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No. 201,435-6

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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IN THE MATTER OF THE  
DISCIPLINARY PROCEEDINGS AGAINST

DONALD PETER OSBORNE

An Attorney at Law

Bar Number 7386

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OPENING BRIEF OF APPELLANT OSBORNE

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## **SUMMARY OF ARGUMENT**

Osborne was denied due process when the Disciplinary Board entered an order declining to order sua sponte review when it had an inadequate record for doing so, when it failed to follow the court rules and when it failed to enter an order allowing meaningful review at this Court.

## **ASSIGNMENTS OF ERROR**

1. The Disciplinary Board erred by not finding that sua sponte review was required to “prevent substantial injustice or to correct clear error” under ELC 11.3(d).

## **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. What is the standard for review on consideration of an order entered by the Disciplinary Board which declined to order sua sponte review and adopted the Findings of the Hearing Officer?
2. Is ELC 11.3 unconstitutional when it fails to allow a record to be presented to the Board for it to engage in a meaningful review of the Hearing Officer’s Decision?
3. Does the Board’s order deny Osborne due process since it fails to provide this Court with a meaningful record on appeal?
4. Was Osborne denied due process where the Board failed to follow the Court’s “consideration” requirements of ELC 11.3 when making a decision on whether to order a sua sponte hearing?
5. What remedy should the Court adopt to cure the defects in the sua sponte process?

## STATEMENT OF CASE

A. Record. In the Court's Order on this matter, entered on January 22, 2016, the Court directed that:

Mr. Osborne's appeal of the Order Denying Sua Sponte Review and Adopting 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). [Emphasis in original.]

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

Below signing counsel is mindful of that directive. However, there are two other documents without which it is impossible to discuss either the procedural history of the case or address the question of error directed by the Court in its January 22, 2016, order. These two documents are the January 22, 2016, Order of the Court and the Disciplinary Board's June 24, 2015, Order Declining Sua Sponte Review and Adopting Hearing Officer's Decision.

The Board's Order is the document which the Court ordered was subject to review. It is not possible to discuss the Board's Order without reference to it. Accordingly, below signing counsel is proceeding on the assumption that the Court's January 22, 2016, Order and the Board's Order are part of the record at the Court and that references to them are not prohibited. If this is in error, by this reference, counsel moves the

Court for an order expanding its January 22, 2016, order to allow references to these two documents.

Attached are:

Appendix A – Hearing Officer’s Findings of Fact, Conclusions of Law and Recommendation (referenced hereafter as “Findings”);

Appendix B – Board’s Order Declining Sua Sponte Review and Adopting Hearing Officer’s Decision (referenced hereafter as “Board’s Order”); and

Appendix C – Supreme Court’s Order of January 22, 2016 (referenced hereafter as “Court’s Order”).

B. Procedural History. A hearing was held on attorney Donald P. Osborne’s (Osborne) disciplinary matter in October 2014 and January 2015. Osborne was accused of the following counts of misconduct:

Count 1 – By preparing the 2009 will, which gave him a substantial gift from the 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 and/or the successor PR when he knew he had not and/or 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 box on October 27, 2009, under purported authority of the power of attorney granted him by Ms. Hancock, which had expired, Respondent violate RPC 8.4(c).<sup>1</sup>

Findings at pages 1-2. On May 6, 2015, the Hearing Officer filed her Findings of Fact, Conclusions of Law and Recommendation. She recommended disbarment on all five counts. Findings at pages 26-32.

Neither Osborne nor the Office of Disciplinary Counsel (hereafter “ODC”) appealed so the Hearing Officer’s Decision was considered by the Disciplinary Board pursuant to ELC 11.3(a) – Sua Sponte Review. The Board’s Order was filed June 24, 2015 and stated in its entirety:

The 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 [Hearing Officer’s Findings] to the Board.

IT IS HEREBY ORDERED THAT the Board declines sua sponte review and adopts the Hearing Officer’s decision.

Board Order at Appendix B. There is a footnote which indicates that the decision was 14-0.

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<sup>1</sup> At hearing the Office of Disciplinary Counsel dismissed that part of Count 5 pertaining to Osborne entering Ms. Hancock’s safety deposit box. Findings at page 2.

Osborne filed a Notice of Appeal with this Court. The ODC sought review of whether Osborne could seek appeal. On January 22, 2016, the Court directed pursuant to an En Banc Conference, that ODC's Motion Under RAP 17.7 to Modify Clerk's Ruling Denying Motion to Strike Osborne's Notice of Appeal would not be considered; that the Board's Order was an appealable order under ELC 12.3(a); and Osborne's appeal is limited to as follows: :

Mr. Osborne's appeal of the Order Denying Sua Sponte Review and Adopting 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). [Emphasis in original.]

[Paragraph referencing record as discussed above omitted.]

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 to correct clear error.

Court's Order at Appendix C.

Osborne now comes before the Court on the issue of whether the Board erred when it declined to direct sua sponte review.

### **DISCUSSION**

A. Standard of Review. As far as below signing counsel is aware this case is a matter of first impression. Accordingly, the first issue for the Court is what is the standard of review?

The Court's basic standard of review in an attorney disciplinary case is well settled:

When a lawyer discipline decision by the Board is appealed, this court has "plenary authority" on review. *In re Disciplinary Proceeding Against Whitt*, 149 Wash.2d 707, 716, 72 P.3d 173 (2003). While we "do[] not lightly depart from the Board's recommendation," we are "not bound by it." *In re Disciplinary Proceeding Against Tasker*, 141 Wash.2d 557, 565, 9 P.3d 822 (2000). The court reviews conclusions of law de novo. *Whitt*, 149 Wash.2d at 716-17, 72 P.3d 173. We have "the inherent power to promulgate rules of discipline, to interpret them, and to enforce them." *In re Disciplinary Proceeding Against Stroh*, 97 Wash.2d 289, 294, 644 P.2d 1161 (1982) (emphasis added); see also ELC 2.1 (recognizing this court's "inherent power to maintain appropriate standards of professional conduct").

*In re Disciplinary Proceeding against Haley*, 156 Wn.2d 324, 333, 126 P.3d 1262 (2006).

Osborne asserts that the failure of the Board to order sua sponte review was a denial of due process. The court "reviews alleged due process violations de novo." *State v. Mullen*, 171 Wn.2d 881, 893, 259 P.3d 158 (2011), citing *State v. Cantu*, 156 Wn.2d 819, 831, 132 P.3d 725 (2006).

Osborne also alleges that the scope of review required by the Board requires the Court to construe ELC 11.3(a).

The court will apply canons of statutory interpretation when construing a court rule. *City of Seattle v. Guay*, 150 Wash.2d 288, 300, 76 P.3d 231 (2003). We review construction of a court rule de novo because it is a question

of law. See *Judd v. Am. Tel. & Tel. Co.*, 152 Wash.2d 195, 202, 95 P.3d 337, 340 (2004). While the plain language of a court rule controls where it is unambiguous, under our court rule interpretation guidelines we must examine CrR 3.1(b)(2) in context with the entire rule in which it is contained as well as all related rules. See *Rest. Dev., Inc. v. Cananwill, Inc.*, 150 Wash.2d 674, 682, 80 P.3d 598 (2003); cf. *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wash.2d 1, 10, 43 P.3d 4 (2002) (requiring consideration of surrounding text when discerning the plain meaning of a statutory provision).

*State v. Robinson*, 153 Wn.2d 689, 692, 107 P.3d 90 (2005).

Accordingly, whether under the plenary and/or inherent power of the Court in attorney disciplinary cases, as noted in *Haley, supra*, or under the law in other cases the standard for review is *de novo*.

B. Procedural Rules In Osborne's Case. The procedural rule at issue is found at ELC 11.3 – Sua Sponte Review. After a hearing officer files her Findings of Fact, Conclusions of Law and Recommendation either the respondent attorney or the ODC can file an appeal. ELC 11.2(b)(1). If neither party appeals the Board must nonetheless conduct a sua sponte review pursuant to ELC 11.3. Since neither party appealed, Osborne's case was procedurally handled under the sua sponte review rules.

Under sua sponte review, a copy of the Hearing Officer's Findings are distributed to the Board members and then "the matter shall be scheduled for consideration by the Board." Sua sponte review should be

ordered “only in extraordinary circumstances to prevent substantial injustice or to correct clear error.” ELC 11.3(d).

C. Lawyers Are Entitled To Due Process In Disciplinary Matters. A lawyer in a discipline case is entitled to reasonable due process rights. United States Supreme Court case law has found that bar disciplinary proceedings are “quasi-criminal.” *In re Ruffalo*, 390 U.S. 544, 551, 88 S. Ct. 1222, 529, 20 L. Ed. 2d 117 (1968). Washington case law has established that bar proceedings are *sui generis* and are not criminal but that there are due process requirements in a Bar disciplinary case. *In re Allper*, 94 Wn.2d 456, 617 P.2d 982 (1980). In a medical disciplinary case this court held that:

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

*Nguyen v. Department of Health*, 144 Wn.2d 516, 523, 29 P.3d 689 (2001). The issue presented was what is the standard of proof in a medical disciplinary case? The Court, at pages 529 and 529, found that this medical disciplinary proceeding was

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

In Washington Bar disciplinary proceedings the due process rights of respondents are not those provided to a criminal defendant but given the fact that the proceedings are sui generis and “quasi-criminal” the accused attorney does have significant due process rights. While not all criminal due process rights attach, heightened due process rights do attach because of the constitutionally protected right which is at stake.

ELC 11.3 denies Osborne his due process rights.

D. Rule 11.3 Is Unconstitutional Because It Fails To Allow A Record To Be Presented To The Board For It To Engage In A Meaningful Review Of The Hearing Officer’s Decision. For ELC 11.3 to be anything but window dressing the Board must have enough of the record to engage in the process of giving the question of whether or not to order a *sua sponte* review consideration. Under ELC 11.3(a) the bare information provided is the Hearing Officer’s Decision; no copy of the briefing is provided, no pleadings except the hearing officer’s decision are provided, no transcript is circulated, no exhibits are presented, and no arguments of the parties are provided.

A trial court's reasons for imposing discovery sanctions should "be clearly stated on the record so that meaningful review can be had on appeal." *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997). If a trial court's findings of fact are clearly unsupported by the record, then an appellate court will find that the trial court abused its discretion. [*Mayer v. Sto Indus., Inc.*, 156 Wash.2d 677, 684, 132 P.3d 115 (2006).] [Underlining added.]

*Magaña v. Hyundai Motor Am.*, 167 Wn.2d 570, 583, 220 P.3d 191 (2009) (footnotes omitted). As *Magana* shows, a mere review of findings, by themselves, does not allow a meaningful review. It is the findings in the context of the record. Without the record there is no way the Board can make a determination of whether there has been "substantial injustice or ... clear error." ELC 12.3(d). Osborne cannot have been given due process if the Board was not given the materials it needs to make the decision it is required to make when it "considers" the Findings. The Board should have ordered sua sponte review to correct this constitutional defect in the process and, therefore, erred when it did not find that sua sponte review was required.

E. The Board's Order Denies Osborne Due Process Since It Fails To Provide This Court With A Meaningful Record On Appeal. Lower courts are required to provide the reviewing court sufficient findings and determinations so that the reviewing court can determine if the lower court shows "a knowledge of the standards applicable to [its] determination:"

For an adequate appellate review in cases such as the one now before us, this court should have, from the trial court which has tried the case do novo, findings of fact (supplemented, if need be, by a memorandum decision or oral opinion) which show an understanding of the conflicting contentions and evidence, and a resolution of the material issues of fact that penetrates beneath the generality of ultimate conclusions, together with a knowledge of the standards applicable to the determination of those facts. [Emphasis added. Internal citations omitted.]

The findings in the present case fall far short of that requirement. The seventh and only reviewable finding contains only [395 P.2d 637] the most general conclusions of ultimate facts, i.e., that the Board 'correctly found the facts,' and 'that the plaintiff [claimant] did not produce evidence \* \* \* sufficient to preponderate against the findings of the Board.' It is impossible to tell upon what underlying facts the court relied and whether proper standards were applied. We could not pass upon the factual issues in this case on such findings without ourselves making a complete de novo review of the entire record. [Internal citations omitted.]

*Groff v. Department of Labor and Industries*, 65 Wn.2d 35, 40, 395 P.2d 633, (1964). "Precise, specific findings are necessary to permit meaningful review. [Citation omitted.] *State v. Holland*, 30 Wn.App. 366, 374, 635 P.2d 142 (1981) "Passing treatment of an issue or lack of reasoned argument is insufficient to allow for our meaningful review." *State v. Stubbs*, 144 Wn.App. 644, 652, 184 P.3d 660 (2008), rev'd on other grounds, 170 Wn.2d 117, 240 P.3d 143 (2010).

While it is true the Board was not a trial court neither is its role that of an appellate court. "[A]lthough one of the Board's functions is somewhat

analogous to that of an intermediate appellate court, we decline to impose Washington's appellate court procedures on the disciplinary process.” *In re Disciplinary Proceeding Against Kronenberg*, 155 Wn.2d, 184, 191, 117 P.3d 1134 (2005).

As with any lower court it is the Board’s duty to provide this Court with adequate findings so that there is a demonstration, in fact, that there has been consideration given to the Hearing Officers Findings. The Board’s Order does not provide that record and, therefore, this Court cannot make the meaningful decision required of it in order for Osborne to get have his due process right of review. The Board erred when it did not order sua sponte review so it could provide this Court with an order the comported with due process.

F. Osborne Was Denied Due Process Since The Board Failed To Follow The Court’s “Consideration” Requirements When Making A Decision On Whether To Order A Sua Sponte Hearing. ELC 11.3 mandates the Board receive a copy of the Hearing Officer’s Decision and then it “shall be scheduled for consideration by the Board.” The plain and ordinary meaning of “consideration” is “Continuous and careful thought; [d]eliberation .... Thoughtful regard .... a result of reflecting or pondering....” Webster’s Third New International Dictionary, Unabridged, Merriam-Webster, (1986). There is no evidence in this matter

that the Board engaged in the rule mandated process of deliberation after reflecting or pondering occurred.

Under Board policy, it only has a “full board review hearing” when there is an appeal or where there has been an order asking for sua sponte review. “The full board reviews hearing officer recommendations for suspension and disbarment only when a party appeals or when sua sponte review is ordered.” What Happens at a Full Board Meeting?, <http://www.wsba.org/Licensing-and-Lawyer-conduct/Discipline/Disciplinary-Board/Full-Board>; retrieved March 4, 2015. Apparently, what happens is once the Hearing Officer’s Finding are distributed, if no Board member objects, the Chair just signs an order. In short, the entire process is treated as a default circulated, one presumes by email, and then by all appearances the order is entered without any full Board consideration.

The Board’s order only makes reference to the Clerk distributing the Hearing Officer’s Decision. There is no reference to any meeting or any reference to the rule mandated date being scheduled for consideration by the Board. There is no evidence of the collective decision making by the Board required for it to give consideration “of whether to order sua sponte review.” ELC 11.3(a). The rule does not say a “date will be set by which time Board members make an individual decision on whether he or

she wants to ask the Board to order a sua sponte proceeding.” The rule expressly commands that “the matter shall be scheduled for consideration by the Board.” Underlining added. “Consideration by the Board” requires a collective process not an individual one.

Had the Board engaged in meaningful review of the Findings it would have discovered that in order to prevent substantial injustice or clear error:

- It needed to review the issue of first impression regarding the application of “new” RPC 1.8(c) which changed the meaning of “close familial relationship” in a family when a lawyer drafts a will. This issue consumed almost five pages of the Hearing Officer’s Conclusions and was the touchstone upon which she recommended disbarment for Count 1. Findings pages 18-22.
- That in regard to Count 2, it needed to review whether Osborne naming himself as a PR while simultaneously being named a residual beneficiary was improper and supported by the record where the Hearing Officer had found that in prior wills Osborne had been named PR and where he was named the residual beneficiary in a valid will where there was no finding that Ms. Hancock lacked testamentary capacity. Findings at paragraphs 33-35. In such circumstance the Board should have asked for briefing on the issue of whether disbarment was appropriate.
- That in regard to Counts 3 and 4, it needed to review whether filing a declaration with the court that he had returned all property formerly belonging to Ms. Hancock to the estate or the successor PR when he “knew” that he had not or when knowingly making similar statements elsewhere or failing to return property demonstrated making a false statement of material fact or was a material

failure to follow a court order when there was no factual finding that anything he failed to turn over was material.

- In regard to Count 5, it needed to review whether purporting to sign the POLST was a violation of any rule where the hearing officer found that Osborne had told the hospital authority that demanded he sign it, that he did not have authority to sign it. Finding 28.

Because the Board did not have a process by which it, as a Board, gave consideration at a scheduled time it has violated this Court's rules and Osborne's due process rights.

An agency's violation of the rules which govern its exercise of discretion is certainly contrary to law and, just as the right to be free from arbitrary and capricious action, the right to have the agency abide by the rules to which it is subject is also fundamental. *Leonard v. Civil Serv. Comm'n*, 25 Wash.App. 699, 701-02, 611 P.2d 1290 (1980); *Wilson v. Nord*, 23 Wash.App. 366, 373, 597 P.2d 914 (1979), cited with approval in *Williams*, 97 Wash.2d at 222, 643 P.2d 426; *Tacoma v. Civil Serv. Bd.*, 10 Wash.App. 249, 250-51, 518 P.2d 249 (1973).

*Pierce County Sheriff v. Civil Service Com'n of Pierce County*, 98 Wn.2d 690, 694, 658 P.2d 648 (1983). The Board erred when it did not give the record proper consideration and thereafter order sua sponte review.

G. Remedy. The process by which this matter has come to this Court is fraught with due process violations and you should decide as a matter of law that the Board's Order is void. As such what are the remedies?

The Court should allow this matter to be treated as a “full appeal” and allow the full record below to be submitted, argument submitted and oral argument held. This is what Osborne thought would happen when he did not appeal his case to the Board but rather proceeded in reliance on ELC 12.3 which provides that he has the right to appeal a Board decision recommending disbarment and pursuant to language in *In re Disciplinary Proceeding Against Kronenberg*, 155 Wn.2d, 184, 191, 117 P.3d 1134 (2005) providing that he was entitled to a full hearing before the Court.

The WSBA urges us to adopt a "waiver rule" under which an attorney waives his or her right to contest the factual findings of the hearing officer if those findings are not contested Before the Board. We decline to create such a rule. Unlike review by this State's intermediate appellate courts, review by the Board is automatic in cases where the recommended sanction is disbarment. It is not occasioned only by an appellant's appeal. See ELC 11.2(b)(1). Thus, although one of the Board's functions is somewhat analogous to that of an intermediate appellate court, we decline to impose Washington's appellate court procedures on the disciplinary process. Additionally, even when reviewing the work of an appellate court, we have reserved the right to exercise our inherent power to reach any issue brought to our attention. See, e.g., RAP 2.5(a) (the "court may refuse to review any claim of error which was not raised" in the court below (emphasis added)).

It seems likely that one of the reasons the Board does not get too invested in the process of review under the sua sponte rule is that it too relied upon the belief that Osborne and other respondent attorneys could get “their day in court” before this Court.

The Court, by its January 22, 2016, Order, has now changed that process in a rejection of *Kronenberg* and now requires that an appeal be taken at the Board if a respondent wishes to bring the full matter to the Court. However, as this is new law, Osborne should not be penalized for this. In a “full appeal” the Court can announce in a published case that there is now a threshold requirement that if a respondent wishes the full record considered on an appeal to the Court the lawyer must first take an appeal to the Board. However, we ask that this rule be applied prospectively so that Osborne is not penalized for relying on previously good law with the result that his case is never heard on the merits on appeal.

Alternatively, the Court could remand and ask the Board to give consideration to the Hearing Officer’s Findings at a scheduled time. However, as discussed above, the record on such review is constitutionally lacking since it does not give the Board an adequate record for review. It needs more than the Findings to make a decision on whether it needs to order sua sponte review to prevent substantial injustice or clear error.

The better alternative remedy is to recognize that the procedural history of this case has, in fact, written new law and, therefore, to allow all the parties to reboot by recognizing they unusual situation of this matter. The parties should be allowed to reopen a request for an appeal to the

Board. This would essentially restore the status quo so that Osborne is not punished by the Court's change in the law. The Court's opinion can make clear that this is an exception and that in future if a respondent attorney wishes to bring matters to the Court it is necessary to have first raised the matters in the gateway process of an appeal at the Board. Osborne has been suspended on an interim basis so there is no need to rush while he gets his chance to make his full arguments on appeal.

### **CONCLUSION**

The entire process by which the Hearing Officer's Findings are reviewed when there has not been an appeal by one of the parties is unconstitutional because the Board does not get a meaningful record to review, the Board fails to follow this Court's rule on the process for consideration and the Board's Order is deficient as it does not provide meaningful findings and opinions for review. These infirmities in the system have been hidden since parties in the past have been able to rely upon the ELC 12.3 right of appeal and *Kronenberg* to get full review before this Court. By this case that has changed so the Court should find the Board's Order is void and direct that a full review be allowed either before the Court or on remand to the Board. Mere remand to allow the Board to consider the matter under ELC 11.3 is not an adequate remedy as

Osborne will be denied due process since the Board will not have a meaningful record before it to consider the issues.

Dated this 16<sup>th</sup> Day of March, 2016.

/s/  
Kurt M. Bulmer, WSBA # 5559  
Attorney for Donald P. Osborne

# APPENDIX A

BEFORE THE DISCIPLINARY BOARD  
OF THE WASHINGTON STATE BAR ASSOCIATION

**FILED**

MAY 06 2015

DISCIPLINARY  
BOARD

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

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 2<sup>nd</sup> 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.

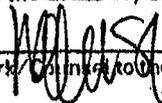
**COUNT 5:** Disbarment.

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, COL & HO's Recommendation  
to be delivered to the Office of Disciplinary Counsel and to be mailed  
to KURT BARNICK Respondent, Respondent's Counsel  
at 410 BENTON ST. P.O. BOX 3200, CLATSOP, WA 97107 by Certified first class mail  
postage prepaid on the 5th day of MAY, 2015

  
Clerk/Counselor 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 decision<sup>1</sup>.

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~~ **Order Declining Sua Sponte Review & Adopting Decision** to be delivered to the Office of Disciplinary Counsel and to be mailed ~~to~~ **to** ~~Respondent/Respondent's Counsel~~ **at** ~~at~~ **740 Belmont Pl. E. 2nd Floor** by Certified/next class mail postage prepaid on the 24th day of June, 2015.

Clerk/Counsel to the Disciplinary Board

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

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## APPENDIX C

JAN 22 2016

Ronald R. Carpenter  
Clerk

THE SUPREME COURT OF WASHINGTON

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

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 02<sup>nd</sup> day of January, 2016.

For the Court

Madsen, C. J.  
CHIEF JUSTICE

## OFFICE RECEPTIONIST, CLERK

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**To:** Kurt Bulmer  
**Cc:** Craig Bray  
**Subject:** RE: Osborne - 201, 435-6

Received 3-16-16

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:** Kurt Bulmer [mailto:kbulmer@comcast.net]  
**Sent:** Wednesday, March 16, 2016 3:06 AM  
**To:** OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>  
**Cc:** Craig Bray <craigb@wsba.org>  
**Subject:** Osborne - 201, 435-6

Attached is Osborne's Opening Brief with three Appendices.

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