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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

Court of Appeal Cause No. 340449

IN THE COURT OF APPEALS, DIVISION III, OF THE STATE OF WASHINGTON

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ROY A. AMES and RUBY M. AMES, Respondents/Plaintiffs

v.

WESLEY B. AMES and STANLEY R. AMES, Appellants/Defendants

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APPELLANTS' APPEAL BRIEF

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### **III. INTRODUCTION AND RELIEF REQUESTED**

This appeal is a result of the Superior Court engaging in gross abuse of discretion in completely succumbing to the greed of Randall Ames, youngest son of Roy and Rubye Ames as he manipulated Respondents/Plaintiffs, Roy A. Ames and Rubye M. Ames.<sup>1</sup> In doing so, after blocking a testimonial evidentiary hearing in which evidence could have been tested, the Superior Court plainly ignored the only admissible expert evidence before the court in order to reach its preferred decision. Even while ignoring the only admissible expert evidence, the Superior Court erred as a matter of law by admitting purported expert evidence which clearly does not satisfy the requirements for admissibility. The direct result of the Superior Court's mishandling of the matter unjustly enriched Respondent at the direct expense of Wesley Ames and Stanley Ames.

Appellants/Defendants request this Court reverse the trial court's legal error and gross abuse of discretion. Because the evidence before this Court is sufficient, Appellants request this Court rule on the merits and

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<sup>1</sup> Appellants moved for the case caption to be corrected in view of the death of Roy Ames, but the Commissioner did not order a change to the case caption. Therefore, this brief will continue to refer to "Respondents" or to Roy and Rubye rather than reflecting the death of Roy Ames.

deny each of Respondents'/Plaintiffs' motions, and order bond funds and 40% of logging proceeds paid to Appellants.

However, if this matter should instead be remanded to the Superior Court, Appellants further request the case be remanded to a different Superior Court judge due to the clear prejudice and injustice repeatedly exhibited by Superior Court Judge Allen C. Nielson against Appellants during the entirety of the underlying case. It is Appellants' understanding Allen C. Nielson intends to retire from the bench effective the end of 2016. However, if the date for Allen Nielson's retirement is incorrect and he remains on the bench, the demands of justice demonstrate the case should not be again placed before Judge Nielson.

Judge Allan C. Nielson began the case with a gross violation of the Superior Court Rules in a manner which irreversibly destroyed Appellants'/Defendants' rights to fair and impartial proceedings. That is, when granting the TRO at the very beginning of the case, Allan Nielson granted the TRO for a period of 39 days before a hearing was to be held, in direct violation of CR 65(b). Because the limitation to 14 days for the TRO is such a basic rule and is one which Judge Nielson would have dealt with so often, his violation of this rule in the present case strongly suggests knowing collusion with Respondents' attorney, Chris A. Montgomery. In particular, this apparent collusion destroyed

Appellants'/Defendants' right to remove the case to federal court after experiencing Judge Nielson's exhibition of bias at the initial hearing.

Further tainting the initial proceedings with clear pre-judgment bias, Judge Nielson stated his conclusion on the outcome in the case during the very first hearing before evidence in the case had been presented, and repeated the same statement on multiple subsequent occasions. This statement, in conjunction with Judge Nielson's subsequent conduct of the case, exhibited consistent support for Mr. Chris Montgomery's assertions and requests for Roy and Rubye.

In connection with the errors giving rise to the present appeal, Wes and Stan requested a testimonial evidentiary hearing in order to enable testing of Roy's and Rubye's false assertions. Consistent with his pattern of bias against Wes and Stan, Judge Nielson denied the request for a testimonial hearing, thereby immunizing Roy's and Rubye's lies against exposure. **Second RP at 26, lines 16-17; 28 lines 14-18.**

It is very unfortunate to have to bring Judge Nielson's deficiencies to the attention of this Court, but they contaminated the entire case. Judge Nielson's bias and lack of judicial integrity is also exhibited in other ways in his Hearing, Findings of Fact, Conclusions of Law and Order where he accuses Wes and Stan of "reckless litigiousness" without basis. **CP at 351.**

Also, Judge Nielson lied when he referred to a “second house” on the property (CP at 348, 349), lied when he stated Roy and Rubye Ames did not have the funds to perform work to obtain standard insurance rates (CP at 349), lied when he said Roy and Rubye Ames did not have the money to purchase building permits (CP at 349), lied when he stated Wes and Stan Ames had filed 5 lawsuits against Roy and Rubye Ames or their agent Randall Ames (CP at 350)(there are only 3 such cases, all filed in Federal Court specifically in order to escape the lies and injustice in Judge Nielson’s court, dealing respectively with demolition of buildings and theft of Wes’ and Stan’s personal property on the Farm, cutting of timber on the Farm contrary to Judge Nielson’s logging order, and for repayment of money loaned by Wesley Ames to Randall Ames ), lied when he stated discovery demands on Randall Ames prevented removal of cut trees (CP at 350) without any evaluation of the very limited extent of discovery and substantial periods when there were no outstanding discovery requests and also ignoring the fact Roy and Rubye Ames were at all time represented by Attorney Chris Montgomery), and lied when he stated there was no evidence Roy and Rubye Ames and/or Randall Ames sold off additional logs (CP at 352)(firewood sales admitted in Randall Ames declaration and failure to account for additional missing timber), among others.

Statements such as those noted above reveal Judge Nielson's bias and even dishonesty in this case.

In short, Judge Nielson violated Appellants' rights at the beginning of the case, exhibited bias during the entirety of the proceedings, produced biased rulings following trial, and capped the unjust process by accepting inadmissible evidence and abusing his discretion by issuing manifestly unreasonable rulings which rested on untenable grounds while basing his rulings on a compendium of lies.

In addition, this Court should note Chris A. Montgomery, Respondents' attorney through the entire underlying case and the entirety of the previous appeal, is now subject to a six-month suspension from the practice of law for unethical conduct. It is Appellants' understanding Judge Allen Nielson testified in defense of Chris Montgomery during Mr. Montgomery's disciplinary proceedings. Such testimony, if confirmed, is a further demonstration of Judge Nielson's extreme solicitude for Mr. Montgomery, a solicitude which pervaded and contaminated all prior proceedings. In order to obtain confirmation, Appellants have requested copies of documents for Mr. Montgomery's disciplinary proceedings in *In re Chris Alan Montgomery, Lawyer (Bar No. 12377)*, Proceeding No. 13#00109. **Ex. 1** (Disciplinary Board Declining Sua Sponte Review and

Adopting Hearing Officer's Recommendations; Findings of Fact, Conclusions of Law, and Hearing Officer's Recommendation).

#### **IV. ASSIGNMENTS OF ERROR**

A. The Superior Court erred in forfeiting the \$45,000 and \$10,000 bonds posed by Appellants.

B. The Superior Court erred by granting all logging proceeds to Respondents.

C. The Superior Court erred by ordering a money judgment against Appellants.

D. The Superior Court erred in ordering Respondents could proceed with additional logging.

#### **V. STATEMENT OF THE CASE**

Appellants Wesley B. Ames ("Wes") and Stanley R. Ames ("Stan")<sup>2</sup> own the remainder interest in the real property located at 3885 Haverland Meadows Road, Valley, WA 99181 consisting of about 160 acres of farmland and forested land, including the house and farm buildings thereon as well as farm equipment, farm vehicles, and farm tools and supplies (the "Farm"), as evidenced by recorded Deed.

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<sup>2</sup> To avoid confusion between multiple individuals having the same last name, first names will be used in this brief.

This case was previously before this Court in Appeal 316611, in which the Court upheld the decision of the lower court despite substantial evidence showing the lower court decision was improper. The direct result of this Court upholding the lower court was to embolden Respondents' and their youngest son, Randall Ames, to engage in ever more extreme abuse of proceedings, lies, theft, and destruction of Appellants' rights and property.

In order to provide consistent context, the first portion of the background facts below is extracted from the Statement of the Case in the AB for Appeal 316611, without the internal citations to the record.

**A. Facts Leading to First Appeal**

**1. 1996 Agreement**

In December 1996, Appellants Stanley R. Ames, through his corporation, Ames Development Corp. (together "Stan"), and Wesley B. Ames ("Wes") reached an agreement with Respondents Roy A. Ames ("Roy") and Rubye M. Ames ("Rubye") to acquire the real property, which included the timber, located at 3885 Haverland Meadows Road, Valley, WA 99181 ("farm"). Payments under the agreement began in February of 1997. The initial sale price was \$160,000. Roy and Rubye later requested \$600 per month in payments, so the initial agreement was modified which increased the purchase price to \$216,000. Stan and Wes

have continued those payments for over 19 years. Stan and Wes also made substantial additional expenditures, such as repairs of the house, payment of property taxes and insurance, and have provided substantial labor on the house, farm buildings, farm equipment, and other matters. Roy and Rubye continued to reside on the property rent free.

Because Stan and Wes wanted their parents to be able to continue with the lives to which they were accustomed and to receive additional income, the agreement between Roy and Rubye and Stan and Wes provided for Roy to continue to operate the farm as long as Roy was able to do so, and to retain the farm income from his efforts. It also provided that Roy and Rubye could live in the house on the farm as long as they wished and were able to do so. Although Stan and Wes were not receiving any income from the farm, they reasonably expected to recover their investment from logging the timber once Roy and Ruby ceased their farming and limited logging activities. This was a key element of their retirement income expectations from purchasing the family farm.

## 2. Circumstances Change Beginning in 2004

By 2004, Roy, who was age 85 at the time, had ceased logging and also dramatically reduced his farming activities. Roy and Ruby then asked Stan and Wes to take full responsibility for the farm, since Roy was unable to earn enough from the farm to pay the taxes, insurance and maintenance

on the home, as well as the barns and other buildings and farm equipment, small tools and vehicles which were included with the purchase of the farm. Stan and Wes then assumed full rights of ownership and responsibility for the farm and made all decisions as to its use. By 2007 Roy had essentially retired from farming. Stan and Wes tried to arrive at an agreement for Randy, the youngest sibling brother, to live on the farm with his family and provide support for the parents, Roy and Ruby Ames. Randy did not cooperate with Stan and Wes and instead, began making decisions on his own, without consulting either Stan and Wes, or even Roy or Ruby Ames. Activities on the farm and the use of the farm equipment were secretly controlled and performed by Randy Ames. Roy was generally not even aware of Randy's actions until after the fact.

### 3. Conveyance of farm in 2006

Beginning in about 2003, Arleta Parr, the youngest daughter of Roy and Rubye, repeatedly urged her parents and Stan and Wes to transfer the farm out of Roy and Rubye's names and to Stan and Wes to avoid problems such as those experienced by Arleta's mother-in-law. As a result, starting at least by the summer of 2005, Roy and Rubye investigated appropriate procedures for formally transferring the Deed to the farm to Stan and Wes. Rubye frequently encouraged Stan and Wes to complete the necessary transfer actions. On November 22, 2005, on their

own initiative, Roy and Rubye had the farm transferred by Quit Claim Deed from the Upper Columbia Corporation of Seventh-Day Adventists into their names in preparation for conveying the farm to Stan and Wes, and had the deed transferring the property fully back into their name recorded on January 11, 2006. On that same day, Roy and Rubye executed the Quit Claim Deed transferring the farm to Stan (in the name of his corporation, Ames Development Corp.) and Wes. The deed to Stan and Wes was duly recorded on December 26, 2006.

Pursuant to the 1996 agreement, Roy and Rubye retained all of the farm's income which was generated by Roy's own farming and logging activities. Roy and Rubye were responsible for farm expenses. However, as Roy further reduced and finally ceased his farming activities, he did not earn enough to pay for the taxes, maintenance and other farm expenses. Therefore, in 2004, Roy and Ruby asked Stan and Wes to assume full responsibility for the farm. Thus, over the period from about 2004 to 2009, Stan and Wes assumed full ownership responsibility and began paying the basic farm expenses such as property taxes and insurance and paid for substantial house repairs and other maintenance.

Consistent with the agreement that Stan and Wes owned the farm, Stan and Wes kept numerous unrestored vintage and classic cars on the farm and repaired barns and other buildings. Stan and Wes used one of the

barns for car storage after Roy retired from farming, and Wes planted numerous fruit trees, shrubs, and vines.

4. Problems with Randy beginning in 2004

At some time in 2003 or early 2004, Randy Ames and his family returned from Lithuania where they had left a failed business venture. Because Randy and his family represented they had no money and nowhere to live, Roy and Rubye asked Stan and Wes to allow Randy and his family to stay on the farm. Stan and Wes gave their consent for a temporary stay. Randy and his family stayed on the farm for a few months before moving to a rough cabin located on an adjoining property. Randy's family subsequently moved to a rented house on a nearby farm: the Davis place. Randy also began working on the farm at issue in this case, with Roy telling Stan and Wes that Randy was just helping him. Stan and Wes had no objection to Randy helping Roy farm at that time.

Stan and Wes subsequently discovered Randy and Darleen, Randy's wife, were not just helping Roy, but instead were acting independently on the farm. This included, in about 2007, bringing their own horses, cattle, and chickens onto the farm without informing anyone in advance. They grazed their livestock in the hayfields on the farm, resulting in very little hay being harvested, and essentially no farm income being received by Roy and Rubye at least for the 2008 farming season.

Due to the failure of Roy, Rubye, Randy, and Darleen to maintain or repair fences, Randy and Darleen's livestock frequently escaped onto public roads and neighbors' properties, creating liability risks for Stan and Wes. Roy and Rubye took little to no action to correct or prevent these problems. They did inform Stan and Wes of Randy's failure to control his animals. Stan and Wes then pressured Randy to correct the problems.

Randy and his family had been renting a house on the Davis place since about late 2004, but due to Randy and Darleen not properly caring for the place, they were forced by the landlords to leave that house sometime in 2008. Because Randy and Darleen again had nowhere to go, no job, and little or no money, so, at the request of Roy and Rubye, Stan and Wes allowed Randy and Darleen to again move onto the farm. Randy's family lived in the house with Roy and Rubye, but conflicts ensued due to insufficient space for 8 people in a 2 bedroom home and Randall's overbearing personality. While Randy and his family were living on the farm, Stan and Wes again attempted to reach an agreement with Randy and Darleen to continue living on the farm to assist Roy and Rubye. This attempt to reach an agreement took place from December of 2008 until the summer of 2009 and was marked by increasing self-serving demands from Randy, including his insistence on a clause to allow him to purchase the farm. The attempt to reach an agreement ended in August of

2009 when Randy informed Stan and Wes that he was taking a job on the Knutson place and would be moving his family there.

5. January 2011 Agreement

The parties had proceeded under the original oral agreement without any dispute until Randy became involved with the farm. On December 20, 2010, Randy sent a letter to Roy and Rubye in which he asserted Roy and Rubye should assert control over the farm and used religious imagery to persuade Roy and Rubye to repudiate the agreement with Stan and Wes. Roy had begun to experience memory problems. Rubye communicated her concern about these memory problems to Stan and Merita including her concern about Randy manipulating Roy's memories of events. Roy's memory loss was apparent in in late 2010 when Rubye, together with Stan and Wes, realized Roy's recollections and attitudes were in the process of changing to be in accord with Randy's brainwashing approach. Therefore, all parties felt it was a good idea to complete a written agreement concerning Roy's and Ruby's use of the farm as previously discussed and begun, instead of continuing to rely on recollections of the original agreement. Rubye talked with Roy about what he wanted in the agreement and relayed that information, initially to Stan and later to Wes. Roy demanded greater rights than the original agreement had provided, but Stan and Wes acquiesced because they feared

even greater changes in Roy's memories and desires would occur under the constant manipulation from Randy.

Stan and Wes acceded to Roy's demands but with limitations to protect them if Roy should make poor decisions. In addition, Stan and Wes recognized Roy and Rubye were already quite elderly, and were naturally concerned about age-related declines in Roy's and Rubye's thinking and decision-making abilities, and the results such declines could have on the farm. Stan and Wes were further fully aware Roy was not physically capable of personally performing farm work, but they believed it would be much better for him mentally and emotionally to continue to have as much involvement with the farm as possible.

As a result, Stan and Wes prepared an initial proposed agreement incorporating both Roy's desires and the limitations. They separately discussed the proposed agreement with Roy and Rubye by telephone, and then sent it to Roy and Rubye for review and revision. Before the first draft was sent, Wes made clear to Rubye in a telephone call that Roy and Rubye were free to consult with an attorney if they had any questions about the agreement. Wes repeated this reminder later during an in-person conversation witnessed by Merita in her home. Later, during a discussion about the draft agreement between Merita and Rubye, Merita also told Rubye she and Roy could see an attorney if they had any questions about

the agreement. In addition, in a telephone call between Rubye and Stan, Stan specifically encouraged Rubye and Roy to discuss the agreement with an attorney or with anyone else if they had any questions or did not understand anything in the agreement. On multiple occasions when the option to see an attorney was mentioned to her, Rubye indicated that she and Roy did not think they needed to see an attorney because the agreement was clear and they understood it.

After Roy and Rubye reviewed the first draft, Ruby talked with Stan by telephone and relayed their desired revisions. Stan made the revisions and sent a revised draft the next day. In response to further communications for revisions from Roy and Rubye, Stan and Wes again revised the draft agreement in accordance with Roy and Rubye's request and forwarded a third draft for review and comments. After receiving Roy and Rubye's further comments and making the corresponding revisions indicated by their parents, Stan and Wes sent a fourth version of the agreement, which was again reviewed and subsequently signed by Roy and Rubye as witnessed by Merita. The agreement was then sent to Wes who signed it and forwarded it to Stan who signed it. A copy of the fully signed January 2011 Agreement was sent to Roy and Rubye who were then living with Merita for the winter.

6. Continued Problems with Randy in 2011

During the winter of 2010-2011, Randy and Darleen continued to live in the house on the farm under their rental agreement with Stan and Wes paying \$250/mo rent. Roy and Rubye wished to return for the summer of 2011. Consistent with their prior obstructive conduct, Randy and Darleen refused to commit to a reasonable date when they would vacate the house, so Stan and Wes were forced to serve an eviction notice.

Despite the signed January 2011 Agreement, problems with Randy and Darleen continued to escalate, so much so that Rubye prepared a letter dated April 24, 2011 directed to Randy, confirming that Stan and Wes owned the farm, and asking Randy to stop causing such problems. In late April of 2011, Randy and Darleen moved out of the house into a cabin located on the adjoining property. On or about May 2, 2011, Roy and Rubye moved back into the house.

Due to the additional problems and damage Randy and Darleen had caused and were continuing to cause, Stan and Wes also subsequently served on Randy and Darleen a notice that the farm lease would not be renewed. The lease would terminate by its terms on December 31, 2011. Problems with Randy grew worse, with Randy continuing to refuse to communicate with Stan and Wes. In addition, Stan learned that significant assets were missing from the farm. As a result, Stan and Wes traveled to the farm on June 18, 2011, in coordination with their sister, Merita, to

Stan and Wes traveled to the farm on June 18, 2011, in coordination with their sister, Merita, to determine the extent of the problems and to attempt to find a resolution, but Randy was extremely hostile and confrontational. The next day Stan and Wes performed an initial partial inspection of the farm discovering, among other things, that numerous items were missing. Randy had also damaged the farm by digging large holes in a hayfield, exposing subsoil and many rocks. The damage made the field unusable for any of the usual field crops. Later that same day, Stan, Merita, and Wes took Roy and Rubye for a Father's Day dinner in Spokane. On June 20, Randy became so confrontational that he physically assaulted Stan while Stan and Wes were talking with Roy about the damage Randy was doing to the farm and Stan and Wes' personal property, and the missing items.

Following Randy's assault on Stan on June 20, 2012, Randy took Roy to a secret location and prevented Rubye as well as Rubye and Roy's family and friends from contacting him for three weeks. Randy threatened Rubye with never seeing Roy again if she did not support Randy and Roy's claims regarding farm ownership. Randy only brought Roy back to Rubye after insisting Rubye's niece depart, leaving Rubye with no other support. As Roy and Rubye's family and friends later testified, Randy isolated Roy and Rubye by constantly monitoring their communications,

barring people from the farm, turning off the ringer on the home phone, and taking away phones from Rubye. Rubye was forced to procure a secret phone to contact her friends and family.

7. Lawsuit initiated July 15, 2011

Due to Randy's assault on Stan and the theft of tools from the farm, damages caused, and refusal to cooperate or maintain equipment he was using, Stan and Wes served Randy and Darleen with a termination notice for the farm lease. Only 10 days after the lease termination with Randy, on July 15, 2011, Roy, now completely under the control of Randy, filed the present lawsuit in which he alleged that he was entitled to reverse the sale of the farm despite the years of payments, the additional, consistent and substantial care and support provided by Stan, Merita, and Wes, a valid Quit Claim Deed, a written agreement between the parties, substantial conduct by all parties consistent with ownership by Stan and Wes, and Rubye's own letter to Randy confirming Stan and Wes owned the farm. After Roy was isolated from Rubye for more than three weeks, and the threats from Randy, Rubye joined the lawsuit.

8. Contentious litigation for the next year<sup>3</sup>

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<sup>3</sup> Roy and Rubye later amended their suit to assert a claim for conversion of over \$10,000 allegedly "taken" by Merita. This claim was dismissed by the trial court after trial and no appeal was taken. Stan and Wes filed a separate lawsuit asserting Roy and Rubye had allowed Randy to damage their personal property on the farm. This suit was voluntarily dismissed at the beginning of trial.

Roy was able to obtain a restraining order which barred Stan and Wes from the farm and from directly contacting him. The restraining order was later amended to include Rubye Ames once she joined the lawsuit against Stan and Wes. The net result was Roy and Rubye were isolated from the children who had cared for them. It also drove a wedge between Roy and Rubye and their friends and other family members who had known them for over 60 years.

9. Trial in September 2012

Trial in this matter began on September 4, 2012. On the eve of trial, Roy and Rubye moved to dismiss their claim for a life estate. The trial court granted this motion. The court also granted Stan and Wes' motion to amend their answer and assert a counterclaim to have a life estate imposed. The counterclaim which the court granted requested the court impose a life estate with the terms of the life estate "to be determined at trial."

During trial Roy testified that he had historically taken approximately \$2000 per year in logs off the property. He also testified that he believed the 1996 agreement meant he would control everything on the farm until he died. Roy testified that Stan and Wes had made improvements to the farm and equipment since the 1996 agreement. These repairs included roofing on the house, repairs to the floors, and repairing

and replacing equipment. Roy also admitted that Stan and Wes had paid property taxes on the property. Finally, Roy testified that he had not read the documents filed in the lawsuit.

Ruby testified that it was her understanding that agreement to sell the farm to Stan and Wes “included the logs.” She also apparently understood the agreement would have her and Roy in control of the logs until they died. Ruby agreed with her prior declaration in which she stated that \$23,279 in logs had been taken off the property since 1997. This was an average of \$1501 per year.

Certified Public Account Larry Zoodsma testified that the value of the remainder interest which Stan and Wes were purchasing in 1996 was approximately \$146,069. This assumed a value of \$370,000 for the land and timber. This \$370,000 figure was the value an appraisal conducted at the request of Roy and Ruby placed upon the farm with the timber in 1997. Stan and Wes actually agreed to pay \$160,000 and later increased this amount to \$216,000 including farm equipment. . Mr. Zoodsma testified that this was bad financial deal for Stan and Wes.

Near the conclusion of trial, the Court asked the parties for supplemental briefing on its authority to fix the terms of the life estate. Stan and Wes supplied this briefing. They requested that the terms of the life estate they had asserted in their counterclaim limit Roy and Ruby’s

logging activities to firewood for personal use and \$1500 in yearly income which was consistent with Roy and Rubye's past practice.

At the conclusion of trial, the court made a finding that Randy had isolated and manipulated Roy and Rubye for his own ends. The court then ruled that it was utilizing the constructive trust doctrine to grant Roy and Rubye a life estate in the property. The court indicated that it was bound by the historical practice of what had been done, unless there was some reason to deviate from that. The court went on to rule that Roy and Rubye had the right with their "possessory interest" to log more than what has historically been done to allow for "unexpected expenses or costs", but this right would have to be exercised in manner mindful of the remaindermen's interest and the obligation not to commit waste. Counsel for Roy and Rubye immediately sought clarification on the court's ruling regarding logging. The Court ultimately ruled the parties could get different opinions on the amount of permissible logging and attempt to agree on a "dollar amount."

#### *10. Post-Trial Hearings*

The parties were unable to agree on dollar amount of logging per year. On November 15, 2012, Stan and Wes filed a timber management plan prepared by Maurice Williamson which identified approximately 1.5 million board feet of timber on the property. Mr. Williamson stated that an

average annual harvest level of 10,600 board feet would not deplete the volume of the forest.

Roy and Rubye relied on a report by Bob Broden which they had submitted at trial and which had been admitted over Stan and Wes' objection.<sup>4</sup> This report identified approximately 400,000 board feet of timber which it recommended for harvest. On November 15, 2013, Mr. Broden submitted a supplemental declaration that suggested that an annual average harvest of 25,000 board feet would be sustainable. Mr. Broden also suggested an "annual program of salvage removal and pre-commercial thinning." The parties submitted numerous declarations offering opinions on the viability of Mr. Broden and Mr. Williamson's proposals.

After an extensive hearing on the timber harvest and other issues, on November 20, 2013, the court ruled that Roy and Rubye could harvest 19,000 board feet per year plus "salvage" identified in the Broden report. The court then signed<sup>5</sup> a document entitled Trial, Findings of Fact, Conclusions of Law And Ruling. In that document the court ruled that Roy and Rubye could harvest timber according to the objectives listed in the Broden report with additional harvests by court order.

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<sup>4</sup> The court later reconsidered its ruling on the admissibility of this report, but then adopted Mr. Broden's revised report in its final decree. The references to the report will cite this final report.

<sup>5</sup> These findings, conclusion, and ruling were not filed until December 4, 2013.

At a November 27, 2012 hearing, the Court heard extensive argument on the question of what additional “salvage” would entail. The court was prepared to rule that Roy and Rubye could harvest 20,000 board feet per year with no allowance for additional salvage, but ultimately the court reserved ruling on the issue.

On December 3, 2013, the court issued a memorandum stating that it would leave the timber harvest decisions to what it termed a “neutral expert”, Department of Natural Resources employee Steve DeCook. Mr. DeCook subsequently filed a declaration indicating that he was not permitted to serve in this capacity.

At a December 18, 2012 hearing, the Court again changed its position on the timber harvest and ruled that it would revisit the issue. After several rounds of additional informal submissions by counsel of proposed final documents, on February 8, 2013, the court entered a final decree. This Decree allowed Roy and Rubye to log 19,000 board feet per year plus “salvage” as defined by WAC 222-16-010. Additional logging was permitted in accordance with the Broden report with the net proceeds to be shared 70% to Roy and Rubye and 30% to Stan and Wes. *Id.* The court left open the possibility of even more logging beyond these amounts to be permitted by court order.

Stan and Wes timely moved for reconsideration of the trial court's final decree. On February 19, 2013, the court granted Stan and Wes' motion to stay enforcement of the Decree, specifically to not permit logging pending reconsideration. The court required a \$10,000 bond to issue the stay of enforcement pending the hearing on reconsideration. *Id.* Stan Ames posted this bond. Roy and Rubye filed motions to increase the bond amount and to modify the stay. The trial court modified the stay to allow 19,000 board feet of immediate logging. The court did not increase the bond amount.

At a March 12, 2013 hearing, the trial court partially granted Stan and Wes' motion for reconsideration. In particular, the court reversed its decision at trial concerning the admissibility of the Broden report. This ruling was omitted from the final order on reconsideration which was drafted by Roy and Rubye's counsel.<sup>6</sup> The court went on to acknowledge the lack of evidence related to logging produced at trial. The final order on reconsideration included a reference to an amended Broden Report. Roy and Rubye filed this amended report on March 20, 2013, after the court had already orally ruled on reconsideration utilizing the prior report. In the end, the Court modified its prior ruling to reflect a 60% - 40% split of logging proceeds in favor of Roy and Rubye. This was reflected in the

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<sup>6</sup> This order also contained a large section concerning the court's consideration of life estate tables which were not addressed at all in the Court's oral ruling.

final order on reconsideration which was filed April 11, 2013. Appeal 316611 followed.

**B. Facts Related to the Current Appeal**

In its Published Opinion in the prior appeal (**CP at 120-154**), this Court ignored the wrongdoing by Respondents (and Randall Ames), and used misleadingly selective reading of case law to state the law of life estates supported Respondents' harvesting of up to 500 mbf (thousand board feet) of timber from the Farm. Despite this Court's errors in its prior decision, that decision stands and that level of harvest is not at issue in this appeal.

At issue now is the scale of the timber harvest actually carried out by Respondents, and the monies which were derived or which should have been derived from that harvest. Thus, after Respondents cut down the timber, only about 783 mbf remained on the Farm out of the original 1500 mbf. **CP at 235-240**. Thus, Respondents cut about 717 mbf of timber from the Farm.

Respondents admitted selling about 107 mbf as saw logs, calculated from the amount of net logging proceeds admitted by Respondents. **CP at 171-175**. However, the majority of the timber was left to deteriorate on the ground, and was later sold as firewood by Randall Ames. The proceeds from firewood sales were retained completely by

Respondents (most likely in Randall Ames hands as the proceeds purportedly do not appear in Respondents bank accounts). Respondents admitted to selling or trading a substantial amount of firewood, about 71 mbf, but completely failed to account for the additional missing timber.

The present appeal arose from the Superior Court's findings and orders in response to a set of four motions filed by Roy and Rubye. CP at 176-180; CP at 171-171; CP at CP at 162-165; CP at 99-101. In these four motions, Roy and Rubye asked for all the reported logging proceeds, forfeiture of all bond monies posted by Wes and Stan, and authorization to carry out further logging.

After refusing to allow live testimony (Second RP at 26 lines 16-17), Judge Nielson continued the hearing to allow timber cruises to be obtained. Wes and Stan obtained a timber cruise by an independent forester, Berrigan Forestry, (CP at 235-240) to obtain a better estimate of remaining timber following the earlier timber cruise performed by Williamson Consulting (CP at 188-208).

Finally a hearing was held on the motions on November 3, 2015, and the court issued its Hearing, Findings of Fact, Conclusions of Law and Order on December 8, 2015. **CP at 345-354**. This appeal followed.

## **VI. LAW AND ARGUMENT**

### **A. Inadmissibility/Admissibility of Expert Evidence.**

## **1. Standards of Review for Admissibility of Expert Testimony**

Admissibility of expert testimony in Washington is governed by *Frye* (*Frye v. United States*, 54 App. D.C. 46, 293 F. 1013 (1923)) and the evidence rules, e.g., ER 403, 702, and 703.

For reviews involving *Frye*, *de novo* review is required. *Anderson v. Akzo Nobel Coatings Inc.*, 172 Wn.2d 593, 600, 260 P.3d 857 (2011) (citing *State v. Copeland*, 130 Wn.2d 244, 255, 922 P.2d 1304 (1996)).

For reviews relating to rulings under Washington evidence rules, e.g., ER 702 and 703, rather than under *Frye* analysis, decisions are reviewed for abuse of discretion. *Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 918, 296 P.3d 860 (2013).

## **2. Determining Inadmissibility of Expert Evidence under *Frye* and/or under ER 702/703.**

The analysis framework for determining whether expert evidence is inadmissible is two-pronged. That is, “[t]he trial court must exclude expert testimony involving scientific evidence unless the testimony satisfies both *Frye* and ER 702.” *Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 918, 296 P.3d 860 (2013) (citing *State v. Yates*, 161 Wn.2d 714, 762, 168 P.3d 359 (2007)).

Thus, “*Frye* and ER 702 work together to regulate expert testimony: *Frye* excludes testimony based on novel scientific methodology

until a scientific consensus decides the methodology is reliable; ER 702 excludes testimony where the expert fails to adhere to that reliable methodology.” *Lakey*, 176 Wn.2d at 918-919 (citing *State v. Cauthron*, 120 Wn.2d 879, 889-890, 846 P.2d 502 (1993)).

**a. Frye Requirements Showing Inadmissibility/Admissibility**

The general acceptance requirement of *Frye* imposes a threshold determination role on the trial court. That is, “[t]o admit evidence under *Frye*, the trial court must find that the underlying scientific theory and the “ ‘techniques, experiments, or studies utilizing that theory’ ” are generally accepted in the relevant scientific community and capable of producing reliable results.” *Lakey*, 176 Wn.2d at 918 (citing *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 603, 260 P.3d 857 (2011)).

The primary goal under *Frye* is to determine “whether the evidence offered is based on established scientific methodology.” *Anderson v. Akzo Nobel Coatings Inc.*, 260 P.3d 857, 862, 172 Wn.2d 593 (2011) (citing *State v. Gore*, 143 Wn.2d 288, 302, 21 P.3d 262 (2001)). As noted above, “[b]oth the scientific theory underlying the evidence and the technique or methodology used to implement it must be generally accepted in the scientific community for evidence to be admissible under *Frye*.” *Id.*

**b. ER 702 Requires Expert Testimony to be Helpful to Assist the Trier of Fact.**

Beyond the *Frye* requirements for general acceptance of the technical theory and methods, ER 702 imposes additional controls before a court may admit expert testimony.

Of course, to be admissible, all evidence must be relevant but is subject to additional requirements under statutes and rules. ER 402, 403. In particular, for expert testimony, ER 702 specifies “[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.”

Thus, “[t]o admit expert testimony under ER 702, the trial court must determine that the witness qualifies as an expert and the testimony will assist the trier of fact. *Lakey*, 176 Wn.2d at 918 (citing *State v. Cauthron*, 120 Wn.2d 879, 890, 846 P.2d 502 (1993)). Importantly, “[u]nreliable testimony does not assist the trier of fact” and is properly excluded under ER 702. *Lakey* at 918 (citation omitted); *In re McGary*, 175 Wn.App. 328, 339, 306 P.3d 1005 (2013) (citation omitted).

In determining exclusion of expert testimony, ER 703 is also pertinent. Thus

ER 703 provides that “[t]he facts or data in the particular case upon which an expert bases an opinion or inference

may be those perceived by or made known to the expert at or before the hearing.””

...  
Because ER 703 is concerned with the trustworthiness of the resulting opinion, the trial court should not allow the opinion if the expert can show only that he customarily relies on such material and if the data are relied on only in preparing for litigation. “The proponent of the testimony must show that experts in the witness's field, in general, reasonably rely upon such material in their own work; *i.e.*, for purposes other than litigation.”

*In re McGary*, 175 Wn.App. 328, 339-340, 306 P.3d 1005 (2013) (internal citations omitted).

To summarize the above discussion, if the purportedly expert testimony in question is unreliable, it should not be admitted under ER 702 because unreliable evidence cannot be helpful to a trier of fact. Further, if the material on which the purported expert relies in formulating his/her opinion is not of the type experts in the witnesses reasonably rely in their own work (other than only for litigation), the demands of ER 703 also mean the purported expert opinion should not be allowed. The burden of establishing purported expert opinion is properly based lies on the party presenting that opinion.

Only by properly applying the standards of *Frye*, ER 702, and ER 703 can the court satisfy its obligations to only admit relevant and helpful expert testimony.

## **B. Judicial Abuse of Discretion**

The basic criteria defining abuse of discretion are frequently expressed. “When the trial court’s exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons, an abuse occurs.” *State v. McPherson*, 46 P.3d 284, 292, 111 Wn.App. 747 (2002) (citing *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997)). “Otherwise stated, an abuse of discretion occurs when no reasonable person would take the view adopted by the trial court.” *Id.* (citing *State v. Castellanos*, 132 Wn.2d 94, 102, 935 P.2d 1353 (1997)).

In finding an abuse of discretion, a reviewing court is guided by the rules of evidence. *Id.* (citing *State v. Atsbeha*, 142 Wn.2d 904, 913, 16 P.3d 626 (2001)). The same general criteria for determining abuse of discretion are used in connection with abuse of discretion with respect to admissibility of expert testimony. See, e.g., *Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 296 P.3d 860 (2013).

**C. Superior Court Allowed Inadmissible Evidence and Abused its Discretion.**

In the previous appeal in this case, this Court allowed itself to be seduced by the web of lies deliberately woven by Attorney Chris Montgomery and Judge Allen Nielson on behalf of Respondents. A significant number of their lies are repeated and relied on in the proceedings leading to this appeal. Some of their lies bear the imprint of

deliberate misconduct in admitting purported expert evidence which should never have been allowed by Judge Neilson.

Broden's false calculation of the 1997 timber on the Farm has, under manipulation by Mr. Montgomery and Judge Nielson, led to a plethora of further false interpretations and rulings both by the Judge Nielson and by this Court.

**1. Superior Court Failed its Obligation to Ensure Reliability of Purported Logging Expert Testimony Submitted by Respondents.**

As pointed out above, this Court reviews *Frye* issues *de novo*. *Anderson v. Akzo Nobel Coatings Inc.*, 172 Wn.2d at 600.

In accordance with the discussion above concerning admissibility of expert testimony, including opinion testimony, the proffered evidence must satisfy the general acceptance criteria of *Frye*, and also must be sufficiently reliable to satisfy the helpfulness requirement of ER 702 and the reliability requirement of ER 703. Otherwise the proffered expert testimony should not be admitted.

In this case, the Superior Court admitted two Declarations of Robert Broden as a forestry expert. CP at 246-249; CP 266-268. In his declaration, Mr. Broden presented his opinion to the effect he was surprised by the number of trees remaining on the Farm, but provided no

actual information addressing the residual timber volume on the Farm, admitting he did not do a timber cruise. CP at 248; CP at 268. Any reasonable person will immediately recognize Broden's approach is not a method which would be followed by any forestry expert in determining the volume of timber on a property, and therefore fails to satisfy any of *Frye*, ER 702, or ER 703 and therefore should never have been admitted or considered by the Superior Court judge.

That is, the only way of determining the residual timber volume was to conduct a timber cruise, which would have necessarily involved taking measurements of a statistically reliable number of randomly distributed trees and then extrapolating the results from the random sampling to obtain an estimate of the total residual timber volume. The difference between the timber volume calculated from the initial timber cruises and the timber volume calculated from a timber cruise of the residual timber would then necessarily be the volume of timber removed by Respondents.

As a result of Roy's and Rubye's failure to provide any actual evidence of residual timber volume, the expert testimony provided by Appellants in the declarations from Maurice Williamson of Williamson Consulting (CP at 188-208) and William Berrigan of Berrigan Forestry (CP at 235-240 and 241-245) is the only expert testimony addressing

residual timber volume on the Farm. That is, in sharp contrast to Roy and Rubye, Wes and Stan presented the declarations of two independent consulting foresters, who conducted timber cruises as was necessary to determine residual timber volume. The first timber cruise performed after the trees were cut but were still on the ground and obstructing access was conducted by Williamson Consulting.<sup>7</sup> Williamson Consulting concluded about 486 MBF had been cut. **CP at 188-208.** The fact most of the cut trees remained on the ground meant access to standing trees was seriously impaired, so the statistical variability of the timber cruise may have been higher than normal.

In order to obtain more definitive results, Wes and Stan had a second timber cruise performed by a different consulting forester, Berrigan Forestry, Inc.<sup>8</sup> Berrigan Forestry conducted a conventional timber cruise after most of the cut trees had been removed by Respondents, and determined only about 783 mbf (and no more than 861 mbf) of timber remained on the Farm. **CP at 235.** The difference between the original timber cruises conducted before the timber was cut and the Berrigan Forestry cruise performed after the timber was cut and

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<sup>7</sup> Williamson Consulting is an independent forestry consultancy located in Colville, WA.

<sup>8</sup> Berrigan Forestry, Inc. is an independent forestry consultancy located in Kettle Falls, WA.

removed was therefore about 717 mbf (but at least 639 mbf). That is, Respondents removed about 717 mbf because that is the amount the timber stand has been reduced compared to the two initial timber cruises (initial Broden and Williamson timber cruises) which found about 1500 mbf.

By admitting the two declarations by Robert Broden contrary to *Frye*, and ignoring the timber volumes determined from proper timber cruises by Williamson Consulting and Berrigan Forestry, the Superior Court judge erred as a matter of law. The Superior Court judge apparently found it necessary to do this in order to reach his desired result of handing all the money to Respondents as requested by Mr. Montgomery. In any event, it was glaringly wrong to the detriment of Wes and Stan.

## **2. Fraud Perpetrated in Respondents' Second Amended Motion for Disbursement of Logging Proceeds.**

Two major elements of fraud pervade Respondents' motion concerning disbursement of logging proceeds, 1) fraud in the accounting for timber volume cut, and 2) fraud in the logging costs charged against the logging proceeds. Additional fraudulent components of Respondents' calculation concern the 19 mbf annual harvest allowed by the trial court's prior order and the calculation of salvage.

The fraud by Respondents concerning logging volume is obvious by comparing the reduction in timber volumes determined by two independent timber cruises (**CP at 235-240; CP at 188-208**) against the very limited cut timber admitted by Respondents. The Berrigan timber cruise shows Respondents cut about 717 mbf (based on 783 mbf remaining trees), or at least 639 mbf after accounting for statistical margin of error. **CP at 236.**

In sharp contrast, Respondents acknowledged sale of only 107.3 mbf. **CP at 176-180.** Strangely, this 107.3 mbf is the only harvested timber acknowledged by the Superior Court judge. However, even Respondents admitted to additional timber harvest of about 71 mbf and the resulting income from firewood sales and trades having a value of about \$28,000, but this admission was completely ignored by the judge. In addition, about 50 mbf remained on the ground. **CP at 198.** Even though the cut timber left on the ground was no longer good for saw logs, it was still valuable for firewood, corresponding to about 100 cord firewood, worth about \$20,000. This was also completely ignored by the judge.

Thus, the total harvested timber accounted for by Roy's and Rubye's admissions and the residual timber left on the ground totaled 228.3 mbf. Thus, about 488.7 mbf (or at least 460.7 mbf if the extreme value of margin of error is used) of cut timber is simply missing. It is

timber which was present when the original timber cruises were performed showing 1500 mbf present, and is not accounted for by Roy and Rubye or by the lower court in any way.

Under the Superior Court's actions, the only timber supposedly taken by Roy and Rubye was the 107.3 mbf, which would have left about 1393 mbf of standing trees. The evidence clearly shows only about 783 mbf remains, i.e., obviously much less than 1393 mbf. The Superior Court judge's actions in ignoring Roy's and Rubye's direct admissions of additional timber volume, ignoring the timber Respondents left on the ground, and ignoring the missing timber necessarily cut by Roy and Rubye is plainly far beyond simple error, and instead verges heavily into the realm of dishonesty.

In addition to the clear and major fraud associated with harvested timber volume, Respondents also fraudulently charged for the allowed harvest of 19 mbf/yr + interest. This charge is fraudulent because the loss did not exist. That is, either the 19 mbf/year harvest was included in the trees which Roy and Rubye have already cut and for which they have received income, or the trees remain standing and are still available to be cut. In either case, charging for the 19 mbf/year is unequivocally false and fraudulent because the loss simply did not occur.

Further, Roy and Rubye charged for 0.7%/yr salvage, and based the calculation on the full 1500 mbf which was initially present. The calculation for this charge is very clearly fraudulent because Roy and Rubye had already cut a very major fraction, i.e., approximately ½, of the trees, so there could not have been annual salvage on trees which no longer existed due to Roy's and Rubye's harvest. While the dollar charge for this item is small, it very clearly demonstrates Roy's and Rubye's complete willingness to lie, Mr. Montgomery's willingness to submit lies to the court, and the Superior Court's willingness to swallow obvious lies so long as they support the Superior Court's pre-determined decision.

For the inflated logging costs of \$270/mbf charged in the motion and accepted by the Superior Court judge, there is simply no evidence supporting such an inflated figure. To the contrary, both of the independent foresters who inspected the site and the timber concluded total logging costs (including labor, logging equipment costs, loading costs, and trucking costs) should have been about \$190/mbf (\$180-\$200/mbf) meaning the logging costs were inflated by \$80/mbf. This conclusion is further supported by the opinion of an independent experienced logger who inspected the site. CP at 209-211.

However, Respondents were not satisfied with fraud at the \$80/mbf level, but added in further equipment charges totaling \$29,250

(plus interest). CP at 173. Respondents tried to hide these additional logging costs by inserting them in their motion for forfeiture of the \$45,000 bond rather than in their motion for disbursement of logging proceeds. The \$29,250 calculates to \$272.60/mbf for the 107.3 mbf recognized by the Superior Court, meaning the total logging costs claimed by Respondents is \$542.60/mbf. In contrast, Respondents reported a price of only \$420/mbf for the 107.3 mbf, meaning Respondents are claiming a :LOSS of \$122.60/mbf for a logging job which was identified as very easy by two independent experienced foresters and an independent experienced logger.

Surely this Court can recognize how preposterous Respondents' claims are and how preposterous it is that the Superior Court went along with those preposterous claims without any reservation.

### **3. Fraud Perpetrated in Respondents' Second Amended Motion for Forfeiture of \$45,000 Bond Monies Tendered on August 12, 2013.**

Respondents commit clear fraud with respect to purported lost rental value. **CP at 173.** The record is devoid of any evidence there would have been any rental value of the house addition due to sharing the residence with Respondents as well as the remoteness of the location. Notably, Wes and Stan had rented the residence to Randall Ames and his

family for \$250/mo during a period while Roy and Rubye were absent and living with Merita Dysart.

Thus, the rental value of the residence was \$250/mo with no sharing of the residence and without the need for Randall Ames and family to provide assistance to Roy and Rubye, but somehow becomes \$750/mo for a shared residence while Randall Ames and family must also provide assistance to Roy and Rubye. Any rental value for the residence addition was fully paid to Roy and Rubye in exchange for the assistance received by Roy and Rubye from Randall Ames. Thus, the purported rental value does not even begin to pass the smell test, let alone any objective evaluation.

In fact, the Superior Court judge flatly lied when he referred to a “second house” when there has never been a second house. All that existed or exists is a conversion of attached garage space to additional living space. CP at 349. The judge then turned around and admitted Randy Ames and family were using the house, “but this has not generated any rental income and it is not what Roy and Rubye wanted to do with their rental.” CP at 349, fn. 3. This assertion is entirely mendacious. As the judge was fully aware, Roy and Rubye Ames had previously asserted it was necessary for Randy Ames and his family to live with Roy and Rubye to help them, otherwise Roy and Rubye would not be able to live

on the Farm due to their advanced ages and declining physical conditions. The only reasonable conclusion is Roy and Rubye intended Randy Ames and his family to live in the addition without rent, which the Superior Court seems to acknowledge was actually occurring. Further, any reasonable person will recognize such additional living space as part of a preexisting residence does not have separate rental value and would not be separately rented.

In this motion, Roy and Rubye also present their fraud concerning additional logging equipment costs. **CP at 173.** This items of fraud is exposed in the discussion above. Apparently Roy and Rubye wished to hide the fact these are additional logging costs by excluding them from the motion concerning disbursement of logging proceeds. **CP 176-180.** As shown above, inclusion of these additional logging costs grossly inflates the total logging costs far beyond any rational level.

Inclusion of excess insurance costs is also a fraudulent component. **CP at 173.** As should be readily apparent, Roy and Rubye had available ample funds to accomplish work on the residence sufficient to receive reduced insurance rates. For their own reasons, in collusion with Randall Ames, Roy and Rubye simply pocketed the money and then falsely blamed Wes and Stan for the higher insurance costs. Thus, the reason for

continued higher insurance costs was Roy's and Rubye's theft through diversion of money rather than any actions of Wes and Stan.

Thus, even though they received about \$80K from the Superior Court orders relating to the orders on Roy's and Rubye's four motion, as well the earlier money from firewood sales, Respondents still have not obtained permits. The only rational explanation is that Respondents lied about their intentions and their access to money, and actually have no intention of actually completing the garage space modification.

**4. Respondents' Amended Motion for Forfeiture of \$10,000 Bond Monies Tendered on February 25, 2013.**

For purposes of this appeal, the forfeiture of the \$10,000 bond based on a fraudulent invoice from Jason Baker represents a complete failure by the trial court as well as by this Court in the prior appeal. Far from creating finality, the trial court's and this Court's unquestioning acceptance of Jason Baker's false invoice emboldened Jason Baker and Respondents to engage in even more egregious fraud as pointed out above.

Forfeiture of the remaining portion of the \$10,000 bond is fraudulent because the alleged deficiency used to justify that forfeiture is itself fraudulent as discussed above.

**5. Fraud Perpetrated in Respondents' Motion for an Order to Complete Logging Operations.**

The multiple items of fraud perpetrated by Roy and Rubye in the other motions make their motion for order to complete logging operations fraudulent. CP at 99-101. That is, the original order by the Superior Court contemplated timber harvest of about 400 mbf. This Court had previously in its Opinion in the previous appeal a calculated increase of about 500 mbf belonged to Roy and Rubye. **CP at 346.** Everything else, i.e., the other 1000 mbf belonged to Wes and Stan as the remaindermen. That calculated increase in timber volume was itself fraudulent, based on a backward extrapolation using a method for estimating annual growth which could not have satisfied the *Frye* test discussed above, and therefore was inadmissible. Nonetheless, that clear court error is behind us.

The important point now is that Roy and Rubye have already harvested more than they were entitled to even under this Court's flawed analysis. As described above, Roy and Rubye have cut about 717 mbf. Thus, Roy and Rubye have already stolen from Wes and Stan about 217 mbf, having a value of about \$91,140 (based on \$420/mbf).

Surely \$91,140 of theft is sufficient without turning Roy and Rubye loose to steal an additional about 350 mbf in the lodgepole pine and remaining Grand fir, having a value of about \$147,000 based on \$420/mbf. If Roy and Rubye are allowed to steal this additional timber, the small amount of residual timber on the Farm will be only about 433

mbf, a significant fraction of which is unharvestable due to proximity to a stream, and the need to leave seed trees and for soil stability on the sloping portion of the Farm. Thus, the actual harvestable timber volume remaining at that point would likely be only about 200-300 mbf. This amount is so small and the trees so scattered that commercial harvesting is likely not viable, leaving Wes and Stan without any significant timber value on the Farm during their lifetimes.

The Superior Court judge earlier stated that no one was contemplating a massive harvest, least of all the court. Obviously the judge lied, because there is no interpretation of the harvest allowed by the judge which takes over 70% of the timber, and over 80% of the actually harvestable timber which would not be a massive harvest.

Once again, this Court's prior statement 500 mbf belonged to Roy and Ruby would have allowed them to harvest 33% of the timber, not the 70-80% the Superior Court has now allowed. The truly massive harvest now allowed by the Superior Court judge constitutes clear theft from Wes and Stan and demonstrates another lack of honesty by the judge.

#### **6. Combination of Superior Court Errors Produced Gross Abuse of Discretion.**

The combination of errors by the Superior Court produced both abuse of discretion on individual issues and an overall abuse of discretion.

As discussed above, when a trial court's exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons, an abuse occurs.” *State v. McPherson*, 46 P.3d 284, 292, 111 Wn.App. 747 (2002) (citing *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997)). “Otherwise stated, an abuse of discretion occurs when no reasonable person would take the view adopted by the trial court.” *Id.* (citing *State v. Castellanos*, 132 Wn.2d 94, 102, 935 P.2d 1353 (1997)).

In this case, the Superior Court erred by admitting any declaration by Robert Broden because the declarations failed the *Frye* test for admissibility. Using the inadmissible Broden declarations created untenable bases for all further actions and judgments concerning the timber, and therefore, those further actions and judgments constituted abuse of discretion.

The judge’s blatant dismissal of the only admissible expert testimony as to the volume of timber remaining and the volume of timber cut by Roy and Rubye was clearly manifestly unreasonable. Likewise, the fact the judge ignored Roy’s and Rubye’s admission additional timber was harvested and sold or traded in addition to the timber accounted for by the money deposited with attorney Chris Montgomery is also clearly manifestly unreasonable.

The judge ignoring blatantly excessive charges for logging costs, including double charging for logging equipment is also manifestly unreasonable.

The judge's inclusion of a loss which never existed, i.e., the 19 mbf harvest previously authorized, is also clearly manifestly unreasonable, as is the inclusion of a charge for salvage based on trees which no longer existed because Roy and Rubye had already cut them.

Taken together, the multiple manifestly unreasonable actions the Superior Court judge took in order to reach his decisions to disburse all logging proceeds to Roy and Rubye and to authorize Roy and Rubye to carry out additional logging are cumulatively both manifestly unreasonable and based on untenable grounds. No honest, reasonable person could have reached the false conclusions and made the orders as was done by the Superior Court judge. The underlying facts simply would not permit it.

Likewise, the judge's inclusion of fabricated rental value for a shared, remote, rural residence addition strains a reasonable person's credulity beyond the breaking point. It is irrational to believe there would be any rental market for space in such a remote, shared rural residence, and especially irrational to believe such a shared residence space would have a rental value of \$750/mo as claimed by Roy and Rubye and blindly

accepted by the Superior Court judge. Further, there was actually no residence space which could have been rented. Randall Ames and his family were already sharing the residence on the Farm with Roy and Rubye, including the residence addition space. The condition of the residence did not alter that residence sharing. Roy and Rubye repeatedly emphasized they needed Randall Ames' assistance in order for Roy and Rubye to live on the Farm. Therefore, the shared residence could only have been shared with Randall Ames and family, leaving no possible rental space.

The judge's further blind acceptance of excess insurance costs allegedly due to Wes' and Stan's actions is also based on untenable grounds because Roy and Rubye clearly had ample funds from firewood sales to carry out work on the residence sufficient to obtain standard rate insurance. The fact Roy and Rubye instead chose to divert that large amount of money with the collusion of Randall Ames does not make the increased insurance costs the fault of Wes and Stan. Therefore, Wes and Stan should not be charged for Roy's and Rubye's deceptive actions.

To summarize, disbursing all logging proceeds to Roy and Rubye was an abuse of discretion because Roy and Rubye concealed harvested timber volume, diverted most of the money away from reported logging proceeds, and claimed losses related to logging which never existed. In

effect, Roy and Rubye stole the majority of the money derived from the harvested trees while padding the claimed charges with fictitious charges.

Likewise, the court abused its discretion by forfeiting the \$45,000 bond because the forfeiture was based on fraudulent double charging of logging costs and on fraudulent charges for rental value which never existed.

The court then extended its abuse of discretion by forfeiting the remainder of the \$10,000 bond based on carry-over of the fraudulent charges for alleged logging costs and fictitious rental value.

The court compounded its abuse of discretion by allowing still further logging by Roy and Rubye after they have already cut more timber than they should have, even under the Superior Court's and this Court's previous erroneous rulings. Roy and Rubye have already stolen a large volume of timber from Wes and Stan over the 500 mbf previously indicated by this Court, and the additional logging allowed by the Superior Court will simply expand that theft to over 500 mbf, having a value of over \$210,000.

## **VII. CONCLUSION**

As discussed above, the Superior Court's ruling concerning logging proceeds was materially based on the Superior Court's admission and acceptance of declaration testimony which does not satisfy the *Frye*

test because the methodology used, i.e., merely looking at the standing trees, is not a method accepted by professional foresters or anyone else determining standing timber volumes.

The Superior Court's ruling giving to Respondents all logging proceeds was manifestly unreasonable and based on untenable grounds and therefore constituted a gross abuse of discretion.

Similarly, the Superior Court's ruling forfeiting the bonds posted by Appellants was manifestly unreasonable and based on untenable grounds and therefore also constituted a gross abuse of discretion.

Further, the Superior Court's judgment against Appellants was manifestly unreasonable and based on untenable grounds, and therefore constituted a gross abuse of discretion.

Finally, the Superior Court's granting Respondents permission to conduct further logging was also manifestly unreasonable and based on untenable grounds, and therefore also constituted a gross abuse of discretion.

For each of the noted items erroneously ordered by the Superior Court, no reasonable person could have taken the view adopted by the Superior Court.

Therefore, Appellants request the Court reverse the decisions of the Superior Court, and order Appellants' bonds returned in full, the

judgment against Appellants terminated, all logging proceeds divided with 40% paid to Appellants, and the authorization for additional logging cancelled.

Submitted this 22nd day of August, 2016

  
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Beaverton, OR 92003

**EXHIBIT 1**

**EXHIBIT 1**

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FILED

JUN 03 2016

DISCIPLINARY BOARD

BEFORE THE  
DISCIPLINARY BOARD  
OF THE  
WASHINGTON STATE BAR ASSOCIATION

Proceeding No. 13#00109

In re  
**CHRIS ALAN MONTGOMERY,**  
Lawyer (WSBA No. 12377)

DISCIPLINARY BOARD ORDER  
DECLINING *SUA SPONTE* REVIEW AND  
ADOPTING HEARING OFFICER'S  
DECISION

This matter came before the Disciplinary Board for consideration of *sua sponte* review pursuant to ELC 11.3(a). On May 12, 2016, the Clerk distributed the attached decision to the Board.

**IT IS HEREBY ORDERED THAT** the Board declines *sua sponte* review and adopts the Hearing Officer's decision<sup>1</sup>.

Dated this 3<sup>rd</sup> day of June, 2016.

*Stephanie Bloomfield*

Stephanie Bloomfield  
Disciplinary Board Chair

CERTIFICATE OF SERVICE

I certify that I caused a copy of the DO Order Declining Sua Sponte Review to be delivered to the Office of Disciplinary Counsel and to be mailed to Chris Alan Montgomery Respondent/Respondent's Counsel at PO Box 1000, Everett, WA 98201, by Certified/first class mail, postage prepaid on the 3<sup>rd</sup> day of June, 2016.

*[Signature]*  
Clerk/Counsel to the Disciplinary Board

<sup>1</sup> The vote on this matter was 14-0. The following Board members voted: Bloomfield, Carney, Davis, Denton, Coy, Fischer, Startzel, Andeen, Berger, Cottrell, Smith, Myers, Egeler and Silverman.

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BEFORE THE  
DISCIPLINARY BOARD  
OF THE  
WASHINGTON STATE BAR ASSOCIATION

In re  
**CHRIS ALAN MONTGOMERY,**  
Lawyer (Bar No. 12377).

Proceeding No. 13#00109  
FINDINGS OF FACT, CONCLUSIONS  
OF LAW AND HEARING OFFICER'S  
RECOMMENDATION

The undersigned Hearing Officer held the hearing on July 13 - 17, 2015, and July 22, 2015, under Rule 10.13 of the Rules for Enforcement of Lawyer Conduct (ELC). Respondent Chris Alan Montgomery (Respondent) appeared at the hearing with his counsel Leland Ripley. Disciplinary Counsel Jonathan Burke appeared for the Office of Disciplinary Counsel (ODC) of the Washington State Bar Association. At the hearing, approximately 30 witnesses were sworn and presented testimony, and over 100 exhibits were admitted into evidence. Given the complexities of this case, the parties stipulated to extend the deadline for filing this Recommendation.

**OVERVIEW**

The Formal Complaint filed by Disciplinary Counsel stems from a series of events, all related, beginning in 2011 with the sale of 124 acres of grazing and timberland near Republic, Washington. At the time of the sale, the property was owned by DM, a man in his mid to late-

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1 | sixties who lived in Republic. DM's mental capacity has been assessed twice by mental health  
2 | professionals, once in 2005 and again in 2012. These assessments found that DM has a low IQ  
3 | of 65, "mild mental retardation," attention deficit disorder, and problems with executive  
4 | functioning. EX 1, EX 46, EX 47.

5 |         DM was able to work as a janitor for the local school for 20 years before retirement. It is  
6 | noted in the 2005 assessment that DM cannot read or write, and does not understand written  
7 | documents or financial transactions to any appreciable degree. EX 1. For example, DM was  
8 | forced into early retirement when a new supervisor was appointed at the school. EX 1. DM is  
9 | recorded in the first assessment as stating, "the new guy didn't like me and gave me early out  
10 | papers to sign, but I did not know what I was signing." EX 1 at 1.

11 |         Respondent operates a law firm in Colville, Washington as a sole practitioner. In late  
12 | 2011, Respondent briefly represented the Gianukakis family after they agreed to purchase the  
13 | property from DM. Respondent was not involved in the details of the agreement. The property  
14 | sale did not include interest or security, and was for less than the appraised value of the  
15 | property, giving rise to a lawsuit against the Gianukakis family by DM's family. DM's family  
16 | believed that the terms of the sale were unfair, and that the Gianukakis family benefitted from  
17 | DM's diminished capacity.

18 |         In response to the lawsuit, the Gianukakis family brought DM to Respondent's office,  
19 | where a meeting took place over the course of 1.6 hours. The Gianukakis family signed a  
20 | second new client agreement and ultimately paid for Respondent's legal services. At the  
21 | meeting, the Gianukakis family provided Respondent with a copy of the summons, complaint,  
22 | and lis pendens, all of which showed that DM's brother was pursuing a claim against the  
23 | Gianukakis family on DM's behalf under a written power of attorney. The complaint clearly  
24 | alleged that DM has diminished capacity and does not understand financial transactions,

1 including the sale of property to the Gianukakis family.

2 At the meeting, Respondent read these documents, then queried DM with the intention  
3 of determining whether he had diminished capacity. Respondent decided on his own that DM  
4 did not lack capacity, and has since acknowledged having provided legal services to both DM  
5 and the Gianukakis family at the meeting. Respondent did not obtain a written conflict of  
6 interest waiver. Ultimately, because DM wanted the sale to go forward, Respondent prepared  
7 additional documents for the sale of the property, as well a document revoking the power of  
8 attorney provided by DM to DM's brother. Respondent prepared the second document with the  
9 intention of revoking the brother's authority to pursue the lawsuit against the Gianukakis family.  
10 DM signed each of these at the meeting.

11 Respondent then sent a letter to DM's brother, as well as the attorney of record for the  
12 lawsuit, informing them that they did not have authority to act on DM's behalf and threatening  
13 additional action if they did not withdraw immediately. EX 26. Respondent also entered a  
14 Notice of Appearance in the same lawsuit on behalf of the Gianukakis family. EX 25.  
15 Unfortunately, this dispute quickly compounded, resulting in a petition for guardianship being  
16 filed and a guardian ad litem being appointed. EX 35, EX 36. It also resulted in a petition for a  
17 vulnerable adult order for protection being filed against John Gianukakis, and the granting of a  
18 temporary restraining order against him. EX 43.2. This latter action was eventually dismissed  
19 by the Court for insufficient evidence to find financial exploitation. EX 44.

20 Respondent continued to represent the Gianukakis family throughout these proceedings.  
21 He filed a Notice of Appearance in the vulnerable adult action and argued on behalf of the  
22 Gianukakis family at the hearing. He also contacted the GAL in the guardianship proceedings  
23 and again made arguments in favor of the Gianukakis family. A written conflict of interest  
24 waiver was not obtained from either DM or the Gianukakises. The majority of this

1 Recommendation focuses on the conflict of interest issues that stem from Respondent's  
2 representation of DM and the Gianukakis family at the March 22, 2012 meeting, as well as  
3 Respondent's representation of the Gianukakis family in the subsequent actions.

4 It should be noted at the onset of this Recommendation that Respondent has practiced  
5 law for more than 30 years, and does not have any history of discipline. He is the former  
6 president of the Stevens County Bar Association. He has also served as a scoutmaster for the  
7 Boy Scouts of America for more than 30 years, and has tutored over 27 kids to be Eagle Scouts.  
8 Respondent is active in his community and provides considerable legal services on a pro bono  
9 basis. He is clearly dedicated to his wife and family. Moreover, no less than two sitting Superior  
10 Court Judges appeared at the hearing to offer character testimony on Respondent's behalf. In  
11 sum, for the record, Respondent has a reputation for being a good man and a good attorney.

12 **FORMAL COMPLAINT FILED BY DISCIPLINARY COUNSEL**

13 The Formal Complaint filed by Disciplinary Counsel charged Respondent with the  
14 following counts of misconduct:

15 Count I – By having direct contact with DM during the pendency of the lawsuit,  
16 Respondent violated RPC 4.2.

17 Count II – In the alternative, to the extent that DM was an unrepresented party on March  
18 22, 2012, by drafting legal documents for DM and/or having DM sign the Revocation and  
19 Release, and/or the PM letter, and/or the Kovarik letter, Respondent violated RPC 4.3.

20 Count III – By having direct contact with PM through the PM letter during the pendency  
21 of the lawsuit, Respondent violated RPC 4.2.

22 Count IV – By providing legal services to DM and to the Gianukakis on March 22,  
23 2012, in connection with the pending lawsuit and/or sale of Hall Creek Property while there was  
24 a conflict of interest, Respondent violated RPC 1.7.

1 Count V – By accepting compensation from the Gianukakis for providing legal  
2 services to DM on March 22, 2012, Respondent violated RPC 1.8(f).

3 Count VI – By representing the Gianukakis in the vulnerable adult action without  
4 obtaining informed consent in writing from DM, Respondent violated RPC 1.9(a), RPC 1.9(b),  
5 and/or RPC 1.9(c).<sup>1</sup>

6 Count VII – By representing the Gianukakis in the vulnerable adult action without  
7 obtaining informed consent in writing from the Gianukakis, Respondent violated RPC 1.7.<sup>2</sup>

8 Count VIII – By dealing with DM, as described in the formal complaint, Respondent  
9 violated RPC 8.4(c) and RPC 8.4(d).

10 Based on the pleadings in the case, and the testimony and exhibits at the hearing, the  
11 Hearing Officer makes the following findings of fact pursuant to ELC 10.14(b) by a clear  
12 preponderance of the evidence.

13 **FINDINGS OF FACT**

14 **A. Findings Regarding Respondent's Background**

15 1. Respondent was admitted to the practice of law in the State of Washington on May  
16 17, 1982.

17 2. Respondent operates a law firm in Colville, Washington as a sole practitioner.

18 3. Respondent employs a paralegal and two legal assistants.

19 4. Respondent's law practice focuses on real estate law (50 percent) and estate  
20 planning and elder law (35-40 percent).

21 5. When Respondent provides estate planning to related clients, such as husband and  
22 wives, he has them sign conflict waivers.

23 <sup>1</sup> ODC has agreed to dismiss the count that Respondent violated RPC 1.9(b).

24 <sup>2</sup> ODC has agreed to dismiss Count 7.

1           6.    When Respondent performs estate planning, he typically recommends a power of  
2 attorney to clients and typically prepares a power of attorney for clients as an alternative to a  
3 guardianship because guardianships are expensive.

4           7.    Respondent has had experience representing clients with mental disabilities and  
5 diminished capacity.

6           8.    Respondent has been a scoutmaster in the Boy Scouts of America (Boy Scouts)  
7 since 1992 and was a den leader for three years before that. He has tutored over 27 kids to be  
8 Eagle Scouts. He has received many awards for his contributions to the Boy Scouts and remains  
9 very active in scouting leadership. In 1999, he received the prestigious Silver Beaver award. He  
10 is the coordinator for the local "Community Flag Program" sponsored by Kiwanis and Boy  
11 Scout Troop 921.

12          9.    Respondent has volunteered to be a judge in Gonzaga Law School's Moot Court  
13 and Client Counseling Competitions.

14          10. Respondent has provided pro bono services, for which he received award  
15 certifications from the Washington State Bar Association for several years.

16          11. Respondent formerly served as Stevens County Bar Association president, at  
17 which time he moderated legal classes for non-lawyers.

18          12. Respondent served as an adjunct faculty member at Spokane Community College,  
19 Colville Campus, for over 30 years and teaches business law.

20          13. Respondent teaches non-credit community classes regarding trusts and landlord  
21 tenant law.

22           **B. Findings Regarding DM**

23          14. During all material times, DM was a man in his mid to late sixties who lived in  
24 Republic, Washington. He has only completed the eighth grade. DM has never married and has

1 no children.

2 15. DM's mental capacity has been assessed twice by mental health professionals,  
3 once in 2005 and once in 2012. These assessments found that DM has a low IQ of 65, "mild  
4 mental retardation,"<sup>3</sup> attention deficit disorder, and problems with executive functioning. EX 1,  
5 EX 46, EX 47. DM cannot read or write with any proficiency. He has difficulty understanding  
6 mathematics and financial matters. His disabilities are lifelong disabilities.

7 16. The testimony Dr. Brian Campbell, Ph.D. regarding his assessment of DM's  
8 disabilities and vulnerability is credible. It was given significant weight. EX 46 and EX 47. In  
9 addition, the 2005 assessment of DM by Dr. Mahlon Dalley, Ph.D. was consistent with Dr.  
10 Campbell's assessment and is also credible. EX 1.

11 17. DM frequently exhibits a desire to please people. Sometimes he does this by telling  
12 people what they want to hear, while other times he gifts his possessions to people when they  
13 admire or compliment those possessions.

14 18. DM has a history of purchasing old items for more than their value, and does not  
15 fully understand the value of money. He has difficulties making correct change when paying for  
16 items. He performed labor services for less money than a reasonable person would accept. He  
17 has difficulty understanding the concept of interest or financial transactions in general.

18 19. DM would go for considerable time without bathing and exhibited poor hygiene  
19 unless cared for by one of his family members.

20 20. DM's disabilities make him vulnerable to manipulation. EX 1 at 3, EX 46 at 14,  
21 EX 47 at 3.

22 21. Although many local people were aware of DM's limitations, many did not know  
23

24 <sup>3</sup> This diagnosis is now referred to as "intellectual disability" in DSM V.

1 the extent of his disabilities because DM learned to use coping mechanisms. These coping  
2 mechanisms include repeating the same jokes and statements, misstating facts, and affirming  
3 that he understood things when he did not.

4 22. DM can drive a vehicle and has a valid driver's license.

5 23. DM lived with his mother until she passed away in 2005. He assisted her with  
6 errands, including driving her to town. DM lived independently at the same location after his  
7 mother passed away.

8 24. DM has several family members. His brother (PM) and nephew live in Spokane,  
9 Washington, while another nephew lives in Seattle, Washington. After the passing of his  
10 mother, DM's brother would visit and help him by paying bills, monitoring finances, cleaning  
11 house, and doing laundry.

12 25. DM's family described his limitations in various ways, including (1) he could not  
13 use a CD or DVD player after being shown, (2) he could not divide an apple into thirds, (3)  
14 when instructed to put \$20.00 of gas into his tank, he filled it up instead and did not have  
15 sufficient funds to cover the transaction, (4) he did not understand that his income in his bank  
16 account came from social security or retirement, and (5) at one time stored large amounts of  
17 cash in the vase on the mantle rather than place it in the bank.

18 26. DM worked as a custodian for the Republic School District for approximately 20  
19 years until retirement. He performed his custodial duties independently, and did not need to  
20 have someone work alongside him. He would frequently interact with members of his  
21 community when purchasing items or performing other errands. Many community members  
22 testified that DM seemed to live independently, though many also understood that DM had  
23 limitations.

24 27. DM's mental limitations manifested in such a way that people would often need

1 | more than one meeting or experience with him to fully appreciate his condition. DM's brother  
2 | testified as follows: "If you are around my brother for one day you would think that he is totally  
3 | independent and strong willed and can do anything." TR 141: 13-25. DM's brother further added  
4 | that by day three, a person would notice that DM tells the same jokes sometimes several times a  
5 | day, and uses the same phrases over and over. TR 141-142.

6 | 28. DM is capable of making some decisions in a general sense, as well as  
7 | understanding moral issues of right versus wrong, but cannot understand financial transactions  
8 | to any appreciable degree, including transactions involving the purchase and sale of property,  
9 | interest, transfer and recording of titles or deeds, appraisals, land valuation, or similar issues.

10 | **C. Findings Regarding the Sale of Hall Creek Property**

11 | 29. In 1986, DM purchased 124 acres of grazing and timberland near Republic,  
12 | Washington (hereafter, the Hall Creek Property). EX 905.

13 | 30. In 2002, DM granted Brian and Debra Gotham (the Gothams) a First Right to  
14 | Purchase the Hall Creek Property. EX 3.

15 | 31. In 2012, the tax assessed value of the Hall Creek Property was \$160,900. EX 4.

16 | 32. John Gianukakis (Gianukakis) was interested in purchasing the Hall Creek  
17 | Property from DM. On several occasions, Gianukakis asked DM if he would sell the property  
18 | and he declined. In 2011, Gianukakis asked again and DM agreed.

19 | 33. On October 28, 2011, DM signed a handwritten agreement to sell the Hall Creek  
20 | Property to Gianukakis and his wife, Penny Gianukakis (collectively referred to as the  
21 | Gianukakis), for \$100,000 with \$10,000 due at closing and \$500 monthly payments. EX 6.

22 | 34. The agreement did not provide DM with security and charged no interest on the  
23 | \$90,000 balance. Respondent was not involved with the agreement, nor was he involved with  
24 | the preparation or signing of this document.

1           35. Gianukakis asked Roberta Weller to assist him in drafting a Land Agreement.  
2 Weller is retired and formerly worked for an attorney and title company. She drafted the Land  
3 Agreement.

4           36. Weller spoke with DM about selling the Hall Creek Property. DM told Weller that  
5 he desired to sell the property to Gianukakis, and that he understood the property would no  
6 longer be his.

7           37. On October 30, 2011, Weller read the agreement to DM, and notarized the  
8 agreement after he signed it. Respondent had no involvement with the preparation or signing of  
9 this document.

10           38. During November and December 2011, after DM had agreed to sell the property,  
11 Gianukakis received legal advice from Respondent's law firm regarding the existing first right  
12 to purchase the Hall Creek Property that had been provided to the Gothams. EX 3. It is clear and  
13 unequivocal from the record that Respondent entered into an attorney-client relationship with  
14 the Gianukakises at this time, and provided them with legal advice regarding this first right to  
15 purchase.

16           39. Gianukakis did not speak directly with Respondent. Instead, Gianukakis spoke  
17 with Respondent's paralegal, who then spoke to Respondent, obtained advice, then contacted  
18 Gianukakis again. Gianukakis visited Respondent's office, dropped off paperwork, and  
19 completed a client intake form. EX 8.

20           40. On December 23, 2011, Respondent's office sent a bill to Gianukakis for legal  
21 services. EX 9.

22           41. On January 2, 2012, the Gianukakises agreed in writing to give the Gothams a First  
23 Right to Purchase Agreement on the Hall Creek Property. EX 13. On January 2, 2013, the  
24 Gothams signed a Waiver of the First Right to Purchase. EX 906. Respondent did not prepare

1 these documents.

2 42. On January 9, 2012, a purchase and sale agreement was prepared by Weller. DM  
3 executed a quitclaim deed transferring the Hall Creek Property to the Gianukakis. The  
4 Gianukakis paid the initial \$10,000 and several \$500 monthly payments. EX 14. Respondent  
5 did not provide the form or prepare the document.

6 43. Weller reviewed the property sale with DM, who indicated understanding that he  
7 was selling the property to Gianukakis. Weller discussed interest with DM, who indicated that  
8 he did not want to charge interest because it would be charging more money. Weller discussed  
9 security with DM, who indicated that he did not want security because he trusted Gianukakis.

10 44. On January 10, 2012, the Gianukakis entered into an agreement to rent the Hall  
11 Creek Property to the Gothams for four years for livestock grazing. EX 15. Respondent did not  
12 provide the form or prepare the document.

13 **D. Findings Regarding the First Lawsuit Filed Against John Gianukakis**

14 45. DM's brother (PM) and DM's family did not know about the sale of the Hall Creek  
15 Property.

16 46. In January and February 2012, PM, DM, and other family members received estate  
17 planning services from lawyer Lynn St. Louis that included preparing trusts and powers of  
18 attorney. The family intended to place real property, including the Hall Creek Property, into a  
19 trust.

20 47. In late February, PM discovered that DM had signed papers selling the Hall Creek  
21 Property to the Gianukakis. When DM was questioned about the sale by family members, it  
22 became apparent that he did not understand the details surrounding the sale. DM acknowledged  
23 selling the property to Gianukakis, however, he also believed that would still be able to use the  
24 property and that he still owned the property until Gianukakis made all of his payments.

1           48. On March 1, 2012, DM executed a General Durable Power of Attorney (GDPOA)  
2 prepared by lawyer Lynn St. Louis naming PM as his attorney-in-fact. EX 17. The GDPOA  
3 provided, among other things, that PM had authority to hire legal counsel on DM's behalf and  
4 bring a lawsuit in DM's name. EX 17.

5           49. On March 12, 2012, and March 13, 2012, CM, PM's daughter-in-law, contacted  
6 Gianukakis and requested that he rescind the sale of the Hall Creek Property because DM did  
7 not understand the full consequences of signing the documents. CM told Gianukakis that DM  
8 was vulnerable and tended to do whatever people tell him.

9           50. Gianukakis expressed disagreement with CM's description of DM and declined to  
10 rescind his purchase of the Hall Creek Property.

11           51. DM's family hired lawyer Nick Kovarik (Kovarik), a Spokane lawyer, to represent  
12 DM. Using the GDPOA, PM authorized Kovarik to file a lawsuit to rescind the sale of the Hall  
13 Creek Property due to DM's diminished capacity and his inability to understand the terms of the  
14 sale.

15           52. On March 13, 2012, Kovarik filed a lawsuit against the Gianukakises and recorded  
16 a lis pendens against the Hall Creek Property. EX 18, EX 18.1, EX 19. At that time, Kovarik  
17 had not yet spoken to DM, who lived in Republic, Washington.

18           53. The summons, complaint and lis pendens filed and recorded by Kovarik state, in  
19 pertinent part, "PM, Attorney in Fact for DM, a Single Man, Plaintiff" in the caption. EX 18,  
20 EX 18.1, EX 19. The complaint also states on its first line, "Plaintiff DM, by and through his  
21 attorneys of record, Dunn & Black, P.S., hereby allege ..." EX 18 at 1. The summons also states  
22 on its first line, "A lawsuit has been started against you in the above-entitled Court by DM,  
23 Plaintiff." EX 18.1 at 1.

24           54. All three documents are signed by Kovarik as attorney for plaintiff. EX 18, EX

1 18.1, EX 19.

2 55. The complaint identified PM as the attorney-in-fact for DM and stated that the  
3 GDPOA authorized PM to sue in DM's name and on his behalf. EX 18 at 1.

4 56. Respondent has testified that he does not consider DM to be the plaintiff set forth  
5 in these documents. Rather, Respondent believes that PM is the plaintiff and therefore Kovarik  
6 is the attorney for PM (and not for DM). Upon consideration, this argument does not have merit.  
7 The summons, complaint and lis pendens list DM as plaintiff and initiate a lawsuit in his name.

8 57. On March 18, 2012, the Gianukakis were served with the summons, complaint  
9 and lis pendens along with a transmittal letter sent by Kovarik. The transmittal letter states in its  
10 opening line, "We represent DM and his family." EX 20. It explained that plaintiff DM is a man  
11 of diminished capacity who cannot understand the nature, terms, and effect of financial or  
12 business transactions. EX 20.

13 58. After receiving the complaint and other pleadings, Gianukakis called CM and  
14 requested three days to consider whether to agree to rescind the sale.

15 59. Gianukakis went over to DM's house and met with DM to discuss the sale and  
16 lawsuit. DM told Gianukakis that he felt bound by his handshake to go forward with the sale of  
17 the Hall Creek Property.

18 60. On or around the same day, Gianukakis contacted Respondent's office and made an  
19 appointment. Gianukakis invited DM to attend the meeting.

20 61. On March 22, 2012, the Gianukakis picked up DM at his house and drove him to  
21 Respondent's law office where they met with Respondent. Gianukakis and his wife were both  
22 present at the meeting.

23 **E. Findings Regarding the March 22, 2012 Meeting**

24 62. The Gianukakis filled out a client intake sheet at Respondent's office identifying

1 themselves as the client. EX 910.

2 63. Respondent knew beforehand that he was meeting with Gianukakis regarding a  
3 new real estate matter. EX 924, EX 925. Respondent's calendar states, "NEW John Gianukakis  
4 R.E. Issue." EX 924.

5 64. Respondent testified that prior to the March 22nd meeting, he did not review the  
6 first Gianukakis file from November through December 2011 and he believed the Gianukakis  
7 to be new clients. His testimony that he did not review this information, and that he did not  
8 "connect the dots" between these two events is credible.

9 65. At the beginning of the meeting, Respondent was informed about the lawsuit and  
10 provided with the summons, complaint and lis pendens. See EX 32.

11 66. Respondent testified that he read the summons, complaint and lis pendens at the  
12 onset of the meeting before deciding to speak with DM about his side of the story.

13 67. Respondent acknowledged reading the complaint, which includes: "Plaintiff DM,  
14 by and through his attorneys of records, Dunn & Black, P.S., hereby alleges . . . Plaintiff DM is  
15 a single man who is unable to understand the nature, terms and effect of financial and business  
16 transactions." EX 18 at 1.

17 68. Respondent also acknowledged having read the allegations in the complaint  
18 regarding the property sale:

19 At all times material hereto, Plaintiff was a man of diminished capacity. At the time  
20 of this particular transaction (sale of the Subject Property), he did not have ability to  
21 comprehend the value of his possessions, the nature, terms and effect of the  
22 transaction. He cannot read or write with proficiency. EX 18 at 2.

22 69. At all pertinent times, Kovarik had not withdrawn from representing DM and PM  
23 in the pending lawsuit against the Gianukakis. The Court docket was available online and  
24 showed that Kovarik represented both DM and PM in this action.

1 70. During the meeting, DM informed Respondent he could not read or write and had  
2 attended school through eighth grade. This information confirmed the allegation in the  
3 complaint that DM could not read or write with any proficiency.

4 71. During the meeting, Respondent asked DM several questions intended to  
5 determine whether DM had diminished capacity. Respondent has testified that based upon DM's  
6 answers to these questions, he did not believe DM to have diminished capacity.

7 72. Respondent's testimony is credible only to the extent that he did not know with  
8 absolute certainty that DM had diminished capacity at the time of the meeting, however, it is  
9 clear from the record that Respondent was on notice of DM's limited capacity based upon the  
10 summons and complaint. Respondent knew, or should have known, that DM had diminished  
11 capacity at the time of the meeting.

12 73. At a minimum, Respondent should have inquired further before taking any actions  
13 that could possible harm DM or his interests. This would not include interviewing DM, and  
14 would have included contacting DM's legal counsel Kovarik.

15 74. During the meeting, Respondent told DM that he liked him and that he found DM  
16 to be "very smart."

17 75. During the meeting, Respondent discussed with DM the sale of the Hall Creek  
18 Property. Respondent has testified that DM still wanted to sell the property to the Gianukakises  
19 because they shook hands on the deal. Respondent's testimony that DM still wanted to sell the  
20 property to the Gianukakises is credible.

21 76. Respondent testified that DM said that Kovarik was not his attorney. Respondent's  
22 testimony is credible to the extent that DM still desired to sell the property, did not tell anyone  
23 to initiate the lawsuit, and did not understand how or why Kovarik was appointed to represent  
24 him. It is clear from the record and the testimony in this case that DM did not understand the

1 complexities of the property sale, the power of attorney provided to his brother PM, or his legal  
2 representation by Kovarik.

3 77. Respondent did not call Kovarik and discuss this matter with him. Respondent did  
4 not seek additional paperwork, including any medical reports indicating DM's capacity, from  
5 Kovarik.

6 78. The meeting between Respondent, the Gianukakises and DM lasted approximately  
7 1.6 hours. Respondent had his staff present to witness the meeting and DM's subsequent signing  
8 of several documents.

9 79. Respondent testified that during this meeting he provided legal representation to  
10 both DM and the Gianukakises. The facts and testimony in this case strongly support this to be  
11 true. Respondent provided legal services to both parties.

12 80. It should be noted that Respondent appears to have provided conflicting accounts  
13 regarding his role in these events. He initially claimed that he was merely acting as a scrivener  
14 who memorialized the agreement between DM and the Gianukakises at the March 22, 2012  
15 meeting. EX 501 at 4¶2. He later told Brian McCarthy, ODC's Investigator, that he was DM's  
16 "advocate" (TR 538: 7-15) and then testified at the hearing that he provided legal advice to DR.  
17 TR 444: 13-16.

18 81. Respondent acknowledged that he did not obtain a written conflict of interest  
19 waiver from DM or the Gianukakises at any time.

20 82. Respondent testified that he believed the interests of DM and the Gianukakises  
21 were aligned because both parties wanted to sell/purchase the property and both parties did not  
22 want the lawsuit against the Gianukakises to continue. This is credible only to the extent that  
23 Respondent may have believed these two things to be true at the time of the meeting. However,  
24 Respondent's analysis should not have ended there. There is a clear and unequivocal conflict of

1 | interest presented in this scenario that becomes even worse over time. This will be discussed in  
2 | further detail below. Respondent's position that a conflict of interest did not exist is not credible.

3 |         83. Under the circumstances, at this point in the timeline, there are some troubling  
4 | issues worthy of mention. First, Respondent has acknowledged that he is not a trained medical  
5 | professional and could not make the determination whether DM had diminished capacity. He is  
6 | correct. Respondent could not determine whether DM had the capacity to understand the  
7 | property sale or the other documents drafted by Respondent at the meeting. The risk that DM  
8 | had diminished capacity was known to Respondent, who should not have proceeded with the  
9 | meeting given this risk.

10 |         84. Second, a similar concern applies to DM's "desire" at the meeting to revoke the  
11 | power of attorney and therefore terminate Kovarik's representation, especially when the  
12 | complaint specifically alleges that DM lacks the capacity to understand such matters (and that  
13 | Kovarik is serving as DM's attorney for DM's protection). It was inappropriate for Respondent  
14 | to meet with DM and to ultimately participate in what amounts to the termination of opposing  
15 | counsel, especially given the fact that opposing counsel was hired to protect DM's interests as a  
16 | person with diminished capacity. The welfare of the person with diminished capacity is of chief  
17 | concern in such situations. To meet with DM and revoke the power of attorney without even  
18 | consulting Kovarik first seems particularly egregious.

19 |         85. Accordingly, Respondent's testimony that he did not understand that DM was  
20 | represented by Kovarik is not credible, given the unequivocal statements in the summons and  
21 | complaint as well as the very real possibility that DM did not have the capacity to understand  
22 | Kovarik's representation and/or make the decision at the meeting that amounted to terminating  
23 | Kovarik's representation.

24 |         86. WSBA Ethics Opinion #1307 regarding RPC 4.2 is instructive. The opinion, titled

1 "Communication with represented party; lawyer contacted by adverse party" states as follows:

2 The Committee reviewed your inquiry concerning a lawyer's obligations when  
3 contacted by an adverse party whom the lawyer knows to be represented by  
4 counsel, and the adverse party states that he or she wants to discuss the matter  
5 directly without the involvement of his or her counsel. The Committee was of the  
6 opinion that the lawyer would have an ethical obligation to resolve the factual  
7 question of whether the adverse party continued to be represented by counsel. The  
8 Committee was of the opinion that before having direct contact with an  
9 adverse party, the lawyer should require that the other lawyer has actually  
10 withdrawn, have the consent of the other lawyer to have direct contact with the  
11 adverse party, or have a letter from the adverse party discharging his or her  
12 counsel. [Emphasis added.]

8 87. None of these things occurred prior to the meeting. Kovarik did not withdraw and  
9 he did not consent to the contact between DM and Respondent. Moreover, DM did not present a  
10 letter prior to the March 22, 2012 meeting terminating Kovarik. Accordingly, Respondent  
11 engaged in conversation and contact with DM, knowing that DM was represented by Kovarik in  
12 a pending lawsuit against Respondent's clients the Gianukakises.

13 88. It is almost nonsensical to argue that DM was not represented by Kovarik at the  
14 time of the meeting. The evidence presented clearly shows that the power of attorney used to  
15 hire Kovarik was signed by DM, who indicated this to Respondent during the meeting. This  
16 gave PM the authority to hire Kovarik on DM's behalf. The fact that DM did not like the lawsuit  
17 and/or did not understand that Kovarik was his attorney, and subsequently revoked the power of  
18 attorney that was used to appoint Kovarik, makes little difference as to whether he was  
19 represented by Kovarik when Respondent met with him.

20 89. It is clear that DM was represented by Kovarik up until Respondent finished  
21 interviewing DM and then concluded that it was appropriate for Respondent to assist in  
22 revoking the power of attorney. Whether it continued to be true once DM, through Respondent,  
23 revoked the power of attorney is not particularly relevant for our purposes.

24 90. It should be noted that a version of this argument has been presented by

1 Respondent. Respondent argues that if DM had capacity to sign a power of attorney for his  
2 brother, then he had capacity to revoke the power of attorney (and terminate Kovarik) while  
3 sitting in Respondent's office (and by extension that this somehow retroactively applies to  
4 Kovarik's appointment). This argument is misplaced for the reasons set forth above. Kovarik  
5 was clearly DM's attorney when Respondent met with him.

6 91. Respondent's chief concern should have been whether DM was represented by  
7 Kovarik when Respondent interviewed him about the property sale and produced several legal  
8 documents for DM's signature. Clearly, DM was represented by Kovarik. His other main  
9 concern should have been whether he could even meet with DM while also representing the  
10 Gianukakises and not create a conflict of interest between the parties, which he could not.

11 92. Respondent knew before conferring with DM that anything DM stated during the  
12 meeting could be used in favor of the Gianukakises in the pending lawsuit.

13 93. Respondent did not inform DM about the potential implications of statements he  
14 made during the meeting.

15 94. Respondent had the Gianukakises and several staff members present at the meeting  
16 as witnesses to DM's statements and behavior knowing that they could be called as witnesses in  
17 any legal proceedings.

18 95. Even if Respondent believed that DM was not represented by Kovarik, Respondent  
19 knew that it was his duty to refer DM to independent legal counsel and to cease any further  
20 communication because there were obvious conflicts of interest between DM and Respondent's  
21 existing clients, the Gianukakises. These conflicts include the fact that DM and the  
22 Gianukakises were opposing parties in a pending lawsuit, as well as purchaser and seller of the  
23 property at issue in the pending lawsuit.

1 **F. Findings of Fact Regarding Revocation of GDPOA and Release of Lis Pendens,**  
2 **Promissory Note and Deed of Trust**

3 96. During the meeting, DM disclosed to Respondent that he had recently signed a  
4 General Durable Power of Attorney (GDPOA) making his brother PM his attorney-in-fact.

5 97. Respondent asked DM whether he wanted to consult with independent counsel or  
6 have a medical exam. DM declined both. A written conflict of interest waiver was not obtained  
7 from DM or the Gianukakises.

8 98. Respondent asked whether DM wanted the land back. DM did not. DM expressed  
9 that he believed "A deal's a deal."

10 99. Respondent had his staff conduct a search through the title company. There was no  
11 record of the GDPOA being recorded in Steven County, Ferry County or Spokane County, nor  
12 with the Court in Ferry County.

13 100. Respondent explained to DM that a Revocation of Power of Attorney and Release  
14 of Lis Pendens would keep his brother from interfering with the sale of his property.

15 101. Respondent also suggested that DM sign documents to make the lis pendens  
16 ineffective.

17 102. It is highly unlikely that DM understood Respondent's explanation regarding these  
18 documents, especially the lis pendens, given Dr. Campbell and Dr. Dalley's assessment of DM's  
19 mental abilities.

20 103. Respondent did not inform DM of the implications and potential risk of harm that  
21 could result by revoking the GDPOA.

22 104. Respondent knew from his substantial trust and estates practice that clients with  
23 limited understanding are sometimes protected by a power of attorney and that revoking the  
24 GDPOA may leave DM vulnerable unless and until a guardianship was established, which

1 | could be very expensive to DM and provide DM with less independence.

2 |       105. Respondent knew or should have known from the pending lawsuit that there was a  
3 | significant risk that the revocation of the GDPOA may result in guardianship proceedings.  
4 | Respondent never revealed this risk to DM.

5 |       106. Respondent drafted a Revocation of General Power of Attorney and Release of Lis  
6 | Pendens ("Revocation and Release"). EX 21. Respondent read the document to DM and/or had  
7 | the document read to DM in front of the Gianukakises and a member of Respondent's staff.

8 |       107. Respondent summarized this document and asked whether DM understood it. DM  
9 | answered in the affirmative. DM did not ask questions of substance regarding his legal rights or  
10 | the nature of these legal documents.

11 |       108. DM signed the Revocation and Release.

12 |       109. Respondent clearly provided legal services and advice to DM while simultaneously  
13 | representing the Gianukakises while both parties were present.

14 |       110. Respondent's primary reason for obtaining the Revocation and Release was for  
15 | the Gianukakises' benefit in the pending lawsuit. Specifically, the Revocation and Release was  
16 | then used in Respondent's demand to Kovarik that the pending lawsuit against his clients, the  
17 | Gianukakises, be immediately dismissed. EX 28.

18 |       111. Respondent also prepared additional documents, including a Promissory Note,  
19 | Deed of Trust, Request for Reconveyance, and Escrow Instructions for the sale of the Hall  
20 | Creek Property. EX 21, EX 22, EX 23, EX 24, EX 30.1.

21 |       112. Respondent informed DM that the Promissory Note, Deed of Trust, and Escrow  
22 | Instructions would protect him. By doing so, Respondent again provided legal advice to DM.

23 |       113. DM signed these documents as well.

24 |       114. Respondent's drafting of the Promissory Note, Deed of Trust, and Escrow

1 Instructions raises the specter that he was protecting the interests of his clients, the  
2 Gianukakises, by making the transaction appear more conventional, thereby assisting them in  
3 their defense in the pending lawsuit. EX 43 at ¶ 11, EX 922 at 5. However, Respondent's  
4 testimony that he was simply helping both parties by drafting conventional documents is to  
5 some degree credible given that DM and the Gianukakises formerly agreed to the sale, and both  
6 expressed a desire at the meeting to have the sale go forward. The Court also considered this  
7 issue, which is discussed in more detail below.

8 115. The Promissory Note prepared by Respondent did not charge interest on the  
9 outstanding balance. EX 22. Respondent later acknowledged that this is unusual, but maintains  
10 that DM did not want interest. Respondent has testified that he did not believe it was his  
11 position to rewrite or renegotiate the terms of the underlying sale.

12 116. However, Respondent knew or should have known that DM did not fully  
13 understand the concept of interest or the concept of present value. DM does not understand  
14 financial transactions, let alone complex financial transactions such as interest, amortization  
15 schedules, and security.

16 117. An objective lawyer would have realized that a clear and unequivocal conflict of  
17 interest existed, and that there was a real risk that DM did not understand these proceedings  
18 based upon DM's decisions and behavior. While Respondent should not have met with DM in  
19 the first place, at this point in time, he should also have insisted that DM obtain independent  
20 legal counsel (or consult with his current legal counsel) and withdrawn from this meeting.

21 118. For example, an independent attorney would have likely advised DM to charge  
22 interest on the \$90,000 15-year loan. But Respondent could not do so because he was  
23 simultaneously representing the Gianukakises and recommending interest (or renegotiating the  
24 terms of sale) would be contrary to the Gianukakises' financial interests.

1 119. During the meeting, Respondent obtained information from the Ferry County  
2 Assessor's Office reflecting that the current fair market value for Hall Creek Property was  
3 \$160,900. The Ferry County Assessor's office had changed the value from \$170,000 in 2011 to  
4 \$160,900 in 2012.

5 120. An objective lawyer representing DM would have almost certainly suggested that  
6 the \$100,000 sale price may be too low given the assessed value of the Hall Creek Property, or,  
7 at a minimum, would have investigated this issue further and made sure that DM understood the  
8 nature of this transaction. This is yet another red flag that should have caused Respondent to  
9 insist on independent legal counsel for DM. An objective attorney would have immediately  
10 withdraw from representing DM and the Gianukakises in a transaction of this nature.

11 121. Respondent did not recommend to DM that the sale price should be higher, given  
12 the assessed value of Hall Creek Property. Again, to do so would be contrary to the financial  
13 interests of the Gianukakises, his paying clients.

14 122. Because DM was shown to have diminished capacity in 2005, which was again  
15 confirmed in 2012, it is credible that he did not appreciate or understand these transactions, and  
16 that he required someone to protect his interests at this meeting. Respondent could not represent  
17 the interests of DM and the Gianukakises at the same time. Their interests were not aligned.

18 **G. Findings of Fact Regarding Respondent's Contact with PM**

19 123. Respondent sent the Revocation and Release directly to PM along with a letter  
20 stating that PM's power as attorney-in-fact was revoked. EX 26. Respondent wrote the letter at  
21 the March 22nd meeting and had DM sign it after it was read to him. EX 26. A copy of the letter  
22 was sent to Kovarik. EX 26.

23 124. At the time Respondent sent these documents to PM, Respondent knew that PM  
24 was represented by Kovarik in the lawsuit filed against the Gianukakises. Respondent has

1 acknowledged this during these proceedings.

2 125. Respondent's testimony that he needed as a matter of law to send the letter directly  
3 to PM to effectively revoke the GDPOA is not credible.

4 126. Respondent's letter discusses the impact of the Revocation and Release in  
5 connection with the pending lawsuit, and also includes Respondent's Notice of Appearance in  
6 the pending lawsuit on behalf of the Gianukakises. EX 25, EX 26.

7 127. Respondent also sent Kovarik a letter that same day threatening to seek attorney  
8 fees for filing a frivolous lawsuit if the lawsuit was not dismissed within ten days. EX 28. This  
9 letter also included copies of the Revocation and Release and Respondent's Notice of  
10 Appearance.

11 128. By doing so, Respondent had direct contact with PM who was represented by legal  
12 counsel in the pending lawsuit.

13 **H. Findings of Fact Regarding Payment by the Gianukakises**

14 129. The Gianukakises paid for the legal services provided by Respondent, including  
15 the services related to preparing the Revocation and Release for DM. EX 33. Respondent  
16 charged the Gianukakises 4.1 hours of attorney time, which represented the 1.6 hour meeting as  
17 well as additional legal services. EX 31.

18 130. Respondent acknowledged at the hearing that he accepted compensation from the  
19 Gianukakises for providing legal services to DM. TR 444: 13-16.

20 131. Respondent did not obtain informed consent from DM or the Gianukakises before  
21 accepting compensation from the Gianukakises.

22 **I. Findings Regarding Respondent's Role in the Guardianship and Vulnerable Adult**  
23 **Statute Case**

24 132. Respondent had no contact with DM after the March 22, 2012 meeting.

1           133. On or around March 28, 2012, Linda Hansen (Hansen) discussed the March 22nd  
2 meeting with DM. Hansen later testified at the hearing that DM believed he still owned the Hall  
3 Creek Property until it was fully paid off. TR 212-214. Hansen also testified that DM had no  
4 recollection or understanding of the significance of the documents that he signed at the March  
5 22nd meeting, including the Revocation and Release. TR 212-214.

6           134. DM's lack of understanding regarding the property transaction was also confirmed  
7 in interviews by Craig Hirt from Adult Protection Services (TR 196-205) and other witnesses.  
8 This testimony is credible. DM did not fully recall or understand the documents that he signed  
9 at the March 22nd meeting, nor did he understand the terms of the sale other than in the most  
10 basic of terms (e.g., that he agreed to sell the property).

11           135. As a result of the sale, DM's family decided to move DM to Spokane for his  
12 protection.

13           136. The Revocation and Release sent by Respondent to Kovarik and PM effectively  
14 delayed the lawsuit filed by Kovarik until after a guardianship was established in July 2012. EX  
15 49-51.

16           137. DM's family hired lawyer Chis Lee (Lee) to pursue the guardianship for DM, as  
17 well as a Vulnerable Adult Protection Action (VAP Action) against Gianukakis relating to the  
18 sale of the Hall Creek Property. DM's nephew was the petitioner for both actions.

19           138. On April 2, 2012, the guardianship action for DM was commenced. The court  
20 appointed lawyer Helen Hokom (Hokom) to serve as DM's guardian ad litem (GAL).

21           139. The reason for filing the guardianship was largely due to the sale of Hall Creek  
22 Property and the subsequent revocation of the GDPOA. EX 35 at 4-5.

23           140. On April 2, 2012, the VAP Action for DM was filed against Gianukakis.

24           141. One of the stated reasons for filing the VAP Action was to restrain the sale or

1 encumbrance of the Hall Creek Property by Gianukakis. EX 43.1 at 4, 8. EX 43.2 at 2.

2 142. Respondent entered a Notice of Appearance in the VAP Action on behalf of the  
3 Gianukakises. EX 43.3. Respondent's representation of the Gianukakises also extended to some  
4 degree to the pending guardianship. EX 42, EX 52 at 2.

5 143. It is clear and unequivocal from the record that Respondent continued to represent  
6 the Gianukakises after the March 22, 2012 meeting by providing them with ongoing legal  
7 services in all three proceedings, as follows: (1) the lawsuit filed by Kovarik against the  
8 Gianukakises, (2) the guardianship proceedings, and (3) the VAP Action. This representation  
9 included drafting letters, filing pleadings, appearing at the VAP Action hearing, arguing in favor  
10 of the Gianukakises' position and against DM's stated position, and providing other legal  
11 services on behalf of the Gianukakises.

12 144. Respondent's subsequent representation of the Gianukakises was substantially  
13 related to Respondent's representation of DM on March 22, 2012. EX 35, EX 43.1.

14 145. Respondent did not obtain a written conflict of interest waiver from DM or the  
15 Gianukakises at any time.

16 146. An ongoing conflict of interest existed between the Gianukakises and DM. For  
17 example, the VAP Action and the guardianship both involved the purchase and sale of the Hall  
18 Creek Property, including the documents Respondent drafted for DM and the Gianukakises. EX  
19 35, EX 43.1, EX 43.2.

20 147. Pleadings in these actions raise material allegations involving Respondent's role as  
21 legal counsel for DM and the Gianukakises with regard to the Revocation and Release.

22 148. For example, the petition of guardianship alleges:

23 "The general durable power of attorney has proved ineffective because, as recent  
24 events confirm, [DM] can be unduly influenced to terminate such durable power  
of attorney documents. To prevent future similar occurrences, a guardianship is

1 needed." EX 35 at 5.

2 149. For example, the Petition for Vulnerable Adult Order for Protection alleges:

3 "On or around March 22nd, 2012, in a brazen act of exploitation, respondent  
4 Gianukakis drove DM down to an attorney in Colville, WA. The attorney had DM  
5 sign a revocation of all general durable Powers of Attorney held by PM which  
6 were referenced in the complaint against respondent Gianukakis. The attorney had  
7 DM remove the lis pendens on the property. The attorney had John grant DM a  
8 deed of trust, and had DM sign a re-conveyance of the property for the following  
9 terms ... The same attorney entered a Notice of Appearance on behalf of  
10 respondent Gianukakis in the action brought by PM as DM's attorney in fact." EX  
11 43.1 at 7-8.

12 150. On April 6, 2012, Lee sent a number of documents to Respondent, including the  
13 2005 DSHS Physicians Certification for Medicaid stating that DM "can't read or write except  
14 name" and was diagnosed with "mental retardation" and an IQ of 65. EX 2. EX 38.

15 151. Mr. Lee's letter stated that:

16 It is clear at the time that you met with [DM] you knew that he was a party in  
17 litigation against John Gianukakis and represented by Mr. Kovarik. You also were  
18 aware that the complaint set forth that [DM] "is a single man of diminished  
19 capacity who is unable to understand the nature, terms and effect of financial and  
20 business transactions." That statement is contained in the same paragraph that is  
21 referenced in the revocation. Nevertheless, you met with [DM], a person of  
22 diminished capacity, unrepresented, in your office, having been taken there by  
23 your client, and had him execute a document that was favorable to your client in a  
24 litigation you later appeared as counsel. EX 38 at 2.

152. Respondent did not reply to Lee's allegations.

153. On April 16, 2012, Respondent wrote a letter to Hokom on behalf of the  
154 Gianukakises stating, "I highly recommend that a current independent Physician and/or Clinical  
155 Psychologist re-evaluate the condition of DM, as the Physician Statement provided to me is  
156 dated July 6, 2005." EX 42 at 2. This same letter asked the GAL to have independent legal  
157 counsel appointed for DM to represent his best interests. EX 42 at 2.

158 154. It is clear from the record, including the allegations in the pleadings and letters,  
159 that the underlying conflict of interest between DM and the Gianukakises should have been well

1 known to Respondent by this time. This conflict of interest could not be waived under RPC 1.7.  
2 Regardless, Respondent continued to ignore these issues and represent the Gianukakises without  
3 attempting to obtain a conflict of interest waiver from either DM or the Gianukakises.

4 155. Accordingly, Respondent knowingly continued to represent the Gianukakises  
5 while a clear conflict of interest existed. A reasonable attorney would not believe that the  
6 interests of DM and the Gianukakises were aligned or that he or she could continue under the  
7 circumstances.

8 **J. Additional Findings Regarding the Vulnerable Adult Statute Case and**  
9 **Guardianship Proceedings**

10 156. As part of the preparation for the vulnerable adult hearing, the family arranged for  
11 DM to be evaluated by Dr. Brian Campbell, PhD, a Spokane Psychologist. EX 46, EX 47.

12 157. On May 21, 2012, Dr. Campbell issued an assessment and letter explaining his  
13 findings. EX 46, EX 47. Dr. Campbell recommended that a guardianship be established to  
14 protect DM. EX 46, EX 47.

15 158. According to the assessment, Dr. Campbell's testing reflected substantial  
16 compromised verbal and language abilities, problem solving, executive functioning,  
17 concentration, attention, reading, mathematics, and general intellectual abilities. EX 46, EX 47.  
18 Dr. Campbell opined that the Hall Creek Property real estate transaction should be "invalidated  
19 based on DM's inability to read, comprehend, and appreciate the nature or consequences of the  
20 transaction." EX 46 at 15.

21 159. On May 23, 2012, Respondent was provided with copies of the assessments  
22 performed by Dr. Campbell in 2012 and by Dr. Mahlon in 2005. This was the first time  
23 Respondent received either assessment.

24 160. On May 25, 2012, prior to the guardianship hearing, the Court held a hearing

1 regarding the VAP Action. EX 44.

2 161. Respondent attended the May 25, 2012 hearing and argued at length on behalf of  
3 the Gianukakises. EX 44. It should be noted that Lee, attorney for DM at the hearing,  
4 specifically alleged overreaching by Respondent at the March 22, 2012 meeting:

5 "But he did something that put DM, a person with an 65 IQ who can't read and  
6 write, in an aspect of extreme danger because there was now nobody, nobody who  
7 had any authority to act or protect him ... basically they were willing to leave DM  
8 unprotected and in question about who could do anything for him because DM  
9 signed a document that said I'm revoking all my powers of attorney." EX 44 at 11.

10 162. It is clear that Lee was implying impropriety on behalf of Respondent with regard  
11 to his representation of DM at the March 22, 2012 meeting, which is a foreseeable argument  
12 under the circumstances. This serves as additional evidence of the ongoing conflict of interest  
13 created by Respondent's dual representation at the March 22, 2012 meeting. An objectively  
14 reasonable attorney would not have presented argument on behalf of the Gianukakises at the  
15 VAP Action when that same attorney represented the opposing party in the underlying  
16 transaction. This is a clear violation of RPC 1.7.

17 163. During this hearing, the Court found that DM was a vulnerable adult under the  
18 statute who is susceptible to exploitation. EX 44 at 19-20. However, the Court ruled that the  
19 evidence before it for its "limited purposes" was "insufficient to find that there has been an act  
20 of financial exploitation within the definition of RCW 74.34.020." EX 44 at 25. The Court  
21 specifically reserved several issues for the other proceedings, including whether there was a  
22 basis for undoing the property transaction, issuing an injunction, or for damages. EX 44 at 25.

23 164. It is worth noting that the Court expressed some concern over the events of March  
24 22, 2012, as follows:

"Now as Mr. Lee points out, that can cut both ways. Come see my attorney and  
we'll get you past this issue with your brother which you evidently just signed  
recently providing him with the ability to be your attorney-in-fact. That does

1 concern me. There's not really much of a record developed for how that occurred.  
2 But I focus on the real estate portion ..." EX 44 at 24.

3 165. The Court goes on to analyze the case from the perspective of RCW 74.34.020. It  
4 is not particularly useful in the instant case to revisit these arguments and conclusions, suffice it  
5 to say that the Court did not tackle any of the ethical concerns regarding conflict of interest  
6 alleged by the Office of Disciplinary Counsel in these proceedings.

7 166. On June 4, 2012, Hokom issued her GAL report recommending, among other  
8 things, that a permanent limited guardianship be established for DM and that PM be appointed  
9 full guardian of DM's estate and limited guardian of the person. EX 48 at 1.

10 167. It was the GAL's opinion that DM did not have capacity to sign legal documents.  
11 EX 48 at 5. The GAL's recommendation was consistent with the neurological assessments  
12 performed by Dr. Campbell in April and May 2012. See EX 46, EX 47.

13 168. On June 29, 2012, the court adopted Hokom's recommendations and appointed  
14 PM as DM's full guardian of the estate and limited guardian of the person. EX 48.1 at 9.

15 169. In the same Order, the court ordered DM's estate to pay GAL fees and costs of  
16 \$4,763.54 and Lee's legal fees of \$7,557.70. EX 48.1 at 13, EX 300 at 36.

17 170. After the guardianship was established, Gianukakis engaged in direct negotiations  
18 with PM to resolve the original lawsuit.

19 171. On July 27, 2012, the Gianukakis signed a stipulation agreeing to rescind the  
20 sale of the Hall Creek Property thereby resolving the lawsuit filed by Kovarik. EX 48-50.

21 172. On August 8, 2012, the Court entered a stipulated dismissal, thereby dismissing the  
22 lawsuit. EX 51.

23 173. DM's family incurred \$35,632.67 in attorney fees between March 22, 2012 and  
24 June 29, 2012. These fees can be attributed primarily to DM's desire to sell the Hall Creek

1 | Property to Gianukakis, which was inconsistent with his family's desires and wishes for DM.

2 |       174. While the Office of Disciplinary Counsel has asked that these fees be attributed in  
3 | full to Respondent's behavior in drafting the Revocation and Release, to be fair, this did not  
4 | occur in a vacuum. Our analysis must take into account the fact that DM agreed to sell the  
5 | property to Gianukakis long before Respondent's involvement, and Gianukakis declined to give  
6 | up the property without a fight. Moreover, the Court ultimately declined to find financial  
7 | exploitation by Gianukakis after reviewing the appraisals and other evidence material to those  
8 | proceedings. DM's family did not prevail in that action.

9 |       175. Accordingly, the petition for guardianship was as much a function of DM's family  
10 | protecting DM from his own decisions as anything else. Clearly, Respondent was not involved  
11 | in the initial agreement to sell the property, nor did he suggest the terms of the underlying sale.  
12 | While it can be argued that Respondent's behavior prolonged these proceedings to some degree,  
13 | this does not rise to a clear preponderance of the evidence required to make Respondent  
14 | responsible for all legal fees incurred by DM's family, especially since the Gianukakis might  
15 | just as well have hired another attorney in the place of Respondent and kept fighting. In sum,  
16 | the other factors contributed to the attorney fees to a much greater degree.

17 |       **K. Findings Regarding Respondent's Post Grievance Conduct**

18 |       176. There are several troubling issues surrounding Respondent's conduct following the  
19 | grievance filed against him on or around August 21, 2013. First and foremost, Respondent has  
20 | declined to take meaningful responsibility for his actions. These actions include, but are not  
21 | limited to representing DM and the Gianukakis at the March 22, 2012 meeting, continuing to  
22 | represent the Gianukakis for several months thereafter in related proceedings, accepting  
23 | payment for DM's representation from the Gianukakis, and having direct communication  
24 | (twice) with an opposing party represented by legal counsel. Some of these issues are clearer

1 | than others, however, it is difficult to accept Respondent's position that he did not know a  
2 | conflict of interest existed between DM and the Gianukakises. This is particularly difficult to  
3 | accept given the allegations in the above pleadings, the letters in the file, and Respondent's  
4 | zealous representation of the Gianukakises' interests over those of DM.

5 |         177. In addition, on September 4, 2013, Respondent submitted a response to the  
6 | grievance provided by the Office of Disciplinary Counsel. EX 501. In his response, Respondent  
7 | maintained that DM was not of diminished capacity. His response also omitted any documents  
8 | reflecting DM's diminished capacity, including Dr. Campbell's assessment, Dr. Mahlon's  
9 | assessment, and the declarations filed in support of the VAP Action. However, the record  
10 | clearly shows that Respondent was in possession of these documents at the time. While it is  
11 | generally understood that an attorney wants to present his best case, Respondent's behavior  
12 | raises the specter of misrepresentation by omission or, at a minimum, an attempt to finesse the  
13 | facts in this case to conceal his mistakes.

14 |         178. Respondent's response avoided any discussion of the RPC 4.2 issue and the  
15 | conflict of interest issues. EX 501.

16 |         179. On March 19, 2015, the Office of Disciplinary Counsel sent Requests for  
17 | Admission asking Respondent to admit that DM has diminished capacity. EX 600 ¶¶ 2, 80, 81,  
18 | 82, 83, 84, 85, 86, 87, 88, 92, 93. Respondent denied or did not admit these requests for  
19 | admission. EX 601. Instead, Respondent answered only that he did not know about DM's  
20 | diminished capacity on March 22, 2012. EX 601.

21 |         180. This was again reflected in Respondent's testimony at the hearing when he argued  
22 | at length with ODC counsel about the premise behind these Requests for Admission.  
23 | Respondent stressed multiple times that he did not know DM had diminished capacity at the  
24 | March 22, 2012 meeting, and implied that the analysis should end there. However, this is not

1 | credible for the reasons set forth above. Respondent knew the allegations in the summons and  
2 | complaint, and went forward with his representation of DM nonetheless.

3 | 181. Whether Respondent took a calculated risk, or just declined to believe the  
4 | allegations in the complaint, he was ultimately shown to be incorrect. It would have been more  
5 | in line with Respondent's reputation for him to acknowledge this fact, which has been proven  
6 | several times over, rather than continue to fight this issue.

7 | 182. In sum, Respondent's behavior suggests an inability to recognize one of the  
8 | primary concerns in this case, that is, that DM has diminished capacity and has been vulnerable  
9 | to exploitation throughout these proceedings. This very fact made Respondent's decisions at the  
10 | March 22, 2012 meeting that much more dangerous for DM, who lacks the capacity to make  
11 | meaningful financial decisions for himself. This was the real threat of harm in this case, which  
12 | will be discussed in more detail below.

13 | CONCLUSIONS OF LAW

14 | VIOLATION ANALYSIS

15 | The Hearing Officer finds that the Office of Disciplinary Counsel proved the following  
16 | by a clear preponderance of the evidence:

17 | 183. COUNT 1. By having direct contact with DM on March 22, 2012, after being  
18 | provided with the summons, complaint and lis pendens reflecting that DM was represented by  
19 | Kovarik, Respondent violated RPC 4.2.

20 | 184. It is clear from the record that DM was represented by Kovarik at the time of the  
21 | March 22, 2012 meeting. Respondent admits having read the summons, complaint and lis  
22 | pendens before meeting with DM. This includes the portions set forth above that indicate DM  
23 | was the named plaintiff in a lawsuit against Respondent's existing clients the Gianukakis.

24 | 185. Respondent's testimony that he believed DM's brother to be the only person

1 represented in the lawsuit is not credible.

2 186. Respondent's behavior of reading these documents and then questioning DM at  
3 length to determine, among other things, whether he was actually represented by legal counsel  
4 was inappropriate. WSBA Ethics Opinion #1307 regarding RPC 4.2 is instructive in this regard.  
5 Furthermore, given DM's diminished capacity, it is clear that he did not understand the nature of  
6 Kovarik's legal representation.

7 187. **COUNT 2.** Count 2 is presented in the alternative to Count 1. Having found  
8 Respondent to have committed Count 1, Count 2 is no longer pending.

9 188. **COUNT 3.** By having direct contact with DM's brother, PM, knowing that he was  
10 a represented person in a pending lawsuit, Respondent violated RPC 4.2.

11 189. Respondent admits sending a letter and Notice of Appearance to PM, and sending  
12 copies to Kovarik. Respondent acknowledges that PM was represented by Kovarik at the time.  
13 WSBA Ethics Opinion #1000 regarding RPC 4.2 is instructive in this regard. By doing so,  
14 Respondent had direct contact with a party represented by legal counsel.

15 190. **COUNT 4.** By simultaneously providing legal representation and services to DM  
16 and to the Gianukakises on March 22, 2012, in connection with the pending lawsuit in which  
17 DM and the Gianukakises were opposing parties, and in connection with the sale of the Hall  
18 Creek Property in which DM was the seller and the Gianukakises were the purchasers,  
19 Respondent violated RPC 1.7.

20 191. The interests of DM and the Gianukakises were directly adverse in the pending  
21 lawsuit to such an extent that the conflict of interest was not waivable.

22 192. To the extent that any conflicts could be waived, Respondent failed to obtain  
23 informed consent in writing from DM and the Gianukakises as required by RPC 1.7.

24 193. **COUNT 5.** By accepting compensation from the Gianukakises for providing legal

1 services to DM on March 22, 2012, Respondent violated RPC 1.8(f).

2 194. Respondent failed to obtain informed consent from DM regarding this issue.

3 195. The record shows that there was interference with Respondent's independent  
4 professional judgment and with the attorney-client relationship, including (1) Respondent had  
5 the Gianukakises present during the entire time that he provided legal services to DM; (2)  
6 Respondent failed to advise DM regarding issues of confidentiality, including the fact that those  
7 present could be called as potential witnesses in future proceedings; (3) Respondent failed to  
8 reasonably protect DM's interests knowing that he may be a person of diminished capacity; (4)  
9 Respondent failed to take reasonable steps to make sure that DM's interests in the property sale  
10 were protected; and (5) by revoking the GDPOA, Respondent left DM without protection unless  
11 and until a guardianship was filed.

12 196. **COUNT 6(1)**. By representing the Gianukakises in the lawsuit filed by Kovarik,  
13 and by representing the Gianukakises in the VAP Action, without obtaining informed consent in  
14 writing from DM, Respondent violated RPC 1.9(a).

15 197. These matters were substantially related to the legal representation provided to DM  
16 at the March 22, 2012 meeting. Respondent's representation in these proceedings was materially  
17 adverse to his former client DM.

18 198. **COUNT 6(2)**. By using information from his former representation of DM in  
19 subsequent legal proceedings, Respondent violated RPC 1.9(c).

20 199. Respondent revealed information relating to his representation of DM during the  
21 VAP Action and related guardianship. This was to the advantage of the Gianukakises and  
22 disadvantage of DM. EX 922, EX 923, EX 45 at 10.

23 200. **COUNT 7. DISMISSED BY THE OFFICE OF DISCIPLINARY COUNSEL.**

24 201. **COUNT 8(1)**. The Office of Disciplinary Counsel has not shown by a

1 | preponderance of the evidence that Respondent's behavior rises to the level of violating RCP  
2 | 8.4(c), engaging in conduct involving dishonesty.

3 |         202. There has been considerable testimony in these proceedings regarding the sale  
4 | price of the property and whether this was a reasonable figure given similar property values.  
5 | There is no evidence that Respondent intentionally endorsed this purchase price because it  
6 | favored his clients, the Gianukakis, in an attempt to exploit DM. To the contrary, the evidence  
7 | shows that DM wanted to sell the property for this price, and the agreement was entered into  
8 | long before Respondent's involvement.

9 |         203. Furthermore, there are disagreements as to the actual value of the property. Similar  
10 | evidence was considered by the Court in the VAP Action, including appraisals of comparable  
11 | properties. The Court did not find exploitation.

12 |         204. **COUNT 8(2)**. By meeting with DM while knowing that he is a person of  
13 | diminished capacity, and/or when the facts available to Respondent indicated this to be true,  
14 | Respondent violated RPC 8.4(d), engaging in conduct that is prejudicial to the administration of  
15 | justice.

16 |         205. The facts in this case overwhelmingly show that DM has diminished capacity. This  
17 | truth was readily available to Respondent who consciously chose to ignore it even though the  
18 | risk of harm to DM was foreseeable and considerable.

19 |         206. Respondent received written notice of DM's diminished capacity in the summons,  
20 | complaint and lis pendens, and decided to meet with him anyway. Ultimately, Respondent  
21 | assisted in revoking the power of attorney, stripping DM of his protections provided by his  
22 | existing legal counsel. An objectively reasonable attorney would not have met with DM under  
23 | these circumstances, and would not have prepared documents intended to terminate opposing  
24 | counsel's role in a pending lawsuit.

1 **PRESUMPTIVE SANCTION ANALYSIS**

2 207. **COUNT 1.** Respondent communicated with DM in violation of RCP 4.2.

3 208. ABA Standard 6.32 states that suspension is generally appropriate when a lawyer  
4 engages in communication with an individual when the lawyer knows that such communication  
5 is improper, and causes injury or potential injury to a party or causes interference or potential  
6 interference with the outcome of the legal proceeding.

7 209. Respondent knew that DM was represented by Kovarik at the time of the March  
8 22, 2012 meeting, and elected to meet with him anyway for approximately 1.6 hours.  
9 Respondent knew that such communication was improper, and knew that his actions at the  
10 March 22, 2012 meeting had a potential to injure DM, who has diminished capacity.

11 210. Suspension is the presumptive sanction for Respondent's behavior under ABA  
12 Standard 6.32.

13 211. **COUNT 2.** Count 2 is presented in the alternative to Count 1. Having found  
14 Respondent to have committed Count 1, Count 2 is no longer pending.

15 212. **COUNT 3.** Respondent had direct contact with DM's brother, PM, in violation of  
16 RPC 4.2.

17 213. ABA Standard 6.34 states that admonition is generally appropriate when a lawyer  
18 engages in an isolated instance of negligence in improperly communicating with an individual  
19 in the legal system, and causes little or no actual or potential injury to a party or the outcome of  
20 the legal proceedings.

21 214. Respondent sent correspondence directly to PM with the purpose of revoking the  
22 power of attorney. Respondent may have negligently believed this to be lawful at the time. This  
23 was an isolated event. Because Respondent also sent a copy of the letter and his Notice of  
24 Appearance to PM's attorney, the potential for harm was not substantial.

1           215. Admonition is the presumptive sanction for Respondent's behavior under ABA  
2 Standard 6.34.

3           216. **COUNT 4.** Respondent represented both DM and the Gianukakises in violation of  
4 RPC 1.7.

5           217. ABA Standard 4.32 states that suspension is generally appropriate when a lawyer  
6 knows of a conflict of interest and does not fully disclose to a client the possible effect of that  
7 conflict, and causes injury or potential injury to a client.

8           218. Respondent knew that a conflict of interest existed between DM and the  
9 Gianukakises at the March 22, 2012 meeting. DM and the Gianukakises were opposing parties  
10 in a lawsuit, and were the buyer and seller of the property at issue in the lawsuit. Respondent  
11 could not have reasonably believed that their interests were aligned.

12           219. Respondent knew that his actions had a potential to injure DM, who has  
13 diminished capacity.

14           220. Suspension is the presumptive sanction for Respondent's behavior under ABA  
15 Standard 4.32.

16           221. **COUNT 5.** Respondent accepted compensation from the Gianukakises for  
17 providing legal services to DM in violation of RPC 1.8(f).

18           222. ABA Standard 4.32 states that suspension is generally appropriate when a lawyer  
19 knows of a conflict of interest and does not fully disclose to a client the possible effect of that  
20 conflict, and causes injury or potential injury to a client.

21           223. Respondent failed to obtain informed consent from DM regarding this issue.

22           224. Respondent knew that his actions had a potential to injure DM, who has  
23 diminished capacity. Respondent failed to properly protect DM's interests, and placed the  
24 interests of his other clients, the Gianukakises, ahead of DM's interests.

1           225. Suspension is the presumptive sanction for Respondent's behavior under ABA  
2 Standard 4.32.

3           226. COUNT 6(1). Respondent represented the Gianukakises after the March 22, 2012  
4 meeting without obtaining informed consent from DM in violation of RPC 1.9(a).

5           227. ABA Standard 4.32 states that suspension is generally appropriate when a lawyer  
6 knows of a conflict of interest and does not fully disclose to a client the possible effect of that  
7 conflict, and causes injury or potential injury to a client.

8           228. Throughout these proceedings, the interests of the Gianukakises were materially  
9 adverse to DM, who was the opposing party in a pending lawsuit to rescind the sale of the Hall  
10 Creek Property.

11           229. Respondent failed to obtain informed consent from either party regarding this  
12 issue.

13           230. Suspension is the presumptive sanction for Respondent's behavior under ABA  
14 Standard 4.32.

15           231. COUNT 6(2). Respondent used information obtained through his representation of  
16 DM in subsequent legal proceedings in violation of RPC 1.9(c).

17           232. ABA Standard 4.31(c) states that disbarment is generally appropriate when a  
18 lawyer, without the informed consent of a client, represents a client in a matter substantially  
19 related to a matter in which the interests of a present or former client are materially adverse, and  
20 knowingly uses information relating to the representation of a client with the intent to benefit  
21 the lawyer or another, and causes serious or potentially serious injury to a client.

22           233. Respondent knowingly used information relating to his representation of DM when  
23 he submitted the Gianukakises' supporting declarations that describe DM's actions at the March  
24 22, 2012 meeting. EX 922 at 5, EX 923 at 2.

1           234. A close review of the declarations shows that they were used to argue that DM did  
2 not authorize the lawsuit against the Gianukakis and desired to sell the property to the  
3 Gianukakis. EX 922 at 5, EX 923 at 2.

4           235. The VAP Action was eventually dismissed, the guardianship established, and the  
5 sale of the Hall Creek Property rescinded by agreement of the parties. While DM's interested  
6 were not seriously harmed in the long term, it is clear that Respondent's actions had the  
7 potential to harm DM, who has diminished capacity.

8           236. However, there are few details in these declarations involving the March 22, 2012  
9 meeting. Moreover, the declarations set forth the testimony of John Gianukakis, who also  
10 attended the meeting. The content of this testimony also appears in other documents and was  
11 generally known by everyone involved to be at the heart of the dispute. The extent of  
12 Respondent's involvement in the content in these declarations it is not clear from the record,  
13 though one of these documents has the name of Respondent's firm in the lower right corner and  
14 was obviously prepared by Respondent's firm.

15           237. While it does raise the specter of using information gleaned from a previous client  
16 against that client at a later proceeding, this scenario seems to fit better with ABA Standard 4.32  
17 (above) and the previous analysis involving conflict of interest. Respondent knew of the  
18 conflict, did not disclose the conflict, and caused potential injury to DM.

19           238. Suspension is the presumptive sanction for Respondent's behavior under ABA  
20 Standard 4.32.

21           239. **COUNT 7. DISMISSED BY THE OFFICE OF DISCIPLINARY COUNSEL.**

22           240. **COUNT 8.** Respondent met with DM while knowing that he is a person of  
23 diminished capacity, and/or when the facts available to Respondent indicated this to be true, in  
24 violation of RPC 8.4(d).

1           241. ABA Standard 7.2 states that suspension is generally appropriate when a lawyer  
2 knowingly engages in conduct that is a violation of a duty owed as a professional and causes  
3 injury or potential injury to a client, the public, or the legal system.

4           242. Respondent is bound by our Rules of Professional Conduct. The preamble of these  
5 rules states that we, as attorneys, have an obligation to maintain the highest standards of ethical  
6 conduct. The preamble states as follows:

7           "Virtually all difficult ethical problems arise from conflict between a lawyer's  
8 responsibilities to clients, to the legal system and to the lawyer's own interest in  
9 remaining an ethical person while earning a satisfactory living. The Rules of  
10 Professional Conduct often prescribe terms for resolving such conflicts. Within  
11 the framework of these Rules, however, many difficult issues of professional  
12 discretion can arise. Such issues must be resolved through the exercise of  
sensitive professional and moral judgment guided by the basic principles  
underlying the Rules. These principles include the lawyer's obligation  
conscientiously and ardently to protect and pursue a client's legitimate interests,  
within the bounds of the law, while maintaining a professional, courteous and  
civil attitude toward all persons involved in the legal system."

13           243. Respondent's behavior toward DM throughout these proceedings shows a certain  
14 disregard for DM's welfare and protection. Respondent did not place DM's wellbeing on equal  
15 footing with his other clients, the Gianukakises. Nor did Respondent exercise reasonable  
16 precautions or act in an objectively reasonable manner prior to meeting with DM, a man with  
17 diminished capacity who was particularly vulnerable.

18           244. Suspension is the presumptive sanction for Respondent's conduct under ABA  
19 Standard 7.2.

20           245. **PRESUMPTIVE SANCTION.** Where there are multiple ethical violations, the  
21 "ultimate sanction imposed should at least be consistent with the sanction for the most serious  
22 instance of misconduct among a number of violations; it might well be and generally should be  
23 greater than the sanction for the most serious misconduct." In re Disciplinary Proceeding  
24 Against Petersen, 120 Wn.2d 833, 854, 846 P.2d 1330 (1993) (quoting ABA Standards at 6).

1 Here, the presumptive sanction for the most serious instances of misconduct is suspension.

2 **ANALYSIS OF AGGRAVATING FACTORS**

3 246. After misconduct has been established, aggravating and mitigating circumstances  
4 may be considered in deciding what sanction to impose. The following aggravating factors in  
5 ABA Standard 9.22 apply to this case.

6 247. **Multiple Offenses.** Respondent engaged in multiple violations, including RPC 4.2,  
7 RPC 1.7, RPC 1.8(f), RPC 1.9(a) and (c), and RPC 8.4(d). However, this cuts both ways.  
8 Almost all of these violations stem from Respondent's representation of DM and the  
9 Gianukakises and involve the inherent conflict of interest between these two clients. It is worth  
10 remembering that Respondent met with DM on March 22, 2012, and the lawsuit regarding the  
11 Hall Creek Property was settled between the parties on August 8, 2012. EX 50. This series of  
12 events spanned approximately four and a half months.

13 248. **Refusal to Acknowledge Wrongful Nature of Conduct.** Respondent has not  
14 acknowledged the wrongful nature of his misconduct other than to suggest during testimony that  
15 he would have done things differently if he knew about DM's diminished capacity at the time of  
16 the meeting. In re Disciplinary Proceeding Against McGrath, 178 Wn. 2d 280, 305, 308 P.3d  
17 615 (2013) (Failure to admit wrongful conduct applies 'to an attorney who admits he engaged in  
18 the alleged conduct' and yet 'denies the conduct was wrongful.').

19 249. **Vulnerability of Victim.** The Supreme Court held that to show a vulnerable  
20 victim, "the record must show an attorney's victims were 'under [a] physical or mental  
21 disability or [were] otherwise particularly vulnerable.'" In re Disciplinary Proceeding Against  
22 VanDerbeek, 153 Wn.2d 64, 93, 101 P.3d 88, 96-97 (2004). There is overwhelming evidence  
23 from the assessments by Dr. Campbell and Dr. Mahlon and other witnesses that DM suffered  
24 from mild mental retardation, serious cognitive and mental disabilities, and was particularly

1 | vulnerable to exploitation.

2 |       **250. Substantial Experience in the Practice of Law.** Respondent's own testimony  
3 | reflects that he has had substantial experience in the practice of law. Respondent was admitted  
4 | to practice in 1982 and has had significant experience with legal matters. Respondent has had  
5 | experience representing clients with mental disabilities and diminished capacity.

6 | **ANALYSIS OF MITIGATING FACTORS**

7 |       251. The following mitigating factors in ABA Standard 9.32 apply to this case.

8 |       **252. Absence of a Prior Disciplinary Record.** Respondent has no prior discipline.

9 |       **253. Character and Reputation.** Respondent presented substantial evidence and  
10 | witnesses demonstrating his good character and reputation. Two Superior Court Judges  
11 | appeared and testified on behalf of Respondent.

12 |       **Absence of a Dishonest or Selfish Motive.** Despite Respondent's mistakes, the record  
13 | does not reflect that he had a dishonest or selfish motive. Rather, it appears that an otherwise  
14 | good attorney got caught up in the over-zealous representation of his clients, the Gianukakises,  
15 | and (knowingly) turned a blind eye to the ethical duties and responsibilities he owed to DM  
16 | from the moment they sat down together in Respondent's office.

17 |       254. The aggravating factors slightly outweigh the mitigating factors by 4 to 3 in  
18 | number. The vulnerability of DM is of particular concern. That said, many of these ethical  
19 | violations stem from the same issue (conflict of interest) in a short time span, and the evidence  
20 | presented in favor of Respondent's reputation and character is compelling. The property was  
21 | returned and no apparent harm came to DM. Respondent was not involved in the original  
22 | agreement between DM and the Gianukakises. Ultimately, the guardianship is in DM's best  
23 | interest to prevent him from making similar decisions again. Accordingly, a balancing of the  
24 | aggravating and mitigating factors justifies a decrease in the degree of discipline to be imposed.

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RECOMMENDATION

255. "A period of six months is generally the accepted minimum term of suspension."

In re Cohen, 149 Wn.2d 323, 67 P.3d 1086, 1094 (2003).

256. Here, there is nothing to be gained by suspending Respondent for more than six months given the facts of this case. The minimum presumptive sanction should be imposed.

257. The Hearing Officer recommends that Respondent be suspended from the practice of law for six (6) months. His reinstatement should be conditioned upon (1) the successful completion of 6.00 CLE credits in the area of ethics specifically dealing with conflict of interest, and (2) paying any costs and expenses assessed in this disciplinary proceeding.

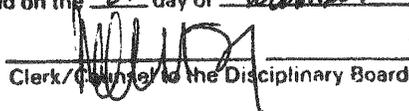
DATED this 3 day of December, 2015.



Kenneth B. Gorton, Bar No. 37597  
Hearing Officer

CERTIFICATE OF SERVICE

I certify that I caused a copy of the FOI, COI & HO's Recommendation  
to be delivered to the Office of Disciplinary Counsel and to be mailed  
to LEAH RIPLEY Respondent/~~Respondent's Counsel~~  
at PO BOX 1302 DURHAM, NH 03824 by Certified/first class mail  
postage prepaid on the 3<sup>rd</sup> day of December, 2015

  
Clerk/Counsel to the Disciplinary Board

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the 22<sup>nd</sup> day of August, 2016, I personally served a copy of the attached APPELLANTS' BRIEF on Rubye Ames by placing a copy in the US Mail with postage prepaid addressed to the persons hereinafter named:

**ATTORNEY FOR RESPONDENTS**

Dennis W. Clayton  
Attorney at Law  
287 E. Astor Avenue  
Colville, WA 99114

I certify under penalty of perjury under the laws of the State of Washington the foregoing is true and correct.

SIGNED August 22, 2016 at Valley, Washington.

  
\_\_\_\_\_  
Wesley B. Ames