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STATE OF WASHINGTON

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SUPREME COURT NO. 200,376-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE DISCIPLINARY PROCEEDING AGAINST

TIMOTHY W. CARPENTER,

Lawyer (Bar No. 5882).

OPENING BRIEF OF TIMOTHY W. CARPENTER

Attorney for Timothy W. Carpenter

Kurt M. Bulmer, WSBA # 5559

Attorney at Law

740 Belmont Pl. E., # 3

Seattle, WA 98102

(206) 325-9949

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This is an attorney disciplinary case involving attorney Timothy W. Carpenter (Carpenter). At the end of a hearing the hearing officer recommended a finding of a technical violation of a single rule, and based upon mitigators and the lack of injury to the client, limited the sanction to the imposition of costs and expenses. Upon appeal by the Bar Association, the Disciplinary Board, found a violation of an additional rule, amended the state of mind, added two aggravators, struck one mitigator and recommended a two-month suspension. Carpenter appeals the case to this court and asks the original sanction recommendation made by the hearing officer be reinstated.

ASSIGNMENTS OF ERROR

- The Board erred when it found a violation of RPC 1.7 as an additional RPC violation of Count 4.
- The Board erred when it found greater harm than the hearing officer did.
- The Board erred when it found a violation of Count 3 when it was not properly before it.
- The Board erred when it found a violation of Count 4.
- The Board erred when it found knowing conduct.
- The Board erred when it found multiple offenses.

- The Board erred when it struck lack of dishonest motive.
- The Board erred when it recommended a two-month suspension.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- Did the Board commit error when it found a violation of RPC 1.7 as an additional RPC violation of Count 4? Assignment 1.
- Did the Board commit error when it found greater harm than the hearing officer did? Assignment 2.
- Did the Board commit error when it found a violation of Count 3 when it was not properly before it? Assignment 3.
- Did the Board commit error when it found a violation of Count 4? Assignment 4.
- Did the Board commit error when it found knowing conduct? Assignment 5.
- Did the Board commit error when it found multiple offenses? Assignment 6.
- Did the Board commit error when it struck lack of dishonest motive? Assignment 7.
- Did the Board commit error when it recommended a two-month suspension? Assignment 8.

STATEMENT OF THE CASE

Respondent does not contest the factual findings entered by the hearing officer and adopted by the Board. Accordingly this summary of the facts is largely taken from the Hearing Officer's Findings of Fact, Conclusions of Law and Hearing Officer's Recommendation (FFCLR). Decision Papers (DP) 1-11. If the factual statement is not taken from the FFCLR, the basis for the assertion is cited in the record.

Facts of Case

This matter started in 1996 when a California corporation, SSI Properties, Inc. (SPI), acted as an exchange facilitator for a \$1,500 fee. E. Ray Holden (Holden) and an entity he controlled, Five Star Holdings, Inc. (Five Star) bought a gas station from Tark Associates (Tark). As part of the transaction Holden and Five Star gave Tark a promissory note for \$320,000.

Subsequently Holden and Five Star stopped making payments to Tark and in February 1999 Tark brought an action in King County Superior Court for the monies due. Exhibit 20. This is called the Tark litigation. The Tark litigation named Holden, Five Star and SPI. On March 17, 1999, attorney Frank Crawford (Crawford) entered a notice of

appearance on behalf of SPI. Holden and Five Star were represented by the attorney in this disciplinary matter, Timothy W. Carpenter.

Crawford contacted Carpenter by phone and by letter dated March 24, 1999, and advised that he (Crawford) represented SPI. Crawford tendered the defense of SPI to Holden and Five Star under the Real Property Exchange Agreement's indemnity provision (Exhibit 3). Crawford sent a copy of the tender letter to David Kuns (Kuns), an officer of SPI. On behalf of Holden and Five Star, Carpenter wrote Crawford on April 1, 1999, and provisionally accepted the tender of defense.

In that letter Carpenter advised Crawford that prior to accepting an unqualified tender that he wanted to review any documents to make sure that acceptance of the tender was appropriate stating that "you [Crawford] have indicated to me you are not aware of any agreement to which Tark Associates was a party, which would have contractually excluded [SPI] from any dispute involving the property." In the same letter Carpenter informed Crawford that he felt that dismissing SPI from the lawsuit would be an advantage because it would allow venue to be changed to Whatcom County. Carpenter further informed Crawford that "depending on the wishes of your client and you" that Respondent's firm could be substituted as counsel for SPI.

Pursuant to that letter, Crawford sent various documents to Carpenter and indicated that he understood that Carpenter would be representing both Holden/Five Star and SPI in the Tark litigation. Crawford again sent a copy of that letter to Kuns of SPI. On April 12, 1999, Carpenter wrote Crawford accepting an unconditional tender of SPI's defense, providing a substitution of counsel, requesting any additional documents germane to the lawsuit and requesting a contact person at SPI.

Carpenter assigned the defense of the case to an associate, Greg Thulin (Thulin). Thulin had been practicing law for seven years and while he had no real property exchange transactions he had argued summary judgment motions. Thulin's responsibilities in the Tark litigation included client management. It was Thulin's belief that while SPI was represented by Carpenter's firm in the Tark litigation, that CPI was also represented by Crawford. Thulin contacted SPI through Crawford, even though Crawford had provided a direct contact person at SPI to Thulin.

Consistent with Thulin's understanding Crawford continued to act as SPI's attorney. Crawford had continuing communications with Carpenter and Thulin, most of which were copied to Kuns. Crawford did

not ask to be excluded from further discussions regarding the Tark litigation.

On April 15, 1999, Thulin sent Crawford a draft answer in the Tark litigation and asked for his and SPI's review of the draft answer. Crawford advised Carpenter he was concerned that because of Respondent's joint representation of Holden/Five Star and SPI that if a judgment were entered against SPI it would be prevented from filing a cross-claim against Holden/Five Star. Crawford proposed that the solution was for Holden to indemnify SPI in the Tark litigation. Holden agreed to this. It was after this point that Crawford then consented to Carpenter and Thulin substituting in as attorneys for SPI in the Tark litigation (Exhibit 37).

On May 11, 1999, Crawford wrote Thulin and indicated that he had reviewed Thulin's draft answer with Kuns and that it was generally acceptable. Crawford did request that Thulin add a request that the action against SPI be dismissed because SPI was acting as an intermediary. Pursuant to this request, Thulin included this claim in the answer.

Tark filed a Motion for Summary Judgment. While Thulin was not that familiar with real property exchange issues, Carpenter was very familiar with them and, in fact, he operated an exchange facilitation business. Carpenter had reviewed the documents involved in the exchange

transaction and had concluded that SPI's attorney had failed to exclude SPI from liability on the note and that any claim that SPI was not a real party in interest was frivolous.

Carpenter and Thulin conferred and Thulin filed a response to the Motion for Summary Judgment. He argued the motion on August 13, 1999. At the motion he did not argue that SPI was not a real party in interest or that SPI should be relieved because of its role as an intermediary. The court entered judgment against all parties, on August 13, 1999, jointly and severally for \$343,516.11.

SPI was not notified of the judgment against it until Respondent's firm mailed a copy to Crawford in late August, after the ten-day period to file a motion for reconsideration had expired. Thulin wrote to Crawford explaining the outcome of the summary judgment motion, reiterating that Holden had agreed to indemnify SPI and advising that he had asked Tark to hold off on any collection efforts from SPI so that something could be worked out with Holden. Crawford never complained to Thulin about receiving the notice of the judgment after expiration of the ten-day period for filing a motion for reconsideration.

On August 25, 1999, Thulin informed Carpenter that he had talked with Holden about options including payment plans, appeal, bonds and

bankruptcy. Thulin informed Holden that bankruptcy would leave SPI “hanging out there.” Thulin did not advise Holden to pursue bankruptcy and Holden did not ask that one be pursued.

Demands were made by Crawford that Holden/Five Star take steps to protect SPI such as appealing the decision, obtaining an agreement from Tark that it would not pursue SPI or satisfy the judgment with Tark. Carpenter attempted to settle the claim with Tark but was not able to do so. A notice of appeal was filed by Thulin on September 7, 1999.

Also on September 7, 1999, he advised Tark that he (Carpenter) had been informed by Holden that the gas station property was the only asset owned by Holden or Five Star in the United States and that Holden had moved his base of operations to Fiji. He stated that Holden marriage community had no assets. Exhibit 58. A copy of that letter was sent to Crawford.

SPI demanded that Holden/Five Star post a bond to stay execution of the judgment. A new attorney appeared for SPI, Mark Nadler (Nadler). He wrote Carpenter and advised that he believed that Holden was hiding assets and that SPI intended to seek a temporary restraining order and/or prejudgment writs of attachment to enjoin Holden from transferring any real property.

On behalf of SPI, Nadler filed a King County action against Holden/Five Star on September 27, 1999. This is called the “SPI litigation.” In the SPI litigation Nadler sought to enforce the defense and indemnity provisions in the Real Property Exchange Agreement. The subject matter of the SPI litigation was substantially related to the Tark litigation and the interests of Holden/Five Star were materially adverse to SPI’s.

Nadler sent the pleadings in the SPI litigation to Carpenter and Carpenter believed that Nadler was asking Carpenter to accept service on behalf of Holden/Five Star. Carpenter did so by a letter dated October 6, 1999 in which he specifically advised that he was accepting service on behalf of Holden/Five Star. Exhibit 64 and RP 2/9/05 – page 47.

That same letter discusses that Carpenter is withdrawing from the Tark litigation. Carpenter advised that under the circumstances it was inappropriate for his firm to continue to represent SPI in the appeal. He did advise, however, that he felt it was in both Holden/Five Star’s and SPI’s mutual interests to cooperate in the appeal. On October 5, 1999, Carpenter signed off on a notice of withdrawal in the Tark litigation and Nadler substituted in.

Carpenter filed a notice of appearance on behalf of Holden/Five Star on October 8, 1999 in the SPI litigation. He had not obtained written consent from SPI to represent Holden/Five Star in that litigation.

Although aware of the conflicting issues interests between PI and Holden/Five Star, since Carpenter specifically mentioned them in his October 6, 1999, letter, Exhibit 64, Nadler did not raise any issues about Carpenter appearing in the SPI litigation until December 22, 1999. Until that time, and after that time, Carpenter believed that SPI had waived any objection it had. Carpenter believed that SPI thought it would be helpful to the case to have him on the case. RP 2/9/05 – page 48/49.

Nadler notified Carpenter on December 22, 1999, that he was “concerned” by the ongoing representation by Carpenter in the SPI litigation. Exhibit 76. However, the letter does not demand that Carpenter withdraw and no such demand was ever made. RP 2/0/05 – page 50. Carpenter responded the next day to the “concerns” raised by Nadler. Exhibit 77. Carpenter asserted that he believed that SPI had waived any conflict and stated: “Finally, if you are now asserting a conflict on behalf of [SPI], and wish me to withdraw from representation of Five Star Holdings and Mr. Holden, you should tell me so. To date, I have been

operating on the opposite understanding.” Nadler never followed up and did not demand that Carpenter withdraw. RP 2/0/05 – page 50.

On January 14, 2000, SPI brought a summary judgment motion against Holden/Five Star in the SPI litigation. Carpenter did not oppose the entry of a judgment against Holden/Five Star and judgment was entered against Holden/Five Star.

Procedural History

The Bar Association brought a four-count Formal Complaint against Carpenter. CP 1-5. The Formal Complaint alleged that:

Count 1 – By representing Holden/Five Star and SPI in the Tark litigation without obtaining client consent in writing after consultation and full disclosure of the materials facts, Respondent violated RPC 1.7, *Conflicts 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 summary judgment had been entered against it, Respondent violated RPC 1.1, *Competency*, and/or 1.3 *Diligence* and/or 1.4 *Communication*, and/or RPC 1.5, *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*.

After a three day hearing the hearing officer entered her Findings of Fact, Conclusions of Law and Recommendation. DP 1-11. She dismissed Counts 1, 2 and 4. She found a violation of Count 3. The Bar had alleged violations of both RPC 1.7 and 1.9 but she found only a violation of RPC 1.9 – the former client rule.

She found that the conduct was an isolated incident of negligence and that ABA Standards for Imposing Lawyer Sanctions 4.34 was the presumptive sanction – Admonition appropriate when lawyer engages in isolated instance of negligence in determining whether the representation of a client may be materially affected by the lawyer’s own interests, or whether the representation will adversely affect another client, and causes little or no actual or potentially injury to a client.

She determined there were no aggravating factors and three mitigating factors: 1) no prior disciplinary record; 2) no dishonest or selfish motive, as evidenced by his acquiesce to a judgment against Holden/Five Star in favor of SPI in the SPI litigation; and 3) good reputation within the legal community. Because of the mitigating factors and the lack of injury to the client she determined that the violation was a technical violation and that the appropriate sanction should be limited to payment of the Associations’ costs and expenses.

The Association appealed the decision to the Disciplinary Board. It did not appeal the dismissal of Count 1. It appealed the dismissal of Count 2, may have appealed elements of Count 3 (whether they did or not is part of the appeal as noted below) and appealed the dismissal of Count 4. The Disciplinary Board, DP 15 –18, affirmed the dismissal of Count 2, found that the Count 3 violation was a “knowing” violation because “SPI did not execute a written waiver of the conflict of interest” (however, the Board left in place the dismissal of the RPC 1.7 allegations in connection with this count) and found a violation of Count 4 stating there was a violation for the continued representation of Holden/Five Star after he became aware that Mr. Holden may not be able to pay the judgment. It stated that “Respondent knowingly violated RPC 1.15(a)(1) by his continuing to 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 RPC 1.15(a) and/or 1.7.”

In short, what the Board found was that Carpenter violated RPC 1.15(a)(1) – when he learned that Holden might not be able to pay and did not withdraw in the Tark litigation and RPC 1.9 when he (Carpenter) appeared on behalf of Holden/Five Star in the SPI litigation.

The Board determined that ABA Standard 4.32 applied asserting that a suspension was appropriate where a lawyer knows of a conflict of interest and does not fully disclose the possible effect of that conflict, and causes injury to potential injury to the a client. The Board determined that two aggravators applied – 1) Multiple offenses, conflicts in two separate lawsuits; and 2) substantial experience in the practice of law. It deleted the Hearing Officer’s determination of no dishonest or selfish motive because “it is not supported by the record.” The Board recommended a two-month suspension.

Respondent filed a timely notice of appeal, DP 19-20, and brings this matter to the court for its consideration.

ARGUMENT

Standard for Review

In a matter such as this the standard for review before this court is established law:

This court exercises plenary authority in matters of attorney discipline. *In re Disciplinary Proceeding Against Carmick*, 146 Wn.2d 582, 593, 48 P.3d 311 (2002). We give considerable weight to the hearing officer's findings of fact, especially with regard to the credibility of witnesses, and we will uphold those findings so long as they are supported by 'substantial evidence.' *See In re Disciplinary Proceeding Against Guarnero*, 152 Wn.2d 51, 58, 93 P.3d 166 (2004) (citing ELC 11.12(b)). 'In reviewing these findings, we look at the entire record. However, 'we

ordinarily will not disturb the findings of fact made upon conflicting evidence." *In re Disciplinary Proceeding Against Huddleston*, 137 Wn.2d 560, 568, 974 P.2d 325 (1999) (citation omitted) (quoting *In re Disciplinary Proceeding Against Miller*, 95 Wn.2d 453, 457, 625 P.2d 701 (1981)). In the end, the Bar has the ultimate 'burden of establishing an act of misconduct by a clear preponderance of the evidence.' *In re Disciplinary Proceeding Against Allotta*, 109 Wn.2d 787, 792, 748 P.2d 628 (1988). "Clear preponderance' is an intermediate standard of proof . . . requiring greater certainty than 'simple preponderance' but not to the extent required under 'beyond {a} reasonable doubt.'" *Id.* Thus, a clear preponderance of all the facts proved must support a finding of misconduct.

We review conclusions of law de novo which must be supported by the factual findings. See *Guarnero*, 152 Wn.2d at 59; see also ELC 11.12(b). In so doing, we give "serious consideration" to the Board's recommended sanction and generally affirm it "unless {the} court can articulate a specific reason to reject the recommendation." *Guarnero*, 152 Wn.2d at 59 (quoting *In re Disciplinary Proceeding Against McLeod*, 104 Wn.2d 859, 865, 711 P.2d 310 (1985)).

In the Matter of Disciplinary Proceedings Against Jeffrey G. Poole, 156 Wn.2d 196, 208, P.3d (2005) (Footnotes omitted). In accord is: *In re Haley*, Slip Opinion, Case Number 200,153-0 (Filed January 26, 2006):

When a lawyer discipline decision by the Board is appealed, this court has 'plenary authority' on review. *In re Disciplinary Proceeding Against Whitt*, 149 Wn.2d 707, 716, 72 P.3d 173 (2003). While we 'do{} not lightly depart from the Board's recommendation,' we are 'not bound by it.' *In re Disciplinary Proceeding Against Tasker*, 141 Wn.2d 557, 565, 9 P.3d 822 (2000). The court reviews conclusions of law de novo. *Whitt*, 149 Wn.2d at 716-17. We have 'the inherent power to promulgate rules of discipline, to

interpret them, and to enforce them.' *In re Disciplinary Proceeding Against Stroh*, 97 Wn.2d 289, 294, 644 P.2d 1161 (1982) (emphasis added); see also ELC 2.1 (recognizing this court's 'inherent power to maintain appropriate standards of professional conduct').

If misconduct is found, after applying the ABA Standards to discern the presumptive sanction and applying any relevant aggravating or mitigating factors, the court considers the revised *Noble* factors (*In re Disciplinary Proceeding Against Noble*, 100 Wn.2d 88, 95-96, 667 P.2d 608 (1983)), of “proportionally” and “degree of unanimity” in assessing the appropriateness of a given sanction. *Poole, supra*, citing *In re Kuvara*, 149 Wn.2d 237, 257, 66 P.3d 1057 (2003).

What Is To Be Reviewed In This Matter

As this matter now stands, Carpenter has been found to have violated RPC 1.15(a)(1) – Declining or Terminating Representation in Count 4 when he did not withdraw when he learned that Holden might have problems paying and RPC 1.9 – Conflict of Interest; Former Clients, when he appeared in the SPI litigation without getting a written waiver. There are no other violations which have been found.

It is true that the Board found at Count 4 that Carpenter “knowingly violated RPC 1.15(a) and/or 1.7.” However, while the RPC 1.7 violation was found as an antecedent violation in order to find the RPC

1.15(a)(1) charge, Carpenter cannot be found to have been violated RPC 1.7 since it was not charged in this count. Count 4 stated: “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*. Respondent cannot have been found to have violated an uncharged RPC provision. *In the Matter of Disciplinary Proceedings Against Jeffrey G. Poole*, 156 Wn.2d 196, 219, P.3d (2005) (dismissal where Bar's complaint did not accurately reflect the charge of misconduct levied).

A substantial portion of the evidence, briefing and argument below focused on the joint representation of SPI and Holden/Five Star in the Tark litigation, Count 1, and Carpenter’s and Thulin’s conduct of the litigation and notice of the summary judgment decision to SPI, Count 2. Those counts were dismissed, have not been appealed and are not presented for review.

The issue of harm is, of course, significant under the ABA Standards. The hearing officer found in her recommendation a lack of injury to the client. FFCLR page 11. The Disciplinary Board made no finding of harm. The Board did assert that Standard 4.32 applied which requires injury or potential injury but that was only in the citation to the

language of the Standard. The Board made no determination of harm. Carpenter is not appealing the issue of harm and accepts the hearing officer's determination that was no injury to the client and intends to argue on that basis. The question of whether or not there was harm would be a factual question. While the standard of review provides for review of the record to see if there is substantial evidence to support a factual finding, that standard only applies where a matter is being actually reviewed. Where a factual determination is not appealed it is a verity on appeal. In *Disciplinary Proceeding Against Romero*, 152 Wn.2d 124, 136, 94 P.3d 939 (2004).

Count 3 Was Not Subject To Review By Board

The Disciplinary Board changed the findings in regard to Count 3. Carpenter had accepted the determination that there was a technical violation of Count 3. The Bar did not mention Count 3 in its Notice of Appeal, DP 12-14 nor did it mention it in its briefing. This was specifically noted in Respondent's Reply to Association's Brief in Opposition to Hearing Officer's Decision.¹ Where Carpenter stated at page 17 "[T]he Bar does not mention Count 3 and does not dispute the decision of the hearing officer to resolve that count by a finding of misconduct but

¹ This was not submitted as part of the Clerk's Papers and will be identified in a Supplemental Designation of Clerk's Papers.

without the imposition of a sanction other than costs.” The Disciplinary Board acknowledged in its decision in a footnote on a page 2 that there was no direct mention of Count 3 in the Bar’s Briefing and asserted that because of a reference to isolated incident in the recommendation of the hearing officer that Carpenter was on notice that Count 3 was at issue.

As was shown by Carpenter’s express reference and reliance on the absence of any appeal or briefing of Count 3, Carpenter was not on notice as to Count 3 and so did not argue it.

The defense in the appeal to the Disciplinary Board was organized in part on the basis that Count 3 was not being appeal. At oral argument the Association sought to expand its arguments. Carpenter is entitled to reasonable due process rights. United States Supreme Court case law has found that bar disciplinary proceedings are “quasi-criminal.” *In re Ruffalo*, 390 U.S. 544, 551, 88 S. Ct. 1222, 529, 20 L. Ed. 2d 117 (1968). Washington case law has established that bar proceedings are *sui generis* and are not criminal but that there are due process requirements in a bar disciplinary case. *In re Allper*, 94 Wn.2d 456, 617 P.2d 982 (1980). Allper apparently argued that his case “was quasi-criminal in nature” and, therefore, all criminal due process rights attached. The court stated the self-evident fact that bar proceedings are not criminal proceedings and

rejected the contention that all criminal due process rights attached to these “special proceedings” but did recognize that due process is required in these proceedings. The court found that “Thus, Allper’s analogy fails because due process requirements in these special proceedings may differ from those in the criminal context.” This is a recognition that due process attaches but there can be argument as the extent of that due process.

In a medical disciplinary case the Washington court has recently held in *Nguyen v. Department of Health*, 144 Wn.2d 516, 523, 29 P.3d 689 (2001) that:

At its heart this case concerns the process due an accused physician by the state before it may deprive him his interest in property and liberty represented by his professional license. “Procedural due process imposes constraints on governmental decisions which deprive individuals of “liberty” or “property” interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment” [Citation omitted.] A medical license is a constitutionally protected interest which must be afforded due process. [Citations omitted.]

The issue presented was what is the standard of proof in a medical disciplinary case? The court, at pages 529 and 529, found that this medical disciplinary proceeding was

“[Q]uasi-criminal” in exactly the same sense the United States Supreme Court used the term when it characterized disbarment proceedings “quasi-criminal.” In *re Ruffalo*, 390 U.S. 544, 551, 88b S. Ct. 1222, 529, 20 L. Ed. 2d 117 (1968). If disbarment is quasi-criminal, so must be medical de-licensure.

In Washington bar disciplinary proceedings the due process rights of respondents are not those provided to a criminal defendant but given the fact that the proceedings are sui generis and “quasi-criminal” the respondent does have significant due process rights. While not all criminal due process rights attach, heightened due process rights do attach because of the constitutionally protected right which is at stake. At the barest minimum, Carpenter was entitled to notice and due process on the issue of whether Count 3 was being reviewed on appeal.

Carpenter Did Not Violate RPC 1.15(a)(1) – Count 4

The Board entered new findings to the effect that Carpenter violated RPC 1.15(a)(1) when he did not withdraw once he learned that Holden might not be able or willing to make the payment. The Board does not assert when that occurred.

Carpenter had no reason to suspect that Holden might be in financial trouble, after all Holden was in Fiji putting together a resort project. RP 2/9/05, 27. Carpenter believed it was a multi-million dollar deal. RP 2/9/05, 55. Carpenter did not learn that Holden might not have assets in the United States until after the ruling on the Summary Judgment. RP 2/9/05, 54. Even then that did not mean that Holden could not make good on the judgment since Holden was telling Carpenter that he had the

financial wherewithal to take care of the judgment, RP 2/9/05, 45. Nonetheless, Carpenter told Tark's counsel about the lack of assets in the US and copied Crawford on the letter. Exh. 58. Within a month or less, new counsel was substituted in for SPI. FF 40 – 44. In fact, once it became apparent that Holden might not have assets to cover the judgment. RPC 1.15(a)(1) does not contain a time within which a lawyer has to proceed. Carpenter acted in a timely and reasonable manner, he did not just get off the case leaving SPI unprotected but on the other hand he did not battle to stay on the case. He acted in a reasonable and timely manner and, therefore did not violate RPC 1.15(a)(1).

Carpenter Did Not Knowingly Violate Either RPC

The allegation in Count 3 was that Carpenter did not obtain a written waiver when he appeared in the SPI litigation. The allegation in Count 4 was that Carpenter had to withdraw when he learned that Holden might not pay the judgment. As discussed above Carpenter submits that his state of mind of negligence as found by the hearing officer in connection with Count 3 was not subject to review and, therefore, is not subject to review here. However, the Board changed the finding from negligent to knowing in Count 3. It offers no rationale other than the statement "SPI did not execute a written waiver of the conflict of interest.

Therefore, Respondent knowingly violated RPC 1.9.” This is nothing more than circular reasoning in which the Board says there was not written conflict, therefore, it must have been knowing.

The Board found at Count 4 that Carpenter knew he had a conflict of interest in and, therefore, his failure to withdraw was a knowing violation. There is was no evidence to establish that Carpenter had any reason to believe he needed the written waiver and there was no evidence to establish that Carpenter knew that the information he had put him in a conflict position that required him to withdraw.

In connection with Count 3, The Association asserted that Carpenter knew he had represented SPI, knew that he had defended Holden and knew that the litigations were substantially related. Based on this the Association argued that Carpenter had a “conscious awareness of the nature or attended circumstances of the conduct” and, therefore, acted knowingly.

The Association sought, by implication, to prove Carpenter’s state of mind. This is unnecessary since there was direct evidence of his state of mind. Carpenter knew that SPI was aware of his representation of Holden/Five Star and believed that SPI did not object to that representation. In fact, he felt that since SPI had expressly asked him to

accept service for Holden/Five Star in the SPI suit that they wanted him to stay on the case. Ex. 77. After asking him to accept service and after he appeared on the case, no one raised any concerns about him being on the case from October 8, 1999 until December 22, 1999. Exhs. 65 and 76. On December 22, 1999, SPI's new counsel indicated in a letter that he felt there was a conflict of interest. Even then SPI did not demand Carpenter withdraw. Instead, for reasons of its own, it apparently wanted to raise the issue but did not want to change the status quo.

Carpenter wrote SPI's new counsel the next day and explained why he had stayed on the case and expressly asked if they wanted him off the case. *See* Exh. 77. Despite the direct demand by Carpenter that they tell him if they wanted him off the case, SPI never demanded that he withdraw.

Carpenter testified at the hearing regarding why he did not withdraw and the hearing officer found this testimony credible. He stated that he felt 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. He also believed there was no conflict since Holden had admitted the obligation to indemnify; since in the Answer in the SPI litigation Holden had admitted he had the obligation

to indemnify; and since Holden was telling him that he (Holden) had the financial wherewithal to take care of the judgment if necessary. RP 2/9/05, 45. Carpenter believed that when SPI did not object to his remaining on the case, especially after his December 23, 1999 letter from him to SPI, “that SPI thought that it would be helpful to them if [he] stayed in the case and in conjunction with Mr. Holden we worked on common concerns.” RP 2/9/05, 49.

He also called his insurance company. After talking with them and having them cite him a case he formed a belief that any objection to him had been waived. RP 2/9/05, 50. [There is a case, *Small Business v. Intercapital Corp.*, 108 Wn.2d 324, 738 P.2d 263 (1987), which discusses that when a party is entitled to object to opposing counsel appearing on a matter and does not do so in a timely manner any conflict of interest is waived. This avoids the use of an objection later as a “tool to deprive his opponent of counsel of his choice....” *Ibid*, at page 337.]

It can be seen from all of this that Carpenter believed that not only was it okay for him to proceed but he also believed that SPI had waived any objection. The hearing officer determined that nonetheless he should not have represented Holden/Five Star in the SPI litigation. However, after hearing Carpenter testify and reviewing the evidence, it was clear to the

hearing officer that Carpenter's state of mind was negligence rather than knowing. Carpenter was not indifferent to his obligations and did the best he could to figure them out.

As for Count 4, there is no evidence that Carpenter had a "conscious awareness of the nature or attended circumstances of the conduct" when he did not withdraw after learning about Holden's financial situation. As discussed above, Carpenter had no reason to suspect that Holden might be in financial trouble, after all Holden was in Fiji putting together a resort project. RP 2/9/05, 27. Carpenter believed it was a multi-million dollar deal. RP 2/9/05, 55.

The Board's determination that Carpenter acted knowingly in either of these two counts should be rejected as not well founded in either the facts or the law.

There Were Not Multiple Offenses

The Board found an aggravator of multiple offenses since it asserted there were violations in two cases. The fact is that there was only one victim here and, while the Board did not find a pattern of misconduct it is essentially, by its reference to two cases, essentially seeking to come in the backdoor and find a pattern of misconduct. For the same reasons that the court has rejected pattern of misconduct where there is a single

victim, *In re Discipline of McMullen*, 127 Wn.2d 150, 171, 896 P.2d 1218 (1995), it should do so here, Furthermore, the premise of the RPC 1.15(a)1) argument is that there was a violation of RPC 1.7. What the Board really found was two violations of the same rule. Where the violation of one rule requires an antecedent violation of another rule, there should not be multiple violations where the rules are the same.

Board Should Not Have Stricken Lack of Dishonest Motive

The Board found there was no evidence in the record to support the finding of a lack of dishonest motive. Motive is a factual determination. It was not required that Carpenter prove this be direct evidence. The WSBA had to show that there is no substantial evidence to support the hearing officer's finding of no selfish motive. This determination was made by the hearing officer after hearing Carpenter testify and after considering the evidence including that identified in the discussion above about Carpenter's state of mind. There was substantial evidence to support the hearing officer's determination as to whether there was a selfish motive.

None of the "evidence" identified by the Association including acquiescence to the judgment against this client or the potential adversity between the clients has anything to do with Carpenter's personal motives for why he represented Holden/Five Star. Not only is there substantial

evidence to support the hearing officer's determination in this regard, there is also no evidence to support the Association's assertion that the motive was selfish. This mitigator should not be stricken.

Hearing Officer's Recommendation Should Be Reinstated

When all the evidence is considered and in view of the lack of any injury to a client there is no reason for Carpenter to be suspended. It is clear that Standard 4.33 does not apply. The most that can be argued is that Standard 4.34 regarding an admonition might apply. At the most Carpenter engaged in an two insolated instances of negligence with no injury to a client. This would result in a presumptive sanction of admonition or less since one of the crucial elements, harm, is missing.

Given the mitigators, the fact of negligence and the lack of harm, the court should reject the Board position and follow the lead of the hearing officer and dismiss without imposition of a sanction. At the most these were technical violations in which everyone was represented and understood what was going on. SPI in its own interests asked Holden/Five Star to conduct its defense. SPI's legal exposure was the same whether Carpenter or any other lawyer represented it. Carpenter's failure to get out of representation of Holden/Five Star in the SPI litigation was based on his

good faith belief that for its own interests SPI wanted him on the other side. There was no injury to anyone from the alleged conflicts.

CONCLUSION

The court should reject the disputed determinations of the Board and impose the sanction determination recommended by the Hearing Officer.

Dated this 10th day of July, 2006.

**FILED AS ATTACHMENT
TO E-MAIL**

Kurt M. Bulmer, WSBA # 5559
Attorney for Attorney Carpenter

Rec. 7-10-06

-----Original Message-----

From: Kurt Bulmer [mailto:kbulmer@comcast.net]

Sent: Monday, July 10, 2006 4:53 PM

To: OFFICE RECEPTIONIST, CLERK

Cc: Nancy Miller

Subject: Carpenter - Sup Court No. 200,376-1

Attached please find the opening brief in this matter.

Kurt M. Bulmer
Attorney at Law
740 Belmont Pl. E, # 3
Seattle, WA 98102
(206) 325-9949 - Phone
(206) 325-9953 - Fax
kbulmer@comcast.net - E-mail