

200,479-2

WSBA No. 11356

SUPREME COURT OF THE STATE OF WASHINGTON

In re Mark Stansfield

Attorney, Respondent

RESPONDENT STANSFIELD'S REPLY BRIEF

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A. Reply to Counterstatement of the Case

The WSBA's brief ignores material facts which support respondent's position. The WSBA's own witness, Ivon Urquilla, testified that Mr. Stansfield declined to assist them with any potential civil lawsuit TR p. 173-74. Mr. Stansfield confirmed her testimony. TR p 136. Mr. Stansfield did not advise the Urquilla's not to file a wrongful death claim, he told them: "there wasn't anything he that he could do [about a tort claim]." TR p 174, ls. 3-4.

Mr. Stansfield was first contacted by Mr. Vargas and his mother during the afternoon of Friday September 19, 2003. While his fee for the entire representation was paid on Monday September 22, 2003, Mr. Stansfield only appeared at the September 22, 2003 Frankie Vargas arraignment. He testified that he told the Vargases that he had done some work for Mrs. Urquilla but he thought he could represent Mr. Vargas. If he concluded that he could not continue the representation he would withdraw. TR p. 125.

Mr. Stansfield's only filing was a single pleading his standard form notice of appearance that he used in every criminal case. Ex. #39 TR. p. 145. After he appeared at the arraignment Mr. Stansfield reviewed the court file for Mr. Vargas, and returned to his office and consulted the probate file for the Urquilla estate. TR p. 129. He discussed the conflict

issue with an Idaho lawyer and the next day began to try to find a new lawyer for Mr. Vargas. TR p. 134 & 138. After he could not get a response from the first lawyer he thought could effectively represent Mr. Vargas he contacted Mr. DiTommaso and signed a withdrawal and substitution on October 1, 2003. TR p. 134-35. Mr. DiTommaso signed on October 3, 2003 and filed it later. Ex. #38, p. 2. Mr. Stansfield kept \$250 of the fee payment and sent the balance to Mr. DiTommaso.

During the hearing, in response to Disciplinary Counsel's question, Mr. Stansfield testified that Mrs. Urquilla had no personal knowledge about the accident. TR p. 43. The record lacks any contrary evidence.

It is also undisputed that there never was a trial but Mr. Vargas pled guilty to the three counts of vehicular homicide.

#### Chavez Estate

Around the same time that Mrs. Urquilla sought Mr. Stansfield's representation to probate her late husband's estate she told Mr. Stansfield that Mr. Chavez's widow lived in Guatemala and she was ill because of her shock at her husband's death. Mrs. Urquilla told Mr. Stansfield that Mrs. Chavez had given her authority to act as the personal representative of the Chavez estate. TR p. 62-63. Mr. Stansfield had her sign a fee agreement and various other documents as the personal representative of

the Chavez estate. Ex. #2 & #6. He also notified Farmers that he represented both victims. EX. #12.

Mr. Stansfield testified that he sent his standard letter to the insurance company indicating that he represented the Chavez estate because he wanted to prevent any insurance company representative from contacting either widow and possibly obtaining statements contrary to the widow's interests. TR p. 135.

When he got no answer to his letters to Mrs. Chavez Mr. Stansfield did not file a probate or initiate any legal action. While Mr. Stansfield had, at first, believed Mrs. Urquilla's representations about what Mrs. Chavez wanted he became concerned about her veracity. On August 29, 2003 Mr. Carpenter informed Mr. Stansfield that he had been retained to represent the Chavez estate. Mr. Stansfield filed a lien for the compensation he believed he was due. Ex #31. Because he was concerned about the truth concerning Mrs. Chavez's case he requested confirmation from Mr. Carpenter which was not provided. TR p. 100

In January 2004 Mr. Carpenter received the insurance company check transmitting policy limits of \$50,000 in a check payable to the personal representative Chavez, Mr. Carpenter and Mr. Stansfield. When Mr. Carpenter contacted Mr. Stansfield about signing the original check, Mr. Stansfield offered to compromise his claim but Mr. Carpenter never

responded to this offer. TR p. 265, Ex #46 Mr. Carpenter failed to respond because he believed that Mr. Stansfield had no claim. TR p. 265.

Mr. Stansfield did not know that Mr. Carpenter had obtained a \$5000 check which he was holding for Mr. Stansfield's signature. In April, 2004 the personal representative of the Chavez estate denied Mr. Stansfield's claim Ex. R-2.

Mr. Stansfield relied upon RCW 11.40.100's time bar if suit on a rejected creditor's claim was not filed within 30 days of the personal representative's rejection of a creditor's claim it is forever barred.

Mr. Carpenter believed that he had to wait two years before he could assume that Mr. Stansfield no longer had a claim and never notified Mr. Stansfield that he continued to hold the \$5,000 check. TR p. 265.

After the formal complaint was filed, Mr. Stansfield learned for the first time that Mr. Carpenter still had the \$5,000 check. When he discovered that Mr. Carpenter still held the \$5,000 check he sent Mr. Carpenter a lien release. Ex R-3 & R-4.

B. Argument

1. The Court's Decision Must be Based Upon the Facts in the Record and Not the WSBA's Hypotheticals Regarding Possible Conflicts

The WSBA premises its argument about a violation of RPC 1.9(a) upon the allegation that one can imagine a number of facts which if true,

Mrs. Urquilla could have confided to shed light on the accident.” WSBA Brief p. 26. However this record contains no information which supports the imaginary facts recited. The record shows that Mrs. Urquilla had no personal knowledge of the accident. The WSBA originally argued that Mr. Stansfield violated RPC 1.9(a) because the court could order restitution or he could have cross examined Mrs. Urquilla if she spoke at the sentencing hearing. Association’s Hearing Brief CP 30. However those possible scenarios have now been abandoned and a new set of hypothetical facts substituted.

However, because there is no proof that any of these facts existed they cannot be the basis for the conclusion that Mr. Stansfield violated RPC 1.9(a).

2. The WSBA’s Reliance on *State v Hunsaker*, is Misplaced.

*State v. Hunsaker*, 74 Wn. App. 38, 873 P.2d 540 (1994) reversed a trial court order disqualifying a public defender’s office based upon RPC 1.9(a) and (b). The *Hunsaker* court held that the record lacked sufficient evidence to establish a ‘substantial relationship’ between the former representation of the State’s witness and that person’s testimony in the current prosecution. 74 Wn. App. at 46.

While the court found that the factual context analysis was probably the correct one, the record did not establish that the witnesses

prior conviction was substantially related to the proposed testimony since the record contained no information about either the nature of the prior conviction or the underlying facts. *Id.*

The court also stated that even if the matters were substantially related the record did not support a finding of material adversity. 74 Wn. App. at 46, n. 6.

The *Hunsaker* court also correctly pointed out that the case law regarding substantial relationship is sparse *Id.* at 42. There is no Washington case on point with the issues in this case.

The Restatement Third of the Law Governing Lawyers supports respondent's argument that the substantial relationship test is used most frequently to protect the confidential information of the former client obtained in the course of the representation. The Restatement indicates that a subsequent matter is substantially related to an earlier matter if there is a substantial risk that the subsequent representation will involve the use of confidential information of the former client obtained in the course of the representation. Substantial risk exists where it is reasonable to conclude that it would materially advance the client's position in the subsequent matter to use confidential information obtained in the prior representation. Restatement Third of the Law Governing Lawyers §132, 379-80 (ALI 2000).

The recent lawyer discipline case *In re Carpenter* (Appendix A) demonstrates a clear violation of RPC 1.9(a). Carpenter represented two defendants in litigation and then withdrew from the representation of one defendant and appeared for the other defendant in a new lawsuit brought by his former defendant client against the client he continued to represent.

Disqualification cases also show how the substantial relationship test is applied. For example, *Teja v. Saran*, 68 Wn. App. 793, 846 P.2d 1375, review denied, 122 Wn.2d 1008 (1999) involved a lawyer's appearance to defend against the plaintiff's lawsuit when the plaintiff previously consulted the lawyer about the debt he was suing to recover. 68 Wn. App. at 796. A later case, *Sanders v. Woods*, 121 Wn. App. 593, 89 P.3d 312 (2004) reversed the trial court's denial of a disqualification order when the lawyer representing the defendant had previously represented the plaintiff in the same type of lawsuit in Oregon and where the lawyer's partner had reviewed the non compete agreements that formed the basis for the plaintiff's lawsuit. 121 Wn. App. at 598-99.

The *Sanders* court also explained the underlying concern that the possibility or appearance of the possibility, that the attorney may have received confidential information during the prior representation that would be relevant to the subsequent matter. *Id.* at 599, quoting *Trone v. Smith*, 621 F.2d 994, 999 (9<sup>th</sup> Cir. 1980).

That possibility does not exist in this case. Mr. Stansfield did not sue Mrs. Urquilla and an analysis of the facts surrounding the probate of her husband's estate and recovery of insurance policy limits do not show that Mr. Stansfield's representation of Mr. Vargas at the arraignment was "substantially related" to the probate and insurance recovery.

3. The Cases from Other Jurisdictions Fail to Support a Conclusion That Mr. Stansfield violated RPC 1.9(a)

The WSBA brief mentions two cases which it claims support the conclusion that Mr. Stansfield violated RPC 1.9(a). WSBA Brief p. 31, n. 16. The first a California case is based upon a different rule than Washington RPC 1.9(a). California RPC Rule 3-310 (Appendix B) does not contain any language about substantial relationship but instead imposes a blanket ban, absent written disclosure to the client, upon a lawyer representing a client when the lawyer had a legal, or professional relationship with another person or entity the member knows or reasonably should know would be affected substantially by resolution of the matter. RPC 3-310 (B)(3). That rule permits a lawyer who obtains informed written consent of the client or former client, to accept employment adverse to the former client where, by reason of the representation of the former client, the member has obtained confidential information material to the employment. RPC 3-310(E).

These rules are significantly different than Washington's RPC 1.9(a). They do not mention "substantial relationship" or "material adversity."

The Texas case, *National Medical Enterprises v. Godbey*, 924 S.W. 123 (Texas 1996) disqualified counsel for the plaintiffs suing NME who were members of a firm which included a lawyer representing a non party who might be the subject of later adverse legal proceedings based upon his relationship with NME. *Id.* at 132.

The individual lawyer had represented one of NME's ex-employees who was not yet charged with criminal conduct but who was a target of an ongoing investigation. *Id.* at 132-33. This former client had intervened in the lawsuit and brought his own motion to disqualify the law firm. *Id.* at 126. Since there was a possibility that the ex-employee could face criminal charges the court disqualified the individual lawyer and his law firm. *Id.* at 132-33.

The lawyer admitted that he had obtain information from NME that he was required, pursuant to a joint defense agreement to keep confidential. *Id.* at 129. Given that admission the Texas court relied upon an irrebutable presumption of imputed knowledge and disqualified the law firm.

4. Mr. Stansfield's Limited Work for Mr. Vargas – His Appearance at the Arraignment is Relevant to a Determination of Whether He Violated Washington RPC 1.9(a).

The WSBA's brief claims the Court should ignore the limited representation Mr. Stansfield provided. However the facts do not support this argument.

The WSBA argues that there was no need for him to enter the case immediately. WSBA Brief at 35. However, he was asked to represent Mr. Vargas on the Friday afternoon before the 9:00 am arraignment. While Mr. Stansfield could have just charged an hourly fee instead he told Mr. Vargas and his mother that if the case involved the Urquillas he would probably withdraw. TR p. 125 & 128. Thus the client knew that there was a possibility that he would not complete the case. It is unrealistic to say that Mr. Stansfield could only insist on a limited engagement or that there was no pressing need for him to appear. The facts demonstrate otherwise.

*In re Knappenberger*, 338 Or. 341, 108 P.3d 1161 (2005) (Appendix C) imposed a 120 day suspension (not three months) suspension when the lawyer contacted two represented parties about the subject of the representation, had prior discipline, and continued to represent a wife in a dissolution and related restraining order proceedings when he had previously consulted with the husband about the same issues.

The Oregon Supreme Court faulted the lawyer for his lack of a comprehensive conflict of interest checking system and stated that the lawyer should have known about the conflict of interest because this was not a complex transaction but instead a contentious divorce between two people with the same last name.

The Court found that the respondent's prior disciplinary record including discipline for similar rule violations meant that this misconduct warranted a 120 day suspension.

5. Character Evidence is Always Relevant to a Lawyer Discipline Proceeding.

The WSBA's brief argues that under ER 405 and *State v. Mercer-Drummer*, 128 Wn. App. 625, 116 P.2d 454 (2005), *review denied*, 156 Wn.2d 1038 (2006) any evidence about Mr. Stansfield's community service and the hearing officer's statement regarding Mr. Stansfield's motives is irrelevant. WSBA Brief p. 43.

First this is neither a civil nor a criminal case but a *sui generis* proceeding. ELC 10.14(a). The evidence rules have only limited relevance as a guide when they do not conflict with the rule that the evidence including hearsay evidence may be admitted if it is the kind of evidence on which reasonably prudent person are accustomed to rely upon in the conduct of their affairs. ELC 10.14(d)(1) & (2). Finally *Mercer-*

*Drummer* involved a defendant's claim that she should have been allowed to present evidence of her law abiding character through her own testimony. 128 Wn. App. at 629-32. The court upheld the trial court's ruling in part because that evidence was not relevant when the issue of a person's following the law was not an element of the crime charged. *Id.* at 632.

ABA Standards 9.32 sets out the mitigating factors including a respondent's character or reputation. Standard 9.32(g). Therefore in this proceeding the evidence is relevant and should be considered.

#### 6. A Six Month Suspension is a Disproportionate Sanction

The ABA Standards state that the usual minimum suspension period is six months. Standards at p. 8. however that, is not always the suspension period the Court imposes.

In this case the Board decision is split 8-3 with the dissenters recommending two reprimands. *In re Carpenter* imposed only a 60 day suspension when a lawyer who dropped a current client and represented a current client in litigation filed by that former client involving an indemnity provision in the agreement between the former client and the current client. The trial court had already entered judgment against the two defendants (the former client and the current client) in the first litigation

and the former client was suing to enforce the other defendant's obligation to indemnify that former client.

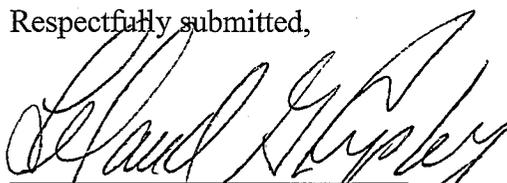
The Court found that Mr. Carpenter violated RPC 1.9(a) yet he received only a 60 day suspension. Thus, while we do not believe that Mr. Stansfield violated RPC 1.9(a) even if the court finds to the contrary the existence of a split Disciplinary Board and the sanction imposed in the Carpenter case show that a six month suspension is a disproportionate sanction.

C. Conclusion

Mr. Stansfield requests that this Court reject the Board's conclusion that Mr. Stansfield violated former RPC 1.9(a) and reject the Boards' disproportionate six month suspension recommendation and impose a Reprimand for a negligent violation of former RPC 1.2(f).

Dated November 27, 2007

Respectfully submitted,



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Attorney for Mark E. Stansfield

2007 Wn.2d (200,376-1); In Re Disciplinary Proceeding Against Carpenter;

Supreme Court of the State of Washington

Opinion Information Sheet

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JUSTICES

See the end of the opinion for the names of the signing Justices.

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 200,376-1

In the Matter of the Disciplinary Proceeding Against TIMOTHY W. CARPENTER, Attorney at Law.

Filed April 12, 2007

En Banc

J.M. JOHNSON, J. -- This attorney discipline case arose out of Timothy W. Carpenter's representation of two codefendants in a lawsuit to collect on a property transaction. He was charged with failing to withdraw when it became apparent that the codefendants had a conflict of interest. He was also charged with representing one of the former codefendants against the other in a later indemnification suit without obtaining consent or a waiver.

The hearing officer recommended no sanction except for the payment of costs. The Washington State Bar Association Disciplinary Board (Board) instead imposed a two month suspension for the conflicts of interest and representation of one former client in the later action against another. We affirm the Board's ruling and approve the two month suspension.

Facts1

In the fall of 1996, Holden/Five Star, Inc. bought a gas station from Tark Associates (Tark). Holden used SSI Properties,

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Inc. (SPI) to facilitate the real estate exchange for tax purposes, with all parties signing a real property exchange agreement. After E. Ray Holden acquired the property, he stopped making payments on the note to Tark. Tark sued both Holden and SPI. Mr. Carpenter represented both Holden and SPI in the action (Tark litigation).

SPI was concerned that Carpenter represented both clients, and that SPI had a potential cross claim against Holden that might not be pursued. SPI asked for additional assurances of indemnity in the Tark case, and Holden signed an additional indemnity statement on April 16, 1999. Carpenter sent Holden a letter on May 27, 1999, which noted that Holden was overdue on his legal bill, Holden's phone had been disconnected, and he had not replied to any correspondence, likely raising questions about the value of Holden's indemnity.

SPI asked to be dismissed from the Tark litigation as a real party and that this claim be included in the answer. Greg Thulin, an associate in Carpenter's firm, added the appropriate language to the answer. However, Carpenter decided it was unlikely that SPI would be dismissed as a real party. Consequently, Carpenter did not argue that SPI should be dismissed in the subsequent response to summary judgment.

On August 13, 1999, judgment was entered against Holden/Five Star and against SPI, jointly and severally, for \$343,516.11. SPI wanted Holden to post a bond to protect SPI's assets from the Tark judgment. Holden told Carpenter's associate (Thulin) that he was leaning toward appealing the judgment without posting a bond. Meanwhile, Carpenter attempted to settle with Tark by offering to return the gas station, along with a cash payment of \$20,000. This offer was rejected. Holden did not have any other assets that could be reached by the judgment.

Tark attempted to attach SPI assets in California to satisfy the judgment. On September 27, 1999, SPI filed a separate suit against Holden to enforce the indemnity provisions (SPI litigation). On October 5, 1999, Carpenter withdrew from the representation of SPI in the Tark litigation. He then accepted service and entered a notice of appearance for Holden in the SPI litigation. Carpenter never obtained written consent from SPI to represent Holden in the SPI litigation.

Carpenter noted in a letter that he felt it was in the parties' mutual interests to cooperate in the Tark appeal and offered to share his appeal brief draft. Additionally, Carpenter argued that SPI had waived any objection to his representation by expressly serving him with the later SPI lawsuit. SPI did not formally complain about Carpenter's involvement in the SPI indemnification litigation until December 22, 1999. Such complaint was made two days after SPI lost a motion for relief from judgment in the Tark litigation.

The December 22, 1999, letter from SPI counsel notes "concern" with Carpenter's past representation of SPI but does not ask him to withdraw. In his written response, Carpenter asserts he had proceeded under the assumption that SPI wanted him involved in the litigation. In this letter, Carpenter asked whether SPI wished him to withdraw. SPI never replied to this request in Carpenter's letter and never directly demanded withdrawal.

SPI posted its own bond for \$460,000 in the Tark litigation. On January 14, 2000, SPI obtained a summary judgment against Holden in the SPI litigation for \$343,693.11. This award was then applied to pay off SPI's obligation in the Tark litigation.

#### Procedural History

On January 27, 2004, the Washington State Bar Association (Association) filed a formal complaint against Carpenter, charging four counts of misconduct. Both the Board and the hearing officer agreed to dismiss counts 1 and 2. Currently, only counts 3 and 4 are disputed before this court:

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, Conflict of Interest, Respondent violated RPC 1.15(a)(1), Declining or Terminating Representation.

iClerk's Papers (CP) at 5.

The hearing officer found a single negligent violation of former RPC 1.9 (2004) in count 3, and based upon mitigators

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and lack of actual injury to the client, reduced the sanction to costs and expenses. The hearing officer found no aggravators, found three mitigators, and found only a technical violation of former RPC 1.9. The hearing officer concluded the appropriate sanction was paying expenses and costs.

On appeal by the Association, the Board affirmed the hearing officer's findings that Carpenter violated former RPC 1.9 in count 3 but amended the finding of mental state from negligence to knowledge. The Board also found a knowing violation of former RPC 1.7 (2004) in count 4. The Board then found two additional aggravators, struck one mitigator, and noted the lack of actual injury to the client. Ultimately the Board mitigated the presumptive six month suspension for a knowing violation to a lesser, two month suspension.

Standard of Review

The Washington Supreme Court has final authority over lawyer discipline matters. In re Disciplinary Proceeding Against Poole, 156 Wn.2d 196, 208, 125 P.3d 954 (2006). We review conclusions of law de novo and will not disturb challenged findings of fact if they are supported by substantial evidence. Id. The Association must prove misconduct by a clear preponderance of the evidence. Id. We give greater consideration to the Board's recommended sanction than to that of the hearing officer because "the Board is the only body that hears the full range of disciplinary matters." In re Disciplinary Proceeding Against Christopher, 153 Wn.2d 669, 677, 105 P.3d 976 (2005).

Analysis

In this case we are presented with three issues: (1) Did Carpenter knowingly violate former RPC 1.7 or former RPC 1.9 under count 3? (2) Did Carpenter knowingly violate former RPC 1.15(a) (2004) and former RPC 1.7 under count 4? (3) Is the Board's sanction appropriate after balancing the mitigating and aggravating factors Today, we affirm the Board's decision that Carpenter knowingly violated former RPC 1.9 under count 3, and knowingly violated former RPC 1.15(a) and former RPC 1.7 under count 4.2

Count 3 -- Violation of Former RPC 1.9 in the SPI Litigation

Carpenter alleges he was denied due process because the Association did not mention count 3 in its notice of appeal or in its briefing to the Board. See Br. of Resp't at 18-19. The Association argues that Carpenter was well aware of its intention to challenge the hearing officer's findings regarding count 3. A quick review of the Association's briefing shows that Carpenter was on notice that count 3 would be reviewed as part of the Board hearing. See CP at 37-40; see also Decision Papers (DP) at 16 n.1 (Disciplinary Board Order Amending Hr'g Officer's Decision) ("the Board finds that the statement in the Association's brief [regarding former RPC 1.9 and count 3] put Carpenter on notice that the mental state and sanction in Count 3 were at issue"). Allowing the Board to review the complaint without a limitation on issues is consistent with ELC 11.12(b).3

In count 3, both the hearing officer and the Board found that Carpenter breached former RPC 1.9 when he represented Holden against former client SPI with materially adverse interests.4 Unchallenged findings are verities on appeal. See In re Disciplinary Proceeding Against Whitney, 155 Wn.2d 451, 461, 120 P.3d 550 (2005). The fundamental issue in this case is whether Carpenter knew about the conflict of interest or if his failure to obtain a waiver for the conflict was merely negligent.5 We affirm the Board's decision which found that Carpenter's violation of former RPC 1.9 was clearly a knowing violation. DP at 16-17.

Carpenter argues he was merely negligent because there was not "substantial risk" of consequences from his actions and he did not deviate from the standard of care employed by a reasonable attorney. See ABA Standards For Imposing Lawyer Sanctions Definitions at 17 (1991). However, Carpenter's actions clearly were taken with knowledge. He had "conscious awareness" of the nature or attendant circumstances of his conflicts. Id. Carpenter knew he was representing Holden/Five Star against a former client (SPI) in a substantially related matter involving some of the same facts and circumstances. He knew he did not procure the required signed consent. See CP at 67 (Findings of Fact 47, 48, 49). Indeed, Carpenter admits he never obtained an informed written consent from SPI. See Opening Br. of Carpenter at 10. Carpenter also admits that "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." Id. at 9.

This case is similar to In re Disciplinary Proceedings Against Haley, 156 Wn.2d 324, 126 P.3d 1262 (2006). In that case, the attorney argued he was only negligent when he knew of a conflict but failed to obtain written consent. Id. at 340 n.11. This court rejected the argument, noting that "[t]here is no intent element related to obtaining informed written consent,

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which either exists or does not." *Id.* Here, Carpenter never obtained informed written consent from SPI.6 Curiously, he attempts to place the burden on SPI by arguing that it could have demanded his withdrawal, and its failure to do so waived the conflict of interest. See Opening Br. of Carpenter at 24-25. However, Haley clearly states that waiver "either exists or does not" and in this case, there was no informed written consent. 156 Wn.2d at 340 n.11. The burden is on the attorney. The Association correctly asserts that it is not "incumbent upon the client to police the lawyer's ethics and conduct, particularly where, as here, the client never received the required disclosures." See Answering Br. of Washington State Bar Association (WSBA) at 21.

In sum, Carpenter should have obtained a fully informed written waiver from his former client. We have previously stated that "[e]ven 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.' The injury is as much to the image of the legal profession as it is to the individual client." *In re Disciplinary Proceeding Against Dann*, 136 Wn.2d 67, 79 n.2, 960 P.2d 416 (1998) (second alteration in original) (internal citation omitted) (quoting *In re Complaint of Dinerman*, 314 Or. 308, 840 P.2d 50, 55 (1992)).

#### Count 4 -- Violations of Former RPC 1.15(a)7 and Former RPC 1.7 8 in the Tark Litigation

The Board held that the hearing officer erred when the officer dismissed Carpenter's violations in count 4. Instead, the Board concluded that:

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 RPC 1.15(a) and/or 1.7.

iDP at 16-17. The Association charges that Carpenter did not adequately defend SPI's interests when he failed to include a dismissal/motion for SPI in the response to the summary judgment motion. The Association also argues that Carpenter knew Holden might not have the financial resources to indemnify SPI. Answering Br. of WSBA at 23-24. Further, the Association argues that Carpenter had an interest in assuring that SPI was jointly liable for the judgment because Tark could look to SPI to satisfy the judgment instead of to his other client, Holden. *Id.* The record supports the Association's position here.

The rule is clear, "If a lawyer accepts dual representation and the client's interests thereafter come into actual conflict, the lawyer must withdraw." *Gustafson 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)). Here, Carpenter did not propose certain defenses for SPI, such as dismissal, because he considered the defenses improbable. Meanwhile, he advanced all defenses attractive to his other client, Holden. See Opening Br. of Carpenter at 6-7. Thulin, Carpenter's associate, did include in the answer a request that SPI be dismissed because SPI was acting only as an intermediary. *Id.* at 6. However, the documents filed for the summary judgment hearing did not present any SPI defense but focused on other Holden defenses. See Ex. 48.

Moreover, Carpenter knew that Holden did not plan to post a bond for the appeal of the judgment against both clients. Ex. 53. He knew that Holden's assets were in Fiji and that Holden might be judgment proof. *Discipline Hr'g Tr.* (February 7, 2005) at 179-80. In light of these facts, Carpenter had to know that SPI was substantially more at risk to collection actions than Holden. This presents a clear conflict of interest between the two clients. In a clear violation of the RPC, Carpenter never obtained SPI's informed written consent to the ongoing, conflicting joint representation.

Finally, Carpenter argues that the charges of count 4 are inconsistent. Carpenter argues that count 4 does not charge a violation of former RPC 1.7 on its face, but instead is dependent on finding a violation in a previous count. This is incorrect. The Board has the right to amend the pleadings to conform to the evidence, and Carpenter was on notice that he would have to defend against multiple violations before the Board. See *In re Disciplinary Proceeding Against Bonet*, 144 Wn.2d 502, 509-10, 29 P.3d 1242 (2001). In count 4, the charged former RPC 1.15(a) violation is the failure to withdraw if the representation will result in violation of another RPC (here the Board determined the additional violation was former RPC 1.7). In conclusion, contrary to Carpenter's assertion, the Board can amend a charging count to conform to the evidence. See ELC 10.1(a) (incorporating CR 15(b) which allows "amendment of the pleadings as may be necessary to cause them to conform to the evidence").<sup>9</sup>

#### Aggravating and Mitigating Factors

The hearing officer found no aggravating factors and three mitigating factors. The mitigators were no prior disciplinary

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record, no dishonest or selfish motive, and a good reputation in the legal community. Consistent with these findings, the hearing officer recommended no sanction<sup>10</sup> for the "technical" violation of former RPC 1.9 and ordered Carpenter to only pay costs and expenses. CP at 70.

The Association appealed the decision to the Board. Upon review, the Board found only two mitigating factors: no prior disciplinary record and a good reputation in the legal community. The Board found two additional aggravating factors: Carpenter's substantial legal experience and multiple offenses.

First, the Board deleted the second mitigating factor, absence of a dishonest or selfish motive, holding that this factor was not supported by the record. Answering Br. of WSBA at 34.

The Association argues that while there is no direct evidence of a selfish or dishonest motive, there is no proof of Carpenter's lack of a selfish motive. *Id.* The ABA Standards clearly states that the absence of a dishonest or selfish motive is a mitigator and the presence of said motive is an aggravator. This places the burden of proof on the respondent to prove the mitigating factor, much as the burden would be on the Association to prove the presence of a selfish motive as an aggravating factor. ELC 11.12(b) provides that findings of fact are reviewed using a "substantial evidence" test. Here, Carpenter does not offer any evidence which would disturb the Board's contention that there is no "substantial evidence" to prove the absence or presence of a selfish motive. Further, the hearing officer does not cite to any facts in the record which would support this mitigator.

Next, the Board correctly found that Carpenter engaged in multiple violations of the RPC, which is an aggravating factor. Carpenter is charged with a conflict of interest in two separate lawsuits involving the same client. He is charged with multiple violations because he was found guilty of both counts 3 and 4. Moreover, Carpenter has substantial legal experience, which is also an aggravating factor. He notes in a letter to the Association that he served as a former president of the Whatcom County Bar Association. Ex. 107. Carpenter should have known better than to litigate against a former client without obtaining a proper written waiver. The Board correctly determined aggravating factors of multiple violations and substantial legal experience.

The issue of harm to the client is an important factor when determining an attorney sanction. Neither the hearing officer nor the Board found that SPI had ultimately been injured (the judgment was satisfied). However, an injury may either be actual or potential. This court has noted that "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." *In re Disciplinary Proceeding Against Halverson*, 140 Wn.2d 475, 486, 998 P.2d 833 (2000) (quoting *Hizey v. Carpenter*, 119 Wn.2d 251, 262, 830 P.2d 646 (1992)). Here, Carpenter's conflicts and failure to obtain a written waiver were properly raised because of the serious possibility of financial harm to SPI if Holden/Five Star refused indemnification or was unable to provide it.

Further, Carpenter's negligent representation of Holden/Five Star against a former client in the substantially related subsequent case potentially damages the reputation of the legal profession. *Id.* Members of the community rightfully expect that when they hire an attorney, the lawyer will not immediately turn around and accept representation against them in an adverse matter. For example, Carpenter could have used confidential information obtained in his representation of SPI in the Tark litigation against SPI in the subsequent litigation. While there is no evidence that such a violation of trust occurred, the possibility of an impropriety is sufficient to show a potential injury.

In sum, the hearing officer's determination that there was little or no actual or potential injury to a client was not correct. While there was no actual harm, there was a substantial possibility of injury to SPI.

#### Recommended Sanction

We conclude that the Board's two month suspension for knowing violations of counts 3 and 4 are supported by substantial evidence. The Board should deviate from the presumptive sanction only if the aggravating or mitigating factors are sufficiently compelling to justify a departure. *In re Disciplinary Proceeding Against Anschell*, 141 Wn.2d 593, 615, 9 P.3d 193 (2000). This court will usually adopt the Board's recommended sanction unless the sanction is not proportionate or the Board was not unanimous in its decision. *In re Disciplinary Proceeding Against Miller*, 149 Wn.2d 262, 277- 78, 66 P.3d 1069 (2003). Here, the Board correctly amended the hearing officer's findings by a vote of 10 to 1. The Board then applied ABA Standard 4.32, which states:

Suspension is generally appropriate when a lawyer knows of a conflict of interest and does not fully disclose

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to a client the possible effect of that conflict, and causes injury or potential injury to a client.

The presumptive sanction for knowing violations in counts 3 and 4 is suspension. The Board, after weighing the aggravating and mitigating factors, reduced the presumptive six month suspension to a lesser suspension of two months. Because of the Board's experience in disciplinary matters, we give its conclusions heavy consideration. Here, we affirm the Board's proposed sanction of a two month suspension from the practice of law.

AUTHOR:

Justice James M. Johnson

WE CONCUR:

Chief Justice Gerry L. Alexander  
Justice Charles W. Johnson  
Justice Susan Owens  
Justice Barbara A. Madsen  
Justice Mary E. Fairhurst, result only  
Stephen M. Brown, Justice Pro Tem.  
Justice Bobbe J. Bridge  
Marywave Van Deren, Justice Pro Tem.

Footnotes:

1. Statement of facts are derived from the hearing officer's findings of fact, conclusions of law and recommendation, which were accepted by the Board. Clerk's Papers (CP) at 60- 70; Decision Papers (DP) at 1-11.
2. When determining appropriate attorney disciplinary sanctions, the court engages in a two- step process utilizing the American Bar Association's Standards for Imposing Lawyer Sanctions (1991). See *In re Disciplinary Proceeding Against Cohen*, 149 Wn.2d 323, 338, 67 P.3d 1086 (2003). First, the presumptive sanction is determined by considering the ethical duty violated, the lawyer's mental state, and the extent of the actual or potential harm caused by the misconduct. *Id.* Second, the court considers any aggravating or mitigating factors that may alter the presumptive sanction or affect the nature or length of the discipline to be imposed. *Id.*
3. ELC 11.12(b): "Standards of Review. The Board reviews findings of fact for substantial evidence. The Board reviews conclusions of law and recommendation de novo. Evidence not presented to the hearing officer or panel cannot be considered by the Board."
4. Former Rule 1.9:  
  
Conflict of Interest;  
  
Former Client  
  
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.
5. "Intent" is the conscious objective or purpose to accomplish a particular result. "Knowledge" is the conscious

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awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result. "Negligence" is 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. ABA Standards Definitions at 17.

6. See ABA, Annotated Model Rules of Professional Conduct 111 cmt. 20 to rule 1.7 (5th ed. 2003) ("[T]he writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.").

7. Former RPC 1.15:

Declining or Terminating Representation

(a) 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;

....

8. Former RPC 1.7:

Conflict of Interest; General Rule

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) The lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) Each client consents in writing after consultation and a full disclosure of the material facts (following authorization from the other client to make such a disclosure).

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

....

9. In re Bonet, 144 Wn.2d at 509.

10. According to the ABA Standards at 10, sanctions require the following state of mind:

4.32 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.

4.33 Reprimand is generally appropriate when a lawyer is negligent 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 injury or potential injury to a client.

4.34 Admonition is generally appropriate when a lawyer engages in an 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 potential injury to a client.

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Appendix B

Printed from The State Bar of California website ([www.calbar.ca.gov](http://www.calbar.ca.gov)) on Tuesday, November 27, 2007  
Location:

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## Rules of Professional Conduct

### Rule 3-310. Avoiding the Representation of Adverse Interests

(A) For purposes of this rule:

- (1) "Disclosure" means informing the client or former client of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client or former client;
- (2) "Informed written consent" means the client's or former client's written agreement to the representation following written disclosure;
- (3) "Written" means any writing as defined in Evidence Code section 250.

(B) A member shall not accept or continue representation of a client without providing written disclosure to the client where:

- (1) The member has a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; or
- (2) The member knows or reasonably should know that:
  - (a) the member previously had a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; and
  - (b) the previous relationship would substantially affect the member's representation; or
- (3) The member has or had a legal, business, financial, professional, or personal relationship with another person or entity the member knows or reasonably should know would be affected substantially by resolution of the matter; or
- (4) The member has or had a legal, business, financial, or professional interest in the subject matter of the representation.

(C) A member shall not, without the informed written consent of each client:

- (1) Accept representation of more than one client in a matter in which the interests of the clients potentially conflict; or
- (2) Accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict; or
- (3) Represent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter.

(D) A member who represents two or more clients shall not enter into an aggregate settlement of the claims of or against the clients without the informed written consent of each client.

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(E) A member shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment.

(F) A member shall not accept compensation for representing a client from one other than the client unless:

(1) There is no interference with the member's independence of professional judgment or with the client-lawyer relationship; and

(2) Information relating to representation of the client is protected as required by Business and Professions Code section 6068, subdivision (e); and

(3) The member obtains the client's informed written consent, provided that no disclosure or consent is required if:

(a) such nondisclosure is otherwise authorized by law; or

(b) the member is rendering legal services on behalf of any public agency which provides legal services to other public agencies or the public.

*Discussion:*

Rule 3-310 is not intended to prohibit a member from representing parties having antagonistic positions on the same legal question that has arisen in different cases, unless representation of either client would be adversely affected.

Other rules and laws may preclude making adequate disclosure under this rule. If such disclosure is precluded, informed written consent is likewise precluded. (See, e.g., Business and Professions Code section 6068, subdivision (e).)

Paragraph (B) is not intended to apply to the relationship of a member to another party's lawyer. Such relationships are governed by rule 3-320.

Paragraph (B) is not intended to require either the disclosure of the new engagement to a former client or the consent of the former client to the new engagement. However, both disclosure and consent are required if paragraph (E) applies.

While paragraph (B) deals with the issues of adequate disclosure to the present client or clients of the member's present or past relationships to other parties or witnesses or present interest in the subject matter of the representation, paragraph (E) is intended to protect the confidences of another present or former client. These two paragraphs are to apply as complementary provisions.

Paragraph (B) is intended to apply only to a member's own relationships or interests, unless the member knows that a partner or associate in the same firm as the member has or had a relationship with another party or witness or has or had an interest in the subject matter of the representation.

Subparagraphs (C)(1) and (C)(2) are intended to apply to all types of legal employment, including the concurrent representation of multiple parties in litigation or in a single transaction or in some other common enterprise or legal relationship. Examples of the latter include the formation of a partnership for several partners or a corporation for several shareholders, the preparation of an ante-nuptial agreement, or joint or reciprocal wills for a husband and wife, or the resolution of an "uncontested" marital dissolution. In such situations, for the sake of convenience or economy, the parties may well prefer to employ a single counsel, but a member must disclose the potential adverse aspects of such multiple representation (e.g., Evid. Code, §962) and must obtain the informed

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written consent of the clients thereto pursuant to subparagraph (C)(1). Moreover, if the potential adversity should become actual, the member must obtain the further informed written consent of the clients pursuant to subparagraph (C)(2).

Subparagraph (C)(3) is intended to apply to representations of clients in both litigation and transactional matters.

In *State Farm Mutual Automobile Insurance Company v. Federal Insurance Company* (1999) 72 Cal.App. 4th 1422 [86 Cal.Rptr.2d 20], the court held that subparagraph (C)(3) was violated when a member, retained by an insurer to defend one suit, and while that suit was still pending, filed a direct action against the same insurer in an unrelated action without securing the insurer's consent. Notwithstanding *State Farm*, subparagraph (C)(3) is not intended to apply with respect to the relationship between an insurer and a member when, in each matter, the insurer's interest is only as an indemnity provider and not as a direct party to the action.

There are some matters in which the conflicts are such that written consent may not suffice for non-disciplinary purposes. (See *Woods v. Superior Court* (1983) 149 Cal.App.3d 931 [197 Cal.Rptr. 185]; *Klemm v. Superior Court* (1977) 75 Cal.App.3d 893 [142 Cal.Rptr. 509]; *Ishmael v. Millington* (1966) 241 Cal.App.2d 520 [50 Cal.Rptr. 592].)

Paragraph (D) is not intended to apply to class action settlements subject to court approval.

Paragraph (F) is not intended to abrogate existing relationships between insurers and insureds whereby the insurer has the contractual right to unilaterally select counsel for the insured, where there is no conflict of interest. (See *San Diego Navy Federal Credit Union v. Cumis Insurance Society* (1984) 162 Cal.App.3d 358 [208 Cal.Rptr. 494].) (Amended by order of Supreme Court; operative September 14, 1992; operative March 3, 2003.)

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Appendix C

## 338 Or. 341; In re Complaint of Knappenberger; 108 P.3d 1161

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In re Complaint as to the Conduct of ALLAN F. KNAPPENBERGER, Accused.

FILED: March 24, 2005

IN THE SUPREME COURT OF THE STATE OF OREGON

(OSB 02-13, 02-14, 02-106; SC S50864)

En Banc

On review of the decision of a trial panel of the Disciplinary Board.

Argued and submitted January 7, 2005.

Peter R. Jarvis, Hinshaw & Culbertson, Portland, argued the cause and filed the briefs for the accused. With him on the briefs was David J. Elkanich.

Stacy J. Hankin, Assistant Disciplinary Counsel, Lake Oswego, argued the cause and filed the brief for the Oregon State Bar.

PER CURIAM

The accused is suspended from the practice of law for 120 days, commencing 60 days from the date of filing of this decision.

PER CURIAM

In this lawyer disciplinary proceeding, the Oregon State Bar (Bar) charged the accused with violating Oregon Code of Professional Responsibility Disciplinary Rule (DR) 7-104(A)(1), which prohibits lawyers from communicating with represented parties on the subject of the representation, and DR 5-105(C), which bars former client conflicts. (fn1) A trial panel of the Disciplinary Board concluded that the accused had violated both rules, and it imposed a 90-day suspension from the practice of law. The accused requested this court's review pursuant to ORS 9.536(1) (2001) and the Bar Rules of Procedure (BRs). (fn2) We review bar disciplinary matters *de novo*. ORS 9.536(2); BR 10.6.

#### COMMUNICATION WITH REPRESENTED PARTIES

The Bar alleges that the accused violated DR 7-104(A)(1) by speaking to two of his employees about an action that they had filed against him.

We find that the Bar proved the following facts by clear and convincing evidence. Four of the accused's employees; including Maddocks and Clark, sued the accused in federal court on employment-related claims. The accused received service of the summons and complaint at his office between 4:30 and 5:00 p.m. on Friday, March 17, 2000. Thirty to 45 minutes later, the accused confronted Maddocks in her office, showing her the summons and complaint, and asking, in an angry tone, what it was and whose idea it had been. Maddocks told him that they should not be discussing the action. The accused left, insisting that they would discuss the matter the following week. The entire conversation lasted between 30 seconds and one minute.

Clark was in her office the next day, a Saturday, when the accused entered and tossed a piece of paper at her. He asked her what it was, and she answered that it was the cover sheet of a civil action. The accused asked Clark why she was bringing the action, who had decided to sue him, and whether "this is really what you want to do." Clark told the accused to direct his questions to her lawyer, but the accused said that he had a right to speak with her directly. Finally, when Clark threatened to leave the room if the accused did not discuss work-related matters, he gave her some papers to file and left. The conversation lasted between 5 and 20 minutes. (fn3)

Both Maddocks and Clark believed that the accused was trying to intimidate them into dropping the action. Both women described the conversations with the accused to their lawyers, who amended the complaint in the action to include retaliation claims based on the conversations. (The accused ultimately prevailed in the action.)

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The Bar alleged that the accused's conversations with Maddocks and Clark violated DR 7-104(A)(1). (fn4) That rule provides:

"(A) During the course of the lawyer's representation of a client, a lawyer shall not:

"(1) communicate or cause another to communicate on the subject of the representation, or on directly related subjects with a person the lawyer knows to be represented by a lawyer on that subject or on directly related subjects, unless:

"(a) the lawyer has the prior consent of a lawyer representing such other person;

"(b) the lawyer is authorized by law to do so; or

"(c) a written agreement requires a written notice or demand to be sent to such other person, in which case a copy of such notice or demand shall also be sent to such other person's lawyer.

"This prohibition includes a lawyer representing the lawyer's own interests."

The trial panel concluded that the accused had violated that rule as to Maddocks, but it further concluded, with one member dissenting, that the violation had been *de minimis* because the accused "should not be expected to engage in detached reflection over his ethical responsibilities" immediately after being served with a complaint. (fn5) However, the trial panel concluded that the accused had violated DR 7-104(A)(1) by speaking with Clark the next day, after he had had time to reflect on the proper course of conduct.

The accused argues that this court should conclude that he should not be sanctioned for either alleged violation of DR 7-104(A)(1) because the communications with Maddocks and Clark were "very brief," because the accused's emotional distress about being sued caused him to act hastily, and because his intent was to determine whether he could continue to work productively with employees who were suing him and not to invade his employees' relationships with their lawyers.

Those arguments are insufficient to avoid the conclusion that the accused violated DR 7-104(A)(1) by separately communicating with Maddocks and Clark regarding the subject of their action against him, when he knew that they were represented. The text of DR 7-104(A)(1) provides no exception for otherwise prohibited communications, and the purposes underlying the rule suggest no basis for such an exception. DR 7-104 is a prophylactic rule designed to insulate represented persons "against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship, and the uncounselled disclosure of information relating to the representation." *The Ethical Oregon Lawyer* § 7.42 (Oregon CLE 1991) (quoting ABA Model Rules of Professional Conduct, Rule 4.2, Comment [1]). All violations of the rule present that risk. Accordingly, this court previously has found violations of DR 7-104(A)(1) even when the prohibited communication was brief, transitory, or not likely to cause serious harm. *See In re Schenck*, 320 Or. 94, 879 P2d 863 (1994) (rule violated when lawyer mailed notice to produce directly to adverse party whom lawyer knew to be represented by counsel); *In re Hedrick*, 312 Or. 442, 822 P2d 1187 (1991) (rule violated when lawyer sent demand letter directly to represented person, with copy to lawyer).

The accused's related defenses also are unavailing. This court has rejected, as a defense to a charge of improperly communicating with a represented party, the claim that the lawyer and the represented party share a relationship separate from the lawyer's status as a lawyer that requires them to interact with each other regardless of the pending litigation. *See In re Otto W. Heider*, 217 Or. 134, 155, 341 P2d 1107 (1959) (rejecting lawyer's defense that improper communication occurred because accused and represented party had business relationship). This court also has held that an accused lawyer's emotional state during the communication is irrelevant. *See In re Lewelling*, 296 Or. 702, 706, 678 P2d 1229 (1984) (rejecting accused's justification that he had communicated with represented party "on sudden impulse" when he "was emotionally upset"). Moreover, a lawyer need not intend to violate the lawyer-client relationship of the represented party to violate DR 7-104(A)(1). *See In re McCaffrey*, 275 Or. 23, 28, 549 P2d 66 (1976) (direct communication with party lawyer knows to be represented, concerning subject of representation, violates rule even if not done intentionally).

Neither the text of the rule nor this court's cases interpreting it recognize as a defense any of the arguments that the accused makes. The accused's arguments are relevant only in determining the appropriate sanction, and we discuss them in that context below.

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We conclude that the Bar has proved, by clear and convincing evidence, that the accused violated DR 7-104(A)(1) with respect to both Maddocks and Clark.

#### FORMER CLIENT CONFLICT

The Bar also alleges that the accused violated DR 5-105(C) by first representing the husband in a divorce proceeding and later representing the wife in the same divorce proceeding and in a proceeding to overturn a related restraining order.

On *de novo* review, we conclude that the Bar proved the following facts by clear and convincing evidence. On October 4, 2000, Richard Grossman, who was seeking to replace his existing lawyer in a divorce proceeding, met with the accused to discuss representation. Richard asked whether the consultation was confidential, and, although the accused did not provide Richard a direct answer, he did not disabuse Richard of that understanding. (fn6) Richard provided a copy of a property settlement agreement that he and his wife Linda had signed, and he described the main issues in the divorce, including whether Linda could share an annuity that he had purchased after the couple had signed a postnuptial agreement. Richard also told the accused about his goals in the divorce proceeding.

Although Richard was seeking representation only in the divorce proceeding, he also told the accused about the history of Family Abuse Prevention Act restraining orders involving the parties. Richard previously had obtained a restraining order against Linda. At the time Richard consulted the accused, Linda had obtained a restraining order against Richard. The petition that had been the basis for the latter restraining order alleged that Richard had shoved and threatened Linda during a public argument on August 13, 2000. However, Richard described to the accused a different version of those events, saying that Linda had been the aggressor, "yelling" and "screaming" at Richard and his female companion and preventing Richard from getting into his car and leaving. Richard told the accused that he believed Linda had sought the restraining order as a defense to a stalking complaint that his companion had filed against Linda. Richard told the accused that Linda had broken into his home sometime after the August 13 incident and that he was concerned because he believed that the police were not being responsive. He said that he was considering obtaining another restraining order against Linda.

On October 12, the accused wrote to Richard expressing a desire to represent him in the divorce proceeding. In a subsequent telephone conversation, however, Richard told the accused that he had decided to retain another lawyer, Urrutia. The accused sent Richard a bill for the October 4 consultation, but Richard never paid it.

On November 21, Richard filed a *pro se* petition seeking a restraining order against Linda and citing the August 13 incident and the break-ins, among other incidents that had occurred in the prior 180 days. The court issued the order on November 22.

Richard did not know, at the time that he filed the petition for a restraining order, that Linda also was seeking a new lawyer because she was dissatisfied with her existing lawyer. On November 30, Linda interviewed the accused, discussed the divorce and restraining order proceedings with him, and retained him to represent her in both those matters. The accused never discussed with Linda the fact that he had consulted with Richard.

Over the next few days, the accused took affirmative steps in connection with his representation of Linda. He wrote to Linda's previous lawyer to request Linda's file, wrote to Urrutia to notify him of the representation and discuss the scheduling of discovery, and requested a hearing to contest the restraining order. He also wrote to Urrutia to request that Linda be allowed to attend a class at Portland Community College (PCC), a location that the restraining order barred her from visiting.

On December 4, Laney, an associate of Urrutia's, notified the accused that he had a conflict in representing Linda because he had consulted with Richard previously. They discussed the propriety of the representation by fax and telephone. Laney requested that the accused withdraw from representing Linda in the divorce proceeding because he had a conflict of interest as a result of his prior consultation with Richard. The accused said that he did not remember speaking to Richard. However, the accused did not check any records that might have refreshed his recollection. Laney sent the accused a copy of the accused's October 12 letter to Richard as evidence of the meeting. The accused responded by faxed letter that he still did not remember Richard but that he would discuss the issue with his ethics counsel.

During their communications on December 4, Laney and the accused also continued to discuss whether Linda could go to PCC. Laney said that the couple might meet there, and that Richard would consider any contact with Linda, however accidental, a violation of the restraining order. The accused said that he intended to contest in court whether Linda's college attendance violated the restraining order.

C-3

On December 5, Laney asked the accused to decide promptly whether he would continue to represent Linda, because a hearing in the divorce proceeding was approaching. The accused responded that he would be meeting with his ethics counsel that day, but he refused to withdraw until after that meeting.

On December 6, the accused informed Urrutia that he would withdraw from representing Linda in the divorce proceeding. He withdrew from the divorce representation on December 8, but he did not withdraw from the restraining order proceeding. Urrutia confirmed the divorce withdrawal by letter, noting that the accused was still "undecided" as to whether he would withdraw from the restraining order matter and requesting that he do so. The accused consulted his ethics counsel a second time. On December 12, he informed Linda that he was withdrawing from that matter as well, and arranged for Linda's previous attorney to resume representing her. Urrutia, who was unaware of the change, threatened to file a motion to disqualify the accused in the restraining order proceeding. On December 18, the other attorney told Urrutia that the accused had withdrawn.

The Bar's complaint charged the accused with violating DR 5-105(C). That provision provides:

"(C)Former Client Conflicts - Prohibition. Except as permitted by DR 5-105(D) [regarding consent by both parties after full disclosure], a lawyer who has represented a client in a matter shall not subsequently represent another client in the same or a significantly related matter when the interests of the current and former clients are in actual or likely conflict. Matters are significantly related if either:

"(1)Representation of the present client in the subsequent matter would, or would likely, inflict injury or damage upon the former client in connection with any \* \* \* matter in which the lawyer previously represented the former client; or

"(2)Representation of the former client provided the lawyer with confidences or secrets as defined in DR 4-101(A), the use of which would, or would likely, inflict injury or damage upon the former client in the course of the subsequent matter."

When evaluating whether a lawyer has violated DR 5-105, we consider all facts that "the lawyer knew, or by the exercise of reasonable care should have known." DR 5-105(B).

The trial panel found that Richard had been the accused's client and that Richard's interests were in conflict with Linda's. It also found that the accused either knew or should have known of that conflict when he met with Linda for the first time and that the conflict was "so obvious \* \* \* that no consultation [with ethics counsel had been] required" on either the restraining order or the divorce proceedings, which were "inextricably intertwined." The trial panel held that "the Accused's failure to recognize the conflict when he undertook to represent [Linda] in both the divorce and [restraining order] matters and his failure to withdraw in a timely manner in both matters when being alerted to the conflict, constitute a violation of DR 5-105 (C)."

The accused argues on review that DR 5-105(C) does not apply to this proceeding because that rule applies only to a conflict between a current client and a "former client," and that Richard was not a "former client" of the accused. In the accused's view, Richard was, at most, a "prospective client" of the accused who never became an actual client and, therefore, cannot be a former client. The Bar, relying on OEC 503 and this court's decision in *In re Spencer*, 335 Or. 71, 58 P3d 228 (2002), argues that this court should construe the word "client" in DR 5-105(C) to include anyone who consults with a lawyer with a view to obtaining professional services from the lawyer. In the Bar's view, Richard was the accused's "client" for purposes of the former client conflict prohibition of DR 5-105(C), even though he did not retain the accused. For the reasons that we discuss below, although we disagree with the Bar's broad reading of the word "client" in DR 5-105(C) to include anyone who consults with a lawyer with a view to retaining legal services, we conclude that, in this proceeding, the Bar has proved by clear and convincing evidence that Richard was a client of the accused's, at least briefly, and, therefore, that he also was a "former client" for purposes of DR 5-105(C).

In *Spencer*, this court considered whether the requirement in DR 9-101(C)(4) that lawyers "promptly \* \* \* deliver to a client as requested by the client \* \* \* properties in the possession of the lawyer which the client is entitled to receive" applied to prospective clients. This court noted that OEC 503 extends the lawyer-client privilege to persons who consult a lawyer "with a view to obtaining professional legal services from the lawyer," *Spencer*, 335 Or at 83, and concluded that, when a person delivers documents

"to a lawyer who is considering whether to represent that person, the person has entrusted those materials to

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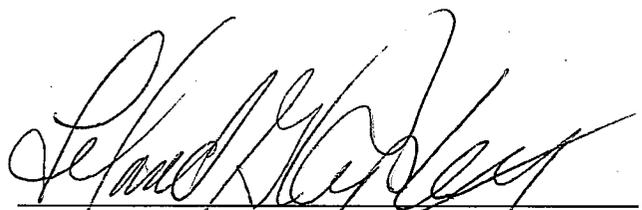
In re Mark Stansfield

Attorney, Respondent

Certificate of Service by Mail

Leland G. Ripley, Counsel for Respondent Mark Stansfield, hereby certifies that on November 27, 2007 I mailed a copy of Respondent's Reply Brief to Natalee Skvir, Disciplinary Counsel, 1325 Fourth Ave Ste. 600, Seattle, WA 98101-2539 by first class mail postage prepaid.

Dated: November 27, 2007



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