
IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE DISCIPLINARY PROCEEDING AGAINST
TIMOTHY W. CARPENTER (RESPONDENT),
Lawyer (Bar No. 5882).

**ANSWERING BRIEF OF THE
WASHINGTON STATE BAR ASSOCIATION**

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I. INTRODUCTION

Respondent Timothy W. Carpenter engaged in conflicts of interest by representing co-defendants and (1) not withdrawing when it became apparent that the co-defendants had adverse interests, and then (2) representing one of the former co-defendants against the other in a suit for indemnification. Respondent appeals from the decision of the Disciplinary Board (the Board) imposing a two-month suspension for these conflicts of interest.

II. COUNTERSTATEMENT OF THE ISSUES

1. Rule 1.7(b) of the Rules of Professional Conduct (RPC) prohibits a lawyer from representing a client if that representation will be materially limited by the lawyer's obligation to another client. RPC 1.15(a)(1) requires a lawyer to withdraw if the continued representation will result in violation of the Rules of Professional Conduct. Respondent represented co-defendants against whom a joint and several judgment was taken. After earlier indications of conflicting client interests, Respondent learned that one co-defendant, whose assets were mainly located offshore, had asked about filing bankruptcy and wanted to appeal the judgment without posting an appeal bond. Did the Board properly conclude that Respondent violated RPC 1.7(b) and RPC 1.15(a) when he continued representing both co-defendants?

2. Rule 10.3(a)(3) of the Rules for Enforcement of Lawyer Conduct (ELC) requires that the formal complaint state the respondent's acts or omissions in sufficient detail to inform the respondent of the nature of the allegations of misconduct. The provisions of the Civil Rules (CR) serve as guidance in disciplinary proceedings, including CR 15(b), which allows pleadings to be conformed to the evidence. Count 4 in the Formal Complaint charged that "By continuing to represent Holden/Five Star when doing so would result in a violation of RPC 1.7, Respondent violated RPC 1.15(a)(1)." Did the Board abuse its discretion when it amended the Hearing Officer's conclusions on Count 4 to find violations of both RPC 1.7 and RPC 1.15(a)(1)?

3. The Hearing Officer found, under Count 3, that Respondent violated RPC 1.9, terming the violation "an isolated incident of negligence," and recommending no sanction except payment of costs. The Association devoted seven pages of discussion in the Association's Board Brief to the Hearing Officer's error in the determination of mental state and recommended sanction. Did the Board correctly conclude that the mental state and appropriate sanction as to the violation in Count 3 was properly before the Board?

4. Respondent represented two co-defendants in litigation until one client sued the other client in a substantially related matter, and then

represented the defendant in that case against the claims brought by his former client. The ABA Standards define “knowledge” as “the conscious awareness of the nature or the attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result.”¹ Did the Board correctly conclude this was a knowing violation?

5. After a judgment was entered against two co-defendants, Respondent switched sides from representing both defendants to defending one client in a suit brought by the other, with potential harm to the former client and the integrity of the legal system. The Board found that the presumptive sanction for Count 3 is a suspension under ABA Standards 4.32, which requires injury or potential injury. Did the Board conclude the correct presumptive sanction as to this violation?

6. The Board found an aggravating factor of multiple offenses because “Respondent violated the conflict of interest rules in two separate lawsuits.” Did the Board correctly find this additional aggravating factor?

7. The Hearing Officer applied a mitigating factor of no dishonest or selfish motive based solely on the Respondent’s admission in response to a plaintiff’s summary judgment motion that his client had an indemnity obligation to the plaintiff. Did the Board correctly conclude that the Hearing Officer’s conclusion was not supported by the record?

¹ ABA Standards for Imposing Lawyer Sanctions (1992) (“ABA Standards”), 17.

8. The Board recommended a two-month suspension for the Count 3 and Count 4 violations. Should this Court impose the minimum presumptive sanction under the ABA Standards and case law of a six-month suspension for an attorney who knowingly engaged in conflicts of interest in two law suits and caused potential harm to his former client and the legal system?

III. COUNTERSTATEMENT OF THE CASE

A. SUBSTANTIVE FACTS

In the fall of 1996, E. Ray Holden (Holden) and an entity that he controlled, Five Star Holdings, Inc. (Five Star), bought a gas station in Sumas. Hearing Officer's Findings of Fact, Conclusions of Law and Recommendation (FFCL) ¶ 2, Bar File (BF) 34. For tax reasons, the sale was structured as an exchange transaction, using as a facilitator SSI Properties Inc. (SPI), a California corporation in the business of facilitating such exchanges.²

Holden later stopped making payments on a \$320,000 purchase

² Under Internal Revenue Code (I.R.C.) Section 1031 and federal regulations, sellers of investment real property may avoid capital gains tax by acquiring other property and using an exchange facilitator, a sort of straw man, as an intermediary in three-way transactions between the facilitator and the buyers and sellers of two parcels of property. The facilitator is typically not intended, nor expected, to be a principal in the transactions beyond nominal holding of title. See I.R.C. § 1031 (a); Treas. Reg. § 1.1031(k)-1 (1991); Washington Real Property Deskbook, § 80.3 (3rd ed. 1996, Supp. 2001); Transcript (TR) 2/7/05, 57: 5-17.

promissory note to the original gas station owner Tark Associates (Tark), after consulting with Respondent about the matter. FFCL ¶ 3; Exhibit (EX) 11; EX 16. In February 1999 Tark filed a Complaint for Monies Due against both Holden and SPI (Tark litigation). FFCL ¶ 4.

Lawyer Frank Crawford (Crawford) entered a Notice of Appearance for SPI. FFCL ¶ 5. Crawford wrote to Holden and Respondent on March 24, 1999, to tender defense to Holden under a clause in the 1996 exchange agreement by which Holden had indemnified SPI. FFCL ¶ 7; EX 24; EX 3. By letter dated April 1, 1999, Respondent accepted the tender of SPI's defense on behalf of Holden. Crawford sent copies of documents to Respondent who, by a second letter dated April 12, 1999, accepted the unconditional tender of SPI's defense, as authorized by Holden. FFCL ¶¶ 9, 10, 14; EX 27; EX 28; EX 32. Through Greg Thulin, an associate in Respondent's firm who handled the defense in the Tark litigation under Respondent's supervision, Respondent substituted as counsel for SPI in the Tark litigation. FFCL ¶¶ 15, 23; EX 37.

On April 16, 1999, Crawford asked that because Respondent would be representing both Holden and SPI, Holden execute an additional indemnity of SPI against any judgment that might be rendered in the Tark litigation. Holden signed the additional indemnity on April

30, 1999.³ FFCL ¶ 22; EX 35.

In the meantime, Respondent began having difficulties reaching Holden. He sent a letter dated May 27, 1999 to Holden stating that Holden's telephone was still disconnected, Holden had not replied to correspondence, and that his account with the firm was seriously overdue. EX 40.

On July 15, 1999, Tark filed a Motion for Summary Judgment. FFCL ¶ 26. The Motion asked for a joint and several judgment against both Holden and SPI. Respondent filed an Answer dated July 27, 1999, incorporating SPI's request to be dismissed from the action because it was only an intermediary, and an August 2, 1999 Response to the Summary Judgment motion which did not address SPI defenses. EX 43; EX 48. Respondent had concluded, based only on review of the 1966 exchange documents, without other investigation, that any claim that SPI was not a real party in interest was frivolous. FFCL ¶ 28. SPI did not know if or when the Summary Judgment would be argued or know that SPI separate defenses would not be raised in the Response to the Summary Judgment Motion. TR 2/8/05 at 32, 37; EX 44; EX 103, ¶ 19.

³ Respondent's Brief states at page 6 that because SPI could not file cross-claims against Holden, due to their joint representation by Respondent, Holden agreed to indemnify SPI. Holden had previously indemnified SPI in the 1996 exchange transaction, and the supplemental indemnity was not a new obligation.

At the hearing on the summary judgment motion, Thulin did not argue that SPI was not the real party in interest or that SPI should be relieved of liability because of its role as an intermediary. FFCL ¶ 32; EX 51. Judgment was entered on August 13, 1999 against Holden and SPI, jointly and severally, for \$343,516.11. FFCL ¶ 33. Respondent did not notify SPI of the judgment until Thulin sent an August 25, 1999 letter to Crawford, after the ten-day period to file a motion for reconsideration had expired. FFCL ¶ 34; EX 52.

On August 25, 1999, Thulin advised Respondent that he had met with Holden and discussed several options: accepting the judgment and trying for a payment plan, appealing the judgment and posting a bond, or appealing without posting a bond. Holden told Thulin that he was leaning towards an appeal without posting a bond, and also raised a fourth option – bankruptcy, which Thulin specified “would leave (SPI) hanging out there.”⁴ EX 53. (Attached as Appendix A.)

Crawford sent an August 26, 1999 letter to Thulin stating that the indemnification agreement should be honored and Holden should take appropriate action to avoid execution upon SPI property. EX 54. Crawford telephoned Respondent, who told him on August 30, 1999, that

⁴ Respondent’s Brief, at 7-8, implies incorrectly that Thulin raised bankruptcy, not Holden. See EX 53, Appendix A.

Holden planned to appeal the judgment but also had authorized a settlement offer of returning the gas station property to Tark together with a monetary payment. Respondent also said that Holden was leaving for Fiji, that most of Holden's assets were in trusts, that Holden was getting a divorce, and that he might be judgment proof. TR 2/7/05 at 179-80.⁵ See also EX 58.

On September 2, 1999, Crawford faxed a letter to Respondent, demanding that by September 8, 1999, Holden protect SPI by appealing the judgment and posting a bond or by settling the matter and obtaining a Satisfaction of Judgment as to SPI. EX 56. On September 7, 1999, Respondent sent a letter to Tark's counsel offering as a settlement the gas station and \$20,000 and stating that he had been informed by Holden that the gas station property was the only asset owned by Holden in the United States and that Holden had moved the base of his operations to Fiji. The letter also objected to the judgment having been taken against Laura Holden. EX 58; FFCL ¶ 40. Thulin filed a Notice of Appeal on September 9, 1999, FFCL ¶ 41, but did not post a bond.

At some point after the Tark judgment was entered, Tark filed an action in California, seeking to attach SPI assets in California to satisfy

⁵ Respondent confirmed the conversation with Crawford and did not deny the substance of the conversation. TR 2/9/05 at 43-4.

the judgment. TR 2/8/05 at 82:15-19. On September 23, 1999, Vincent O'Brien, California counsel for SPI, wrote to Respondent, again demanding that Holden post a bond to stay execution of the judgment. FFCL ¶ 42; EX 59. Respondent did not respond until November 1999. EX 71; EX 72.

On September 27, 1999, Respondent wrote to Holden, described the letter from O'Brien, reminded Holden of past conversations about his outstanding legal bill and expressed reluctance about continuing to invest legal time and staff resources. EX 61.

On September 27, 1999, SPI, through lawyer Mark Nadler, filed suit against Holden to enforce the defense and indemnity provisions in the exchange agreement (SPI litigation). FFCL ¶ 46.

On October 5, 1999 Respondent signed a notice of withdrawal from the representation of SPI in the Tark litigation and Mr. Nadler took over that representation. EX 70. Respondent signed a Notice of Appearance on behalf of Holden on October 6, 1999 in the SPI litigation for indemnification. FFCL ¶ 47; EX 65. Although SPI's indemnification suit against Holden was substantially related to the Tark litigation in which Respondent had represented SPI as well as Holden, and although Holden's interests in the SPI litigation were materially adverse to the interests of SPI, Respondent made no effort to obtain SPI's consent to his

representation of Holden against SPI. FFCL ¶¶ 48, 49, 50.

In November 1999, SPI's motion to reconsider and stay the Tark judgment as to SPI was denied. FFCL ¶ 51. On December 20, 1999, SPI's Motion for Relief from Judgment under CR 60 was denied. EX 110. In December 1999, SPI posted its own supersedeas bond for \$460,000 in the Tark litigation. FFCL ¶ 53. Rochelle Stone, SPI President and majority stockholder, pledged assets including her home in order to post the bond. TR 2/8/05 at 83. On January 14, 2000, SPI brought a summary judgment motion against Holden in the SPI litigation, and obtained a judgment in February 2000 for \$343,693.11. The judgment provided that any amounts collected were to be paid against the underlying Tark judgment and that subsequent supplemental judgments for costs and attorney's fees would depend on later presentation and argument. FFCL ¶¶ 54, 56; EX 89.

Respondent filed a Notice of Intent to Withdraw from representation of Holden in the SPI litigation on February 25, 2000. EX 95. SPI filed a malpractice action against Respondent, Thulin and other parties in federal court, which later settled. TR 2/8/05 at 153-54. See EX 103. The Court of Appeals affirmed the Tark summary judgment in April 2001. FF ¶ 57.

B. PROCEDURAL FACTS

On January 27, 2004, the Association filed a Formal Complaint charging Respondent with four counts of misconduct:

COUNT 1

By representing Holden/Five Star and SPI in the Tark litigation without obtaining client consent in writing after consultation and a full disclosure of the material facts, Respondent violated RPC 1.7, Conflict of Interest; General Rule.

COUNT 2

Through Thulin's and Respondent's failure to adequately raise SPI legal defenses in the Tark litigation and to timely notify SPI that a summary judgment had been entered against it, Respondent violated RPC 1.1, Competence, and/or 1.3, Diligence, and/or 1.4, Communication, and/or RPC 5.1, Responsibilities of a Partner or Supervisory Lawyer.

COUNT 3

By representing Holden/Five Star in the SPI litigation, Respondent violated RPC 1.7 and/or 1.9, Conflict of Interest; Former Client.

COUNT 4

By continuing to represent Holden/Five Star when doing so would result in a violation of RPC 1.7, Respondent violated RPC 1.15(a)(1), Declining or Terminating Representation.

Following a three-day hearing, the Hearing Officer filed Findings of Fact, Conclusions of Law and Recommendation. BF 34. She dismissed Counts 1, 2 and 4 and found a violation of RPC 1.9 under Count 3. Based on a finding that the violation was "an isolated incident of negligence," the Hearing Officer concluded that the presumptive sanction

was an admonition. FFCL ¶ 10. The Hearing Officer concluded that there were no aggravating factors and that there were three mitigating factors: no prior disciplinary record, no dishonest or selfish motive, and a good reputation in the legal community. Calling the violation “technical,” the Hearing Officer recommended that no sanction be imposed but that Respondent pay the Association’s costs and expenses. FFCL ¶¶ 10, 11.

The Association appealed regarding Counts 2, 3 and 4. The Board affirmed the Hearing Officer’s dismissal of Count 2. By a ten to one vote the Board amended the mental state finding on Count 3 from negligence to knowledge. Also by a ten to one vote, the Board overruled the Hearing Officer’s conclusions as to Count 4, finding a knowing violation. BF 61, Disciplinary Board Order (Board Order) at 2-3.⁶

The Board revised the Hearing Officer’s conclusions as to mitigating and aggravating factors, finding only two mitigating factors (no prior disciplinary record; good reputation) and adding two aggravating factors (multiple offenses; substantial legal experience). *Id.* at 3. The Board, by a nine to two vote, overruled the Hearing Officer’s recommendation of no sanction and mitigated the “presumptive six-month suspension” sanction to a two-month suspension “after balancing the

⁶ Disciplinary Board Order Amending Hearing Officer’s Decision, filed March 22, 2006.

aggravating and mitigating factors and considering proportionality.”⁷ Id. at 4. The Board did not identify the cases that it relied on in considering proportionality.⁸

Respondent filed a Notice of Appeal on March 31, 2006.

IV. ARGUMENT

A. STANDARD OF REVIEW

The Supreme Court has plenary authority in lawyer discipline matters.⁹ It reviews conclusions of law de novo, but will not disturb challenged findings of fact if they are supported by substantial evidence.¹⁰ When reviewing factual findings, the Court will not modify findings of fact made upon conflicting evidence.¹¹ Unchallenged findings of fact made by the Hearing Officer and affirmed by the Disciplinary Board are accepted as verities on appeal.¹²

⁷ One dissenting Board member believed the proper sanction to be reprimand. Board Order at 4, n. 1. The opinion on sanction of the other Board member is not known.

⁸ Respondent did not raise the subject of proportionality; therefore, the Association’s brief does not address it. See In re Disciplinary Proceeding Against Anschell, 149 Wn.2d 484, 517, 69 P.3d 844 (2003).

⁹ In re Disciplinary Proceeding Against Poole, 156 Wn.2d 196, 208, 125 P.3d 954 (2006).

¹⁰ Id.; In re Disciplinary Proceeding Against Guarnero, 152 Wn.2d 51, 59, 93 P.2d 166 (2004).

¹¹ In re Disciplinary Proceeding Against Huddleston, 137 Wn.2d 560, 568, 974 P.2d 325 (1999).

¹² In re Disciplinary Proceeding Against Whitney, 155 Wn.2d 451, 461, 120 P.3d 550 (2005).

Although the Court gives the Board's sanction recommendation "serious consideration," it is not bound by it and is free to modify it.¹³ However, the Court gives greater weight to the Board's sanction recommendation than to that of the Hearing Officer, because "the Board is the only body that hears the full range of disciplinary matters."¹⁴

B. THE BOARD AND THE HEARING OFFICER PROPERLY FOUND A VIOLATION OF RPC 1.9 UNDER COUNT 3

As to Count 3, both the Hearing Officer and the Board found that the indemnification action brought by SPI against Holden was a substantially related matter to the Tark litigation in which Respondent represented SPI, and that by defending Holden against SPI's indemnification claims, without obtaining the consent of SPI in writing, Respondent violated RPC 1.9.¹⁵ Such unchallenged findings are accepted as verities on this appeal.¹⁶

¹³ In re Disciplinary Proceeding Against Christopher, 153 Wn.2d 669, 677, 105 P.3d 976 (2005).

¹⁴ Id.

¹⁵ RPC 1.9 provides: A lawyer who has formerly represented a client in a matter shall not thereafter:

(a) Represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents in writing after consultation and a full disclosure of the material facts; or

(b) Use confidences or secrets relating to the representation to the disadvantage of the former client, except as rule 1.6 would permit.

¹⁶ Whitney, 155 Wn.2d at 461.

Although both the Board and the Hearing Officer found a violation under Count 3, the Board overruled the Hearing Officer as to the appropriate sanction.

1. Count 3 Sanction Issues Were Correctly Before the Board

Respondent's Brief claims that the Association did not mention Count 3 in its Notice of Appeal or in its briefing to the Board, and that this is a denial of due process.¹⁷ Respondent's argument has no factual basis.

First, the Association's Notice of Appeal to the Board, filed March 10, 2005, asked for review of the Hearing Officer's Findings of Fact, Conclusions of Law and Recommendation, with no limitation of issues. BF 35. This is consistent with ELC 11.2(b), which does not require that issues on appeal be listed. Compare former RLD 6.1(b) ("notice of appeal shall specify the issues intended to be raised before the Board").

Second, the Association's Board Brief discussed the Count 3 violation at length. BF 41. The entire Section E of the Association's Board Brief was devoted to the issue of the proper sanction for Count 3, under the heading: "The Hearing Officer Erred in Finding that Respondent's Violation of RPC 1.9 was Negligent and that No Sanction Should Be Assessed." BF 41 at 16-22. It appears that Respondent's chief complaint is that the title of Section E did not include the words "Count

¹⁷ Respondent's Brief at 18-19.

3.” But the entire section relates to whether the Hearing Officer recommended the appropriate sanction for the RPC 1.9 violation. Only Count 3 of the Formal Complaint alleged an RPC 1.9 violation. Furthermore, Count 3 was specifically referenced in the Association’s Board Brief as follows:

The Hearing Officer found that Respondent violated RPC 1.9. The determination was based on Respondent’s representation of Holden/Five Star in the SPI litigation immediately after formerly representing SPI in a substantially related matter (the Tark litigation), which representation was materially adverse to the interests of SPI. **Conclusions of Law, Count 3.** But the Hearing officer erred in finding that this conduct was an isolated incident of negligence and in recommending that no sanction should be imposed because of three mitigating factors and lack of injury to the client.

Id. at 17: 8-14 (emphasis added).

Respondent’s Board Brief responded to the Association’s arguments regarding Count 3 under the heading “Respondent’s State of Mind.” Respondent conceded that Count 3 had been placed in issue by the Association when he began his argument stating: “The Association next challenges the hearing officer’s determination that Carpenter’s state of mind when he continued to represent Holden/Five Star in the SPI litigation was negligent.” BF 52, Respondent’s Board Brief at 12. The final sentence of the Association’s Reply Brief to Respondent’s Board Brief urged that:

The Disciplinary Board should find rule violations under the Association's Counts 2 and 4, **reject the Hearing Officer's recommendation of no discipline for the Count 3 ethical violation**, and suspend Respondent from the practice of law for six months.

BF 55 at 8 (emphasis added).

After a careful reading of the Association's Board Briefs, it is impossible to conclude that Respondent was not put on notice that the mental state and sanction as to Count 3 were being challenged.

Respondent raised the claim of lack of notice at oral argument before the Board, TR 1/20/06 at 10, and the Board Order addressed this point in footnote 1, page 2, stating:

[T]he Association does not have to appeal a count that the Hearing Officer found proven. Additionally, the Board finds that the statement in the Association's brief put Carpenter on notice that the mental state and sanction in Count 3 were at issue.

2. The Board Correctly Found that the Violation of RPC 1.9 was Knowing

The Board rejected the Hearing Officer's conclusion that Respondent's conduct in violating RPC 1.9 was an isolated incident of negligence. The ABA Standards define "negligence" as "the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a

reasonable lawyer would exercise in the situation.”¹⁸ The ABA Standards define “knowledge” as “the conscious awareness of the nature or the attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result.”¹⁹ “Knowledge” under the ABA Standards does not require that the lawyer know that his conduct violates the RPC.²⁰ It is “the universal maxim that ignorance of the law excuses no one.”²¹

Respondent was fully aware that, directly after withdrawing as counsel of record for co-defendant SPI in the Tark litigation, he entered a notice of appearance for Holden in SPI’s lawsuit against Holden. He *knew* that he had previously represented SPI, he *knew* that he was now defending Holden against SPI’s claims, he *knew* that these were substantially related matters involving some of the same facts and circumstances, and he *knew* that Holden and SPI were now adverse and that he did not have a signed consent from SPI.²²

In the recent Haley disciplinary decision, a respondent lawyer

¹⁸ ABA Standards at 17.

¹⁹ ABA Standards at 17; In re Disciplinary Proceeding Against Boelter, 139 Wn.2d 81, 100, 985 P.2d 328 (1999).

²⁰ In re Disciplinary Proceeding Against Egger, 152 Wn.2d 393, 416, 98 P.3d 477 (2004).

²¹ Kingery v. Department of Labor & Industries, 132 Wn.2d 162, 175, 937 P.2d 565 (1997).

²² See FFCL ¶¶ 47, 48, 49.

claimed that he was only negligent where he knew of a conflict but failed to obtain written client consent.²³ The Court rejected this argument, noting: “There is no intent element related to obtaining informed written consent, which either exists or does not.”²⁴ Respondent admits that he did not obtain from SPI the informed written consent mandated by RPC 1.9, which contains no provision for oral waiver.

Respondent knew he had a conflict of interest in representing Holden in the suit brought by SPI, yet he took no steps to comply with RPC 1.9. The attorney is in the best position to know the facts about a potential conflict between clients and to present those facts in drafting a written consent. “[T]he writing is required in order to impress upon clients the seriousness of the decision the client is being required to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.”²⁵

3. Respondent’s Former Client Did Not Waive the RPC 1.9 Requirement of Consent in Writing

Respondent concedes that he knew there was an inherent conflict

²³ In re Disciplinary Proceeding Against Haley, 156 Wn.2d 324, 340, n. 11, 126 P.3d 1262 (2006).

²⁴ Id.

²⁵ See Comment 20 to Rule 1.7, ABA Annotated Model Rules of Professional Conduct, 111 (5th ed. 2003)

in his defense of Holden against suit by SPI.²⁶ But Respondent argues that SPI waived Respondent's conflict of interest because SPI did not object early and often, and because Respondent cooperated with SPI's counsel by accepting service for his client Holden. Respondent cites First Small Business Investment Company of California, a case not involving lawyer discipline, to support his waiver argument.²⁷ That case involved litigation procedure and a delay of several years in filing a motion for disqualification, which was denied. Whether a litigant can waive disqualification does not determine whether a lawyer complied with RPC requirements. *Waiver* via silent acquiescence over several years is not the same as the informed written consent required by RPC 1.9.

Respondent claims that he believed "it was not a conflict to represent Holden/Five Star in the SPI litigation since a unity of action was the best approach in addressing the common interests of defeating the judgment."²⁸ While the obligors to a joint and several judgment may have some common interests vis-à-vis dealing with the judgment creditor, it was clear that these two obligors had very adverse interests, demonstrably emphasized when SPI sued Holden.

²⁶ Respondent's Brief at 10.

²⁷ First Small Business Investment Company of California v. Intercapital Corporation of Oregon, 108 Wn.2d 324, 738 P.2d 263 (1987)

²⁸ Respondent's Brief at 24.

Nothing short of a well-drafted disclosure of the material facts of the conflict, and SPI's consent in writing, would have allowed Respondent to represent Holden in the SPI litigation. Although SPI and Holden may have worked together to some degree in negotiations with Tark about the Tark judgment, SPI, not Holden, posted the appeal bond in the Tark litigation. Holden did not pay anything voluntarily to Tark or to SPI to satisfy the judgment or reimburse SPI for its expenses. TR 2/8/2005, 129:20-25, 131:6-15. Respondent filed a response to an SPI summary judgment motion raising various issues and objecting in particular to the requested attorneys' fee amount.²⁹ EX 85. Respondent failed to disclose the material facts in an understandable fashion to SPI and failed to obtain SPI's written consent to a clearly conflicting representation.

Respondent attempts to blame SPI for his violations of ethical rules, repeatedly citing SPI's failure to demand that he not represent Holden in the SPI suit against Holden. It is not, however, incumbent upon the client to police the lawyer's ethics and conduct particularly where, as here, the client never received the required disclosures.³⁰ In the Dann

²⁹ Respondent's Brief at 11 stated that Respondent did not oppose entry of a judgment against Holden, without mentioning that he opposed the timing of the judgment, the attorneys' fee amount, and the method of accounting for funds to be received. See FFCL 55 (referring to the "unopposed part of SPI's motion").

³⁰ See, e.g., ABA Standards 9.4(f) (stating that failure of a client to complain is neither an aggravating nor mitigating factor).

disciplinary decision, the Court noted:

[W]here clients themselves did not come forward to complain about Dann's billing practices, that fact does *not* provide circumstantial evidence rebutting the misconduct charges. Even assuming that some clients tacitly approved of his misconduct, "[t]he disciplinary rules govern the conduct of lawyers; misconduct is not something other than misconduct when it is approved by others." In re Complaint of Dinerman, 314 Or. 308, 840 P.2d 50, 55 (1992). The injury is as much to the image of the legal profession as it is to the individual client.³¹

C. THE BOARD CORRECTLY FOUND VIOLATIONS OF RPC 1.15(a) AND RPC 1.7 UNDER COUNT 4

The Board rejected the Hearing Officer's dismissal of Count 4, amending the Conclusion as follows:

Count 4. The Respondent knowingly violated RPC 1.15(a)(1) by his continuing representation of Holden/Five Star in violation of RPC 1.7 after he became aware of facts and circumstances regarding Holden's willingness or ability to pay. Therefore, Respondent knowingly violated 1.15(a) and/or 1.7.

Board Order at 3-4, BF 61.³²

³¹ In re Disciplinary Proceeding Against Dann, 136 Wn.2d 67, 79 n. 2, 960 P.2d 416 (1998).

³² The pertinent rule's relevant text is:

RPC 1.15(a), **Declining or Terminating Representation**. Except as stated in section (c), a lawyer shall not represent a client or, where representation has commenced, shall, notwithstanding RCW 2.44.040, withdraw from the representation of a client if:

(1) The representation will result in violation of the Rules of Professional Conduct or other law; ...

1. Respondent Had a Conflict of Interest and Failed to Withdraw

Conflicting interests between co-defendants SPI and Holden came to a head with entry against them of the August 13, 1999 joint and several judgment for \$343,516.11 in the Tark litigation, and Holden's subsequent failure to honor his agreement to indemnify SPI. But there were earlier indications of the conflicting interests of the two clients. Respondent had cause to be concerned about Holden's intentions as to his indemnity of SPI earlier in the litigation when he learned Holden's telephone was disconnected, when Holden did not reply to correspondence, and when Holden failed to pay his legal bill.

When Respondent elected not to investigate or put forward SPI's defenses in the Response to the Summary Judgment Motion, there was a resulting functional conflict between SPI and Holden.³³ The failure to adequately defend SPI potentially benefited Holden, because if a judgment were entered against Holden, SPI would be jointly liable and Tark might choose to collect from SPI alone. Also, spending more time on SPI's legal

³³ Nadler, who succeeded Respondent in representing SPI, interviewed the escrow officer who handled the 1996 real estate exchange transaction. He testified that his understanding of potential SPI defenses was that no one had intended to hold SPI liable on the promissory note, and that the Tark attorney had confirmed this to the escrow officer. TR 2/8/05 at 105-11. See Berg v. Hudesman, 115 Wn.2d 657, 801 P.2d 222 (1990) (in appropriate circumstances, the court may look beyond the contract documents to determine the intent of the parties). See also EX 110 at 19-22.

defense would increase Holden's legal fees payable to Respondent.

Respondent learned on August 26, 1999 that Holden did not plan to pay the Tark judgment voluntarily, was inquiring about the possibility of bankruptcy, and was inclined to appeal without posting a bond. EX 53. Respondent told Crawford on August 30, 1999, that Holden's assets were in trusts or in Fiji, that he was in a divorce proceeding and that he might be judgment proof. TR 2/7/05 at 179-80.

With new information raising additional doubts about whether Holden would stand behind his indemnification, the conflict was even clearer.³⁴ If Holden's assets were in Fiji, Respondent had to know that SPI was substantially more at risk to Tark collection actions than Holden, and that this would potentially benefit Holden. While serving as counsel of record for SPI, Respondent ignored three anxious letters from SPI's counsel in Tacoma and California asking him to protect SPI. EX 54; EX 56; EX 59.

Respondent's September 7, 1999 letter to counsel for Tark had the

³⁴ Respondent favored his preexisting client Holden over new client SPI from the beginning of the relationship with SPI. Respondent and his associate Thulin had minimal direct contacts with SPI and did not interview potential witnesses for the SPI defense, such as the escrow agent who had handled the gas station purchase. TR 2/8/05 at 105-11. Without investigation and based on the documents alone, Respondent decided that SPI defenses were frivolous. TR 2/9/05 at 30. The documents filed for the summary judgment hearing did not present any SPI defenses but focused on a Holden defense related to an environmental clean up issue, even though Thulin had written a previous memo that this defense was questionable. EX 48; EX 8.

effect of protecting Holden while endangering SPI. The letter asked that no action be taken against Holden's estranged wife, but made no similar request as to the assets of SPI. EX 58. Following this letter stating that Holden had no assets in the United States except the original property purchased from Tark, counsel for Tark took actions to move against SPI assets in California. TR 2/8/2005 at 82:16-19.

Respondent had a conflict of interest beginning at least by August 26, 1999, and more likely earlier, in May when Holden's telephone was disconnected and his legal bills in arrears, or in July when the decision was made to only present Holden defenses against the Tark Summary Judgment, implementing the conflicting and differing positions of the two clients. "If a lawyer accepts dual representation and the clients' interests thereafter come into actual conflict, the lawyer must withdraw."³⁵

According to Respondent's testimony, he had determined that the SPI defenses were frivolous. But he never communicated this to SPI. This was a logical point to obtain SPI's informed consent in writing to the continuing conflict in representing both Holden and SPI in the Tark litigation, when only Holden's defense arguments would be presented – with resulting potential detriment to SPI. Respondent failed to obtain

³⁵ Gustavson v. City of Seattle, 87 Wn. App. 298, 303, 941 P.2d 701 (1997), citing Eriks v. Denver, 118 Wn.2d 451, 459, 824 P.2d 1207 (1992).

SPI's informed written consent, just as he failed to do so regarding the continuing conflict in representation after the joint and several judgment was entered. Respondent never obtained SPI's written consent to the ongoing, conflicting joint representation, and he did not withdraw until after SPI sued Holden for indemnification on September 27, 1999.

2. The Board's Conclusion on Count 4 is in Accord With the Charges and Evidence

Respondent objects to the Board's conclusion of a violation of RPC 1.15(a) *and/or* 1.7, objecting to the statement that there were two violations.³⁶ RPC 1.15(a) states in relevant part that "a lawyer shall withdraw from the representation of a client if: (1) the representation will result in violation of the Rules of Professional Conduct" Implicit in concluding there is an RPC 1.15(a)(1) violation is violation of some other RPC.

Respondent urges this Court to give a hyper-technical reading of Count 4 of the Formal Complaint. Count 4 charged that "By continuing to represent Holden/Five Star when doing so would result in a violation of RPC 1.7, Respondent violated RPC 1.15(a)(1)." This put Respondent on notice that Respondent was alleged to have violated RPC 1.7 by continuing to represent Holden despite the conflict of interest with SPI,

³⁶ Respondent's Brief at 1-2, 16-17.

and failed to withdraw.

At most, the Board's conclusion as to Count 4 was a *sua sponte* amendment of the pleadings to conform to the evidence. In the Bonet disciplinary decision, the Court noted that it was within the Board's discretion whether to *sua sponte* change the language of a charging count to conform to the evidence, based on the disciplinary rule, now ELC 10.1(a), that incorporates CR 15(b), which provides for "amendment of the pleadings as may be necessary to cause them to conform to the evidence."³⁷

Respondent mistakenly relies on the Poole disciplinary decision, where the Court dismissed a count, stating: "At no point did the Bar's complaint accurately reflect the charge of misconduct levied against Poole."³⁸ Count 6 of the Poole Complaint had charged a delay in paying the client a settlement amount. However, the facts as pleaded in the Poole Complaint did not support the charge. There is no such deficiency with the Complaint in this matter.

In the present matter, the charge in the Complaint was that by continuing to represent clients with adverse interests, a "violation of RPC

³⁷ In re Disciplinary Proceeding Against Bonet, 144 Wn.2d 502, 509-10, 29 P.3d 1242 (2001).

³⁸ In re Disciplinary Proceeding Against Poole, 156 Wn.2d 196, 219, 125 P.3d 954 (2006). Poole was suspended due to other proven violations.

1.7, Respondent violated RPC 1.15(a)(1).” Under ELC 10.3(a)(3), the formal complaint must state respondent’s acts or omissions in sufficient detail to inform the respondent of the nature of the allegations of misconduct.

Here, Respondent was clearly on notice at the hearing that his continued representation of both SPI and Holden after he became aware they had differing interests was alleged as a conflict of interest violation, and that his failure to withdraw was alleged as a violation of RPC 1.15(a)(1).³⁹ Whether it is considered to be a violation of one rule or two is immaterial as the sanction is based on Respondent’s conduct.

3. The Violation was Knowing

The Board found a knowing violation and this is supported by substantial evidence. Respondent knew from Thulin’s email message to him that Holden did not plan to pay the judgment or post an appeal bond, notwithstanding Holden’s indemnity of SPI. There were earlier indications of the conflict as well. Nevertheless, Respondent continued to represent both SPI and Holden.

Respondent argues that he had no reason to suspect that Holden might be in financial trouble as he believed that Holden was putting

³⁹ See also Association’s Hearing Brief at 14, BF 29; Association’s Board Brief at 9-11, BF 41.

together a multi-million dollar resort project in Fiji.⁴⁰ The Board, in referring to “willingness or ability to pay” in its Amended Conclusion 4, recognized that having financial assets available and being willing to expend them are two different things. Respondent’s belief that Holden possessed assets did not change his state of mind and was not sufficient to avoid a conflict, when he knew that Holden was considering bankruptcy and had told Crawford that Holden might be judgment proof. He also knew that SPI defenses had not been presented to the Court, to SPI’s detriment while potentially to Holden’s advantage.

4. Respondent’s Withdrawal was Untimely

Respondent claims that he acted in a reasonable and timely manner and therefore did not violate RPC 1.15(a)(1) by failing to withdraw until SPI sued Holden.⁴¹ There is no suggestion regarding the mandatory withdrawal required under RPC 1.15(a)(1) that the lawyer may take his time before withdrawing. Here, Respondent knew in late August 1999, if not sooner, that there was a conflict. When Respondent received Crawford’s August 26 and September 2, 1999 letters⁴² asking that Holden take action to avoid execution upon SPI property and/or post an appeal bond, Respondent knew that Holden did not plan to take these actions

⁴⁰ Respondent’s Brief at 21.

⁴¹ Respondent’s Brief at 22.

⁴² EX 54; EX 56.

while SPI *expected* protective action from Respondent or Holden. The Board concluded Respondent knew SPI's interests were adverse to those of Holden, yet he continued to represent both parties for five more weeks, withdrawing only after SPI filed its suit against Holden. Every day that Respondent withheld this knowledge from SPI, he was favoring one client to the detriment of the other client. Every day he denied this information to SPI was a day SPI could have used to protect itself regarding the joint liability. Due to his conflicting duty to Holden, Respondent could not advise SPI in this regard. His duties to SPI were materially limited by his duties to Holden in violation of RPC 1.7(b). Likewise, his earlier advancing of Holden's interests over those of SPI in responding to the Tark Summary Judgment Motion violated RPC 1.7(b).

D. THE BOARD CORRECTLY CONSIDERED INJURY TO THE CLIENT IN RECOMMENDING A SUSPENSION

Having found two knowing violations in Counts 3 and 4 of the conflict of interest rules, the Board identified ABA Standards 4.32 as being applicable, which reads:

Suspension is generally appropriate when a lawyer knows of a conflict of interest and does not fully disclose to a client the possible effect of that conflict, and causes injury or potential injury to a client.

Respondent argues that injury to a client was not proved so no

sanction should be imposed.⁴³ The Board correctly, albeit implicitly, concluded that there was injury or potential injury.

Injury in a conflict situation may be actual or potential. “[A] disciplinary proceeding does not require a showing of actual harm. . . . The rationale is the need for protection of the public and the integrity of the profession.”⁴⁴ For example, in the Gillingham disciplinary proceeding, the respondent lawyer wrote himself into the client’s will.⁴⁵ Because the client made a new will, without including Gillingham, there was no actual harm. In considering the sanction, the Court noted that “no actual harm resulted since Gillingham received no portion of the estate. However, the potential harm was extreme.”⁴⁶ The Court imposed a sanction of a 12-month suspension. Here, a bankruptcy filing by Holden, even if unlikely, represented serious potential harm to SPI, as noted in Thulin’s email to Respondent. Appendix A (EX 53).

Although the Tark litigation and SPI litigation were separate matters, they were based on the same body of facts. Respondent essentially switched sides from representing both SPI and Holden in the

⁴³ Respondent’s Brief at 28.

⁴⁴ In re Disciplinary Proceeding Against Halverson, 140 Wn.2d 475, 486, 998 P.2d 833 (2000), citing Hizey v. Carpenter, 119 Wn.2d 251, 262, 830 P.2d 646 (1992).

⁴⁵ In re Disciplinary Proceeding Against Gillingham, 126 Wn.2d 454, 826 P.2d 856 (1995)

⁴⁶ Id. at 466.

Tark litigation to defending Holden against SPI in the SPI litigation. Attorney side-switching undermines the integrity of the legal system in the eyes of the public, as members of the community have the right to consult an attorney without later having that attorney appear representing the other side.⁴⁷ SPI President Stone testified that she found it “unbelievable” that the attorney who was to protect SPI was now defending the man from whom she was trying to collect the funds owed to Tark. TR 2/8/05 at 85:13-22.

There was also potential injury to SPI through the possible use of any confidential information gained by Respondent in the representation. When a lawyer represents one client against a former client in a case stemming from a previous joint representation, there is a risk of harm through use of the confidences of the former client, when there is no written disclosure and consent regarding the implications of the joint representation.

SPI officers David Kuns and Rochelle Stone testified as to their concerns that a California judgment against SPI could hold up closings and prevent transfers of third-party titles to the correct party, a “nightmare

⁴⁷ See Teja v. Saran, 68 Wn. App. 793, 801, 846 P.2d 1375 (1993). The Court of Appeals in Teja did not reverse the trial court, notwithstanding the clear violation of RPC 1.9, stating that Bar proceedings were the proper place to address ethical violations and disciplinary action inherent in the matter.

for the company.” TR 2/8/05 at 39, 82. Respondent had information about these possible problems, although he tried to minimize them as being only a labeling problem as to fiduciary interests. TR 2/7/05 at 92-93.

SPI President Stone also testified that it couldn't be right that SPI “never had a chance to stand in front of a Court and tell them what SPI's position is or what our defense is.” TR 2/8/05 at 82. The conflict between SPI and Holden became increasingly apparent during the summer of 1999, stemming in part from Respondent's disparate treatment of his clients.⁴⁸ He made SPI's requested changes in the answer to the Tark complaint, but did not advise SPI that he regarded the defense raised by these changes as frivolous. Respondent did not include the separate SPI defense in the response to the Tark summary judgment and did not send a copy of the response to SPI. Respondent did not file a Request for Reconsideration after the Summary Judgment was entered. SPI never had its day in court and was injured as a result. Being deprived of one's day in court constitutes actual harm.⁴⁹

⁴⁸ See supra footnote 34, page 24.

⁴⁹ In re Disciplinary Proceeding Against Cohen, 150 Wn.2d 744, 759, 82 P.3d 224 (2004).

E. THE MITIGATING AND AGGRAVATING FACTORS ARE BALANCED EQUALLY

After amending the Hearing Officer's conclusions and finding two knowing rule violations, the Board concluded there were two mitigating and two aggravating factors.

1. Mitigating Factors

The Hearing Officer found three mitigating factors: 1) no prior disciplinary record; 2) lack of dishonest or selfish motive; and 3) a good reputation in the legal community. As to the second of these, the Hearing Officer concluded: "The Respondent had no dishonest or selfish motive, as evidenced by his acquiescence to a judgment against Holden/Five Star in favor of SPI in the SPI litigation." BF 34 at 11. The Board deleted this mitigating factor as not supported by the record, leaving unchanged the factors of no prior disciplinary record and good reputation within the legal community.

The Hearing Officer's conclusion was wrong. Although Respondent did not object per se to the indemnification requested in an SPI summary judgment motion against Holden in February 2000, he argued that entry of a judgment would be premature until SPI actually paid the SPI judgment and he objected to the requested attorneys' fee amount. TR 2/9/05 at 51; EX 85. In any event, Respondent's actions regarding a judgment against his client are irrelevant to this mitigating factor.

Respondent misstates the issue and burden of proof regarding the lack of a selfish motive, referring to the Hearing Officer's determination of no selfish motive and then claiming the Association has asserted that the motive was selfish.⁵⁰ A dishonest or selfish motive is an aggravating factor under the ABA Standards. The Association does not assert that the aggravating factor of a selfish motive should have been found. Rather, the argument was made that the partial acquiescence to a judgment against his client did not prove the mitigating factor of Respondent's *lack* of a selfish motive.

The Hearing Officer's explanation quoted above, finding no dishonest or selfish motive because Respondent acquiesced to a judgment being taken against his client, is a logical disconnect. Such a determination is customarily made regarding the *attorney's* motives rather than in connection with actions taken on behalf of the client such as conceding an issue on a summary judgment. The Board recognized the illogic and found that the Hearing Officer's determination was not supported by the record.

Deleting this factor means that no determination was made as to whether Respondent had or did not have a dishonest or selfish motive. Respondent claims that there is substantial evidence to support the

⁵⁰ See Respondent's Brief at 27-28.

Hearing Officer's finding of no selfish motive but gives no record references as to this evidence. Such challenges to the conclusions of the Board, when wholly unsupported by citations to the record should be disregarded. "The failure to cite to the record is not a formality. It places an unacceptable burden on opposing counsel and on [the] court."⁵¹

The only evidence in the record concerning Respondent's good reputation in the legal community was his own testimony. TR 2/9/05 at 5-6. A lesser weight should be given to this mitigating factor, since Respondent's testimony was uncorroborated. Reputation is generally proved by testimony of a witness who knows the reputation in the community for the particular trait, in this case, professional competence.⁵²

2. Aggravating Factors

Rejecting the Hearing Officer's determination that there were no aggravating factors, the Board found two aggravating factors, [ABA Standards 9.2] "(d) Multiple offenses (Respondent violated the conflict of interest rules in two separate lawsuits) and (i) Substantial experience in the

⁵¹ Lawson v. Boeing Co., 58 Wn. App. 261, 271, 792 P.2d 545 (1990); see also Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (refusing to consider arguments unsupported by reference to the record in violation of RAP 10.3(a)(5)).

⁵² Karl B. Tegland, Washington Practice, Courtroom Handbook on Washington Evidence (2006), Author's Comments to Rule 405, 237-38.

practice of law.”⁵³

Respondent confuses the aggravating factor of a pattern of misconduct under ABA Standards 9.2(c) with the aggravating factor of multiple offenses under ABA Standards 9.2(d). Respondent correctly states that the Court has rejected the pattern of misconduct factor when there is a single victim, citing In re Discipline of McMullen.⁵⁴ But the McMullen decision also notes that the separate aggravator of multiple offenses is appropriate where there is more than one violation concerning a single client – as is the case here.⁵⁵ Even if one were to accept Respondent’s argument that the Count 4 RPC 1.7/1.15 violation was singular, this together with the Count 3 RPC 1.9 violation amounts to the aggravator of multiple violations. These two violations were based on Respondent’s actions in connection with two actions, the Tark litigation and the SPI litigation.

F. THE BOARD CORRECTLY FOUND SUSPENSION TO BE THE SANCTION FOR RESPONDENT’S CONDUCT

Respondent argues that this matter should be dismissed without imposition of a sanction.⁵⁶

⁵³ Board Order at 3. BF 61.

⁵⁴ In re Disciplinary Proceeding Against McMullen, 127 Wn.2d 150, 896 P.2d 1218 (1995).

⁵⁵ Id. at 171.

⁵⁶ Respondent’s Brief at 28.

The Board correctly concluded that the presumptive sanction for the knowing violations in Count 3 and Count 4 is a suspension under ABA Standards 4.32. This Court has stated that “[t]he minimum suspension is appropriate in cases where there are both no aggravating factors and at least some mitigating factors, or when the mitigating factors clearly outweigh the aggravating factors.”⁵⁷ Here, the mitigating factors do not clearly outweigh the aggravating factors. Respondent should be suspended for at least six months.

In the Halverson decision,⁵⁸ the Court stated this principle again:

[T]his Court has previously recognized that suspensions “generally should last for a period of time not less than six months and not greater than three years.” Boelter, 139 Wash.2d at 101, 985 P.2d 328; McMullen 127 Wash.2d at 170, 896 P.2d 1281.

Respondent urges the Court to overrule the Board’s recommendation in favor of the “sanction” recommendation of the Hearing Officer. The recommendation by the Hearing Officer, of payment of costs only, is not authorized by ELC 13.9(a). Because of the Board’s broader experience in disciplinary matters, Board recommendations should be preferred over that of individual hearing officers, absent clear

⁵⁷ In re Disciplinary Proceeding Against Cohen, 149 Wn.2d 323, 339, 67 P.3d 1086 (2003); In re Disciplinary Proceeding Against Halverson, 140 Wn.2d 475, 495, 998 P.2d 833 (2000).

⁵⁸ Halverson, 140 Wn.2d 475 at 495.

reasons for deviating. As noted in the Anschell 2000 disciplinary decision:

Greater weight is given to the conclusions of the Disciplinary Board regarding the recommended sanction than is given to those of the Hearing Officer. The Disciplinary Board is "the only body to hear the full range of disciplinary matters" and has a "unique experience and perspective in the administration of sanctions."⁵⁹

V. CONCLUSION

Respondent continued to represent two co-defendant clients in the same matter after their interests diverged significantly, and then defended one client in a suit by the other for indemnification. His actions reflect a disregard for the ethical rules relating to conflicts. Only a suspension for a minimum of six months will show the importance of adhering to ethical rule requirements for dealing with conflicts of interest and deter other lawyers from similar misconduct.

RESPECTFULLY SUBMITTED this th 14 day of September, 2006.

WASHINGTON STATE BAR ASSOCIATION



Nancy Bickford Miller, Bar No. 7020
Disciplinary Counsel

⁵⁹ In re Disciplinary Proceeding Against Anschell, 141 Wn.2d 593, 606-07, 9 P.3d 193 (2000) (quotations omitted).

APPENDIX A

MAIL LISTING FOR Tim Carpenter

August 25, 1999

- - Mail - -

August 25, 1999 11:50am MAIL IS -
FROM: Greg Thulin Private
TO: Tim Carpenter
SUBJECT: Holden

I spoke with Ray about the situation. He would like to get together with the two of us to discuss his options. I told him about several options e.g. accept the judgment and try to provide some type of payment plan; appeal the judgment and post a supersedeas bond to prevent Tark from collecting; or appeal the judgment without posting the bond. Ray mentioned another option, bankruptcy, but I specified that would leave SSI hanging out there. Ray is leaning towards appealing without posting a bond. He would like to meet with you and I either this afternoon, Thursday or Friday. I'm free this afternoon after 3:00pm and I believe all afternoon tomorrow after rotary. I'm gone Friday thru Tuesday and Ray leaves sometime Friday. Are you able to find a half hour to meet? Let me know and I'll make arrangements with Ray.

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