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Case No.: 200,568-3

SUPREME COURT OF THE STATE OF WASHINGTON

**In re Stephen K. Eugster,
an Attorney at Law
WSBA No. 2003**

OPENING BRIEF OF APPELLANT

Attorneys for Appellant

**Kris J. Sundberg
WSBA 14549
Sundberg Law Office
P.O. Box 1577
3023 – 80th Ave., S.E. #200
Mercer Island, WA 98040
PH: 206.230.0210
FAX: 206.236.0525**

**Shawn Timothy Newman
WSBA 14193
Attorney at Law, Inc.
2507 Crestline Dr., N.W.
Olympia, WA 98502
PH: 360.866.2322
FAX: 866.800.9941**

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I. Introduction

This is a disciplinary proceeding against attorney Stephen Eugster, admitted to practice on January 2, 1970. Eugster has no prior disciplinary record. The Bar solely relied on admittedly confusing,¹ erroneous and inapposite findings² to recommend Eugster be disbarred based on his two to three month representation of Marion Stead, an 87 year old widow. In particular, the Bar recommends Eugster be disbarred based on “knowingly filing a petition for guardianship that was not well grounded in fact against a former client without making a reasonable inquiry about the client’s mental condition.”³ The Bar’s recommendation⁴ is procedurally, factually and legally flawed. It ignores the fact that Eugster had a contractual, ethical and/or legal duty to take protective action for the benefit of Marion.

RPC 1.13 states:

¹Adding to the confusion is the numbering of for the FOF by the Board (e.g. multiple uses of the same numbers); numbering of the exhibits sent to the Disciplinary Board. The exhibit list runs 1-82; 204-207 and then begins again with 1-134 without distinguishing if they are from Eugster or the Bar, when and for what phase of the case.

²Attached as Exhibit A is Eugster’s challenges to the FOF and COL.

³Count 5 and 8 [RPC 1.15(d); 3.4 and CR 11] FOF & COL at pg. 25.

⁴The first assigned error refers to the Hearing Officer’s Denial of Eugster’s Motion to Dismiss.

CLIENT UNDER A DISABILITY: (a) When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client. (b) When the lawyer reasonably believes that the client cannot adequately act in the client's own interest, a lawyer may seek the appointment of a guardian or take other protective action with respect to a client.⁵

The standard is subjective reasonableness on a prospective basis.

What did the lawyer reasonably believe at the time? The undisputed facts are that Marion, an 87 year old widow, was psychologically impaired⁶ and did not handle her own finances. Eugster reasonably believed that Marion was not acting consistent with her best interests, her financial objectives and/or her estate plan based on her own actions and the involvement of third parties.

The Board and Hearings Officer completely ignored Eugster's arguments under RPC 1.13.⁷ They ignored basic principles of

⁵Emphasis added. RPC 1.13 (in effect in 2204) has since been revised to 1.14 [Client with Diminished Capacity].

⁶Marion had "psychologic conditions with major depressive disorder" for which she took various medications and was in counseling. Ex. 85 (Guardianship Medical/Psychological Report at VI). "Psychologic conditions" refers to a variety of mental disorders, including severe phobias, dysrationalia, and PTSD. See Webster's New World Medical Dictionary.

⁷Eugster repeatedly raised RPC 1.13 in his answer [CP 63], briefs and motions. See, e.g. Brief of Respondent at page 6 [R. *Did Eugster have a right to rely on RPC 1.13 and if he did, did he violate RPC 1.13?*]; page 19 [*Nothing is said that Eugster did not have the power under law to bring guardianship proceeding. Nothing is said about RPC 1.13.*] The only mention of RPC 1.13 is in passing at

guardianship law which allow “any person” to petition for a guardian.⁸

This complete disregard is evidenced by the FOF which shrilly characterize Eugster’s pursuit of the guardianship action as being “against”⁹ Marion rather than for her best interests.¹⁰ They ignored Eugster’s argument¹¹ that he had a duty as an “interested person”¹² and “permissive reporter”¹³ to report suspected “financial exploitation”¹⁴ of a vulnerable adult¹⁵ and/or petition for an order of

page 23 of the FOF. There is no finding that Eugster violated or did not act reasonably under RPC 1.13.

⁸RCW 11.88.030-.040 (requiring personal service on the ward). See FOF 3.3 at pg. 24 [“He humiliated her in the common room at her home when he had her served by a uniformed officer with the Guardianship papers.”]

⁹See, e.g. FOF pg. 28 [Count 9]

¹⁰See, e.g. *In re Guardianship of Karan*, 110 Wn.App. 76, 38 P.3d 396 (2002) [The primary reason to establish a guardianship is to preserve the ward’s property for his or her own use; it is not for the benefit of others.]

¹¹CP 23 [Brief of Respondent at 23].

¹²RCW 74.34.020(9) "Interested person" means a person who demonstrates to the court's satisfaction that the person is interested in the welfare of the vulnerable adult, that the person has a good faith belief that the court's intervention is necessary, and that the vulnerable adult is unable, due to incapacity, undue influence, or duress at the time the petition is filed, to protect his or her own interests.

¹³RCW 74.34.020 (12) "Permissive reporter" means any person, including, but not limited to, an employee of a financial institution, attorney, or volunteer in a facility or program providing services for vulnerable adults. [Emphasis added]

¹⁴RCW 74.34.020 (2)(d) "Exploitation" means an act of forcing, compelling, or exerting undue influence over a vulnerable adult causing the vulnerable adult to act in a way that is inconsistent with relevant past behavior, or causing the vulnerable adult to perform services for the benefit of another. [Emphasis added]

¹⁵Marion was a “vulnerable adult” under the statute. She was “(a) Sixty years of age or older who has the functional, mental, or physical inability to care for himself or herself.” She was also a person who had been admitted to a “facility.” RCW 74.34.020 (15) and .021

protection.¹⁶ RPC 1.13, RCW 11.88.030(1)¹⁷ and these reporting statutes confer qualified immunity¹⁸ on Eugster and any disclosures of confidential information.¹⁹

II. Assignments of Error

- A. The Board erred in entering the order of January 25, 2007, modifying the Hearing Officer's Findings which were, "as a whole" confusing, and adopting the Hearing Officer's disbarment recommendation. Those Findings of Fact and Conclusions of Law are so confusing and erroneous they deny Eugster due process. [See App. A].
- B. The Hearings Officer erred in denying Eugster's Motions to Dismiss²⁰ the case based on RPC 1.13 and/or state law.

III. Issues Presented

- A. Did Eugster intentionally fail to abide by a client's or former client's objectives when he exercised his ethical duty and legal authority to petition for guardianship?
- B. Did Eugster intentionally use a client's or former client's secrets and confidences to her disadvantage when he petitioned for guardianship?

¹⁶RCW 74.34.110

¹⁷"Any person or entity may petition for the appointment of a qualified person, trust company, national bank, or nonprofit corporation authorized in RCW 11.88.020 as the guardian or limited guardian of an incapacitated person. No liability for filing a petition for guardianship or limited guardianship shall attach to a petitioner acting in good faith and upon reasonable basis." [Emphasis added]

¹⁸See e.g. Washington's anti-SLAPP law [RCW 4.24.500 - .510].

¹⁹RCW 74.34.050 ["Conduct conforming with the reporting and testifying provisions of this chapter shall not be deemed a violation of any confidential communication privilege."]. There are no FOF describing what exactly was disclosed.

²⁰CP 538 et seq.; there were several motions to dismiss and orders denying them. See, e.g. CP 707-708; 726-728 (8/24/2006).

- C. If Eugster reasonably believed a client or former client could not adequately act in her own best interests, either because of her mental disability or “for some other reason,” was he entitled to petition for guardianship under RPC 1.13 and/or state law, including RCW 11.88.030(1)?
- D. Did Eugster engage in “conduct prejudicial to the administration of justice” by filing for guardianship pursuant to RPC 1.13 and/or state law, including RCW 11.88.030(1)?
- E. Is it a violation of due process to discipline Eugster for filing for guardianship pursuant to RPC 1.13 and/or state law, including RCW 11.88.030(1)?
- F. Did the Hearing Officer apply the wrong burden of proof?
- G. Did the Hearing Officer and Board fail to give full consideration to mitigating factors and proportionality in making their recommendation?

IV. Statement of the Case

A. Initial status, understanding and objectives when Marion met Eugster in 2004.

In late June 2004 Marion Stead, an 87 year old widow²¹ who had recently moved into an assisted living facility, contacted Eugster regarding concerns she had about her estate and financial affairs.²² She was upset²³ and not speaking to her only child, Roger Samuels,²⁴

²¹Her husband, John Stead, passed away on February 4, 2004. Hearing TR 260:25

²²TR 406.

²³Marion was troubled about being in an assisted living facility (Parkview). She was dismayed that her only son, Roger Samuels, had not been visiting her enough and that he might be going to Europe in the next few days without visiting her before doing so. TR 410. According to Roger, “I thought my mother had flipped

who was up to that point managing her financial affairs for free. She “was very upset over Roger and wanted him to no longer be in charge of her affairs.”²⁵ Marion believed by “removing Roger from control of her affairs she could rekindle her relationship with him.”²⁶ However, she did not want to permanently remove him from all duties if Eugster found he was being a good, dutiful son.²⁷

Marion was confused about her rights under a complex estate plan²⁸ created in October 2003 by attorney David Hellenthal.²⁹ Under that plan, Marion and her then-living husband, John, named Roger as

... I realized she was under extreme emotional pressure. John was visibly wasting away, and she was extremely agitated about his condition, and that’s why she was in such a near hysterical state.” Hearing TR 259:8-12.

²⁴The Bar Complaint states: “During the summer of 2004, Respondent became aware that Ms. Stead’s relationship with Mr. Roger Samuels was strained to the point that Ms. Stead and Ms. Roger Samuels were not speaking to each other.” Complaint at 5:17-19. These conflicts with FOF 2.26 which states: “The guardianship action destroyed what was left of Ms. Stead’s relationship with her son, Roger. They last spoke after a guardianship hearing.”

²⁵FOF 2.18

²⁶See FOF 2.23; See also FOF 2.21 for Count 1.

²⁷The reason why Marion agreed to have Roger named as successor to Eugster on certain estate documents was the idea that Roger would be allowed to take over again on Eugster’s finding that Roger was acting appropriately. See, Ex. 30 & 52 [Eugster letter to Marion (8/13/04)]

²⁸Before contacting Eugster, Mr. and Mrs. Stead contacted attorney Summer Stahl regarding her dissatisfaction with the plan. FOF 2.14 “Ms. Stahl’s testimony that Ms. Stead said she didn’t want the trust was reiterated by Mr. Eugster, and several persons interviewed by the Guardian ad Litem.” FOF 2.14.1

²⁹Hellenthal was a specialist in “elder law” who could provide “guidance in financial planning for long term care, especially asset preservation within medical Assistance limitations.” See Ex. 15. Note, the FOF incorrectly states that Eugster prepared these new documents. FOF 2.13

personal representative of their estates,³⁰ Attorney-in-Fact under their durable powers of attorney for property management³¹ and trustee of a Supplemental Needs Trust for Surviving Spouse.³² The purpose of the trust was preservation of estate assets for the surviving spouse within medical assistance limitations.³³ The residual beneficiary of their estate was their only grandchild (Emilie), Roger's daughter.³⁴

Roger was independently financially secure and provided his services as Attorney-in-Fact and trustee free of charge.³⁵ As Trustee, Roger had "absolute discretion" to make or withhold payments under the Testamentary Supplemental Needs Trust created by John's will, including providing Marion an allowance so long as it did not

³⁰Ex. 2.1

³¹Ex. 2 at para. 2: "My Attorney-in-Fact shall have all the powers of an absolute owner over my assets and liabilities...." These includes authority to sell real and personal property, deal with financial/securities/brokerage accounts and add/remove property from any trust created by her or for her benefit.

³²Also referred to as the John Stead Trust or simply as the testamentary trust. Ex. 55. The trust was funded from the spouse's 50% share of the marital property and became irrevocable upon the death of the first spouse. Ex. 2.1, p. 4, para. C This left the surviving spouse (Marion) with control of the remaining 50% of the community estate.

³³Ex. 16: Correspondence from Roger to Eugster regarding his parents changing their estate plan.

³⁴See Last Will, Ex. 2.1 at p. 10 [Trust for Emilie Sammons]. John and Marion's immediate family consisted of her son, Roger and her granddaughter, Emilie Sammons. Ex. 15 [Marion Stead Will].

³⁵Under her Durable Power of Attorney for Property, Roger, as her Attorney-in-Fact, was "entitled to reasonable compensation for all services rendered on my behalf, including care management...." Ex. 2, para. 9 According to FOF 2.12, "Roger worked in hospitals until an inheritance from his father's family made working for a living unnecessary."

disqualify her from any other assistance.³⁶ Roger was handling all of Marion's bills,³⁷ including caring for her sick dog.³⁸

B. Eugster's familiarity with the Stead family and Marion's circumstances.

Eugster, who was an old acquainted with the family,³⁹ agreed to look into her estate planning and financial affairs. However, at the time Marion contacted Eugster in late June 2004, her circumstances had dramatically changed. She had been a widow for five months after her 54 year marriage, she had left her home of over 20 years for an assisted living center⁴⁰ and she was just two months shy of her 88th birthday."⁴¹ She is described as "an elderly, grieving widow suffering from depression and physical health problems who had a difficult

³⁶Ex. 3, p. 5. Under the trust, Roger had "all powers granted to Trustees under the Washington Trust Act." Id., at 8.

³⁷FOF 2.16. The Special Needs Trust provided for early termination "in the event of a lawful determination by a court or agency of competent authority that Trust income or principal is liable for basic maintenance..." Ex. 3, p. 7.

³⁸Ex. 29; Hearing TR 263-264 [The dog had a "large bladder tumor" and was incontinent.]

³⁹Eugster previously prepared estate planning documents for Mr. & Mrs. Stead and represented Roger in his divorce. FOF 2.12-2.13 [Ex. 7-11]

⁴⁰Marion was moved into the assisted living center called Parkview in Colville in March, 2004, one month after her husband, John, died. Her only son, Roger, was trustee of the Supplemental Needs Trust (Hellenthal documents). Roger said "his mother had once been capable of handling household bills, but did not believe she could still do it. He had been filling out checks, putting the postage on the envelopes, and had arranged for as many automatic monthly payments as possible." FOF 2.16

⁴¹FOF 2.18

relationship with her only son.”⁴² That relationship is described as “complicated and strained,”⁴³ “love/hate”⁴⁴ and a “very dysfunctional family.”⁴⁵

C. Eugster’s plan to accomplish Marion’s objectives.

Eugster sought to work with Marion and to develop a plan where her concerns could be addressed and her affairs could be put into order also taking into account her concern about her son, Roger, including whether or not there was any legitimate basis for her concerns.⁴⁶ To protect Marion consistent with the existing testamentary trust and consistent with her desire that Roger *not* control her financial affairs until at least Eugster could assure her of Roger’s suitability to serve in various capacities, Eugster developed an estate plan for those matters under Marion’s control⁴⁷ which included a Durable Power of Attorney,⁴⁸ Durable Power of Attorney

⁴²FOF 3.14 regarding Aggravating and Mitigating Factors.

⁴³FOF 2.23

⁴⁴Marion was dismayed that Roger had not been visiting her enough at the assisted living facility (Parkview) and that he might be going to Europe in the next few days without visiting her before doing so. TR 410.

⁴⁵FOF and COL at 31

⁴⁶FOF 2.20; RPC 1.13(a)

⁴⁷The family residence had been deeded entirely to Marion from her husband John’s Probate Estate. Ex. 130

⁴⁸Ex. 37

for Health Care,⁴⁹ Revocable Living Trust⁵⁰ and a Pour-Over Will.⁵¹

Eugster did not and could not (absent a court order) change the irrevocable Special Needs Trust established for her in her late husband John's will.⁵²

Marion wanted Eugster to serve as successor trustee with respect of her Revocable Living Trust,⁵³ and as her Attorney-in-Fact for her Durable Power of Attorney and Health Care Power of Attorney.⁵⁴ Marion also wanted Roger to serve as a successor if Eugster resigned or otherwise failed or ceased to serve in any of such capacities. The desire to have Eugster serve first was so he could look into the conduct of Roger to ensure that all was being taken care of as it should be taken care of.⁵⁵ Eugster reluctantly consented to doing so after advising her of his concerns in a letter to Marion.⁵⁶ The record reflects that Eugster diligently performed his duties and kept in

⁴⁹Ex. 34

⁵⁰Ex. 36

⁵¹Ex. 35. The estate plan developed by Eugster for Marion did not jeopardize the estate plan that Marion had already entered into with her deceased husband John with attorney Hellenthal in 2003.

⁵²Hellenthal Documents, Ex. 12 & 20.

⁵³Marion was trustee.

⁵⁴FOF 2.21

⁵⁵This answers FOF 2.21 which states: "Ms. Stead did not testify during this proceeding, so why she would agree to have Roger as successor remains a mystery."

⁵⁶Ex. 33. In the letter, Eugster also pointed out concern for her intended beneficiaries. Further, Eugster told her he would work for \$125 per hour, a rate substantially below his normal billing rate.

communication with Marion, Roger, her bank, her investment advisor,⁵⁷ Paul Buxton at Edward Jones, and others.⁵⁸

D. Status of the family home.

After effecting Marion's new estate plan, Eugster continued to investigate her affairs, assets, bills payments and other matters including insurance on her residence. During the course of the probate of John Stead's estate by attorney David Hellenthal, the family residence was quit-claimed to Marion. The residence was then placed into Marion's living trust which she signed in July 2004.⁵⁹ Eugster was working with her and a local estate agent, Maryann Duffy,⁶⁰ in preparing to sell the personal property in the house that she did not wish to keep or distribute and then to sell the house itself.

E. Status of probate of John Stead's estate and the insurance issue.

Eugster commenced more investigation regarding the probate of the estate of John Stead. That probate was being handled by

⁵⁷Paul Buxton at Edward Jones

⁵⁸Ex. 4 et seq. This includes numerous letters, telephone calls, copies of bills received and bills paid. See, e.g. Ex. 36. "Others" would include contact with a local estate sale person, Maryann Duffy, to conduct the sale of the contents of the residence so Stead could put the home on the market.

⁵⁹Ex. 16 [Living Trust of Marion Stead]; Ex. 56 Braff Declaration and attached exhibits, including Quit Claim Deed from Roger, a Personal Representative of the Estate of John Stead, to Marion, as Trustee of her Living Trust.

⁶⁰Ex. 30

attorney David Hellenthal, not Eugster.⁶¹ Eugster understood that the estate had been partially distributed – some assets to the testamentary trust (i.e. the irrevocable Special Needs Trust for Marion), some assets to her. These assets consisted of accounts at Paul Buxton’s brokerage firm (Edward Jones), payments coming from an annuity which were being used to pay the monthly cost of the Parkview (assisted living) residence, bank accounts and the residence which, as previously mentioned, had been quit-claimed to Marion and then placed in her Living Trust. At that time, Eugster did not know about any misapplied or unaccounted for insurance proceeds or any misallocated assets. At that time he understood that all the assets had been characterized as community property but that they did not pass under a community property agreement. The directions to Buxton from Hellenthal confirmed his understanding. Eugster did not know of concerns about the Hellenthal directions as to the division of property from John’s estate.⁶²

Buxton of Edward Jones had all of the assets of John’s probate estate under his control except for some stock in a company that John had worked for previously. Buxton talked freely about the estate and

⁶¹Ex. 21

⁶²Ex. 131

the assets and the division of the estate assets. Nothing was communicated to Eugster by Buxton that there was anything amiss regarding the funds moving from the estate to Marion. The probate had not been completed as far as Eugster then knew. All of the funding issues and the charges against the estate for expenses and the allocations as to the funds going to the trust and the funds confirmed to Marion Stead had yet to be resolved by Hellenthal.

Marion expressed concern to Eugster about “what assets had been used to fund the trust and her belief that there had been errors.”⁶³ Eugster met with Buxton about her concerns.⁶⁴ Later, the attorney Marion hired after Eugster, “Mr. Braff, reviewed the trust funding and determined the insurance policy that designated Ms. Stead the beneficiary was improperly in the trust, as were two other assets.”⁶⁵ The trust refunded \$129,000 to \$135,000 to Marion in June of 2005.

⁶³FOF 2.22

⁶⁴Id.

⁶⁵Id. Note, Trefts and Braff sought re-division of the estate after Roger declined to pay Trefts \$2,000 per month from the irrevocable special needs trust set up by John’s will. TR 60: 19; See Ex. 55, Letter to Roger from Trefts (Oct. 8, 2004). See discussion *infra*.

The Hearings Officer ultimately concluded that “Who was responsible for these errors was not clear from the evidence presented.”⁶⁶

F. Enter Attorneys Braff, Trefts and Northwest Trustee & Management Services.

After just barely more than two months of working for her, Eugster wrote Marion on September 1, 2004, regarding various bills, inquiring about the house and suggesting a meeting with Roger.⁶⁷ Instead of responding, Marion apparently retained attorney Andrew Braff on or about September 7.⁶⁸ Although Braff acknowledged that Roger was what Eugster described him as, a dutiful and honest son,⁶⁹ he immediately prepared and arranged for attorney Stephen Trefts, d.b.a. Northwest Trustee and Management Services, to serve as her new paid Attorney-in-Fact.⁷⁰ Braff had worked with Trefts in the past.⁷¹ According to Braff’s Durable General Power of Attorney,⁷² Trefts d.b.a. Northwest Trustee and Management Services was entitled to reimbursement for all costs and expenses and “shall be

⁶⁶Id. Obviously this inconclusive finding cannot justify or support any disciplinary action against Eugster.

⁶⁷Ex. 36

⁶⁸Ex. 54 [Affidavit of Marion R. Stead]

⁶⁹TR 92 - 93 in the letter of August 24, 2004 (Ex. 52)

⁷⁰Ex. 37-39

⁷¹TR 80:20.

⁷²Ex. 39

entitled to receive at least annually, without court approval, reasonable compensation for services performed on the principal's behalf.”⁷³

G. Eugster's concerns and the need for guardianship to protect Marion.⁷⁴

Eugster believed these attorneys (Braff and Trefts) importuned upon Marion and enabled, encouraged and facilitated her to pursue a plan for her affairs and her estate which contravened the plan she and her husband had put in place with attorney Hellenthal, including the irrevocable Special Needs Trust.⁷⁵ They importuned upon her in securing their services for hire including the day-to-day management of assets and payment of expenses performed by Trefts d.b.a. Northwest Trustee and Management Services. They improperly attempted to get Roger, as trustee of John Stead's Testamentary trust to pay \$2,000 per month from those irrevocable trust assets to them

⁷³Emphasis added. This Power of Attorney differs from Marion's prior Power of Attorney prepared by Hellenthal which has a paragraph specifically entitled "compensation." Ex. 21 para. 9. Information about compensation and fees in the Braff document is not obviously identified in any caption or section of the document but buried in two different paragraphs entitled "Accounting" and "Acknowledgement."

⁷⁴See Eugster's testimony before the Board on 9/21/07 at TR 10 et seq. Eugster understood that Marion did not want Roger out of the picture if he was a loyal son. She was angry at Roger because he had not recently come to visit her and he was about to leave for a European vacation.

⁷⁵TR 395

for “one-half of her support.”⁷⁶ This was contrary to the irrevocable supplemental needs trust established by John and Marion with attorney Hellenthal. When Roger declined to pay Trefts, Braff pursued efforts to correct a division of the marital estate between John Stead’s testamentary trust and Marian which was not the division the couple had tried to accomplish in the Hellenthal Plan.⁷⁷

Two days before her death in November 2006, Marion executed a new will.⁷⁸ Rather than leaving her estate to her only grandchild per the Hellenthal and all previous plans, Marion left the bulk to Roger’s ex-wife and an animal shelter. The estate is now in litigation.⁷⁹

Based on his observations and professional judgment practicing law for over 30 years,⁸⁰ Eugster grew to believe Marion, a vulnerable adult,⁸¹ increasingly was not able to manage or understand her

⁷⁶TR 60: 19; See Ex. 55, Letter to Roger from Trefts (Oct. 8, 2004) stating: “At this time, our estimate is that one-half of her support would be approximately \$2,000.00 per month. As the trustee of the John Stead Trust, we are asking that you send a check to us on a monthly basis for this amount. We will then use that check, along with her other funds, to pay for her needs.”

⁷⁷TR 79:12.

⁷⁸See FOF & COL Recommendation at pg. 30

⁷⁹TR 641. The Bar blames Eugster for this litigation and for wrecking the lives and relationship with Marion and her son. FOF 2.45; pg. 27.

⁸⁰TR 762; see generally *State v. Israel*, 19 Wn. App. 773, 779, 577 P.2d 631 (1978) (acknowledging counsel’s dual role as representative of client and officer of the court, and holding that counsel’s opinion about competency is entitled to weight).

⁸¹See, Washington Vulnerable Adult Statutes, RCW Ch. 74.34; see also fn 26, supra, RPC 1.13, Client Under A Disability (version in effect in 2004).

financial affairs, including the terms of her late husband's will and the testamentary trust.⁸² Eugster's impressions were confirmed by Marion's conduct, including: her desire to change or contest her late husband's will,⁸³ her constant contacts with her stock broker, Paul Buxton,⁸⁴ her frequent, repetitive, inconsequential communications with Eugster's office,⁸⁵ her decision to sell the home and furnishings without professional assistance arranged by Eugster, her continued lack of understanding as to how her bills were being paid, her living circumstances and how her residence at the assisted living facility was being paid for under the irrevocable Special Needs Trust. She continued to make decisions without adequate consideration of her financial affairs, contrary to her estate plan and her stated objectives. This includes retaining the services of attorney Braff and Treft dba Northwest Trustee and Management Services for an unknown fee when Roger had competently managed Marion's estate consistent with her estate plan for free.

Based on these observations and his professional judgment,

Eugster wrote to Braff on September 13, 2004 stating that he did not

⁸²See, Ex. 30 [Letter to Marion from Eugster dated August 13, 2004 RE: Estate] "You cannot Change John's Will."

⁸³Ex. 16 and 30

⁸⁴TR 210

⁸⁵See, e.g. Ex. 30.

believe Marion was competent when she hired Braff and revoked Eugster's power of attorney.⁸⁶ Due to the swiftly changing circumstances, Eugster reasonably believed that a guardianship action should be filed to protect Marion and test her competency.⁸⁷ Braff responded by letter dated September 15 stating that "not only is the Power of Attorney revoked, but also that your services as Ms. Stead's attorney is (sic) terminated, and Mrs. Stead wants her files forwarded to this office."⁸⁸ On October 5, Braff filed a motion in the guardianship action to liquidate Marion's assets, for Roger to return all personal property and for Eugster to be prohibited from representing Roger "to the detriment of his former client."⁸⁹

H. Guardianship Proceeding.

As interested persons, Eugster and Roger believed they had a legal,⁹⁰ ethical⁹¹ and contractual⁹² obligation to protect Marion from

⁸⁶There is no FOF stating that Marion was completely competent at all relevant times.

⁸⁷Ex. 40

⁸⁸Ex. 42

⁸⁹This motion was entirely unnecessary. All of Marion's assets were in the revocable trust. And, the trustee (Trefts) was in control of all those assets including the house which was deeded to the trust. [See Ex. 56] The court had no jurisdiction over the trustee or the trust assets. Neither were parties to the guardianship action.

⁹⁰Washington Vulnerable Adult Act: RCW Ch. 74.34.020 (6) "Financial exploitation" means the illegal or improper use of the property, income, resources, or trust funds of the vulnerable adult by any person for any person's profit or advantage other than for the vulnerable adult's profit or advantage.

financial harm.⁹³ Therefore, on September 27, 2004 they jointly filed a Petition for Guardianship of Person and/or Estate nominating Roger, her “natural born son,” as guardian.⁹⁴ Eugster did not represent Roger in the guardianship action.⁹⁵ State law provides that “any person” may petition for the appointment of a guardian.⁹⁶ The Petition⁹⁷ alleged that Marion was incapable of managing her person and estate and explains the “Degree of Alleged Incapacity” as follows:

Marion Stead is capable of taking care of her daily physical means, however, she is not capable of making decisions as to where she should reside. She has to live in a facility where daily care can be provided, if necessary, and where she may be looked in on from time to time to ensure that she is all right. Mrs. Stead has been prescribed many medications including anti-depressants, anti-insomnia, and anti-anxiety drugs. These

RCW 74.34.035 (1) When there is reasonable cause to believe that abandonment, abuse, financial exploitation, or neglect of a vulnerable adult has occurred, mandated reporters shall immediately report to the department.

⁹¹See RPC 1.13 at fn 26.

⁹²Both Eugster and Roger were named as trustees in Marion’s Living Trust.

⁹³This includes attorneys Andrew Braff and Stephen Trefts, d.b.a. Northwest Trustee and Management Services.

⁹⁴Ex. 47. Both Eugster and Roger Samuels are identified as “Petitioner/Attorney.” Note, the Durable General Power of Attorney created by Braff and naming Trefts fails to identify who should be appointed as Marion’s guardian should it be necessary. See Ex. 39, p. 4 (para. 5). Compare Ex. 17: “In the event that it becomes necessary to appoint a guardian of the person and/or estate of the Principal, the Principal nominates her attorney, STEPHEN K. EUGSTER, as the guardian of her person and/or estate. If he resigns or otherwise fails or ceases to serve, the Principal nominates her son, Roger Samuels, as the guardian of her person and/or estate.”

⁹⁵FOF 2.33 “There is insufficient evidence to find Mr. Eugster represented Roger in the guardianship action.”

⁹⁶RCW 11.88.030

⁹⁷Ex. 64

medications are not monitored nor managed by staff at the Parkview Assisted Living Facility. Mrs. Stead is not capable of managing her investments or her daily expenses and monthly expenses. Further, she is at a loss to understand how these matters are taken care of. In the past few weeks, it has become apparent that Mrs. Stead has become somewhat delusional and that she believes her son Roger Samuels in somehow out to take advantage of her when this is certainly not the case.⁹⁸

Pursuant to state law, the notice that a guardianship proceeding must be “personally served upon the alleged incapacitated person....”⁹⁹ A guardian was appointed to investigate and make a report.¹⁰⁰ Emilie Sammons (Marion’s only grandchild) testified in favor of a guardianship and that she thought her grandmother was incompetent.¹⁰¹ On October 4, 2004 the guardian filed his report.¹⁰² That report included an opinion from Dr. Patrick Shannon, a Family Practitioner,¹⁰³ that Marion did not need a guardian to handle her

⁹⁸Ex. 47

⁹⁹The Hearings Officer shrilly berates Eugster for having the notice personally served. See FOF Count IX at 2.44 [Braff testifying (in what amounted to hearsay from a dead person) that Marion was “humiliated by the service.”] However, in Steven’s County, service of process in such cases is affected by the Sheriff.

¹⁰⁰Ex. 65 Before the investigation was completed there was a hearing regarding the sale of the house. The house was not in the guardianship proceeding because Marion’s Living Trust was not in the proceedings. The court did not have jurisdiction over the house.

¹⁰¹Ex. 82

¹⁰²Ex. 88

¹⁰³Patrick J. Shannon, M.D., specializes in family practice, not psychiatry. He is not a psychologist. See Ex. 85 [Medical/Psychological Report (October 12, 2004)]. Section XII of the Report asks for the “Names of persons with whom the physician/psychologist has met or spoken with regarding the patient.” Dr.

financial affairs noting, however, that she had “psychologic conditions with major depressive disorder” for which she took various medications and was in counseling.¹⁰⁴

On October 8, 2004, Trefts wrote Roger stating that Marion had resigned as trustee of her Living Trust and named Trefts as her successor trustee.¹⁰⁵ However, according to the terms of the Living Trust, if Marion resigned, Eugster became Trustee then Roger.¹⁰⁶ On October 21, 2004, Eugster declined to serve as successor trustee of Marion’s Living Trusts, ceased to serve as Attorney-In-Fact, and declined to act as guardian for Marion.¹⁰⁷ Mr. Trefts wrote Eugster on

Shannon fails to mention attorney Trefts who previously asked him to evaluate Marion on September 22, 2004. See and compare Affidavit of Stephen W. Trefts, Trustee of Living Trust of Marion R. Stead with Dr. Shannon’s Medical/Psychological Report. Ex. 78 [Ex. A]; Ex. 85. In the statement attached to Treft’s declaration, Dr. Shannon makes no mention of any psychologic condition, depressive disorder, or the fact she has was seeing a counselor. Given the issue was her mental health, rather than her physical health, perhaps the counselor should have submitted a report.

¹⁰⁴Ex. 85 (Guardianship Medical/Psychological Report at VI). “Psychologic conditions” refers to a variety of mental disorders, including severe phobias, dysrationalia, and PTSD. See Webster’s New World Medical Dictionary.

¹⁰⁵Ex. 55. Trefts did not attach a copy of her resignation or if one was prepared revoking any powers given to Roger. Compare Ex. 43. Under the terms of Marion’s Living Trust, Eugster was the first successor trustee with Roger as the second successor trustee.

¹⁰⁶Ex. 16 at p. 9 [Art. XII (A)]

¹⁰⁷Ex. 65 & 112 Because Marion resigned as Trustee of her Living Trust, Eugster automatically became trustee. The Trust, which is a separate entity, was not part of the guardianship proceeding.

October 26 stating that the trust had been amended and that he was no longer a successor trustee.¹⁰⁸

On November 4, 2004, attorney Terry Williams appeared in the guardianship action for co-petitioner Roger Samuels.¹⁰⁹ On November 17, 2004, Eugster withdrew his petition for guardianship.¹¹⁰ On February 1, 2005 by stipulation between Mr. Braff and Mr. Williams and their clients, the petition for guardianship was dismissed.¹¹¹

V. Eugster's response to reasons given for disbarment.¹¹²

A. Eugster did not fail to abide by his Marion's objectives. For her own protection, Eugster had an ethical duty and/or legal authority to ask the court to determine whether she was impaired and incapable of managing her affairs.¹¹³

Eugster attempted to abide by Marion's objectives which were to review her estate plan and ensure that her son, Roger, was not taking advantage of her in his management of her estate. Eugster consulted

¹⁰⁸Ex. 68 & 114. Although the revocation of the Power-of-Attorney was sent to Eugster, apparently the amendment to Marion's Living Trust was not sent until after he withdrew. Ex. 43. Apparently, neither the Living Trust prepared by Eugster [Ex. 16] nor the Braff amendment to that Living Trust [Ex. 43] was recorded like the Eugster Durable General Power of Attorney and Braff's amendment. Ex. 17 and 39.

¹⁰⁹Ex. 92

¹¹⁰Ex. 94

¹¹¹Ex 76.1.

¹¹²Summarized in the Association's Petition for Interim Suspension and listed at pages 1-2 of the FOF & COL.

¹¹³Count I [RPC 1.2(a)] FOF & COL at pg. 21

with Marion as to the means by which to pursue her objectives.¹¹⁴

Marion agreed to designate Eugster as primary Attorney-in-Fact, personal representative and trustee with Roger as second in line. As stated in the FOF 2.21, “Ms. Stead did not testify during this proceeding, so why she would agree to have Roger as successor remains a mystery.”¹¹⁵ It was not a mystery at all. Marion wanted Roger to continue to serve if all was in order. All Eugster was to do, all Marion wanted him to do, was put himself before Roger for the time being so as to check things out. Eugster did not expect to continue as person with a power or as a trustee if it turned out that Roger was what he had always been: loyal, dutiful and unselfish son.

Eugster tried to maintain a normal client – lawyer relationship with Marion.¹¹⁶ He pursued as much as he possibly could her objectives and her estate plan as they existed in July of 2004. He acted immediately and rationally to take steps to protect Marion’s assets in the event her expressed concerns concerning Roger proved to be correct. Yet, he was doubtful Marion understood her affairs – that she

¹¹⁴RAP 1.2(a)

¹¹⁵*Id.* Although Marion passed away before the hearing, the Bar began its investigation in January 2005 but for unexplained reasons never interviewed Marion. Eugster maintains that his due process rights to confrontation were violated if hearsay from a dead person is allowed. See Brief of Respondent at 27-30.

¹¹⁶RPC 1.14(a)

had the ability to make adequately considered decisions concerning her affairs. RPC 1.13

Eugster, as a result of continued contact and experience with Marion and in light of what her objectives were, reasonably believed that Marion could not adequately act in her own interest. In light of the rapidly changing circumstances and the intervention of third parties, Eugster believed he had an obligation to protect Marion from financial harm¹¹⁷ and, therefore sought the appointment of a guardian.¹¹⁸

B. Eugster did not use a “former”¹¹⁹ client’s secrets and confidences to her disadvantage when he petitioned for guardianship for her benefit as authorized by RPC 1.13 and state law.

Washington's guardianship statutes are solely designed to protect a person of diminished capacity.¹²⁰ The purpose of a guardianship isn't for the attorney's (or anyone else's) benefit but to protect the

¹¹⁷This includes attorneys Andrew Braff and Stephen Trefts, d.b.a. Northwest Trustee and Management Services.

¹¹⁸Although Marion stated in response to the guardianship petition that she believed Eugster filed it for financial gain, there is no proof of that claim. FOF at p. 22. Eugster's sole intent was to protect Marion consistent with RPC 1.13.

¹¹⁹If Marion's mental impairment reached the point of incompetency, then she would have lacked capacity to terminate Eugster. Moreover, Braff fired Eugster.

¹²⁰*In re Guardianship of Karan*, 110 Wn. App. 76, 80, 38 P.3d 396 (2002). Likewise, RPC 1.14 applies to “Client with Diminished Capacity.”

prospective ward's interests.¹²¹ The best interests of the prospective ward are the court's sole concern. Here, the guardianship was filed solely for Marion's benefit.

Under RPC 1.14 comment 8 states:

Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information.¹²² When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c)¹²³ limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one."¹²⁴

¹²¹*In re Mignerey's Guardianship*, 11 Wn.2d 42, 118 P.2d (1941) ["the trial court, of course, may, in an endeavor to ascertain all relevant and material facts, hear anyone who is apparently able to assist the court in so determining the matter as to best conserve the interests of the person for whom a guardian is to be appointed."]

¹²²This case does not involve an involuntary commitment proceeding.

¹²³RPC 1.14(c) states: "Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests." Note, RPC 1.13 (in effect in 2004) does not have that language.

¹²⁴RPC 1.14 includes a comment [8] "Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the

RPC 1.14(b) states:

When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

Compare RPC 1.13(b)¹²⁵ [in effect in 2204] which simply states:

When the lawyer reasonably believes that the client cannot adequately act in the client's own interest, a lawyer may seek the appointment of a guardian or take other protective action with respect to a client.

Although, RPC 1.13 was superseded by and is more liberal than

RPC 1.14, the Hearing Officer ignored RPC 1.13. The Hearings

question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one.”

¹²⁵“Client Under a Disability” whereas the revised 1.14 is entitled “Client with Diminished Capacity.”

Officer only cited RPC 1.13 once in passing¹²⁶ even though Eugster repeatedly raised the issue beginning with his Answer to the Complaint¹²⁷ and briefs.¹²⁸ There is no finding that Eugster violated or failed to act reasonably under RPC 1.13.

Evidently, the Hearing Officer and Board erroneously applied RPC 1.14 retroactively against Eugster. This is illustrated by the core recommendation that Eugster be disbarred based on “knowingly filing a petition for guardianship that was not well grounded in fact against a former client without making a reasonable inquiry about the client’s mental condition.”¹²⁹ Likewise, the Hearing Officer states that “There was never any suggestion that Ms. Stead was consulted or agreed to the guardianship.”¹³⁰ Under RPC 1.13(b), the lawyer need only reasonably believe at the time that “the client cannot adequately act in the client’s own interest.” The standard is subjective and prospective, not retrospective.

¹²⁶FOF at 23 [“After receiving a letter discharging him as Ms. Stead’s attorney, he listed himself as current attorney in the guardianship action and then attempted to use former RPC 1.6 as a defense, saying he divulged information to protect his client, and former RPC 1.13 for the representation.”]

¹²⁷CP 40.

¹²⁸Brief of Respondent at 23 [“Contractual Statuses and RPC 1.13”].

¹²⁹Count 5 and 8 [RPC 1.15(d); 3.4 and CR 11] FOF & COL at pg. 25.

¹³⁰FOF 2.31

Under RPC 1.13(b), the lawyer is under no obligation to consult with the client¹³¹ or others before seeking the appointment of a guardian for the person. This is also true under the state guardianship law¹³² and Vulnerable Adults Statute.¹³³

Under RPC 1.13(b), the lawyer is not required to test the extent of the client's impairment, disability, diminished capacity, competency or sanity before seeking the appointment of a guardian for that person. That would be for the court to decide, not the lawyer or petitioners. The lawyer need only have a reasonable belief "that the client cannot adequately act in the client's own interest" whether or not the impairment is "because of minority, mental disability *or for some other reason.*" RPC 1.13(a).

The record fails to identify what secrets or confidences Eugster allegedly disclosed to Marion's disadvantage given RPC 1.13's explicit authorization to pursue a guardianship which is also authorized for "any person" to pursue under the guardianship

¹³¹To illustrate the Hearing Officer's lack of understanding of RPC 1.13 and guardianship law in general she states in the FOF 2.31 that "There was never any suggestion that Ms. Stead was consulted or agreed to the guardianship."

¹³²RCW Ch. 11.88. See RCW 11.88.040 Notice of Hearing ["personally served on the alleged incapacitated person"].

¹³³RCW Ch. 74.34

statute.¹³⁴ Marion's financial affairs and mental state were known by and obvious to numerous people, including Roger, her only son and successor Attorney-in-Fact and trustee, her financial advisor and others. Marion gave informed consent¹³⁵ in writing to have Roger designed as successor trustee, attorney-in-fact and administrator of her estate. Consequently, any disclosure by Eugster would have been necessary and impliedly authorized by Marion to carry out her wishes.¹³⁶

C. Pursuant to RPC 1.13 and state law, Eugster reasonably believed Marion could not adequately act in her own best interests.¹³⁷ He filed the petition for guardianship for her benefit.

Under RPC 1.13 and state law, the only precondition placed on a lawyer who seeks the appointment of a guardian for a client (or anyone else) is the lawyer's sole, subjective and reasonable belief that the person is impaired, for whatever the reason, and cannot adequately act in his or her best interests. Here, the record shows that Marion had "psychologic conditions with major depressive disorder" for which

¹³⁴RCW 11.88.030-.040.

¹³⁵RPC 1.8(3)

¹³⁶RPC 1.6(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation.

¹³⁷Count 5 and 8 [RPC 1.15(d); 3.4 and CR 11] FOF & COL at pg. 25

she took various medications and was in counseling.¹³⁸ She was delusional to the effect that her only son was taking advantage of her estate. She increasingly did not understand her estate plan, especially the purpose and limitations on the irrevocable special need trust.

Eugster came to view Marion as a vulnerable adult at risk of serious financial harm.¹³⁹ In hindsight, Eugster concerns were justified. After Marion hired Braff and Trefts, her estate was paying thousands of dollars for management fees which were heretofore provided for free by her son, Roger. The carefully crafted estate plan she and her husband John established with Hellenthal naming their granddaughter, Emilie, as beneficiary was completely supplanted by a will Marion signed two days before her death naming Roger's ex-wife and an animal shelter as beneficiaries.

The Bar claims Eugster "violated Civil Rule 11 and/or an obligation under the rules of a tribunal, and therefore, violated RPC

¹³⁸Ex. 62. It is unknown if Dr. Shannon was aware of or quarried Marion regarding her knowledge of her estate plan and the limits on the testamentary trust

¹³⁹Washington Vulnerable Adult Act: RCW Ch. 74.34.020 (6) "Financial exploitation" means the illegal or improper use of the property, income, resources, or trust funds of the vulnerable adult by any person for any person's profit or advantage other than for the vulnerable adult's profit or advantage." [Emphasis added]. RCW 74.34.035 (1) When there is reasonable cause to believe that abandonment, abuse, financial exploitation, or neglect of a vulnerable adult has occurred, mandated reporters shall immediately report to the department.

3.4(c)”¹⁴⁰ by filing the petition for guardianship “without making a reasonable inquiry about Ms. Stead’s mental condition.”¹⁴¹ However, no such claim was made in the guardianship proceeding nor were there any collateral claims of abuse of process or malicious civil prosecution.

It is undisputed Marion suffered from a “major depressive disorder” for which she was on a variety of medications. Now she was involving third parties in her affairs when Eugster was otherwise satisfactorily performing his duties. Those managing her financial affairs in recent months were, first her son, Roger, then Eugster and finally Northwest Trustee and Management Services. Eugster was mindful of all of this, as reflected in the guardianship petition. To claim his filing violated CR 11 when the court did not make that determination is absurd and violates due process.

D. By following RPC 1.13 and state law, Eugster did not engage in conduct prejudicial to the administration of justice by commencing a guardianship action for the benefit of Marion.¹⁴²

RPC 1.9(a) provides:

¹⁴⁰A lawyer shall not ... knowingly disobey an obligation under the rules of a tribunal.

¹⁴¹FOF & COL at page 2, Count 8 and 26

¹⁴²Count 9 [RPC 8.4(d)] “It is professional misconduct for a lawyer to ... engage in conduct that is prejudicial to the administration of justice.” This must be read in light of RPC 1.13.

A lawyer who has formerly represented a client in a matter shall not thereafter 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 gives informed consent, confirmed in writing.

The Bar simplistically presumes a guardianship is automatically “against a former client” if it is not granted but, “for the client” and proper if it is. This is a very unfair double standard by which to judge an attorney’s performance. RPC 1.13 and state law, on the other hand, does not judge a lawyer’s action by such perfect hindsight but rather by what the lawyer “reasonably believes” at the time. The guardianship petition simply gets the ball rolling and it is then up to the court to decide.¹⁴³

Furthermore, Eugster was not "representing" anyone in the guardianship action, let alone representing someone "against" Marion (whether or not she is a current or former client). This court totally misunderstands the unique nature of guardianship, which is for the benefit of the prospective ward and not the reverse. Eugster and Roger were co-petitioners for the benefit of Marion, merely placing the matter before the court to determine if her impairment had

¹⁴³RPC 1.13; See, e.g. *In re Mignerey's Guardianship*, 11 Wn.2d 42, 118 P.2d 440 (1941).

devolved into incompetency thereby throwing into doubt her capacity to hire new counsel, revoke the DPAs, amend trusts, etc. – all of which had suddenly and recently arisen over a very short period of time. And of course RPC 1.13 and state law explicitly authorized Eugster to so petition.

Eugster’s interests in joining Roger in filing the guardianship action¹⁴⁴ were not “materially adverse” to those of Marion. If so, any guardianship action would be potentially unethical. Eugster and Roger believed a guardianship was in Marion’s best interests to protect her from financial harm.¹⁴⁵ Eugster reasonably believed that she had diminished capacity and was at risk of substantial financial harm. Based on his professional judgment and ethical duty under RPC 1.13 and state law, Eugster petitioned with Roger for a guardianship. At the time the guardianship action was commenced, Eugster and Roger remained trustees on Marion’s Living Trust and, as

¹⁴⁴This is not like “a lawyer who has represented a business person and learned extensive private financial information about that person then representing that person’s spouse in seeking a divorce.” [RPC 1.9 Comment 3]. Roger was not only her only son but he was a trustee of her Living Trust which had not been revoked at the time the Guardianship petition was filed. See Ex. 55 [Letter from Trefts to Marion dated Oct. 8 stating she had resigned as trustee of her revocable trust and named Trefts as her successor.] The Guardianship was filed on September 27, 2004.

¹⁴⁵This includes attorneys Andrew Braff and Stephen Trefts, d.b.a. Northwest Trustee and Management Services.

such, owed a separate fiduciary and contractual duty to protect Marion and her estate.

VI. Additional Arguments:

A. Disciplining Eugster for following RPC 1.13 and state law violates due process.¹⁴⁶

RPC 1.13 CLIENT UNDER A DISABILITY: (a) When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client. (b) When the lawyer reasonably believes that the client cannot adequately act in the client's own interest, a lawyer may seek the appointment of a guardian or take other protective action with respect to a client.

In bar association proceedings, the Supreme Court has made it clear that the Due Process Clause of the Fourteenth Amendment applies.¹⁴⁷ To punish a person because he has done what the RPCs and state law plainly allows him to do is a due process violation of the most basic sort and for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal

¹⁴⁶By "due process" we are referring to the following: Article 1, section 3 of the State Constitution's Declaration of Rights provides that "No person shall be deprived of life, liberty, or property, without due process of law." Wash. Const. art. I, § 3. Article 1, section 32 provides: "A frequent recurrence to fundamental principles is essential to the security of individual right and the perpetuity of free government." Wash. Const. art. I, § 32. The 14th Amendment to the U.S. Constitution provides at section 1 that "No State shall ... deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend XIV

¹⁴⁷*In re Ruffalo*, 390 U.S. 544, 552 (1968).

rights is patently unconstitutional.¹⁴⁸ Those who petition the court should be entitled to qualified immunity subject to a finding by the court that the filing was frivolous or a violation of CR 11.¹⁴⁹ RPC 1.13 expressly defers to the lawyer's judgment that the client's ability to make "adequately considered decisions" is impaired "for some reason."

Here, Marion was suffering from a psychological impairment and evidently did not and could not make "adequately considered decisions" regarding her financial matters. The undisputed facts are that someone had handled her financial matters before, during and after Eugster's representation. Consequently, Eugster, concerned that Marion was making sudden and erratic changes in attorneys, DPAs, the trusts, etc., did what RPC 1.13 and state law authorizes a conscientious attorney concerned for the welfare of a client or others to do: he sought the "appointment of a guardian ... with respect to a client," not "against the client" as the Bar claims.¹⁵⁰

¹⁴⁸*Chaffin v. Stynchcombe*, 412 U.S. 17, 32 n. 20 (1973)

¹⁴⁹By analogy, see Washington's Anti-SLAPP laws which provide qualified immunity for persons complaining to state agencies. RCW 4.12.500-.510

¹⁵⁰See, e.g. FOF Count 9 at pg. 28[County 9: Misconduct the Association proved by a clear preponderance of the evidence that Respondent Eugster engaged in Misconduct when he filed a guardianship petition *against* Ms. Stead.]

B. The hearing officer applied the wrong burden of proof. The burden of proof should be “clear and convincing evidence” not “clear preponderance”¹⁵¹ or “beyond a doubt.”¹⁵²

The “clear preponderance of the evidence” standard is not sufficient to protect the due process, property and liberty interests at stake in professional disciplinary proceedings involving lawyers. The standard of proof should be no different from the standard used in other professional disciplinary proceedings in this state. The standard applied by the Medical Quality Insurance Commission for physicians is “clear and convincing evidence.”¹⁵³ The Department of Health’s Office of Professional Standards applies “clear and convincing evidence” for nursing assistants.¹⁵⁴ A reasonable person would conclude that the property rights and liberty interest of lawyers in their professional license is worthy of the same standard.

This Court has opined that “clear preponderance” is an intermediate standard of proof ... requiring greater certainty than

¹⁵¹ELC 10.14(b). Note, the hearing officer used various standards, including “beyond a doubt” [FOF 3.1 (pre-board revision)].

¹⁵²Count 1 at 3.1, pg. 21.

¹⁵³*Bang Nguyen v. Department of Health*, 144 Wash.2d 516, 29 P.3d 689 (2001). In that case, the Court cited *Gandhi v. State Med. Examining Bd.*, 168 Wis. 2d 299, 483 N.W.2d 295 (1992) (preponderance for physician but clear and convincing for attorneys). *Id.*, at fn. 3.

¹⁵⁴*Ongom v. State, Dept. of Health, Office of Professional Standards*, 159 Wn.2d 132, 148 P.3d 1029 (2006), *cert. denied*, ___ U.S. ___ (2007). Eugster raised this new case supplemental to his closing argument before the Hearings Officer. CP 2044

“simple preponderance” but not to the extent required under “beyond a reasonable doubt.”¹⁵⁵ However, “clear preponderance” is not the same as “clear and convincing evidence.”¹⁵⁶ The courts have always recognized that the standards are different, that “clear and convincing evidence” is a higher standard. In *U.S. Dist. Court for Eastern Dist. of Washington v. Sandlin*,¹⁵⁷ the Court said:

To be sanctioned for making false statements regarding the integrity or qualification of a judge, attorney’s knowledge of falsity of statement, or reckless disregard of their truth, must be established only by clear preponderance and not by clear and convincing evidence, despite First Amendment concerns that are raised.¹⁵⁸

The standard to be applied is “clear and convincing evidence.”

This is the only standard that is fully consistent with the broad discretion lawyers have under RPC 1.13 and state law to petition the

¹⁵⁵*In re Disciplinary Proceeding Against Allotta*, 109 Wn.2d 787, 792, 748 P.2d 628 (1988).

¹⁵⁶ The clear and convincing standard is comparable to the beyond a reasonable doubt standard. *State v. Rhodes*, 92 Wn.2d 755, 760, 600 P.2d 1264 (1979), *overruled on other grounds*, *State v. Baldwin*, 150 Wn.2d 448, 78 P.3d 1005 (2003). See, generally, Black’s Law Dictionary [“clear and convincing proof” means “proof beyond a reasonable doubt.”]

¹⁵⁷12 F.3d 861, 865 (9th Cir. 1993).

¹⁵⁸See also, *U.S. v. Motamedi*, 767 F.2d 1403, 1406 (9th Cir. 1985) the Court said: “In the trial court and in this court, the Government must establish risk of flight by a clear preponderance of the evidence, not by the higher standard of clear and convincing evidence.”

court for a guardianship to protect a client.¹⁵⁹ Under the Association's application of RPC 1.13, lawyers are apparently only entitled to protection from disbarment if the court actually grants the petition. This is contrary to the letter of RPC 1.13 and state law, forcing the non-clairvoyant lawyer into the cruelest of ethical dilemmas (i.e. run the risk of being disbarred if the court determines guardianship is unwarranted) and is absurd in that it completely ignores the honest judgment of a conscientious lawyer under evolving circumstances.

The Hearings Officer applied two different standards, "clear preponderance" and something she characterized as "beyond a doubt."¹⁶⁰ These are improper standards, indeed, the "beyond a doubt" is not a standard at all. It is merely a statement of a condition, and not a matter of application of the proper standard of proof. It is not the application of "clear and convincing" evidence rule. Indeed, it is not even the application of the "preponderance of the evidence rule." Her application of these standards was flawed because she relied on incompetent, ill-founded, subjective and biased "evidence" and innuendo.

¹⁵⁹By analogy, the state anti-SLAPP law requires proof of actual malice by the party petitioning the agency. RCW 4.24.510. See, e.g. *Right-Price Recreation v. Connells Prairie*, 146 Wn.2d 370, 382, 46 P.3d 789 (2002).

¹⁶⁰Count 1 at 3.1, pg. 21.

C. The Hearing Officer and Board failed to give full consideration to mitigating factors and proportionality.

The FOF include numerous unsupported subjective assertions and innuendos, including that Eugster had bad motives or some unearned gain;¹⁶¹ had Marion served with process (as prospective ward of the guardian) in a manner calculated to deliberately embarrass her; etc. There is no proof of these assertions. They are personal opinions of an inexperienced and potentially biased hearings officer that confuse the core issue:

Did Eugster violate his duties under RPC 1.13 and/or state law?

With respect to proportionality, consider the recent case *In re Disciplinary Proceeding against Burch*.¹⁶² Mr. Burch was disbarred because of a long history of misconduct, testifying falsely and presenting false evidence to a court and/or during disciplinary proceedings, refusing to pay restitution ordered by the Bar, etc.¹⁶³

¹⁶¹In fact, Eugster billed at a reduced rate because he thought he was helping a person he knew who was in need.

¹⁶²2008 WASC 2000,469-5

¹⁶³In the *Ongom* case, the U.S. Supreme Court let stand the Washington State Supreme Court ruling that the state didn't have enough proof to suspend a woman's nursing assistant license for the alleged abuse of an Alzheimer's patient in 2001. *Ongom v. State, Dept. of Health, Office of Professional Standards*, 159 Wn.2d 132, 148 P.3d 1029 (2006), *cert. denied*, ___ U.S. ___ (2007); CP 2046

In another recent case, *In re Disciplinary Proceeding against Marshall*,¹⁶⁴ the lawyer was found to have: improperly shared fees with a nonlawyer; concealing the fee sharing arrangement; inflated his costs; failed to advise his clients of the risks of multiple representation; failed to get their written consent where there was a potential conflict of interest; filed an appeal in the Ninth Circuit Court of Appeals without proper consultation with his clients and without their authorization. Although the Board recommended disbarment, the Court concluded that the appropriate sanction was an 18 month suspension and restitution.

In another case, *In re Disciplinary Proceeding Against Poole*,¹⁶⁵ the lawyer was charged with six counts of misconduct based on his alleged mismanagement of his trust account and billing practices and allegations that he falsified documents. The hearing officer found that the lawyer committed four of the counts and recommended that the lawyer be suspended from the practice of law for six months followed by two years' probation and periodic audits of his trust account. The disciplinary board affirmed the hearing officer's findings of fact and conclusions of law and, based on findings of two additional

¹⁶⁴160 Wash.2d 317, 157 P.3d 859 (2007)

¹⁶⁵156 Wn.2d 196, 209, 125 P.3d 954 (2006)

aggravating factors, recommended a sanction of one year's suspension. The Court held that the record supported only two of the counts and that the appropriate sanction was suspension from the practice of law for six months followed by two years' probation.

VII. Conclusion.

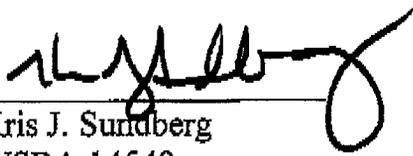
This case is based on a distinct single act of alleged misconduct: filing a petition of guardianship to protect a vulnerable person. Because of this, the Bar Association asserts that the single act violated a host of rules and that Eugster should be disbarred. This is a real doubling up of punishment or stated another way a doubling up of wrongdoing on the basis of a single act so as to be able to claim the greatest amount of punishment.¹⁶⁶ Eugster had a right to take protective action under RPC 1.13 and state law.

The Conclusions of Law cannot be upheld because they are unsupported by competent factual findings which are admittedly confusing and erroneous.¹⁶⁷ Consequently, the Board's recommended sanction should be rejected.

¹⁶⁶The purpose of the constitutional prohibition against double jeopardy is to prevent repeated attempts to convict an individual for a single offense. *State v. Escobar*, 30 Wn.App. 131, 633 P.2d 100 (1981)

¹⁶⁷See App. A.

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Kris J. Sundberg
WSBA 14549
Sundberg Law Office
P.O. Box 1577
3023 - 80th Ave., S.E. #200
Mercer Island, WA 98404
PH: 206.230.0210
FAX: 206.236.0525



Shawn Timothy Newman
WSBA 14193
Attorney for Appellant
2507 Crestline Dr., N.W.
Olympia, WA 98502
PH: 360.866.2322
FAX: 866.800.9941

Appendix A: Errors in Findings of Fact and Conclusions of Law

While the State Supreme Court gives considerable weight to the hearing officer's findings of fact, especially with regard to the credibility of witnesses, those findings will be upheld so long as they are supported by "substantial evidence."¹⁶⁸ Here, "the Board determined that the Findings as a whole were so confusing that the modifications were necessary to prevent confusion."¹⁶⁹ However, even with the modifications, the findings are confusing, incomplete, misleading or erroneous. For example, numerous generic references to "wills" and "trusts," without reference to points in time or who wrote them is especially confusing. FOF 2.13 erroneously states that "Respondent prepared new document" (referring to Eugster) when it was actually attorney David Hellenthal. Any conclusions of law based on them are likewise erroneous. The biggest error is the total absence of any discussion of RPC 1.13 or the duties imposed under the guardianship statute [Ch. 11.88 RCW].

2.13 This finding is wrong in a number of respects: Eugster did not meet with the Steads in 2003. Eugster did not prepare the new documents prepared in 2003. The wills were joint and mutual wills. The Steads revoked their earlier estate planning done for them by Eugster in 1997. The new wills were mirror images of each other. The Steads revoked their Community Property Agreement which provided that all assets upon the death of one would go to the survivor. They set up an estate plan where all assets were to be treated as community property so that half would pass under the will of the first to die. That will set up a special needs trust to ensure there would be benefits for the survivor if necessary but also sought to ensure that the survivor's estate would be used up before use would be made of the trust of the decedent set up under his will, a special needs trust or supplemental needs trust. The Steads intended their granddaughter, Emilie, to get as much of their joint estate as possible.

¹⁶⁸*In re Poole*, 156 Wn.2d 196, 125 P.3d 954 (2006) [citing *In re Disciplinary Proceeding Against Guarnero*, 152 Wn.2d 51, 58, 93 P.3d 166 (2004).

"Substantial evidence exists if the record contains "evidence in sufficient quantum to persuade a fair-minded, rational person of the truth of a declared premise." " *In re Disciplinary Proceeding Against Bonet*, 144 Wash.2d 502, 511, 29 P.3d 1242 (2001).

¹⁶⁹Board Order at 3:3-4.

Roger only was to get the residence of the Steads if it was owned by the survivor at the time of her death. The house was a specific bequest which was defeated in the event the house was not owned by the survivor.

2.14 The testimony of Summer Stahl as to Marion's dissatisfaction with the Hellenthal Wills of 2003, the joint and mutual wills, is hearsay. Hearsay for which there is no exception to the hearsay rule. Under the Hellenthal documents, all death benefits were to be divided between the estate of the first to die and the survivor. The insurance beneficiary change reversed what had been done to affect this plan and made all the insurance proceeds go to Marion in the event of John Stead's death.

2.14.1 The trust the finding refers to is the testamentary trust which was provided for under the Hellenthal will prepared for and signed by John Stead, that is, the special needs trust.

2.21 Why Marion named Eugster and then her son, Roger, as successor trustees to her under the Revocable Living Trust is not a "mystery" at all. That is what she wanted. Marion wanted Eugster to take over things at least for the time being to ensure her son was not taking advantage of her. It turned out that he was not and Eugster told her so in August.

2.24 Under the Hellenthal wills, Roger was only to get the house in Colville if, at the time of the death of the survivor the survivor then owned the house. If the house had been sold before that time he would not get the house nor would he receive anything in place of the house.¹⁷⁰ This is under the spouse not surviving portion of the wills. "I give all interest in which I may have in my residence at 485 E. Dominion Ave. Colville, Washington including the contents, . . ." ¹⁷¹ Eugster prepared a Living Trust for Marion funded by the home which was quit claimed by Roger, as personal representative of the Estate of John C. Stead, to her Living Trust.¹⁷² Thus, Eugster fulfilled Marion's directive.

¹⁷⁰See Ex. 2.1

¹⁷¹Ex. 2.1 et seq. [Hellenthal estate plan]

¹⁷²Ex. 56

2.28 The statement that "It appears the checkbook was received by Mr. Eugster on July 19, 2007 during the meeting with Roger," is false since it post-dates the Hearing Officer's decision (May 22, 2007).

2.32 Roger had never hired Eugster to represent him in the joint guardianship petition. The statement that "he hired another attorney" is simply in error. The cost of litigating the guardianship was not \$13,500. The guardianship was not just by Eugster. It was by both Eugster and Roger. Both had been nominated by Mrs. Stead as her guardian under the Durable Power of Attorney for Health care which had never been revoked and the Durable Power of Attorney. The nomination in the Durable Power of Attorney had likewise not been revoked.

2.21 Eugster did accomplish all of Mrs. Stead's objectives. Her affairs were placed in a condition whereby Roger did not have any control over her affairs. She wanted Roger to serve in Eugster's place if he did not serve. She was in control of all her assets and the disposition of the assets. She was the trustee of her revocable trust. She could amend the trust at any time. She could change the provisions of the trust so that if she was not able to act as trustee neither Eugster or Roger would be the successor. She in fact changed the trust amending it making Stephen Trefts and his company the trustee.¹⁷³

Further, it is not proper for the Board or the Hearing Officer to speculate as to what Marion's subjective estate planning objectives were. They were to be found in the documents she had signed over the years.

2.22 The guardianship would not have made Eugster the trustee of Marion's revocable trust. She was the trustee of the trustee. The trust was not a party to the guardianship proceeding. Indeed, by the time of the guardianship proceeding or sometime during the proceeding, Marion had already amended the trust and had removed Eugster and/or Roger as her successor trustee and had named Stephen Trefts and Northwest Management as the trustee.

¹⁷³Ex. 42

It was not contrary to Marion's objectives to have Roger named as her guardian. She had nominated him as such under the Hellenthal documents and under the documents of the summer of 2004.¹⁷⁴

This finding is speculative and argumentative. Even if Mrs. Stead was incompetent at the time of the signing of the 2004 documents, the 2003 documents would have been in force and Roger was the guardian under those documents and the one holding her power of attorney.

2.26 This finding is speculative and argumentative.

2.26.1 Eugster did not argue that the trust was not before the court in the guardianship proceeding. He was stating a fact. There is no basis for saying Eugster "wanted control of the client's money." In fact, the client, Mrs. Stead had complete control over all of her assets, her money. All of her assets were in the revocable trust Mrs. Stead had signed in 2004. She was the trustee and she had the power to change the terms of the trust including the successor trustees if she refused to act as trustee or her doctor had determined she could not act as trustee.

The guardianship court had nothing to do with the revocable trust, its trustee, and its terms. The court simply did not have jurisdiction.

There is no evidence that the guardianship was the cause of the trouble Marion thought she had with her son. That predated the guardianship by a long time. There is absolutely no basis in fact for saying Eugster was responsible for Marion's opinions or delusions about her son.

Marion did not change dispositive provisions of her estate plan until two days before she died. Until then, the provisions were the same as they were when her revocable trust was signed in 2004 and were the same as they were under the provisions of the joint and mutual wills signed in 2003. The only change was that Roger was not to receive a specific bequest of the residence in Colville. This provision was not carried over to the dispositive provisions of the trust.

¹⁷⁴Ex. 2 et seq.

The findings do not support the statement. There has been no showing that any of the client confidences Eugster had generated in conversation with Marion were in any way used in bringing the guardianship proceeding to ensure her protection.

2.35 Eugster did use knowledge he had gained in his work with Marion in making the decision that he should file a proceeding in guardianship asking the court to look into whether the court should become involved in assuring that her person and personal affairs were being taken care of. Eugster had received a significant number of signals or impressions that Mrs. Stead was not capable of managing herself. Based on his observations and professional judgment practicing law for over 30 years,¹⁷⁵ Eugster grew to believe Marion, a vulnerable adult,¹⁷⁶ increasingly was not able to manage or understand her financial affairs, including the terms of her late husband's will and the testamentary trust.¹⁷⁷ Eugster's impressions were confirmed by Stead's conduct, including: her desire to change or contest her late husband's will;¹⁷⁸ her constant contacts with her stock broker, Paul Buxton;¹⁷⁹ her decision to sell the home and furnishings without professional assistance arranged by Eugster; her continued lack of understanding as to how her bills were being paid, her living circumstances and how her residence at the assisted living facility was being paid for under the irrevocable Special Needs Trust. She continued to make decisions without adequate consideration of her financial affairs, contrary to her estate plan and her stated objectives. This includes retaining the services of attorney Trefl dba Northwest Trustee and Management Services for an unknown fee when Roger, prior to and under Eugster's supervision, had competently managed Marion's estate consistent with her estate plan for free.

¹⁷⁵TR 762; see generally *State v. Israel*, 19 Wn. App. 773, 779, 577 P.2d 631 (1978) (acknowledging counsel's dual role as representative of client and officer of the court, and holding that counsel's opinion about competency is entitled to weight).

¹⁷⁶See, Washington Vulnerable Adult Statutes, RCW Ch. 74.34; see also fn 26, supra, RPC 1.13, Client Under A Disability (version in effect in 2004).

¹⁷⁷See, Ex. 30 [Letter to Marion from Eugster dated August 13, 2004 RE: Estate] "You cannot Change John's Will."

¹⁷⁸Ex. 16 and 30

¹⁷⁹TR 210