Cudmore. In response, Mr. Meehan stated only as follows (p. 3):

In the guardianship proceeding, the guardian ad litem [Mr.] May petitioned the court to appoint attorney [Ms.] Woodard as counsel for Mr. Cudmore as the [AIP]. CP at 34-35; see also RCW 11.88.090(5)(g); GALR 4(h)(1-2)

Mr. Meehan would have this Court believe that Mr. May’s efforts to get Ms. Woodard appointed to the team were appropriate under the referenced RCW and GALR. Mr. Meehan has seen Mr. Bolliger’s reply to his aforequoted statement in prior briefing in the Cudmore guardianship case, which is

reproduced in the next footnote.¹¹ Despite the fact that Mr. Meehan has read Mr. Bolliger's reply before, Mr. Meehan presented this Court his aforequoted statement – while refusing even to address Mr. Bolliger's reply, which reply **Mr. Meehan knows** completely undermines his statement by exposing its total lack of merit. It is improper for Mr. Meehan to so pretend and mislead this Court in a respondent's brief.

Fifth, Mr. Meehan makes the following assertion to this Court (p. 3):

Bolliger drafted a will for Cudmore naming Bolliger as the personal representative of Cudmore's estate which was executed on July 26, 2013 – almost three weeks after the guardianship action was initiated and a week after the court appointed Woodard as Cudmore's attorney in the guardianship.

Mr. Meehan asks this Court to believe that it was inappropriate for Mr. Bolliger to prepare the new Will which Mr. Cudmore hired and directed him to prepare. Mr. Meehan has seen Mr. Bolliger's reply to his aforequoted statement in prior briefing in the Cudmore/Belt case, which is reproduced in the next footnote.¹² In addition, (1) Mr. Cudmore was declared **mentally**

¹¹ . . . Mr. Meehan (without analysis) urges this Court to accept that Mr. May was justified in getting involved in the specific-attorney-selection process for Mr. Cudmore – on grounds of RCW 11.88.090(5)(g) and GALR 4(h)(1-2). However, that RCW merely authorizes Mr. May to inform the judge that an AIP might need an attorney, not to engage in selecting a specific attorney for the AIP. Also, that RCW, by its own terms, is inapplicable where, as here, “counsel [already] has appeared” for the AIP – and Mr. May knew that Mr. Bolliger already was representing Mr. Cudmore for the case – because Mr. May personally served a copy of his subject petition on Mr. Bolliger on 7/18/13. Mr. Meehan's reliance upon GALR 4(h)(1-2) also must fail. By its own terms, that GALR applies only “under RCW 13.34 [juvenile court dependency and termination of parent-child relationship cases] or RCW 26.26 [Uniform Parentage Act cases].” However, as Mr. Meehan well knows, Mr. Cudmore's case is an adult guardianship case, not a juvenile court case or a paternity case.

¹² See, e.g., Guardianship of Beecher, 130 Wn.App. 66, 121 P.3d 743 (2005). In Beecher, Loretta Beecher was the AIP. Her stepson (Mr. Thorpe) was the guardianship petitioner. Ms. Beecher (like Mr. Cudmore, here) hired an attorney to defend her against the guardianship action. During the case, Ms. Beecher's attorney “aggressively challenged the guardianship proceedings. He filed motions seeking, among other things, Schisel's removal as GAL, dismissal of the guardianship petition, non-disclosure of Beecher's medical reports, and revision and reconsideration of several of the commissioner's rulings. Ms. Beecher's attorney also challenged Thorp's standing and moved for summary judgment before the GAL filed her final report or finished her investigation.” Id. at 69. Later during the case, Mr. Thorpe and the GAL (Ms. Schisel) brought a motion disputing Ms. Beecher's attorney's fees “as unreasonable and unnecessary.” Id. The trial court held the attorney's fees “which totaled \$110,740, were ‘unreasonable and inappropriate in light of this matter.’ [It] ordered [the attorney] to repay Beecher \$47,500 of the \$86,500 she had already paid [the attorney], approving only \$39,000 of his fees.” Id. at 70. The Beecher Court reversed, holding as follows:

. . . the court can review fee and costs only after an adjudication of incapacity. Until then, an alleged

competent to direct the terms of his new Will, [CP 122-23] (2) Mr. Cudmore hired Mr. Bolliger, with a written fee agreement, to draft his new Will, [CP 115] and (3) the judge's order (referred to in Mr. Meehan's aforementioned statement) did not express any prohibition against Mr. Bolliger drafting Mr. Cudmore's new Will for him. Despite the fact that Mr. Meehan has read Mr. Bolliger's reply before, Mr. Meehan presented this Court his aforementioned statement – while refusing even to address Mr. Bolliger's reply, which reply **Mr. Meehan knows** completely undermines his statement by exposing its total lack of merit. Again, it is improper for Mr. Meehan to so pretend and mislead this Court in a respondent's brief.

Sixth, Mr. Meehan makes the following assertion to this Court (p. 4):

Bolliger continued to contact Cudmore regarding the subject matter of the guardianship even though Bolliger knew Cudmore was represented by counsel. Despite not having permission from Woodard as required by RPC 4.2, Bolliger met with Cudmore on multiple occasions.

Mr. Meehan tempts this Court to believe that Mr. Bolliger could not communicate with Mr. Cudmore. Mr. Meehan has seen Mr. Bolliger's reply to his aforementioned statement in prior briefing in the guardianship case, which is reproduced in the next footnote.¹³ In addition, (1) Mr. Cudmore was

incapacitated person retains the right everyone else has to hire and pay the attorneys of her choice. [*Id.* at 68, original emphasis and emphasis added.]

.... a court's statutory review of an AIP's attorney's fees must also be limited to situations **where there has been a determination that the AIP is in fact incapacitated. Until that time, she has the same autonomy and rights as any other person.** [*Id.* at 72, emphasis added in bold.]

- ¹³ 8. **Bolliger Did Not Violate RPC 4.2 In Continuing To Advocate For Mr. Cudmore's Desire To Have Bolliger, And Not Ms. Woodard, For His Attorney In The Guardianship Case – And, So, CR 11 Is Inapplicable To Mr. Meehan's False RPC 4.2 "Issue"**

Mr. Meehan has orally argued and filed briefing to the effect that Bolliger's involvement in the Guardianship case on behalf of Mr. Cudmore violates RPC 4.2. That is another false issue which Mr. Meehan raised merely to confuse the court.

RPC 4.2 states in full as follows:

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by a court order.

In that regard, Mr. Meehan argues that, once Judge Mendoza appointed Ms. Woodard to represent Mr. Cudmore in the Guardianship case, Bolliger could no longer communicate with Mr. Cudmore without Ms. Woodard's permission. However, that is only Ms. Woodard's issue to raise, not Mr. Meehan's: Mr. Meehan represented Mr. Cudmore's opposing party in the Guardianship case (not Mr. Cudmore). Yet, Ms. Woodard never raised that issue in any filing or in any of the more-than-a-dozen written and oral communications she had with Bolliger during the case. In other words, **in those numerous communications, Ms. Woodard never once mentioned RPC 4.2 to Bolliger and never once asserted that she did not want him communicating with Mr. Cudmore.** Instead, e.g., in her **August 21, 2013** email to Bolliger on the subject of who[] would be Mr. Cudmore's attorney in the Guardianship case, Ms. Woodard stated both that "I appreciate your plight in this regard" and "I know you will continue to fight to become his counsel."

More importantly, for the following reasons, RPC 4.2 is not applicable to Bolliger's representation of Mr. Cudmore during the aforementioned **mere 2 months and 11 days**. First, Mr. Cudmore had already hired Bolliger as the attorney to prepare new estate planning documents for Mr. Cudmore (including a new Will) – and Mr. Cudmore hired Bolliger therefor with a written fee agreement. As for the Guardianship case, (1) Mr. Cudmore hired Bolliger with another written fee agreement to defend him in the Guardianship case, (2) Mr. Cudmore repeatedly declared (in typed declarations, in his handwritten note, conversationally to several people, and in a preserved voice message to Bolliger) that he wanted Bolliger, and not Ms. Woodard, to be his attorney in the case, (3) at the same time, Mr. Cudmore's personal physician of 14 years declared him mentally fit enough to prepare new estate planning documents, including a new Will, (4) the operative guardianship statute – RCW 11.88.045(1)(a) – provides Mr. Cudmore the **unqualified right** to choose which attorney will represent him in the guardianship case, (5) the operative guardianship statute – RCW 11.88.045(3) – provides Mr. Cudmore the **unqualified right** to appear at court, testify, and present evidence regarding who he wanted as his attorney in the guardianship case (and Mr. Cudmore desperately wanted to get into a court hearing for that purpose), (6) Ms. Woodard was appointed pursuant to GAL Mr. May's improper petition for her to be appointed (improper because the operative guardianship statute – RCW 11.88.045(1)(b) – provides for expressly distinct (conflicting) duties for the AIP's GAL and the AIP's attorney toward the AIP), and (7) Mr. Cudmore had numerous, specific legal interests he wanted advanced in the case, which Ms. Woodard was doing (and ultimately did) **nothing** about: a jury trial, a medical report from his personal physician since 1999 (Dr. Vaughn), a court-ordered mediation, court review of the power of attorney documents (and approval of those he had Bolliger prepare for him), resolution of the case with the "least restrictive alternative" (i.e., residential and medical care to continue to be provided by The Manor, with financial and health care decision making as set forth in his power of attorney documents) – **without the need for any guardianship.**

RPC 4.2 plainly prohibits an attorney from communicating with "a [represented] person" **who is not the attorney's own client**. However, as the foregoing facts make clear, for the **mere 2 months and 11 days** during which Bolliger represented Mr. Cudmore in the Guardianship case, Mr. Cudmore wanted to be Bolliger's client, and not Ms. Woodard's client – and Bolliger's involvement in the Guardianship case was merely to get that issue (who would be Mr. Cudmore's attorney for the case) finally resolved – with Mr. Cudmore's desired participation in that process. Because (as detailed in the preceding section) Judge Mendoza had not brought the issue to a final resolution, Mr. Cudmore wanted Bolliger to keep pursuing the issue for him.

Further, comment [1] to RPC 4.2 states in pertinent part as follows (with emphasis added):

This Rule contributes to the proper functioning of the legal system by protecting a **person who has chosen to be represented by a lawyer** in a matter against possible overreaching by other lawyers who are participating in the matter

Obviously, for the **mere 2 months and 11 days** during which Bolliger represented Mr. Cudmore in the Guardianship case, the only person whom Mr. Cudmore had "chosen" to be his attorney in the Guardianship case was Bolliger, and not Ms. Woodard. For that reason, as well, RPC 4.2 is inapplicable to Bolliger's representation of Mr. Cudmore during the aforementioned **mere 2 months and 11 days**.

In addition, comment [4] to RPC 4.2 states as follows in its initial sentence:

This Rule does not prohibit communications with a represented person, or an employee or agent of such a person, concerning matters outside the representation.

Here, Mr. Cudmore had hired Bolliger to prepare new estate planning documents (including a new Will) for him in **July of 2013**, and Bolliger did so. In particular, **in the Guardianship case**, Mr. Meehan was feverishly trying to get

a copy of Mr. Cudmore's Will from Bolliger. Indeed, during the **mere 2 months and 11 days** at issue, Mr. Meehan continually sought – via motions, letters, subpoenas, and, later, four (4) depositions in the Guardianship case – to obtain copies of, and details about, Mr. Cudmore's Will. Clearly, however, the subject of Mr. Cudmore's Will is a matter outside the scope of his Guardianship case. See, again, Guardianship of York, 44 Wn.App. 547, 552, 723 P.2d 448 (1986):

First, a will has no legal significance before the testator's death, nor is it an asset of the ward's estate. Thus, prior to the initiation of probate proceedings, a court has no jurisdiction to compel surrender of a will at the guardian's request.

It is axiomatic that, if his guardian cannot be entitled to the Will, neither can be Mr. Cudmore's opposing party in the Guardianship case, Tim Lamberson, nor that party's attorney, Mr. Meehan. Throughout that period, Mr. Cudmore adamantly instructed Bolliger that he did not want Bolliger to release a copy of his new Will to anybody. For that reason, Bolliger properly declined to do so. See Guardianship of York, supra, at 553, which further holds as follows (in a guardianship case):

Finally, without the consent of the testator, disclosure of a will prior to the testator's death violates the Code of Professional Responsibility (CPR). Former CPR DR 4-101(B)(1)^{Fn5} imposes a duty on lawyers not to reveal the client secrets or confidences. Although the rule permits disclosure of confidences and secrets pursuant to a court order, CPR DR 4-101(C)(2) and CPR EC 4-2, such compulsion must be used sparingly. The duty to abide by the Rules of Professional Conduct and the need to preserve public trust in the privileged communications of the legal profession must be weighed against the public's interest in the administration of justice. Under the facts presented here, we perceive no compelling reason why the contents of the wills need to be disclosed. . . .

^{Fn5} The Code of Professional Responsibility was abrogated and superseded by the Rules of Professional Conduct (RPC) RPC 1.6, entitled "Confidentiality," is consistent with the old rule and does not affect our analysis.

So, Bolliger's efforts in the Guardianship case to avoid releasing Mr. Cudmore's new Will to others were dictated by Mr. Cudmore's express instructions to Bolliger, as well as Bolliger's duty of confidentiality to Mr. Cudmore pursuant to RPC 1.6.¹⁹

^{Fn19} That said, when – on **October 14, 2013** – Bolliger received written notice from Mr. Cudmore that he now wanted Bolliger to release a copy of his new Will to Ms. Woodard, after all, Bolliger provided them to Ms. Woodard **the very next day**. Notably, that occurred more than a month after Mr. Cudmore was foreclosed from communicating/consulting any further with Bolliger – because of the VAPO order of protection which had been entered against Bolliger on **September 13, 2013** (which order presently is under appeal).

Moreover, comment [4] to RPC 4.2 states as follows in its final sentence:

Also, a lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so.

The facts already mentioned in this section make it clear that Bolliger had such "independent justification or legal authorization for communicating" with Mr. Cudmore: Mr. Cudmore had expressly, and in writing, hired Bolliger for the very purpose of defending Mr. Cudmore in the Guardianship case and, separately, for the very purpose of preparing a new Will for Mr. Cudmore – which new Will Mr. Meehan was actively (and wrongfully) seeking to obtain a copy of in the Guardianship case.

Also, comment [5] to RPC 4.2 states as follows in its initial sentence:

Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government.

Here, as mentioned, Mr. Cudmore had a statutory right, pursuant to RCW 11.88.045(3), to testify and present evidence about his wishes with respect to the guardianship sought against him (including whom his attorney would be) – and he desperately wanted to get into court to present his testimony to a judge (i.e., the government official charged with deciding that issue in Mr. Cudmore's case). Throughout the **mere 2 months and 11 days** at issue, it was **only Bolliger who strove to get Mr. Cudmore into court for those purposes – and Ms. Woodard actively**

declared **mentally competent** at the time material to this discussion, [CP 122-23] (2) the judge's order (referred to in Mr. Meehan's aforementioned statement) did not express any prohibition against Mr. Bolliger communicating further with Mr. Cudmore, (3) Mr. Bolliger served Ms. Woodard a copy of every filing and written communication he made in the case, and (4) at the very end of the hearing, less than 2 minutes before he signed Mr. Meehan's order, the judge stated as follows:

[a]t some point later perhaps Mr. Bolliger you might be involved as the attorney with other motions and briefing but at this point I'm going to appoint Rachel Woodard.¹⁴

Ms. Woodard's engagement with Mr. Bolliger in more than a dozen written and oral communications about which of them properly should be representing Mr. Cudmore, her being served with a copy of every filing and written communication Mr. Bolliger made in the case, her declining to ever communicate to Mr. Bolliger any objection to his speaking with Mr. Cudmore, and her 8/21/13 email to Mr. Bolliger – "I appreciate your plight in this regard" and "I know you will continue to fight to become his counsel" – far exceed Ms. Woodard providing Mr. Bolliger her tacit consent for him to continue communicating with Mr. Cudmore. See, e.g., Bunn v. Walch, 54 Wn.2d 457, 463, 342 P.2d 211 (1959) ("Where a party knows what is occur-

(and successfully) worked with Mr. Cudmore's opposing counsel, Mr. Meehan, and GAL Mr. May to keep Mr. Cudmore out of court. That was part of their concerted strategy, throughout the case, to work together to impose a guardianship on Mr. Cudmore that he did not want and did not need.

Finally, comment [6] to RPC 4.2 states as follows in its initial sentence:

A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order.

In this regard, although Bolliger did not harbor any such uncertainty about whether he could lawfully communicate with Mr. Cudmore during the **mere 2 months and 11 days** at issue, again, it was only Bolliger – and not Ms. Woodard – who was seeking to get the matter clarified and resolved via a court order after a hearing at which Mr. Cudmore could participate, as Mr. Cudmore desperately wanted to do.

¹⁴ 7/19/13 hrg. transcript., p. 20, emphasis added].

ring and would be expected to speak, if he wished to protect his interests, his acquiescence manifests his tacit consent.”) Despite the fact that Mr. Meehan has read Mr. Bolliger’s reply before, Mr. Meehan presented this Court his aforequoted statement – while refusing even to address Mr. Bolliger’s reply, which reply **Mr. Meehan knows** completely undermines his statement by exposing its total lack of merit. Again, it is improper for Mr. Meehan to so pretend and mislead this Court in a respondent’s brief.

Seventh, Mr. Meehan makes the following assertion to this Court (p. 4):

Bolliger then issued subpoenas duces tecum to Cudmore’s financial institutions seeking copies of Cudmore’s account information. Bolliger did this despite not being ... the attorney for a party in the guardianship action.

Mr. Meehan wants this Court to believe that it was inappropriate for Mr. Bolliger to subpoena Mr. Cudmore’s banking records for him. Remember, however, that (1) Mr. Cudmore was declared to be **mentally competent** at the time, (2) Mr. Cudmore had hired Mr. Bolliger – with separate, written fee agreements – to (a) prepare new estate planning documents for him and (b) defend him against the guardianship case, and (3) Mr. Cudmore expressed his firing of Mr. Lamberson from helping him with his finances anymore. Against that backdrop, CR 45 authorizes a subpoena to be issued by “[a]n attorney of record of a party or other person authorized by statute.” That begs the question, “was Mr. Bolliger an attorney of record for Mr. Cudmore at the time?” The answer is yes. See Cheek v. ESC, 107 Wn.App. 79, 84, 25 P.3d 481 (Div. 3 2001), in which this Court adopted the Black’s Law Dictionary definition of “attorney of record,” as follows:

Attorney whose name must appear somewhere in permanent records or files of [the] case, or on the pleadings or some instrument filed in the case, or

Thus, a party can have more than one “attorney of record” in a case. Here, Mr. Bolliger filed a petition, and several motions and declarations, in the

guardianship case on behalf of Mr. Cudmore: that was Mr. Meehan's stated reason for bringing this VAPO case against Mr. Bolliger. As such, Mr. Bolliger was an attorney of record for Mr. Cudmore – and he therefore was authorized to issue the subpoenas on Mr. Cudmore's behalf. CR 45.

Moreover, Mr. Meehan has seen Mr. Bolliger's reply to this subpoena issue in the guardianship case, which is reproduced in the next footnote.¹⁵ So, this subpoena issue promptly became an irrelevant issue below, anyway. It does not constitute even a preponderance that Mr. Cudmore was a vulnerable adult in need of protection from Mr. Bolliger.

Eighth, Mr. Meehan makes the following assertion to this Court (p. 4):

Bolliger also refused to produce his client file or billing records to Woodard or the [GAL] despite being ordered to do so by the court.¹⁶

Mr. Meehan urges this Court to believe that Mr. Bolliger unlawfully ignored a court order. Mr. Meehan has seen Mr. Bolliger's reply to his aforementioned statement in prior briefing in a guardianship case *motion for reconsideration*, which is reproduced in the next footnote.¹⁷ Thus, while Mr. Bolliger's client,

¹⁵ In response, without calling Bolliger to discuss the matter, Mr. Meehan filed a motion to quash the subpoenas, based essentially on the technicalities that they were not served on Mr. Meehan five days before they were issued and they omitted to have attached to them a copy of CR 45(c) and (d). In response, [a mere 2 days later], Bolliger faxed Mr. Meehan a letter, in which he stated in full as follows:

This notifies you I will stipulate to an order quashing the subpoenas. As such, at your earliest opportunity, please email me your proposed order therefor – so I can sign it and get it back to your right away. This will obviate the need for any hearing on the subject next Friday. Thank you for your professional courtesies.

A copy of that letter is attached hereto as Exhibit D.

¹⁶ It was **Mr. Meehan** who moved the court to require Mr. Bolliger to produce (1) Mr. Cudmore's new Will and (2) Mr. Bolliger's case file and billing records to **Ms. Woodard and Mr. May**. This Court should recognize that is another fact demonstrating that all three of them were working together, against Mr. Cudmore. For a pictorial representation of that, see Mr. Bolliger's AB, App., p. 1.

¹⁷ **2. The Trial Court Committed Error In Ordering Mr. Bolliger To Provide Copies Of Mr. Cudmore's Will To Ms. Woodard And Mr. May – Because, Prior To Mr. Cudmore's Passing And The Initiation Of Probate Proceedings Relative To His Will, The Trial Court Has No Jurisdiction To Compel The Surrender Of His Will**

In Mr. Cudmore's *Memorandum of Law and Declaration of John C. Bolliger in Opposition to Motion to Compel*, the following case was twice cited: *In re Guardianship of York*, 44 Wn.App. 547, 723 P.2d 448 (Div. 3 1986). In *Guardianship of York*, our Division 3 of the Court of Appeals held as follows:

The trial court has no authority to either (1) generally compel production of the Wills or (2) order release of the Wills to Ms. Taylor as the Yorks' guardian. First, a Will has no legal significance before the testator's death, nor is it an asset of the ward's estate. Thus, prior to the initiation of probate proceedings, a court has no jurisdiction to compel surrender of a Will at the guardian's request. . . .

Second, while a client is alive, his or her communications with an attorney concerning preparation of a Will remain privileged. . . . A Will, drawn by a lawyer at the direction of a client, contains the very essence of the communications from the client relating to his or her wishes, intentions, and desires with respect to the disposition of their property.

Finally, without the consent of the testator, disclosure of a Will prior to the testator's death violates the Code of Professional Responsibility (CPR). Former CPR DR 4-101(B)(1)⁵ imposes a duty on lawyers not to reveal the client secrets or confidences. Although the rule permits disclosure of confidences or secrets pursuant to court order, CPR DR 4-101(C)(2) and CPR EC 4-2, such compulsion must be used sparingly. The duty to abide by the Rules of Professional Conduct and the need to preserve the public trust in the privileged communications of the legal profession must be weighed against the public's interest in the administration of justice. . . .

Fn. 5 The Code of Professional Responsibility was abrogated and superseded by the Rules of Professional Conduct (RPC), effective September 1, 1985. See 104 Wn.2d 1101, 1102-39 (1985). RPC 1.6, entitled "Confidentiality," is consistent with the old rule and does not affect our analysis.

Thus, the issue of Mr. Cudmore's testamentary capacity cannot be before the court in this guardianship proceeding. Prior to the death of the testator, the court has no authority ("no jurisdiction") to inquire into the validity of a Will, in order to determine the competency of the testator of the Will. *Pond v. Faust*, 90 Wn. 117, 121, 155 P. 776 (1916); see, also, *Ullman v. Garcia*, 645 So.2d 168, 170 (Fla.Ct.App. 1994) (citing *Pond*, guardian cannot contest validity of revocable trust during settlor's lifetime based on alleged under influence).

Based upon the foregoing, it was error for the trial court to order Mr. Bolliger to provide copies of Mr. Cudmore's Will to anybody. The trial court therefore should set aside its September 5, 2013 order in that regard.

3. The Trial Court Committed Error In Ordering Mr. Bolliger To Provide Copies Of "His Entire File, Including Any And All Substantive Documents And Any And All Billing And Timekeeping Records," To Ms. Woodard And Mr. May

As the aforementioned fee agreements and numerous filings in this case demonstrate without a scintilla of a doubt, **Mr. Cudmore hired Mr. Bolliger to be his attorney – and, therefore, Mr. Bolliger is Mr. Cudmore's attorney**. Also, Mr. Lamberson is seeking a full guardianship over Mr. Cudmore's person and finances in this case – yet, Mr. Cudmore does not want Mr. Lamberson to have guardianship power over him. Also, Mr. Lamberson wants a copy of Mr. Cudmore's recently executed Will – yet, Mr. Cudmore does not want Mr. Lamberson to obtain a copy of his Will. Therefore, on grounds of both (1) the attorney work product doctrine and (2) the attorney client confidential communications privilege, Mr. Bolliger's files are not discoverable to other parties in this case (or to anybody else, for that matter).

Moreover, on the specific issue of Mr. Bolliger's "billing and timekeeping records" relating to his representation of Mr. Cudmore, in Mr. Cudmore's *Memorandum of Law and Declaration of John C. Bolliger in Opposition to Motion to Compel*, he provided the following discussion for the court:

. . . this matter is conclusively dealt with in 5A Wash.Prac., Evidence Law and Practice, §501.16 (5th ed.) as follows (with emphasis added):

Although fee arrangements are generally not privileged, the professional services provided by the attorney remain privileged. **The court will not require disclosure of fee statements, billing records, and the like when the party seeking disclosure is seeking information about the services provided by the attorney.** [Fn. omitted.]

In his *Motion to Compel*, Mr. Lamberson unabashedly asserts the reason he wants the requested billing records is because

mentally competent Mr. Cudmore, was forbidding Mr. Bolliger to produce (1) Mr. Cudmore's new Will and (2) Mr. Bolliger's case file and billing records to Mr. Meehan's team, Mr. Bolliger was honor bound and ethically bound not to do so. Then, when (on 10/14/13) Mr. Bolliger received written

.... Mr. Bolliger's billing records are relevant to determine whether Mr. Cudmore is suffering from incapacity or has been subject to financial exploitation as a vulnerable adult.

Obviously, then, Mr. Lamberson is "seeking information about the services provided by the attorney" within the meaning of just-quoted 5A Wash.Prac., Evidence Law and Practice, §501.16 (5th ed.). As such, "[t]he court will not require disclosure of fee statements, billing records, and the like." *Id.* (emphasis added).

Based upon the foregoing, it was error for the trial court to order Mr. Bolliger to provide copies of his Mr. Cudmore's "any and all billing and timekeeping records" to anybody. The trial court therefore should set aside its September 5, 2013 order in that regard.

4. On Issues Like These, The Appellate Courts Will Not Uphold An Order Of Contempt Against Mr. Bolliger For Respectfully Declining To Produce Documents He Reasonably Believes He Is Not Required By Law Or The RPC To Produce

Based upon the foregoing authorities, Mr. Bolliger has concluded he cannot comply with the September 5, 2013 order here under reconsideration. He therefore respectfully declines to do so. Hypothetically speaking, if the court is unpersuaded by the foregoing authorities and decides to find Mr. Bolliger in contempt for respectfully declining to comply with the order, the appellate courts will not uphold such a finding/order of contempt. See, e.g., Seventh Elect Church in Israel v. Rogers, 102 Wn.2d 527, 688 P.2d 506 (1984). In that case, as here, the attorneys in good faith refused to comply with a trial court order requiring them "to disclose the amount, source, and manner of payment of legal fees" pending appellate review of the issue. The Supreme Court of Washington held as follows:

Finally, we address the trial court's finding of contempt against [the law firm of] Betts, Patterson. We faced a similar issue in Dike v. Dike, 75 Wn.2d 1, 448 P.2d 490 (1968). In Dike, an attorney in a child custody proceeding refused to disclose the location of a client who had taken custody of her child in violation of a court order. The attorney claimed his client's address was a privileged communication. The trial court rejected the claim of privilege and found the attorney in contempt. We rejected the attorney's claim of privilege, but also vacated the finding of contempt. We do the same in this case.

In Dike, *supra*, the Supreme Court held that substantial justice would demand that the attorney be given an opportunity for review by an appellate court before being found in contempt.

In the instant case, Mr. Bolliger's belief that it is **reasonable** for him to believe he is not required to reveal information relating to his representation of Mr. Cudmore (even in the event of a court ordering him to do so) further stems from the aforementioned RPC 1.6. RPC 1.6(b) contains seven subsections of **limited** instances wherein an attorney ethically can reveal such client confidences. Subsection (1) starts with the word "shall" – meaning, of course, that the attorney "must" do so in the circumstances mentioned in that subsection (1). However, subsection (6) – which is the only subsection relating to a **court order** – instead starts with the word "may" and states in full as follows (with emphasis added):

(b) A lawyer to the extent the lawyer reasonably believes necessary:

(6) **may** reveal information relating to the representation of a client to comply with a court order[.]

Thus, even when confronted with a court order to reveal Mr. Cudmore's confidences, Mr. Bolliger "may" do so, but he is **not required** to do so by the RPC. Guardianship of York, *supra*.

For the foregoing reasons, it would be a futile act for the court to find Mr. Bolliger in contempt for respectfully declining to comply with its September 5, 2013 order – because that order and such a finding of contempt are ultra vires ("beyond the powers") of the Superior Court.

notice from Mr. Cudmore that he now wanted Mr. Bolliger to release a copy of his files to Ms. Woodard, after all, Mr. Bolliger complied with Mr. Cudmore's request **the very next day**. (Notably, that occurred more than a month after Mr. Cudmore was foreclosed from communicating/consulting any further with Bolliger – because of Mr. Meehan's VAPO which had been entered against Bolliger on 9/13/13.) So, this issue of producing a copy of Mr. Bolliger's files was timely resolved below, anyway – and the court did not enter an order of contempt against Mr. Bolliger therefor. Despite the fact that Mr. Meehan has read Mr. Bolliger's reply before, Mr. Meehan presented this Court his aforementioned statement – while refusing even to address Mr. Bolliger's reply, which reply **Mr. Meehan knows** completely undermines his statement by exposing its total lack of merit. Again, it is improper for Mr. Meehan to so pretend and mislead this Court in a respondent's brief.

In sum, as Mr. Bolliger explained in his AB (pp. 43-44, original emph.):

The record in this case is very, very clear. There is **nothing** in the record which supports a finding that Mr. Bolliger committed an "abandonment" of Mr. Cudmore. There is **nothing** in the record which supports a finding that Mr. Bolliger committed an "abuse" of Mr. Cudmore. There is **nothing** in the record which supports a finding that Mr. Bolliger committed a "neglect" of Mr. Cudmore. There is **nothing** in the record which supports a finding that Mr. Bolliger committed a "financial exploitation" of Mr. Cudmore. Mr. Bolliger never did any of those things – never, never, never – not even once.

In response, Mr. Meehan only cited the inapposite Gradinaru, supra and Goldsmith, supra decisions – and tossed out eight more residual theories. **Not one** of those even preponderates to support the judge's conclusory finding that Mr. Bolliger "committed acts of abandonment, abuse, neglect, and/or financial exploitation of Mr. Cudmore." Thus, clear, cogent, and convincing evidence certainly does **not** support that conclusory finding by the judge.

CONCLUSION

Once a trial court accepts a guardianship petition for review, the petitioner's role in the process essentially ends. The real party at interest in a guardianship proceeding is the [AIP] and it is the trial court's duty to ensure that his interests are protected.

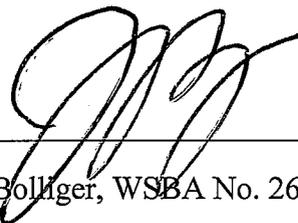
Guardianship of Matthews, 156 Wn.App. 201, 210, 232 P.3d 1140 (2010). In his AB, Mr. Bolliger demonstrated how, as petitioner Mr. Lamberson's attorney, Mr. Meehan grossly overshot his just-quoted role in the case to prevent Mr. Cudmore from disinherit Mr. Lamberson – by dishonestly and unethically assembling a team who acted in concert with him to (1) impose an unneeded and unwanted guardianship over Mr. Cudmore and (2) sabotage **mentally competent** Mr. Cudmore's RCW 11.88.045(1)(a)-prescribed entitlement to be defended against the guardianship by the attorney of **his own choosing**, Mr. Bolliger. That latter effort resulted in Mr. Meehan personally insinuating himself as a petitioner in this, his unmerited VAPO case against Mr. Bolliger. Sad to say, a new judge, who had no apparent prior experience in these practice areas, was unable to recognize and properly prohibit Mr. Meehan's deceitful maneuvers. In his respondent's brief, as purported justification for those, Mr. Meehan provided this Honorable Court (1) on the "vulnerable adult" issue, four meritless inventions and, (2) on the "acts" issue, inadmissible hearsay and inapposite cases – along with some residual theories, about which Mr. Meehan pretended he was unaware of the existence of Mr. Bolliger's prior worthier replies, and for which theories the VAPO itself expresses **no** supporting factual findings. **Not one** of Mr. Meehan's positions supports the conclusion for which he offered it.

Based upon the foregoing, Mr. Bolliger respectfully requests that this Court (1) hold Mr. Meehan accountable for his egregious mistreatment of Mr. Cudmore and (2) grant the relief requested in Mr. Bolliger's AB.

DATED this 21 day of September, 2015.

BOLLIGER LAW OFFICES

By: _____



John C. Bolliger, WSBA No. 26378

Attorneys for Appellant

DECLARATION

I, John C. Bolliger, declare as follows:

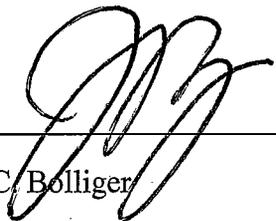
1. I am the appellant in this appeal, I have personal knowledge of the facts set forth above, and, if called to testify about the same, I can and will competently do so.

2. I swear under penalty of perjury under the laws of the state of Washington the foregoing is true and correct.

DATED this 21 day of September, 2015.

Kennewick, WA

City, state where signed



John C. Bolliger

DECLARATION OF SERVICE

STATE OF WASHINGTON)
COUNTY OF BENTON) ss.

I, John C. Bolliger, declare as follows:

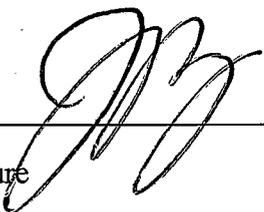
On the date set forth below, I caused a true and correct copy of this document to be sent to the following persons and entities in the manner shown:

<u>Shea C. Meehan</u>	<input type="checkbox"/>	regular mail
	<input type="checkbox"/>	e-mail no.
1333 Col. Park Trail, Ste. 220	<input type="checkbox"/>	facsimile no.
Richland, WA 99352	<input checked="" type="checkbox"/>	Pronto Process & Messenger Service, Inc.
	<input type="checkbox"/>	hand-delivery by John C. Bolliger
	<input type="checkbox"/>	Federal Express _____

I swear under penalty of perjury under the laws of the state of Washington the foregoing is true and correct.

DATED this 21 day of September, 2015.

Kennewick, WA
City, state where signed


Signature