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Supreme Court No. 201,435-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE DISCIPLINARY PROCEEDING AGAINST

DONALD PETER OSBORNE,

Lawyer (Bar No. 7386).

ANSWERING BRIEF OF THE
OFFICE OF DISCIPLINARY COUNSEL
OF THE WASHINGTON STATE BAR ASSOCIATION

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 ORIGINAL

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I. COUNTERSTATEMENT OF THE ISSUES

1. After a six-day disciplinary hearing, the hearing officer entered a detailed 35-page decision recommending that Respondent Donald P. Osborne be disbarred for multiple, serious violations of the Rules of Professional Conduct (RPC). Osborne did not seek review of the hearing officer's decision. Following the procedures set forth in Rule 11.3 of the Rules for Enforcement of Lawyer Conduct (ELC), the Disciplinary Board unanimously declined to order *sua sponte* review. Was Osborne denied the due process of law because the Board did not conduct a review of the hearing officer's decision that Osborne himself never sought?

2. Under ELC 11.3, the Board should order *sua sponte* review only in extraordinary circumstances to prevent substantial injustice or to correct a clear error. Did the Board err by not finding that *sua sponte* review was required to prevent substantial injustice or to correct a clear error?

II. COUNTERSTATEMENT OF THE CASE

A. PROCEDURAL FACTS

On October 10, 2013, the Office of Disciplinary Counsel (ODC) charged Osborne by formal complaint with five counts of misconduct as follows:

COUNT 1 - By preparing the 2009 will, which gave him a substantial gift from Ms. Hancock's estate, Mr. Osborne violated RPC 1.8(c).

COUNT 2 - By naming himself as PR of Ms. Hancock's estate while simultaneously making himself the residual beneficiary while representing Ms. Hancock, Mr. Osborne violated RPC 1.7(a)(2).

COUNT 3 - By filing a declaration with the court on February 24, 2011, asserting that he had returned all property formerly belonging to Ms. Hancock to the estate and/or the successor PR when he knew he had not and/or by knowingly making similar false assertions in other pleadings, Mr. Osborne violated RPC 3.3(a), RPC 4.1(a), and/or RPC 8.4(c).

COUNT 4 - By failing to return property formerly belonging to Ms. Hancock to the estate and/or the successor PR despite being ordered to do so by the court, Mr. Osborne violated RPC 3.4(a), RPC 3.4(c), and/or RPC 8.4(j).

COUNT 5 - By purporting to have authority to execute the September 2009 POLST and/or by entering Ms. Hancock's safety deposit box on October 27, 2009, under purported authority of the power of attorney granted him by Ms. Hancock, which had expired, Mr. Osborne violated RPC 8.4(c).

Hearing Officer's Findings of Fact, Conclusions of Law, and Recommendation (FFCLR) pp. 1-2. A copy of the FFCLR is attached as Appendix A.¹ ODC later dismissed that portion of Count 5 pertaining to Osborne's entry into his deceased client's safety deposit box on October

¹ The findings of fact are numbered by paragraph, but the preliminary paragraphs, conclusions of law, and subsequent paragraphs are not. The findings of fact are referenced herein by paragraph number, while other portions of the FFCLR are referenced by page number.

27, 2009. Id. at p. 2.

On May 6, 2015, after a six-day disciplinary hearing, Hearing Officer Nadine Scott entered her FFCLR. The hearing officer found that ODC proved by a clear preponderance of the evidence that Osborne committed the misconduct charged in all five counts of the formal complaint. Id. at pp. 18-25. The hearing officer concluded that the presumptive sanction for each of the five counts was disbarment. Id. at pp. 26-32. After weighing six aggravating factors (dishonest or selfish motive, pattern of misconduct, multiple offenses, refusal to acknowledge wrongful nature of conduct, vulnerability of victim, substantial experience in the practice of law) against one mitigating factor (absence of a prior disciplinary record), the hearing officer recommended that Osborne be disbarred. Id. at pp. 32-35.

Osborne had 30 days to seek review of the hearing officer's decision by filing a notice of appeal under ELC 11.2(b)(1). Osborne did not file a notice of appeal. On June 11, 2015, following the procedures set forth in ELC 11.3, the FFCLR was distributed to the Disciplinary Board members for consideration of whether to order *sua sponte* review. On June 24, 2015, the Board issued an order under ELC 11.3(a) declining *sua sponte* review and adopting the FFCLR. Disciplinary Board Order Declining Sua Sponte Review and Adopting Hearing Officer's Decision

(Board Order). A copy of the Board Order is attached as Appendix B.

On July 6, 2015, Osborne sought review by this Court of the Board Order by filing a notice of appeal under ELC 12.3. ODC moved to strike Osborne's notice of appeal or, in the alternative, to limit the scope of review and the record on review. By order issued January 22, 2016, the Court unanimously determined:

The Disciplinary Board's Order Denying Sua Sponte Review and Adopting the Hearing Officer's Decision is an appealable order under ELC 12.3(a);

Mr. Osborne's appeal of the Order Denying Sua Sponte Review and Adopting the Hearing Officer's Decision is limited to ONLY the record and scope of the Disciplinary Board's review as required by ELC 11.3(a);

The record of this review is therefore limited to the Hearing Officer's Findings of Fact, Conclusions of Law, and Recommendation;

The scope of the issue on appeal is limited to whether the Disciplinary Board erred by not finding that sua sponte review was required to "prevent substantial injustice or to correct a clear error," *see* ELC 11.3(d);

A copy of the Court's order is attached as Appendix C.

B. SUBSTANTIVE FACTS

Osborne was admitted to the practice of law in the State of Washington on May 13, 1977. FFCLR ¶ 1. In 1986, Osborne prepared a will for his clients Elizabeth Hancock and her husband, George Hancock. In 2003, following the death of George, Osborne prepared another will for

Ms. Hancock. Both wills named Osborne as personal representative of the estate. Id. at ¶¶ 19-21.

Osborne was not related to Ms. Hancock either by blood or by marriage. Id. at ¶ 2. Osborne did not have a close familial relationship with Ms. Hancock. Id. at ¶ 18. Based on all the evidence, including the testimony of Ms. Hancock's close friends, neighbors, and family members, the testimony of Osborne's assistant, and the testimony of Osborne himself, the hearing officer found that Osborne had no more than a casual friendship with Ms. Hancock. Id. at ¶¶ 3-18.

After falling at home and suffering from that and other medical issues, Ms. Hancock was hospitalized at Overlake Hospital on August 29, 2009. Id. at ¶ 22. She was discharged from Overlake Hospital and transferred to Mission Healthcare, a nursing home, on September 19, 2009. Id. at ¶ 23. While there, Ms. Hancock asked her friends and neighbors William and Susan Spencer to find a lawyer to help her with legal matters and possibly to change her will. Id. at ¶¶ 3, 24. Ms. Hancock did not ask for Osborne by name. Id. at ¶ 24.

The Spencers found Osborne listed in Ms. Hancock's address book as "Attorney at Law," telephoned him, and asked if he could come see Ms. Hancock. Id. at ¶ 25. Osborne did so. Id. at ¶ 26. Ms. Hancock gave Osborne a power of attorney over her financial affairs, but she did not give

Osborne authority to make health care decisions for her. Id. at ¶ 27. Only after he visited Ms. Hancock at the Spencers' request did Osborne begin doing errands for Ms. Hancock. Id. at ¶ 14.

On September 22, 2009, after a hospital official confronted him, Osborne signed a document entitled "Physician's Order for Life Sustaining Treatment" (POLST) on behalf of Ms. Hancock, thereby indicating that he had the authority to make health care decisions for Ms. Hancock, even though he knew he did not. Id. at ¶ 28, p. 25. Several days before that, Ms. Hancock had indicated that she wanted her daughter, Sandra Hudson, to make healthcare decisions for her. Id. at ¶ 29.

On October 5, 2009, Ms. Hancock was transferred from Mission Healthcare to Overlake Hospital and intubated, consistent with the POLST that Osborne had signed. Id. at ¶ 30. The hospital later voided the POLST after finding that Osborne did not have authority to sign it. Id. at ¶ 28.

While she was at Overlake Hospital, Osborne consulted with Ms. Hancock about a new will and about what revisions were to be made. Id. at ¶ 31. Osborne had his assistant Jean Phillips prepare a will based on instructions and handwritten notes that he gave her. Id. at ¶¶ 31-32. The primary difference between the new will and Ms. Hancock's 2003 will was that the residual beneficiary of the estate was changed from a number of charities to Osborne himself. Id. at ¶ 33. The new will named Osborne

himself as personal representative of the estate and included a clause that penalized any beneficiary who challenged the will. Id. at ¶¶ 33, 37.

Ms. Hancock's residual estate included her home and was worth approximately \$600,000. Id. at ¶ 34. It was a substantial gift to Osborne under the new will he himself prepared. Id. at ¶ 35. The new will gave Osborne a personal interest in Ms. Hancock's estate and created a substantial risk that his ability to represent Ms. Hancock and her estate would be materially limited by his personal interest. Id. at ¶¶ 35-36.

On October 14, 2009, Osborne met with Ms. Hancock, who was in declining health, and had her execute the new will. Id. at ¶ 40. Ms. Hancock was later discharged from Overlake Hospital to Mission Healthcare, and died there on October 22, 2009, only eight days after executing the new will that Osborne prepared for her. Id. at ¶ 41.

On October 29, 2009, Osborne had the new will admitted to probate and himself appointed personal representative of the estate. Id. at ¶ 44. After Osborne gave the Spencers a check for \$15,000 to satisfy Ms. Hancock's bequest to them, they became concerned about changes in Ms. Hancock's will and asked J. Scott Greer, a lawyer and a neighbor of Ms. Hancock, to investigate. Id. at ¶¶ 6, 45. Mr. Greer went to court, read the new will, and discovered that Osborne had not only drafted the new will, but named himself the residual beneficiary of the estate. Id. at ¶ 46. Mr.

Greer then contacted lawyer Randolph Petgrave and expressed his concerns. Id. Ms. Hancock's daughter, Sandra Hudson, hired Mr. Petgrave to represent her. Id. at ¶¶ 46-47.

Mr. Greer and Mr. Petgrave met Osborne at Ms. Hancock's home and raised their concerns about the new will. Id. at ¶ 48. They asked Osborne to step down as personal representative, but he refused. Id. Osborne admitted that he had drafted the new will and had named himself the personal representative of the estate, as well as the estate's residual beneficiary. Id. at ¶ 49.

On behalf of Ms. Hancock's daughter, Mr. Petgrave petitioned the court to remove Osborne as personal representative of the estate. Id. at ¶ 52. The charities that had been replaced by Osborne as residual beneficiaries challenged the validity of the new will, as well. Id. The court removed Osborne as personal representative and appointed lawyer Barbara Coster as the successor personal representative. Id. at ¶ 53.

Meanwhile, Osborne had removed valuable property from Ms. Hancock's home. Id. at ¶ 51. On different separate occasions, after finding that he had not returned estate property to the successor personal representative, the court ordered Osborne to turn over all property in his possession that belonged to Ms. Hancock and/or her estate, including all personal papers and records of any kind, documents, keys and property of

the estate, and Ms. Hancock's address book. Id. at ¶¶ 54-55, 58.

Osborne never returned all the property he had taken. Id. at ¶ 62. He willfully violated the court's orders by intentionally retaining Ms. Hancock's identification, some of her credit cards, pages from her address book, financial records, and records of an insurance policy with cash value that Osborne had been trying to have paid to himself. Id. at ¶¶ 61-62, pp. 24-25. Eventually, some of the estate property that Osborne failed to return was found in his home office by law enforcement officers and the successor personal representative when the officers executed a writ of execution of judgment at his home. Id. at ¶ 62.

Before the missing estate property was found in his home office, Osborne had repeatedly claimed in court pleadings and sworn deposition testimony that he had either returned all estate property or had it destroyed. Id. at ¶¶ 55, 59-60. On February 24, 2011, Osborne filed a sworn declaration with the court stating that he had already turned over to the successor personal representative and the estate all of the "financial records, contents of the safety deposit box, collectibles, jewelry, collection of old currency, decedent's purse, contents of a two drawer file cabinet, papers and records, all estate funds from my IOLTA account, and all other personal property." Id. at ¶ 57. But the declaration was false, and Osborne knew it was false. Id. at ¶¶ 62-63, p. 23.

The probate litigation continued until a settlement was reached in November 2011. Under the settlement, Osborne paid \$200,000 in attorney fees and sanctions. Id. at ¶ 64.

III. ARGUMENT

A. STANDARD OF REVIEW

The only finding before this Court on review is the Board's unanimous finding that sua sponte review was not required to "prevent substantial injustice or to correct a clear error." Appendix B; ELC 11.3(d). The Court should give great deference to the Board's unanimous finding, as the Board is the only body that considers the full spectrum of disciplinary matters. In re Disciplinary Proceeding Against Rodriguez, 177 Wn.2d 872, 887, 306 P.3d 893 (2013); In re Disciplinary Proceeding Against Kuvvara, 149 Wn.2d 237, 246, 66 P.3d 1057 (2003).

There is no Board decision concerning the constitutionality of ELC 11.3 before this Court for review, because Osborne never asked the Board to make any decision about that or anything else. Court rules and statutes are presumed constitutional, and the burden to show unconstitutionality is on the challenger. Amunrud v. Board of Appeals, 158 Wn.2d 208, 215, 143 P.3d 571 (2006).

B. OSBORNE HAS NOT MET HIS BURDEN OF PROVING THAT ELC 11.3 IS UNCONSTITUTIONAL OR THAT HE WAS DENIED THE DUE PROCESS OF LAW

Osborne argues that he was denied the due process of law because the Board's consideration of whether to order sua sponte review under ELC 11.3 did not include a review of the entire record before the hearing officer. What his argument amounts to is this: that the Board should have conducted the sort of review it would have conducted if Osborne had simply asked for it; that is, if he had filed a notice of appeal under ELC 11.2. Unsurprisingly, Osborne cites no authority for the novel proposition that the Disciplinary Board, or any other appellate body, is required to conduct any review at all when neither of the parties seeks review.²

ELC Title 11 provides ample process for the review of a hearing officer's decision. Osborne could have sought review by filing a notice of appeal, ELC 11.2(b)(1), but he did not. If Osborne had sought review, the record on review would have included all the hearing transcripts, exhibits, and bar file documents designated by the parties, as well as the briefs of the parties. ELC 11.5(a), 11.9, 11.12(a). Osborne had all that process

² ELC 11.12(g) provides, "When a Board decision recommending suspension or disbarment becomes final because neither party has filed a notice of appeal or petition for discretionary review, the Clerk transmits to the Supreme Court a copy of the Board's decision together with the findings, conclusions and recommendation of the hearing officer for entry of an appropriate order." According to Osborne's reasoning, due process would require this Court to conduct the same sort of review in cases where neither party has filed a notice of appeal as in cases where a party has filed a notice of appeal.

available to him; he simply failed to avail himself of it.

The right to due process does not mean a right to unlimited process, State v. Parvin, 184 Wn.2d 741, 760, 364 P.3d 94 (2015), and it certainly does not mean a right to process that a party never asks for when it is clearly available for the asking. Appellate rights may be waived by a failure to exercise them, whether such failure results from neglect or from conscious choice. See, e.g., State v. Wilson, 174 Ariz. 564, 566-67, 851 P.2d 863 (1993). If Osborne did not receive the Board review he desired, it is not through any constitutional defect in the ELC; it is because he simply never asked for it.

Osborne also claims, based on nothing in particular, that the Board failed to engage in “the rule mandated process of deliberation after reflecting or pondering occurred.” Respondent’s Brief (RB) at 12-13. Osborne does not explain how he knows how much or how little “reflecting or pondering occurred” between June 11, 2015, when the hearing officer’s decision was distributed to the Disciplinary Board members, and June 24, 2015, when the Board issued a unanimous order under ELC 11.3(a) declining *sua sponte* review.

What we do know is that the Board is presumed to have performed its functions regularly and properly without bias or prejudice, Kay Corp. v. Anderson, 72 Wn.2d 879, 885, 436 P.2d 459 (1967), and that anyone

claiming to the contrary must support his claim with more than mere supposition and conjecture, Wolfkill Feed and Fertilizer Corp. v. Martin, 103 Wn. App. 836, 841, 14 P.3d 877 (2000). Even if, as Osborne supposes, the Board did not “collectively” consider the matter at a “meeting,” RB at 12-13, ELC 2.3(g) specifically provides that “the Board may meet and act through electronic, telephonic, written, or other means of communication.” Such “other means of communication” are not inconsistent with “reflecting or pondering.”

C. THE BOARD DID NOT ERR IN DECLINING *SUA SPONTE* REVIEW UNDER ELC 11.3(a)

ELC 11.3(d) provides that the Board should order *sua sponte* review “only in extraordinary circumstances to prevent substantial injustice or to correct a clear error.” Osborne identifies four issues of which he claims the Board should have ordered *sua sponte* review. See ELC 11.3(a) (order for *sua sponte* review shall set forth issues to be reviewed). The Board would have reviewed these issues if Osborne had only asked (after filing a notice of appeal). Each issue is addressed separately below. None of them presents any “extraordinary circumstances” such that *sua sponte* review was required “to prevent substantial injustice or to correct a clear error.” ELC 11.3(d).

1. The Board was not required to order *sua sponte* review of the hearing officer's conclusion as to the definition of "related persons" in RPC 1.8(c).

Osborne argues that the Board should have ordered *sua sponte* review of the hearing officer's conclusion that the definition of "related persons" in RPC 1.8(c) does not apply to lawyers who are not related to their clients by blood or marriage. RB at 14. But Osborne has failed to show that this was error, much less "clear error." ELC 11.3(d). Furthermore, there was no need for the Board to review this conclusion because the hearing officer found that even if the definition of "related persons" encompassed such lawyers, Osborne, as a matter of fact, did not have a "close familial relationship" with his client. FFCLR ¶¶ 18, pp. 20-21.

RPC 1.8(c) states:

A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of the client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(Emphasis added.) Prior to 2006, lawyers who were not closely related to the donee were prohibited from preparing a will that gave them a

substantial testamentary gift.³ The rule was amended in 2006 to expand the definition of related persons to encompass non-traditional family relationships; this resolved a dispute over whether persons like cousins could be considered “related persons.” Reporter’s Explanatory Memorandum to the Ethics 2003 Committee’s Proposed Rules of Professional Conduct 155 (cited at FFCLR p. 19). This expansion was accomplished as noted above, by changing the language that defined related persons to read “spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.” RPC 1.8(c) (emphasis added).

Osborne argued at hearing that the inclusion of the language “other relative or individual” in the definition meant that a lawyer like him who is unrelated to his client by blood or marriage could still draft a will giving him a substantial gift from a client if he had a close familial relationship with the client. The hearing officer rejected this argument, concluding that the purpose of the 2006 amendment to RPC 1.8(c) was to clarify that the exception could apply to extended, but still familial, related individuals or people such as in-laws who occupied the same type of family relationship

³ Prior to 2006, RPC 1.8(c) said: “[a] lawyer who is representing a client shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.”

as other close relatives, although not by direct blood. FFCLR p. 20.

But the hearing officer went on to conclude that even if RPC 1.8(c) were construed to allow a lawyer who is not related to the client by either blood or marriage to both draft a will and take from that will a substantial gift, Osborne still violated the rule because he did not have a close familial relationship with his client. Id. at pp. 20-21. A close familial relationship is a required element of the exception, whether the lawyer is a relative of the client or another unrelated individual. RPC 1.8(c).

The hearing officer's conclusion that Osborne did not have a close familial relationship with his client, and therefore violated RPC 1.8(c), is amply supported by the findings of fact:

- Prior to being hospitalized in August 2009, Osborne's client, Elizabeth Hancock, only mentioned Osborne once to her good friend and caretaker William Spencer and his wife Susan, and then only referred to Osborne as her husband's lawyer, whom she did not trust. FFCLR ¶¶ 3-4;
- Ms. Hancock's close friend Toni Grandaw, who had known Ms. Hancock since 1954, had never heard of Osborne until after Ms. Hancock was hospitalized in 2009. Id. at ¶ 10;
- Ms. Hancock's hairdresser Rosina Opong, who had done Ms. Hancock's hair in her home every two weeks since 1990, knew William Spencer, but had never been in contact with Osborne until after Ms. Hancock died. Id. at ¶ 12;
- Neither the Spencers nor lawyer J. Scott Greer, all of whom were frequently at home day and night and had good views of Ms. Hancock's home, had ever seen Osborne there. Id. at ¶¶ 3, 5-6;

- There were no photos of Osborne in Ms. Hancock's home. Id. at ¶ 16;
- Ms. Hancock kept greeting cards she received in a box, but no cards from Osborne were found in the box. Id. at ¶ 7. She also kept a list of the persons with whom she exchanged cards, and Osborne was not on that list. Id.;
- In her address and day books, Ms. Hancock separately listed her friends and family along with their respective dates of birth. Osborne was not on those lists. The only entry for Osborne in her address book was as "Attorney at Law." Id. at ¶¶ 8-9;
- When Ms. Hancock asked the Spencers to find a lawyer to help her change her will while she was in nursing care, she did not ask for Osborne by name. Id. at ¶ 4;
- Osborne's friend and assistant Jean Phillips had never heard Osborne mention Ms. Hancock in the 20 years Phillips had known Osborne and did not meet Ms. Hancock until after she was hospitalized. Id. at ¶ 11;
- Osborne asserted that between 2003 and 2009, he occasionally "swung by" Ms. Hancock's home to see how she was doing but also admitted that he seldom shared holidays with her. While he claimed he exchanged recipes with her, he admitted he shared recipes with everyone. Id. at ¶ 13;
- While Osborne started going to Ms. Hancock's home after she was hospitalized to do errands and chores, there was no evidence that he did such things before she was hospitalized in August 2009. Id. at ¶ 14;
- Osborne presented no witness or documentary evidence to corroborate his claim that he had a close relationship with Ms. Hancock prior to her being hospitalized. Id.;
- Osborne had no more than a casual friendship with Ms. Hancock, not a close familial relationship. Id. at ¶¶ 17-18.

The hearing officer's resolution of the factual issue of whether

Osborne had a close familial relationship with Ms. Hancock is dispositive of the issue of whether he was “related” to Ms. Hancock. There was no need for the Board to order *sua sponte* review concerning an issue that was not material to the outcome of the proceeding. Christiano v. Spokane County Health Dist., 93 Wn. App. 90, 94, 969 P.2d 1078 (1998) (“principles of judicial restraint dictate that when one issue is dispositive, we should refrain from reaching other issues that might be presented”).

2. The Board was not required to order *sua sponte* review of the hearing officer’s conclusion as to the presumptive sanction for Count 2.

Osborne argues that the Board should have ordered *sua sponte* review of the hearing officer’s conclusion that disbarment was the appropriate sanction for his having engaged in an improper conflict of interest by intentionally naming himself both personal representative and residual beneficiary in the same will. RB at 14. Osborne has failed to show that this was error, much less “clear error.” ELC 11.3(d).

The hearing officer found that Osborne knew that preparing a will that simultaneously named him as personal representative of the estate and gave him a substantial gift placed his personal interests at odds with those of the estate and his client, that he intentionally did so anyway, and that he thereby caused serious or potentially serious injury to his client and her estate. FFCLR p. 28. She also found that Osborne made conflicting

statements about whether he advised his client that she could obtain the advice of independent counsel before executing the new will and that he told witnesses Petgrave and Greer that he had not. Id. at ¶¶ 40, 49.

From this it can be reasonably inferred that Osborne's client did not give informed consent to the representation. Great weight is given to the hearing officer's findings on mental state and credibility. In re Disciplinary Proceeding Against Abele, 184 Wn.2d 1, 12, 14, 358 P.3d 371 (2015). Based on these findings, the hearing officer correctly applied Standard 4.3 of the American Bar Association's Standards for Imposing Lawyer Sanctions (1991 ed. & Feb. 1992 Supp.) (ABA Standards), which "is generally appropriate in cases involving conflicts of interest" and concluded that the presumptive sanction for Count 2 is disbarment under ABA Standard 4.31(a).⁴ FFCLR p. 28.

Furthermore, there was no need for the Board to order *sua sponte* review of this issue because the hearing officer properly found that the presumptive sanction for the other four charged violations is disbarment, too. Where there are multiple ethical violations, the ultimate sanction to be imposed is the sanction for the most serious one. In re Disciplinary

⁴ ABA Standard 4.31(a) states that "[d]isbarment is generally appropriate when a lawyer, without the informed consent of client(s) engages in representation of a client knowing that the lawyer's interests are adverse to the client's with the intent to benefit the lawyer, and causes serious or potentially serious injury to the client."

Proceeding Against Petersen, 120 Wn.2d 833, 854, 846 P.2d 1330 (1993).

So even if, as to Count 2, the hearing officer should have applied ABA Standard 4.32⁵ instead of ABA Standard 4.31(a), it would make no difference to the outcome. The sanction would still be disbarment.

3. The Board was not required to order *sua sponte* review of the hearing officer's conclusions as to Counts 3 and 4.

Osborne contends that the Board should have ordered *sua sponte* review of the hearing officer's conclusions as to Counts 3 and 4. RB at 14-15. But Osborne fails to provide even the most cursory explanation of what "substantial injustice" or "clear error" the Board needed to prevent or correct. ELC 11.3(d).

As to Count 3, the hearing officer concluded that Osborne violated RPC 3.3(a), 4.1(a), and 8.4(c) when he filed pleadings with the court, which likewise were provided to the other parties, wherein he falsely claimed that he had returned all estate property when he knew he had not. FFCLR pp. 23-24. As to Count 4, the hearing officer concluded that Osborne violated RPC 3.4(a), 3.4(c) and 8.4(j) when he willfully and intentionally failed to return estate property that had evidentiary value, thereby knowingly disobeyed the court's orders directing him to return the

⁵ ABA Standard 4.32 states that "[s]uspension is generally appropriate when the 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.

property, and obstructed the other parties' access to material having evidentiary value. FFCL pp. 24-25.

The hearing officer found that Osborne failed to return estate property, including Ms. Hancock's identification, credit cards, pages from her address book with handwritten data on them, and financial records including records of an insurance policy that was not an estate asset, despite the fact that these items were expressly listed by the court as property Osborne was ordered to return. FFCLR ¶¶ 54-55, 58, 62. She found that Osborne had not disclosed the nature of the insurance policy or his efforts to have its proceeds paid to himself. Id. She further found that the property had evidentiary value in the court proceedings concerning Osborne's actions as personal representative and allegations that he had stolen estate property. Id. at ¶¶ 51-52, pp. 24-25. And she found that despite knowing he still had this property, Osborne repeatedly, falsely claimed and swore that he had returned or destroyed it all. Id. at ¶¶ 55, 57, 59, 60-61, p. 23. Those findings, as well as others, amply support the hearing officer's conclusions as to Counts 3 and 4.

4. The Board was not required to order *sua sponte* review of the hearing officer's conclusions as to Count 5.

Finally, Osborne contends that the Board should have ordered *sua sponte* review of the hearing officer's conclusion that he violated RPC

8.4(c) as charged in Count 5 by falsely representing that he had authority to execute the September 2009 POLST. To determine an RPC 8.4(c) violation, the only question is “whether the attorney lied. No ethical duty could be plainer.” In re Disciplinary Proceedings Against Dann, 136 Wn.2d 67, 77, 960 P.2d 416 (1998). The hearing officer found that Ms. Hancock did not give Osborne authority to make health care decisions for her. FFCLR ¶ 27. She further found that Osborne admitted he had no such authority. Id. at ¶ 28. Yet despite admitting that he did not have such authority, Osborne intentionally signed a POLST, thereby misrepresenting his authority. Id. at ¶ 28, pp. 25, 32. These findings, as well as others, support the hearing officer’s conclusion that Osborne violated RPC 8.4(c), so there was no cause for the Board to order sua sponte review.

D. THE COURT’S PRIOR ORDER IS FINAL AND NO CIRCUMSTANCES JUSTIFY EXTENDING THE TIME FOR BOARD APPEAL.

Lastly, Osborne asserts that this Court should “void” the Board’s order and grant him a “full appeal” in this Court based on “the full record below.” RB at 15-16. This is nothing more or less than an attempt to reargue the issues that this Court previously determined in its unanimous January 22, 2016 order:

Mr. Osborne's appeal of the Order Denying Sua Sponte Review and Adopting the Hearing Officer's

Decision is limited to ONLY the record and scope of the Disciplinary Board's review as required by ELC 1 1.3(a);

The record of this review is therefore limited to the Hearing Officer's Findings of Fact, Conclusions of Law, and Recommendation;

The scope of the issue on appeal is limited to whether the Disciplinary Board erred by not finding that sua sponte review was required to "prevent substantial injustice or to correct a clear error," *see* ELC 1 1.3(d);

Appendix C. ODC will presume that these issues have been decided, that the Court's order means what it says, and that no additional argument is necessary or appropriate until the Court directs the parties to provide it.

Alternatively, Osborne suggests that "the parties" be allowed to "reopen a request for an appeal to the Board." RB at 17. But there is only one party who desires an appeal to the Board, and that party never made any "request for an appeal to the Board" that could be reopened. What Osborne is seeking is an extension of the time to file a notice of appeal to the Board. But the time period for filing a notice of appeal there may not be extended or altered, at least not by the Chair of the Disciplinary Board. ELC 11.13. Even were the Court to apply the Rules of Appellate Procedure (RAP), the time for filing a notice of appeal can be extended only in extraordinary circumstances and to prevent a gross miscarriage of justice. RAP 18.8(b). "Extraordinary circumstances" are those "wherein the filing, despite reasonable diligence, was defective due to excusable

error or circumstances beyond the party's control." Reichelt v. Raymark Industries, Inc., 52 Wn. App. 763, 765, 764 P.2d 653 (1988); Shumway v. Payne, 136 Wn.2d 383, 396-97, 964 P.2d 349 (1998) (citing Reichelt). That standard "has rarely been satisfied" Reichelt, 52 Wn. App. at 765. Osborne has not shown any excusable error or that adopting the hearing officer's decision in this matter without full record appellate review would result in a gross miscarriage of justice.

IV. CONCLUSION

The Board did not err in declining sua sponte review, Osborne has not met his burden of proving that ELC 11.3 is unconstitutional, and no remedy need be provided. The Court should affirm the Board's declination of sua sponte review under ELC 11.3, find that application of the rule in the absence of Osborne appealing did not deny him due process, review the record before it and adopt the hearing officer's recommendation that Osborne be disbarred.

RESPECTFULLY SUBMITTED this 15th day of April, 2016.

OFFICE OF DISCIPLINARY COUNSEL



M Craig Bray, Bar No. 20821
Disciplinary Counsel

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re

DONALD PETER OSBORNE,

Lawyer (Bar No. 7386).

Supreme Court No. 201,435-6

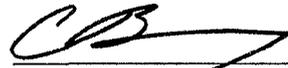
DECLARATION OF MAIL
SERVICE

The undersigned Disciplinary Counsel of the Office of Disciplinary Counsel of the Washington State Bar Association (ODC) declares that he caused a copy of ODC's Answering Brief to be mailed by regular first class mail with postage prepaid on April 15, 2016, to:

Kurt M. Bulmer
Attorney at Law
740 Belmont Pl E Apt 3
Seattle, WA 98102-4442

I declare under penalty of perjury under the laws of the State of Washington that the foregoing declaration is true and correct.

4/15/2016; Seattle, WA
Date and Place



M Craig Bray, Bar No. 20821
Disciplinary Counsel
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OFFICE RECEPTIONIST, CLERK

To: Craig Bray
Cc: Kurt Bulmer; Allison Sato
Subject: RE: In re Donald Peter Osborne, Supreme Court No. 201,435-6

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Supreme Court Clerk's Office

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Cc: Kurt Bulmer <kbulmer@comcast.net>; Allison Sato <Allisons@wsba.org>
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Dear Clerk:

Attached for filing in the above-captioned matter is the Office of Disciplinary Counsel's Answering Brief and a Declaration of Mail Service. The brief has three appendices. The appendices are being sent by separate email. Thank you.

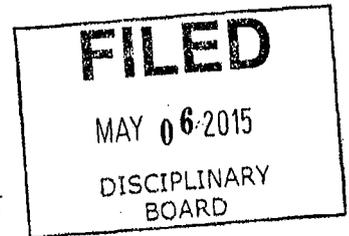
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APPENDIX A

BEFORE THE DISCIPLINARY BOARD
OF THE WASHINGTON STATE BAR ASSOCIATION



In re **DONALD PETER OSBORNE**,
Lawyer (Bar No. 7386)

Proceeding No. 13#00082
HEARING OFFICER'S FINDINGS OF
FACT, CONCLUSIONS OF LAW AND
RECOMMENDATION

In accordance with Rule 10.13 of the Rules for Enforcement of Lawyer Conduct (ELC), Hearing Officer Nadine Scott held a six (6) day Disciplinary Hearing on October 1, 2 and 3, 2014, and January 12, 13 and 14, 2015, at the offices of the Washington State Bar Association in Seattle. Disciplinary counsel Craig Bray appeared for the Office of Disciplinary Counsel and Respondent Donald Peter Osborne (hereinafter "Respondent") appeared with his legal counsel Kurt Bulmer.

I. FORMAL COMPLAINT

Respondent was charged by formal complaint dated October 10, 2013, with five (5) counts of having violated the Rules of Professional Conduct (RPC). The respective counts are set forth verbatim as:

"COUNT 1: By preparing the 2009 will, which gave him a substantial gift from Ms. (Elizabeth) Hancock's estate, Respondent violated RPC 1.8(c).

"COUNT 2: By naming himself as P(ersonal) R(epresentative) of Ms. Hancock's estate while simultaneously making himself the residual beneficiary while representing Ms. Hancock, Respondent violated RPC 1.7(a)(2).

"COUNT 3: By filing a declaration with the court on February 24, 2011, asserting that he had returned all property formerly belonging to Ms. Hancock to the estate

05/14

and/or successor PR when he knew had not and/or by knowingly making similar false assertions in other pleadings, Respondent violated RPC 3.3(a), RPC 4.1(a), and/or RPC 8.4(c).

"COUNT 4: By failing to return property formerly belonging to Ms. Hancock to the estate and/or the successor PR despite being ordered to do so by the court, Respondent violated RPC 3.4(a), RPC 3.4(c), and/or RPC 8.4(j).

"COUNT 5: By purporting to have authority to execute the September 2009 POLST and/or by entering Ms. Hancock's safety deposit box on October 27, 2009, under purported authority of the power of attorney granted him by Ms. Hancock, which had expired, Respondent violated RPC 8.4(c)." (NOTE: At the hearing, the Office of Disciplinary Counsel dismissed that part of Count 5 pertaining to Respondent's entering Ms. Hancock's safety deposit box on October 27, 2009; therefore, this aspect of Count 5 will not be addressed any further.)

II. HEARING

At the above-stated hearing, witnesses testified under oath and exhibits were admitted into evidence. Having considered the testimonial evidence and the documentary evidence, as well as the argument of counsel for both parties, the Hearing Officer makes the following Findings of Fact, Conclusions of Law and Recommendation regarding the charged violations.

III. FINDINGS OF FACT

Based on the totality of the testimonial evidence and documentary evidence presented at the hearing, the following facts were proven by a clear preponderance of that evidence:

1. Donald Peter Osborne ("Respondent") was admitted to the practice of law in the State of Washington on May 13, 1977. Transcript ("TR") 945.

2. Respondent admitted he is not related to Elizabeth Hancock ("Ms. Hancock") by either blood or marriage. TR 1268.

3. William Spencer and his wife, Susan, lived across the street from Ms. Hancock for many years prior to her death. TR 312-13. Through a "great big window" in their home and through their front yard, the Spencers had a direct view of Ms. Hancock's home which permitted them to see people coming and going from Ms. Hancock's home. TR 314; TR 326. Their relationship with Ms. Hancock became closer after the death of Ms. Hancock's husband, George. TR 296; TR 316. Ms. Spencer and Ms. Hancock talked with each other about common interests such as yards, birds and flowers. TR 496. Using a porch light and kitchen blinds, Ms. Hancock had a signaling code with the Spencers to indicate to them if she was having problems. TR 502. They considered her to be a friendly neighbor and like a family member. TR 316. Mr. Spencer took Ms. Hancock to her doctor's appointments and to be with her. TR 324. He cared for her in a number of ways, including taking care of her home and her yard, cooking some of her meals and even helping her with sponge baths when necessary. TR 325. His caring for her increased in approximately 2008 after Ms. Hancock had a hip problem. TR 379; TR 397. Prior to Ms. Hancock's being hospitalized, the Spencers never saw Respondent at Ms. Hancock's home. TR 404.

4. Prior to her experiencing a fall in August 2009, Ms. Hancock mentioned Respondent only once by name to Mr. Spencer, said he was her husband George's lawyer, and stated she was not happy with Respondent and did not trust him; otherwise,

she never mentioned Respondent. TR 490-91; Exhibit (hereinafter "EX") A-16-1. After Ms. Hancock was hospitalized in August 2009, Mr. Spencer visited her daily at Overlake Hospital and at Mission Care. TR 446. While at Mission Care, Ms. Hancock asked the Spencers to contact "a" lawyer so she could change her will. TR 313; TR 331; TR 506. Without specifying Respondent by name, TR 331, Ms. Hancock told them to look in her address book under "lawyer." TR 331; TR 506. Ms. Hancock's address book listed "Donald P. Osborne, Attorney at Law" and included an address and phone number. TR 332; TR 336; TR 506; TR 509-10.

5. Prior to Ms. Hancock's injury and hospitalization, the Spencers never saw Respondent at Ms. Hancock's home. TR 326; TR 517. Between the time when Ms. Hancock asked the Spencers to contact a lawyer and when Ms. Hancock died, Ms. Spencer saw Respondent at Ms. Hancock's home several times. TR 518. Mr. Spencer first met Respondent in Ms. Hancock's driveway, then saw him at the hospital the next day. TR 421.

6. J. Scott Greer lived across the street from Ms. Hancock and is likewise a neighbor of the Spencers. TR 33-34; TR 47. He practices law from home and is constantly there; his living room is his office. TR 52. He recognized who were and who were not regular visitors at Ms. Hancock's home. TR 52. Mr. Greer saw that Respondent did not start arriving at Ms. Hancock's home until after she became ill approximately a month or so before she died. TR 49. Mr. Greer saw that Mr. Spencer was constantly at Ms. Hancock's home doing yard work; it was his understanding that Mr. Spencer would cook and do whatever Ms. Hancock needed to help out around her home. TR 50.

7. During his legal representation of Ms. Hancock's daughter, Sandra

Hudson, attorney Randall Petgrave became aware of a box of greeting cards in Ms. Hancock's home; his client wanted to retrieve the ones she had sent to her mother, Ms. Hancock. He found that from about 2001 through 2009, Ms. Hancock had kept greeting cards she had received, including those from Ms. Hudson to her mother. Mr. Petgrave found there were no greeting cards from Respondent to Ms. Hancock. Ms. Hancock also kept a list of persons to whom she sent and from whom she received Easter cards from year to year; Respondent was not on that list. TR 873.

8. In her address and day books, Ms. Hancock listed her friends and family members, along with their respective dates of birth; Respondent was not on that list. EX A-96, at Bates Stamp 2449-50.

9. The only entry for Respondent in Ms. Hancock's address book listed him as "Donald P. Osborne, Attorney at Law." EX A-96, at Bates Stamp 2385.

10. Toni Grandaw had known Ms. Hancock since approximately 1954, beginning when they started working together at a meat packing company. TR 139. After retirement, they kept in touch all the time. TR 140. This relationship between Ms. Grandaw continued until Ms. Hancock died in 2009. TR 141. They got together once every two months, talked and ate out all the time. TR 142-43. Ms. Hancock talked with Ms. Grandaw about Sandra (Ms. Hancock's) daughter, about Sandra's family, about Ms. Hancock's family in Europe and about the Spencers. TR 143; TR 147; TR 150; TR 152-53. She told Ms. Grandaw that Mr. Spencer was always there to help out in caring for her home, such as fixing the gutters, taking care of the yard, having a key to and watching over her home. TR 152. Ms. Hancock also talked with Ms. Grandaw about legal and financial matters, stating she was concerned that her investments were losing money.

TR 155-56. Ms. Hancock told Ms. Grandaw that she did not have a lawyer and never mentioned Respondent. TR 157-58. George Hancock, Ms. Hancock's late husband, had likewise never mentioned Respondent to Ms. Grandaw. TR 159. Ms. Grandaw had never heard of Respondent until Ms. Hancock got sick, saw him once at the hospital and never met him until Ms. Hancock's funeral. TR 158-59. Ms. Grandaw visited Ms. Hancock at Overlake Hospital and Mission Healthcare 6-7 times. TR 159. During one of those visits, Ms. Hancock mentioned that a lawyer had come to the hospital and was helping her get things done. TR 163. Ms. Hancock told Ms. Grandaw that she wanted to change her will regarding her daughter, her charities, her nephew and the Spencers. TR 163. When the Spencers told her that Ms. Hancock had changed her will in the hospital, Ms. Grandaw was flabbergasted that Ms. Hancock had left the rest of her estate to Respondent, a person whom Ms. Hancock had never mentioned to her. TR 165. While undergoing health care prior to her death, Ms. Hancock no longer appeared to Ms. Grandaw to be the same person. TR 166.

11. Jean Phillips helped Respondent with such things as typing since approximately 2003. TR 220. The first time she met Ms. Hancock was in Overlake Hospital. Respondent talked with her about his friends. TR 221. Prior to Ms. Hancock's falling and being hospitalized, Ms. Phillips had never heard Respondent mention Ms. Hancock in the 20 years she has known him. TR 239.

12. Rosina Opong knew Ms. Hancock very well. TR 583. While attending beauty school in 1989 and 1990, she first met Ms. Hancock, at which time she started doing Ms. Hancock's hair and continued doing so every two weeks since then. TR 582-84. Ms. Hancock talked with Ms. Opong about family and friends. TR 589. When she

would go to Ms. Hancock's home to do her hair in the upstairs kitchen, Ms. Opong saw Mr. Spencer working in the yard. TR 604; TR 599. She was first in contact with Respondent after Ms. Hancock's death. TR 592-93.

13. Respondent asserts that, between 2003 and 2009, he occasionally "swung by" Ms. Hancock's home to see how she was doing but also admits that he seldom shared holidays with her. TR 1014. Respondent exchanged recipes with her, EX R-211, but admitted that he shared recipes with everyone. TR 1017. On a couple of occasions, he had dinner with her at a restaurant and they also socialized in her back yard when circumstances fit. TR 1019-20. No one else was present at Ms. Hancock's home on such occasions. TR 1021.

14. Other than himself, Respondent presented no witness or any documentary evidence to corroborate his testimony about his relationship with Ms. Hancock prior to her being injured in a fall at her home and having to be hospitalized. After the Spencers phoned him that Ms. Hancock had been hospitalized, Respondent went to Overlake Hospital to assess what needed to be done. TR 1022. At that point, he started going relatively frequently to the hospital and also started going to her home to do such things as getting the mail, newspapers and magazines, doing her banking, setting up a bill-paying account, checking on her flowers and retrieving a change of clothing for her. TR 1027; TR 1033; TR 1035. Both he and Ms. Spencer did Ms. Hancock's laundry. TR 1028. No evidence was presented which demonstrated that he helped Ms. Hancock in any of these ways prior to her being hospitalized.

15. As personal representative ("PR") of Ms. Hancock's estate following her death, Respondent engaged in such activities as preparing pleadings to probate the

estate, undertaking the marshaling of her assets, opening bank accounts and notifying financial institutions, paying bills, watering plants at her home and protecting the estate's physical property. TR 1163-64.

16. After the court named Ms. Coster to succeed Respondent as PR of Ms. Hancock's estate, she was in the Hancock home and saw photographs of people but none of the photographs included Respondent. TR 662-63.

17. Prior to her death, Respondent maintained a casual friendship with Ms. Hancock.

18. Respondent did not have a close, familial relationship with Ms. Hancock.

19. In 1986, Respondent prepared a will for Elizabeth Hancock and her husband, George. This will was witnessed by attorneys Eric Lind and Richard Atherton. EX A-1.

20. In 2003, following the death of George Hancock, Respondent prepared another will for Ms. Hancock. This will was witnessed by Robert F. Koreski and his wife, Joyce J. Koreski. EX A-3.

21. Both the 1986 will and the 2003 will nominated Respondent as the PR of the respective estates. EX A-1; EX A-3.

22. After falling at home and suffering from that and other medical issues, Ms. Hancock was hospitalized at Overlake Hospital between August 29, 2009 and September 19, 2009. EX A-35 at Bates Stamp 371.

23. Ms. Hancock was discharged from Overlake Hospital and transferred to Mission Healthcare, a nursing home, on September 19, 2009. TR 313; TR 331; TR 506.

24. While at Mission Healthcare, Ms. Hancock asked the Spencers to find a

lawyer to help her with legal matters and to possibly change her will. She did not specify Respondent by name. TR 313; TR 331; TR 506.

25. By referencing her address book in Ms. Hancock's home, the Spencers located the name and telephone number for Respondent, listed therein as "Donald P. Osborne, Attorney at Law," phoned him and informed him of what Ms. Hancock had stated. TR 332; TR 336; TR 506; TR 509-10.

26. Respondent met with Ms. Hancock at both Overlake Hospital and at Mission Healthcare. TR 1060; TR 1064; TR 1130-32; TR 1133-34.

27. On September 22, 2009, while she was hospitalized, Ms. Hancock signed a power of attorney which gave Respondent authority over her financial affairs. This power of attorney was witnessed by the Spencers and notarized by Respondent. This power of attorney did not give authority to Respondent to make health care decisions for Ms. Hancock. EX A-4.

28. On September 22, 2009, Respondent signed a document entitled "Physician's Order for Life Sustaining Treatment" (POLST) on behalf of Ms. Hancock, thereby indicating that he did have the authority to make health care decisions for Ms. Hancock. EX A-5. An official at Overlake Hospital had demanded that Respondent sign the POLST. Respondent told the Overlake Hospital official that he did not have the authority to sign the POLST. EX A-5; A-62 at 3-4; EX A-98 at 71-75. Respondent signed the POLST form but struck that part of the form that indicated he was signing it pursuant to his having a healthcare power of attorney. Subsequently, Overlake Hospital voided the POLST after finding Respondent did not have the authority to sign it. Later, in his verified accounting and in his sworn deposition in March 2011, Respondent

repeated his assertion that he did not have the authority to sign the POLST. EX-98 at 71-75. At the hearing, Respondent produced a power of attorney which he testified had been executed by Ms. Hancock and gave him the authority to sign the POLST presented to him by the Overlake Hospital official. EX R-222; TR 1289-90.

29. Several days before September 22, 2009, Ms. Hancock had indicated she wanted her daughter, Sandra Hudson, to make healthcare decisions for her in the event she were to become unable to make those decisions for herself. EX A-55, at Bates Stamp 365; EX A-10.

30. On October 5, 2009, after being transferred from Mission Healthcare, Ms. Hancock was readmitted to Overlake Hospital and intubated.

31. While she was at Overlake Hospital, Respondent consulted with Ms. Hancock about a new will and what revisions were to be made. TR 1023.

32. In October 2009, Respondent directed Jean Phillips to prepare a will, hereinafter referred to as the 2009 will, based on instructions and handwritten notes Respondent provided to Ms. Phillips. TR 224.

33. In the 2003 will, Ms. Hancock identified a number of charities as the residual beneficiaries of her estate. In the 2009 will, Respondent became the residual beneficiary of Ms. Hancock's estate and the charities were no longer the residual beneficiaries. This change in the identity of the residual beneficiary was the primary difference between the 2003 will and the 2009 will. EX A-1, A-2, A-3. Like the 1986 will and the 2003 will, the 2009 will left the penalty clause intact. EX A-3 at Bates Stamp 16 (Clauses Eighth and Ninth).

34. Ms. Hancock's gift to Respondent of her residual estate included her

home, representing the bulk of her estate. EX A-3 at 2-5; TR 661. Both Respondent and Ms. Coster, the successor PR, valued Ms. Hancock's residual estate at approximately \$600,000.00. EX A-28; A-86 at Bates Stamp 1004-05; TR 658.

35. Ms. Hancock's bequest of her residual estate to Respondent in the 2009 will, regarding which she had retained Respondent to represent her interests, was a substantial gift to Respondent and gave him a personal interest in her estate.

36. Respondent's personal interest in Ms. Hancock's estate presented a substantial risk that his ability to continue to represent Ms. Hancock and/or Ms. Hancock's estate would be materially limited.

37. Like the 1986 will and the 2003 will, the 2009 will nominated Respondent as PR of the estate. EX A-3 at Bates Stamp 16 (Clauses Eighth and Ninth).

38. Ms. Phillips accompanied Respondent to Overlake Hospital so Ms. Hancock could execute the 2009 will. TR 226.

39. At Overlake Hospital, Respondent had a private consultation with Ms. Hancock about the newly prepared will. He told Professor John Strait that, during this consultation with Ms. Hancock, he thought that between the advice he gave her about healthcare decisions, powers of attorney and the will, he had used the phrase "independent advice of counsel" at some point. EX A-27 at 5. In his March 29, 2011, sworn deposition, Respondent testified that he did discuss independent counsel with Ms. Hancock regarding the 2009 will. EX A-98 at 59. In his sworn testimony at the hearing, Respondent stated that Ms. Hancock had specifically waived independent counsel. Respondent produced handwritten notes and testified that these notes bear Ms. Hancock's initials next to a waiver of her right to consult independent counsel. TR 1081-

82; EX R-200 at 2. At hearing, however, Mr. Greer and Mr. Petgrave testified that Respondent admitted to them that he had not advised Ms. Hancock that she had the right to consult with another attorney as independent counsel prior to her bequeathing to Respondent her residual estate. TR 76; EX A-17.

40. On October 14, 2009, while in declining health, Ms. Hancock executed the new will. In addition to bearing the signature of Jean Phillips as a witness to Ms. Hancock's signing the 2009 will, this will contained the signature of Elaine Kerns as also having witnessed Ms. Hancock's signing the will. EX A-3. Yet when Jean Phillips witnessed Ms. Hancock's affixing her signature to execute the 2009 will, no other witness was in the room to witness Ms. Hancock's signing. Ms. Phillips has never seen nor met Elaine Kerns. Ms. Phillips admits it was wrong for her to have witnessed the will under these circumstances. TR 228. Respondent notarized the 2009 will and later presented it to the court for probate. TR 229.

41. On October 15, 2009, Ms. Hancock was discharged from Overlake Hospital and transferred to Mission Healthcare where she died on October 27, 2009. TR 1151.

42. Respondent was notified of Ms. Hancock's death. TR 1151.

43. Upon her death on October 27, 2009, any power of attorney granted by Ms. Hancock to Respondent expired. EX A-4.

44. On October 29, 2009, Respondent had the 2009 will admitted to probate and himself appointed as PR of the estate. EX A-11; EX A-13.

45. Following Ms. Hancock's death, Respondent went to the Spencers' home and gave them a check from her estate for \$15,000.00. TR 349. Respondent had shown

Mr. Spencer a prior will under which Ms. Hancock was going to give the Spencers \$10,000.00. TR 349. The Spencers went to Mr. Greer with their concerns about this \$15,000.00 bequest. Mr. Spencer wanted to know why there had been a change. TR 350.

46. After reading the 2009 will, Mr. Greer became concerned that Respondent was acting unethically when he learned that Respondent had not only drafted Ms. Hancock's 2009 will but also had been named as the residual beneficiary of Ms. Hancock's estate. TR 36. Though he is an attorney, Mr. Greer is neither an estate planner nor an estate attorney; therefore, he called attorney Randolph Petgrave, whose practice includes estate planning, probate and probate litigation, and related his concerns. TR 38. After Mr. Greer spoke with the Spencers, he contacted Sandra Hudson, the daughter of Ms. Hancock. Ms. Hudson then contacted and retained Mr. Petgrave as her attorney. TR 39.

47. Mr. Petgrave was concerned that Respondent had a conflict-of-interest under RPC 1.7 by having been both the drafter of a will and the executor of the estate and by Respondent's being a beneficiary under the will, and was also concerned because Respondent had not done an inventory and appraisal within ninety (90) days of his being appointed as the PR of Ms. Hancock's estate. TR 72-73.

48. Mr. Greer and Mr. Petgrave had a discussion with Respondent at Ms. Hancock's home to discuss the concerns they had about the 2009 will. In this discussion, they asked Respondent to step down as the PR of Ms. Hancock's estate but Respondent refused to do so. TR 40; TR 75.

49. At hearing, Respondent testified that he spoke with Ms. Hancock about

her wanting to name him in her 2009 will, that he advised her that she had a right to get a second opinion and a right to have someone else do the will. He further testified that Ms. Hancock told him she "Does not want 2nd Opinion or someone else to do (the will)." TR 1081-82. However, according to the hearing testimony of both Mr. Greer and Mr. Petgrave, Respondent admitted to each of them that he had drafted the 2009 will, that he had named himself as the PR of the estate, that he was named as the estate's residual beneficiary, that Ms. Hancock had not had an opportunity to consult with other counsel about her will and that he had not advised Ms. Hancock that she had the right to seek independent counsel prior to her bequeathing his her residual estate. TR 76; EX A-17.

50. When Mr. Greer and Mr. Petgrave stated to Respondent that he had violated the Rules of Professional Conduct, Respondent asked which one. TR 41. Mr. Greer and Mr. Petgrave replied that there were a number of ethical issues about Respondent's having a conflict-of-interest in violation of RPC 1.7 and that Respondent had committed a "very blatant violation" of RPC 1.8 which prohibits Respondent's drafting Ms. Hancock's will while also drafting himself into his client's will. TR 41; TR 77. Though Respondent denied doing anything wrong, he admitted to Mr. Greer and Mr. Petgrave that he was not familiar with those RPC's; he also told them that he had a close familial relationship with Ms. Hancock. TR 41; TR 77; TR 79. At the hearing, Respondent testified that he had researched the RPC's for two hours prior to presenting the 2009 will to Ms. Hancock. TR 1158.

51. After being appointed PR of the estate in October 2009, Respondent began removing Ms. Hancock's property from her home and sought control of her financial assets. EX A-62 at Bates Stamp 594-99. For instance, the Spencers saw Respondent take

boxes, plants and clothing from Ms. Hancock's home after her death. TR 346-47. Ms. Spencer also saw him take Ms. Hancock's fur coats and put them in his Jeep. TR 570. Ms. Grandaw knew that George Hancock had a big stamp and coin collections as she had seen them in the painting room of the Hancock home. TR 167. Ms. Hancock had shown Ms. Grandaw jewelry that Mr. Hancock had given to his wife on birthdays or at Christmas, jewelry which Ms. Grandaw recognized as being real jewelry, i.e., not costume jewelry. TR 167-68. Ms. Opong saw glass Chinese antiques in Ms. Hancock's upstairs kitchen when she would do Ms. Hancock's hair and then visit with her afterwards. TR 605. When Ms. Spencer later bought Ms. Hancock's address book at the estate sale, someone had removed its previous contents, leaving only blank pages. TR 512.

52. Mr. Petgrave was concerned that Respondent was stealing from Ms. Hancock's estate; in behalf of Sandra Hudson, Ms. Hancock's daughter, Mr. Petgrave petitioned the King County Superior Court to remove Respondent as PR of Ms. Hancock's estate. TR 79. In addition to the petition filed in behalf of Ms. Hudson, a number of charities likewise petitioned the court to challenge the validity of the 2009 will. EX A-17.

53. Pursuant to Mr. Petgrave's petition filed in behalf of Sandra Hudson, the court removed Respondent as PR of the estate on May 21, 2010, and appointed attorney Barbara Coster as successor PR. EX A-23.

54. In 2010, the King County Superior Court issued orders on June 10 and on June 17 pursuant to which Respondent was required to deliver to Ms. Coster all personal papers and records of any kind, information, keys and property of the estate, including

Ms. Hancock's address book. EX A-26; EX A-29.

55. In July 2010, Respondent filed pleadings in the King County Superior Court stating that he had already turned over all records to Ms. Coster. EX A-34; EX A-41. On December 17, 2010, the court issued another order, again requiring Respondent to turn over to Ms. Coster all assets of the estate. EX A-52.

56. On November 9, 2010, after the court had permanently removed him as the Hancock estate's PR and after he had failed to regain control of the estate, Respondent disclaimed his personal interest in the estate. EX A-46.

57. On February 24, 2011, Respondent filed a sworn declaration with the King County Superior Court stating that he had already turned over to Ms. Coster or to Ms. Hancock's estate all of the "financial records, contents of the safety deposit box, collectibles, jewelry, collection of old currency, decedent's purse, contents of a two drawer file cabinet, papers and records, all estate funds from my IOLTA account, and all other personal property." EX A-57.

58. On March 2, 2011, the King County Superior Court found that Respondent had still not turned over all items of personal property belonging to the Hancock estate, e.g., personal and financial records, the original wills from 1986 and 2003, Ms. Hancock's purse and its contents, and pages from her address book. EX A-58.

59. In sworn deposition testimony on March 29, 2011, Respondent stated that he took Ms. Hancock's identification and credit cards out of her purse and disposed of them. EX A-98 at 89. He also testified that he took financial documents and statements for SunTrust, Merrill Lynch, Jackson National Life, Puget Power and AIG from Ms. Hancock's home and disposed of them by shredding them and throwing them away. EX

A-98 at 89-91.

60. In sworn deposition testimony on April 8, 2011, Respondent stated that after looking "high and low" for files and a copy of the 2003 will with interlineations on it, all he found was George Hancock's original notes for his 1986 will. EX A-99.

61. The King County Superior Court entered judgment against Respondent for fees and costs. EX A-60; EX A-66. After judgment was confirmed, Respondent moved for reconsideration, again claiming that he had turned over all assets and property belonging to Ms. Hancock and her estate, and also claiming that Ms. Coster's assertions to the contrary were false. EX A-61.

62. Pursuant to judgment being entered, the King County Superior Court issued a writ of execution on August 23, 2011. EX A-74. Acting on the writ of execution, officers from the King County Sheriff's Department entered Respondent's home which contained his office from which he practiced law. Respondent allowed Ms. Coster and Matthew Green, her attorney, to enter the premises as well. They located records and property belonging to Ms. Hancock and her estate lying in plain sight in Respondent's home office. TR 697. The officers seized these records and property including, for example, Ms. Hancock's identification, some of her credit cards, pages from her address book with handwritten data on them and financial records including records of an insurance policy that was a not a probate asset. A-95; TR 717-18. As to the insurance policy, Respondent had not disclosed the nature of that asset or his efforts to have its proceeds paid to himself. TR 709-11. Since the King County Superior Court had previously ordered Respondent to deliver those records and property to Ms. Coster, the court later ordered all of these records and property released to Ms. Coster as the

estate's successor PR. EX A-52; EX A-78.

63. During the search of Respondent's home office in the course of acting on the writ of execution, Ms. Hancock's identification, credit cards and financial records were found. EX A-95; EX A-107; EX A-111; EX A-87 at 4-5; TR 709-11. TR 716-18. At hearing, Respondent testified that he did not know he had those items because he had directed Jean Phillips to find and dispose of them. TR 1168-69; TR 1215-16. At hearing, Jean Phillips testified that Respondent had not directed her to find and dispose of them. TR 1437-38; TR 1441.

64. Litigation pertaining to the Hancock estate continued until a settlement agreement was reached a year later in November 2011. Pursuant to that settlement agreement, Respondent paid \$200,000.00 in attorney fees and sanctions, including payment of the judgment which had been executed at Respondent's home office. EX A-81; EX A-84; EX A-85.

IV. CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact, the Hearing Officer makes the following Conclusions of Law:

COUNT 1: By preparing the 2009 will, which gave him a substantial gift from Ms. Hancock's estate when he did not have a close familial relationship with Ms. Hancock, Respondent violated RPC 1.8(c).

Pursuant to RPC 1.8(c), a "lawyer shall not ... prepare on behalf of the client an instrument giving the lawyer ... any substantial gift unless the lawyer ... is related to the client. For purposes of this paragraph, related persons include spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client

maintains a close, familial relationship.”

Prior to the 2006 amendment, RPC 1.8(c) required that the lawyer must be related to the client in order to be qualified to both draft the will and also take a substantial gift under the will. The intent of the 2006 amendment to this RPC was to expand the definition of “related” but only for the purpose of encompassing non-traditional family relationships. Ref Reporter’s Explanatory Memorandum to the Ethics 2003 Committee’s Proposed Rules of Professional Conduct 155. Washington specifically rejected the construction of other states which had held that persons not related by blood or marriage could be considered to be “related.” Ref Washington Ethics Advisory Opinions 87-07 and 99-03. The Reporters Notes to the drafting of Washington’s current RPC 1.8(c) point out that the rule prohibits a client from giving a lawyer a substantial gift unless that lawyer is a relative of the client by blood or marriage or unless that lawyer is an “other relative with whom the lawyer or the client maintains a close, familial relationship.” The Drafters Notes, authored by Doug Ende [who was then Reporter to the Washington Ethics 2003 Ethics Commission and then later became Chief Disciplinary Counsel for the Washington State Bar Association], explicitly emphasize “other relative” rather than “other individual.” EX A-27, at Bates Stamp 000134.

Quoting expert witness John Strait, whom the King County Superior Court appointed as Special Master in the 2009 will litigation, “... the Reporter’s Notes to the Washington RPC 1.8(c) make it fairly clear that the language Mr. Osborne relies upon was not intended to extend to lawyers who are not relatives of Mrs. Hancock, but rather to expand the definition of how far the *family* relationship could extend. In my view,

WRPC 1.8(c) as amended in 2006 does not provide a basis for Mr. Osborne to claim that he is 'another individual.' The purpose of our adoption of WRPC 1.8(c) language in 2006 was to clarify that it could apply to extended but still familial, related individuals or people such as in-laws who occupied the same type of family relationship although not by direct blood. It is uncontested that Mr. Osborne is not related by marriage or otherwise to Mrs. Hancock. In my view, this makes it unnecessary to resolve how 'close' his relationship was to Mrs. Hancock. Mr. Osborne should not have drafted the will in which he was made a substantial beneficiary." (Italics added) EX A-27, at Bates Stamp 000135.

Assuming that, at the very most, Respondent was a close friend of Ms. Hancock, being her "close friend" is not tantamount to having had a "close familial relationship" with her. Ref CJE Opinion No. 97-3 (Massachusetts, April 22, 1997). In that Respondent admitted he was not related to Ms. Hancock by either blood or marriage, TR 1268, he violated RPC 1.8(c) when he both drafted the will and also took a substantial gift from the estate as the residual beneficiary.

In a 2008 decision, the Oregon Supreme Court addressed a similar issue wherein a lawyer had drafted a will which gifted to his wife antiques, furniture and half of his client's estate. The court found that substantial testamentary gifts (in that instance worth at least \$1,000) conveyed to a will-drafting lawyer (or his family) was a violation of RPC 1.8(c). *In re Schenck*, 345 Or 350, 358, *mod on recon*, 345 Or 652 (2008).

Even if RPC 1.8(c) were to be construed to allow a lawyer who is not related to the testator by either blood or marriage to both draft a will and to also take from that will a substantial gift as the residual beneficiary, Respondent still violated this RPC. Ref *In re*

Horgos, 682 A.2d 447 (Penn. Court of Jud'l. Discipline, 1996). In *Horgos*, the court deliberated the issue of what is a "close familial relationship" by considering several factors: (1) intimacy of address, (2) recognition by others of a close relationship, (3) shared meals, (4) frequent contact either by phone or in-person, (5) shared holidays, (6) shared family events, (7) assistance with physical, medical, legal or emotional needs, and (8) longevity.

Pursuant to the totality of the facts set forth above and herein incorporated by reference, and considering the *Horgos* factors, (1) Respondent had no intimacy of address with Ms. Hancock; (2) there is no evidence that others recognized a close relationship between Respondent and Ms. Hancock; (3) other than sharing cookies on occasion, there is insufficient evidence that Respondent shared meals with Ms. Hancock; (4) other than infrequent, catching-up phone calls, there is insufficient evidence that Respondent visited Ms. Hancock on a frequent basis; (5) there is no evidence that Respondent shared holidays with Ms. Hancock; (6) other than his seeing Ms. Hancock's relative from European when that person would come to town on a rare occasion, there is no evidence that Respondent shared family events with Ms. Hancock; (7) though he did assist with her legal needs in drafting the September 2009 will and two prior wills, there is no evidence that Respondent assisted with Ms. Hancock's physical, medical or emotional needs prior to September 2009; and (8) as to longevity, he had been acquainted with her since 1986. Pursuant to the totality of the facts set forth above and incorporated herein by reference, Respondent did not have a close familial relationship with Ms. Hancock.

Additionally, based upon Respondent's testimony that Ms. Hancock refused to seek a second opinion or to have another lawyer prepare the 2009 will, Respondent either knew or should have known that he should proceed no further. If the client refuses to seek independent legal advice, then the lawyer may not draft the will or other instrument. Ref Los Angeles County Bar Association Ethics Opinion 462 (November 1990).

By both drafting the will and being the recipient of a substantial gift as the named residual beneficiary of the estate under the totality of the circumstances herein, Respondent violated RPC 1.8(c).

COUNT 2: By naming himself as PR of Ms. Hancock's estate while simultaneously making himself the residual beneficiary while representing Ms. Hancock, Respondent violated RPC 1.7(a)(2).

Pursuant to RPC 1.7(a)(2), "Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if ... there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer."

Due to his being both the residual beneficiary of Ms. Hancock's estate, which constituted his having a personal interest in the estate, while also purporting to represent the interests of Ms. Hancock and the estate, Respondent had a concurrent conflict of interest. RPC 1.7(a)(2) bars Respondent's having such a concurrent conflict of interest where there is a significant risk that his personal interests in the estate could

potentially affect his taking an appropriate course of action for Ms. Hancock or her estate. "Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests." Comment (8) to RPC 1.7.

COUNT 3: By filing a declaration with the court on February 24, 2011, asserting that he had returned all property formerly belonging to Ms. Hancock to the estate and/or successor PR when he knew he had not and/or by knowingly making similar false assertions in other pleadings, Respondent violated RPC 3.3(a), RPC 4.1(a), and/or RPC 8.4(c).

RPC 3.3(a) provides that "a lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; ... or (4) offer evidence that the lawyer knows to be false."

This rule applies to Respondent's conduct in representing Ms. Hancock's estate in the King County Superior Court in which he filed or caused to be filed certain pleadings in which he made representations regarding the status or location of property of estate property. Ref Comment (1) to RPC 3.3. The totality of the facts, as set forth above, demonstrate by a clear preponderance that Respondent knew those representations made to the court were false, conduct which violates RCP 3.3. An "assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes to be true on the basis of a reasonably diligent

inquiry.” Ref Comments (2) and (3) to RPC 3.3.

RPC 4.1(a) provides: “In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person ...” The subject declaration Respondent filed with the court would have likewise been provided to others who were challenging Respondent regarding the location of the estate’s property. Respondent was prohibited from making misrepresentations to those other person when dealing with them. Comment (1) to RPC 4.1.

RPC 8.4 provides: “It is professional misconduct for a lawyer to: (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation ...” The totality of the facts set forth above demonstrate by a clear preponderance of the evidence that, in filing this subject declaration with the King County Superior Court, Respondent engaged in acts of dishonesty, fraud, deceit or misrepresentation, in violation of RPC 8.4(c). See Comment (1) to RPC 8.4(c).

COUNT 4: By failing to return property formerly belonging to Ms. Hancock to the estate and/or the successor PR despite being ordered to do so by the court, Respondent violated RPC 3.4(a), RPC 3.4(c), and/or RPC 8.4(j).

RPC 3.4(a) provides that a “lawyer shall not: (a) unlawfully obstruct another party’s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value ... (or) (c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists ...” The totality of facts set forth above demonstrate by a clear preponderance that Respondent failed or refused to return certain property to either Ms. Hancock’s estate and/or to Ms. Coster as the estate’s successor PR despite the

court's ordering him to do so. This property had potential evidentiary value in the proceedings pending before the court. Respondent's conduct unlawfully obstructed the right of the estate's access and/or Ms. Coster's access to that property or concealed that property from the estate and/or Ms. Coster. Respondent's conduct was well beyond the scope of competition in the adversary system or fair discovery and constituted professional misconduct. Ref Comment (1) to RPC 3.4(a) and (c).

RPC 8.4(j) provides: "It is professional misconduct for a lawyer to ... (j) willfully disobey or violate a court order directing him or her to do or cease doing an act which he or she ought in good faith to do or forbear ..." The totality of the facts set forth above demonstrate by a clear preponderance that Respondent willfully disobeyed or violated one or more orders of the Superior Court, more specifically identified above directing him as to what to do about certain property of Ms. Hancock's estate. In so acting, Respondent engaged in professional misconduct.

COUNT 5: By his purporting to have authority to execute the September 2009 POLST when he did not have such authority, Respondent violated RPC 8.4(c).

RPC 8.4(c) provides: "It is professional misconduct for a lawyer to: ... engage in conduct involving dishonesty, fraud, deceit or misrepresentation." The totality of the facts set for above demonstrate by a clear preponderance that, by signing the POLST, Respondent was representing that he had the authority to do so. Respondent admitted that he had no such authority to execute the POLST. Therefore, by his signing the POLST when he knew he had no authority to sign it, Respondent engaged in an act of misrepresentation. This act of misrepresentation constitutes professional misconduct under RPC 8.4(c).

V. PRESUMPTIVE SANCTIONS

The American Bar Association's Standards for Imposing Lawyer Sanctions (1991 ed. & Feb. 1992 Supp.) – hereinafter “ABA Standards” – govern bar discipline cases in Washington. *In the Matter of the Disciplinary Proceeding Against Halverson*, 140 Wn2d 475, 492, 998 P2d 833 (2000); *In re Disciplinary Proceeding Against Boelter*, 139 Wn2d 81, 99, 985 P2d (1999); *In re Disciplinary Proceeding Against Lynch*, 114 Wn2d 598, 610, 789 P2d 752 (1990). Applying the respective ABA Standards to each of the counts against Respondent:

COUNT 1: ABA Standard 4.3 “Failure to Avoid Conflicts of Interest” applies to Respondent's preparing the 2009 will which gave him a substantial gift from Ms. Hancock's estate. This standard states that absent aggravating or mitigating circumstances, upon application of the factors set out in 3.0, the following sanctions are generally appropriate in cases involving conflicts of interest.

ABA Standard 4.31 (a) provides: Disbarment is generally appropriate when a lawyer, without the informed consent of client engages in representation of a client knowing that the lawyer's interests are adverse to the client's with the intent to benefit the lawyer, and causes serious or potentially serious injury to the client.

ABA Standard 4.32 provides: Suspension is generally appropriate when the 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.

ABA Standard 4.33 provides: 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.

ABA Standard 4.34 provides: 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.

The totality of the factual circumstances demonstrate by a clear preponderance that, in representing Ms. Hancock, Respondent prepared the 2009 will, that he knew that his personal interests in being the recipient of a substantial gift under the 2009 will as the residual beneficiary were adverse to or potentially adverse to the interests of Ms. Hancock, that he acted intentionally, that his conduct caused serious or potentially serious injury to the client through her estate and that he either knew or should have known that his conduct was unethical under the Rules of Professional Conduct.

As to Count 1, the presumptive sanction is disbarment.

COUNT 2: ABA Standard 4.3 "Failure to Avoid Conflicts of Interest" applies to Respondent's preparing the 2009 will which named himself as the personal representative of Ms. Hancock's estate and also, in naming himself as the residual beneficiary, gave Respondent a substantial gift from Ms. Hancock's estate. This standard states that, absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving conflicts of interest:

ABA Standard 4.31 (a) provides: Disbarment is generally appropriate when a lawyer, without the informed consent of client engages in representation of a client

knowing that the lawyer's interests are adverse to the client's with the intent to benefit the lawyer, and causes serious or potentially serious injury to the client.

ABA Standard 4.32 provides: Suspension is generally appropriate when the 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.

ABA Standard 4.33 provides: 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.

ABA Standard 4.34 provides: 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.

The totality of the factual circumstances demonstrate by a clear preponderance that, in representing Ms. Hancock, Respondent prepared the 2009 will in which he was simultaneously named as the residual beneficiary, that he knew his personal interests in being the recipient of a substantial gift under the will as the residual beneficiary were adverse to or potentially adverse to the interests of Ms. Hancock and her estate, that he acted intentionally, that his conduct caused serious or potentially serious injury to the client through her estate and that he either knew or should have known that his conduct was unethical under the Rules of Professional Conduct.

As to Count 2, the presumptive sanction is disbarment.

COUNT 3: ABA Standard 6.1 "False Statements, Fraud, and Misrepresentation" applies to Respondent's filing a declaration with the court on February 24, 2011, asserting that he had returned all property formerly belonging to Ms. Hancock to the estate and/or successor PR when he knew he had not and/or by knowingly making similar false assertions in other pleadings. This standard states that, absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving conduct that is prejudicial to the administration of justice or that involves dishonesty, fraud, deceit, or misrepresentation to a court:

ABA Standard 6.11: Disbarment is generally appropriate when a lawyer, with the intent to deceive the court, makes a false statement, submits a false document, or improperly withholds material information, and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding.

ABA Standard 6.12: Suspension is generally appropriate when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld, and takes no remedial action, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially effect on the legal proceeding.

ABA Standard 6.13: Reprimand is generally appropriate when a lawyer is negligent either in determining whether statements or documents are false or in taking remedial action when material information is being withheld, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially

adverse effect on the legal proceeding.

ABA Standard 6.14: Admonition is generally appropriate when a lawyer engages in an isolated instance of neglect in determining whether submitted statements or documents are false or in failing to disclose material information upon learning of its falsity, and causes little or no actual or potential injury to a party, or causes little or no adverse or potentially adverse effect on the legal proceeding.

As set forth in the Findings of Facts, Respondent asserted in a sworn declaration he filed with the King County Superior Court on February 24, 2011, that he had returned to the estate all property formerly belonging to Ms. Hancock. The totality of the facts set forth above demonstrate by a clear preponderance that Respondent's declaration and/or other similar assertions he made in other pleadings filed with the court were false and that he made such false declarations and/or assertions with the intent to deceive the court. His conduct had the potential to cause serious injury to a party or to cause a significant or potentially significant adverse effect on the legal proceeding.

As to Count 3, the presumptive sanction is disbarment.

COUNT 4: ABA Standard 6.2 "Abuse of the Legal Process" applies to Respondent's failing to return property formerly belonging to Ms. Hancock to the estate and/or the successor PR despite being ordered to do so by the court. This standard states that absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving failure to expedite litigation or bring a meritorious claim, or failure to obey any obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists:

ABA Standard 6.21: Disbarment is generally appropriate when a lawyer knowingly violates a court order or rule with the intent to obtain a benefit for the lawyer or another, and causes serious injury or potentially serious injury to a party or causes serious or potentially serious interference with a legal proceeding.

ABA Standard 6.22: Suspension is generally appropriate when a lawyer knows that he or she is violating a court order or rule, and causes injury or potential injury to a client or a party, or causes interference or potential interference with a legal proceeding.

ABA Standard 6.23: Reprimand is generally appropriate when a lawyer negligently fails to comply with a court order or rule, and causes injury or potential injury to a client or other party, or causes interference or potential interference with a legal proceeding.

ABA Standard 6.24: Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence in complying with a court order or rule, and causes little or no actual or potential injury to a party, or causes little or no actual or potential interference with a legal proceeding.

The totality of the facts set forth above demonstrate by a clear preponderance that when Respondent failed to return property formerly belonging to Ms. Hancock to the estate and/or the successor PR despite being ordered to do so by the court, he knowingly violated one or more court orders with the intent to obtain a personal benefit and caused serious or potentially serious interference with a legal proceeding.

As to Count 4, the presumptive sanction is disbarment.

COUNT 5: ABA Standard 5.1 "Failure to Maintain Personal Integrity" applies to Respondent's purporting to have authority to execute the September 2009 POLST when he did not have such authority. This standard states that absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases with conduct involving dishonesty, fraud, deceit, or misrepresentation:

ABA Standard 5.11(b): Disbarment is generally appropriate when a lawyer engages in intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

ABA Standard 5.13: Reprimand is generally appropriate when a lawyer knowingly engages in any other conduct that involves dishonesty, fraud, deceit, or misrepresentation and that adversely reflects on the lawyer's fitness to practice law.

ABA Standard 5.14: Admonition is generally appropriate when a lawyer engages in any other conduct that reflects adversely on the lawyer's fitness to practice law.

The totality of the facts set forth above demonstrate by a clear preponderance that when, Respondent purported to have authority to execute the September 2009 POLST, he knew he did not have such authority and thereby engaged in intentional conduct involving dishonesty, fraud, deceit or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice law.

As to Count 5, the presumptive sanction is disbarment.

VI. AGGRAVATING OR MITIGATING FACTORS

A. Pursuant to ABA Standard 9.22, the following *aggravating* factors apply:

1. Standard 9.22 (b): Dishonest or selfish motive.

Respondent left the penalty clause in the 2009 will, made false claims during the underlying litigation in an attempt to preserve his personal interests in the estate as the residual beneficiary, made false statements that concealed his continued possession of estate property and executed the POLST on September 22, 2009, under false pretenses.

2. Standard 9.22 (c): A pattern of misconduct.

The conduct Respondent engaged in included: While representing Ms. Hancock and without there existing between them a close familial relationship, Respondent prepared the 2009 will with the penalty clause intact from the prior wills, named himself as the personal representative of Ms. Hancock's estate, bestowed upon himself a substantial gift when naming himself as the residual beneficiary, executed the POLST without apparent authority to do so, asserted in court pleadings that he had turned over to the successor personal representative all estate property formerly belonging to Ms. Hancock when he knew he had not done so, and violated court orders directing him to turn over estate property to the successor personal representative. The totality of the conduct Respondent engaged in is set forth above in the Findings of Fact and incorporated herein by reference. This represents a pattern of misconduct, including personal greed, selfishness, conflict of interest, deceit, dishonesty, lack of candor and/or defiance inconsistent with the standards to be practiced by a lawyer admitted to practice in the State of Washington.

3. Standard 9.22 (d): Multiple offenses.

As set forth above, incorporated herein by reference, Respondent committed multiple violations of the Rules of Professional Conduct.

4. Standard 9.22 (g): Refusal to acknowledge wrongful nature of conduct.

Respondent has admitted that he prepared the 2009 will knowing that, as the residual beneficiary, he was the recipient of a substantial gift but denies that he violated the Rules of Professional Conduct in doing so. Without being able to sufficiently elucidate substantial supporting facts, Respondent asserts that he had a close, familial relationship with Ms. Hancock. Respondent has admitted that he retained certain property belonging to Ms. Hancock's estate but asserts that the property was worthless and attempts to shift the blame to others by accusing them of impropriety in serving the writ of execution that led to the discovery of the property in his custody, possession or control. In executing the POLST on September 22, 2009, Respondent admits that he had no authority to do so but rationalizes his behavior by asserting that he executed the document while engaging in an argument with an official of a nursing home. Ref *In re Disciplinary Proceeding Against Jackson*, 180 Wn2d 201, 322 P3d 795 (2014).

5. Standard 9.22 (h): Vulnerability of the victim.

Ms. Hancock was elderly and hospitalized due to injury and/or illness when interacting with Respondent about the preparation and execution of the 2009 will.

6. Standard 9.22 (i): Substantial experience in the practice of law.

Since Respondent was admitted to practice law in the State of Washington in 1977, he had 32 years of experience prior to the misconduct in which he engaged herein.

B. Pursuant to ABA Standard 9.23, the following *mitigating* factors apply:

Standard 9.23 (a): Absence of a prior disciplinary record.

Respondent has no prior disciplinary record.

VII. RECOMMENDATION

With aggravating factors substantially outweighing mitigating factors as to each of the Counts 1-5, inclusive, the Hearing Officer makes the following recommendations:

COUNT 1: Disbarment.

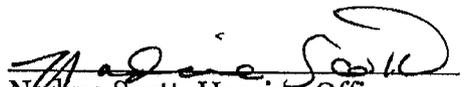
COUNT 2: Disbarment.

COUNT 3: Disbarment.

COUNT 4: Disbarment.

COUNT 5: Disbarment.

Dated this 5th day of May, 2015.


Nadene Scott, Hearing Officer
Washington State Bar Association

CERTIFICATE OF SERVICE

I certify that I caused a copy of this PDF, LOL by HO's Recommendation
to be delivered to the Office of Disciplinary Counsel and to be mailed
to Kurt Dillner Respondent ~~Respondent's Counsel~~
at 740 Belmont Pl. SE Seattle, WA 98104 by Certified first class mail
postage prepaid on the 6th day of MAY, 2015


Clerk/Counsel to the Disciplinary Board

APPENDIX B

FILED

JUN 24 2015

DISCIPLINARY
BOARD

BEFORE THE
DISCIPLINARY BOARD
OF THE
WASHINGTON STATE BAR ASSOCIATION

In re

DONALD PETER OSBORNE,

Lawyer (WSBA No.7386)

Proceeding No. 13#00082

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

This matter came before the Disciplinary Board for consideration of *sua sponte* review pursuant to ELC 11.3(a). On June 11, 2015, the Clerk distributed the attached decision to the Board.

IT IS HEREBY ORDERED THAT the Board declines *sua sponte* review and adopts the Hearing Officer's decision¹.

Dated this 23 day of June, 2015.

Jennifer A. Dremousis
Disciplinary Board Chair

CERTIFICATE OF SERVICE

I certify that I caused a copy of the Order Declining Sua Sponte Review & Adopting Hearing Officer's Decision to be delivered to the Office of Disciplinary Counsel and to be mailed to Kurt Bremer, Respondent/Respondent's Counsel at 410 Belmont Pl. E. #2300 Seattle WA 98101 by Certified/first class mail postage prepaid on the 24th day of June, 2015

WASA
Clerk/Counsel to the Disciplinary Board

¹ The vote on this matter was 14-0. The following Board members voted: Dremousis, Bloomfield, Davis, Carney, Coy, McInville, Fischer, Andeen, Berger, Cottrell, Smith, Mesher, Egeler and Myers.

0588

APPENDIX C

RONALD R. CARPENTER
SUPREME COURT CLERK

SUSAN L. CARLSON
DEPUTY CLERK / CHIEF STAFF ATTORNEY

THE SUPREME COURT
STATE OF WASHINGTON



TEMPLE OF JUSTICE
P.O. BOX 40929
OLYMPIA, WA 98504-0929

(360) 357-2077
e-mail: supreme@courts.wa.gov
www.courts.wa.gov

January 22, 2016

LETTER SENT BY E-MAIL ONLY

Donald Peter Osborne
16716 SE 31st Street
Bellevue, WA 98008-5721

Kurt M. Bulmer
Attorney at Law
740 Belmont Place E Apt 3
Seattle, WA 98102-4442

M. Craig Bray
Washington State Bar Association
1325 4th Avenue Suite 600
Seattle, WA 98101-2539

Re: Supreme Court No. 201,435-6 - In re Donald Peter Osborne, WSBA #7386

Mr. Osborne and Counsel:

Enclosed is the Order that was signed and entered in the above referenced case on this date. The Supreme Court Clerk has established the following briefing schedule in the matter:

Attorney's Opening Brief	due February 22, 2016;
WSBA Answering Brief	due within 30 days after service of the opening brief;
Reply Brief	due 20 days after service of answering brief.

Sincerely,

Ronald R. Carpenter
Supreme Court Clerk

RRC:drc
Enclosure as stated
cc: Julie Shankland, WSBA
Allison Sato, WSBA
Kevin Bank, WSBA



JAN 22 2016

Ronald R. Carpenter
Clerk

THE SUPREME COURT OF WASHINGTON

IN RE:)	BAR NO. 7386
)	
)	Supreme Court No.
)	201,435-6
DONALD PETER OSBORNE,)	
)	ORDER
ATTORNEY AT LAW.)	
_____)	

This matter came before the Court at its January 7, 2016, En Banc Conference. The Court considered the “ODC’S MOTION UNDER RAP 17.7 TO MODIFY CLERK’S RULING DENYING MOTION TO STRIKE OSBORNE’S NOTICE OF APPEAL” and the “ODC’S MOTION FOR EXTENSION OF TIME TO FILE MOTION TO MODIFY CLERK’S RULING” and determined unanimously that the following order should be entered. Now, therefore, it is

ORDERED:

The ODC’S Motion for Extension of Time to File Motion to Modify Clerk’s Ruling is denied, therefore, ODC’S Motion Under RAP 17.7 to Modify Clerk’s Ruling Denying Motion to Strike Osbornes’ Notice of Appeal was not considered;

The Disciplinary Board’s Order Denying Sua Sponte Review and Adopting the Hearing Officer’s Decision is an appealable order under ELC 12.3(a);

Mr. Osborne’s appeal of the Order Denying Sua Sponte Review and Adopting the Hearing Officer’s Decision is limited to ONLY the record and scope of the Disciplinary Board’s review as required by ELC 11.3(a);

The record of this review is therefore limited to the Hearing Officer’s Findings of Fact, Conclusions of Law, and Recommendation;

The scope of the issue on appeal is limited to whether the Disciplinary Board erred by not finding that sua sponte review was required to “prevent substantial injustice or to correct a clear error,” *see* ELC 11.3(d); and

725/635

Page 2
ORDER
201,435-6

The Clerk of the Court shall set a briefing schedule for the parties by separate correspondence.

DATED at Olympia, Washington this 20th day of January, 2016.

For the Court

Madsen, C. J.
CHIEF JUSTICE

OFFICE RECEPTIONIST, CLERK

To: Craig Bray
Cc: Kurt Bulmer; Allison Sato
Subject: RE: In re Donald Peter Osborne, Supreme Court No. 201,435-6

Received on 04-15-2016

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Craig Bray [mailto:craigb@wsba.org]
Sent: Friday, April 15, 2016 10:56 AM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: Kurt Bulmer <kbulmer@comcast.net>; Allison Sato <Allisons@wsba.org>
Subject: In re Donald Peter Osborne, Supreme Court No. 201,435-6

Dear Clerk:

Attached for filing in the Osborne matter are the appendices to the Office of Disciplinary Counsel's Answering Brief.
Thank you.

M Craig Bray | Disciplinary Counsel

Washington State Bar Association | ☎ 206-239-2110 | craigb@wsba.org
1325 Fourth Avenue, Suite 600 | Seattle, WA 98101-2539 | www.wsba.org

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