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Supreme Court No. 201,255-8

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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IN RE DISCIPLINARY PROCEEDING AGAINST

ALAN F. HALL,

Lawyer (Bar No. 1505).

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ANSWERING BRIEF OF THE  
WASHINGTON STATE BAR ASSOCIATION

---

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 ORIGINAL

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## STATEMENT OF THE ISSUES

1. RPC 1.4 requires a lawyer to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. Under RPC 1.7, a lawyer shall not represent a client if there is a significant risk that the representation will be materially limited by a personal interest of the lawyer. According to the evidence and the unchallenged findings of fact, Respondent prepared estate planning documents for a client that provided for Respondent to receive \$8,000 per year for “managing” a trust corpus that never exceeded \$49, and that potentially gave Respondent extensive decision-making authority over the client’s assets, living arrangements, healthcare, and even the welfare of her disabled child. Respondent did so without his client’s knowledge of the provisions that benefited Respondent himself, and without his client’s informed consent. Do the evidence and the findings of fact support the Disciplinary Board’s unanimous conclusion that Respondent violated RPC 1.4 and 1.7?

2. RPC 1.5(a) prohibits a lawyer from charging or collecting an unreasonable fee. Under RPC 8.4(c), it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation. According to the evidence and the unchallenged findings of fact, Respondent charged and collected a \$2,000 quarterly fee

for acting as trustee of a \$49 trust at a time when he was not yet the trustee. After he was discharged and a grievance was filed, Respondent sent his client a “reconstructed” \$4,373.25 invoice for “services” which, according to expert testimony, were “just [an] unnecessary churning of fees.” Do the evidence and the findings of fact support the Board’s unanimous conclusion that Respondent violated RPC 1.5(a) and 8.4(c)?

3. RPC 1.15A(f) requires a lawyer to promptly deliver to a client the property which the client is entitled to receive. Under RPC 1.16(d), a lawyer must surrender papers and property to which the client is entitled. According to the evidence and the unchallenged findings of fact, Respondent repeatedly and persistently refused to return his clients’ original estate planning documents after they terminated his services. According to his own testimony, Respondent did so out of “pride.” Do the evidence and the findings of fact support the Board’s unanimous conclusion that Respondent violated RPC 1.15A(f) and 1.16(d)?

4. Under RPC 8.4(d), it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice. According to the unchallenged findings of fact, Respondent made threats against a former client to induce him to withdraw a grievance he filed after Respondent refused to return the client’s original estate planning documents. Respondent also went to the home of his former client’s

subsequent lawyer and made threats against her, as well. Do the evidence and the findings of fact support the Board's unanimous conclusion that Respondent violated RPC 8.4(d)?

5. Suspension is the presumptive sanction for each of the four violations that Respondent committed. There are seven aggravating factors, and no mitigating factors. Based on the presumptive sanctions and the aggravating factors, the Disciplinary Board unanimously recommended that Respondent be suspended for two years. Should this court affirm the Board's unanimous sanction recommendation?

6. This court suspended Respondent on an interim basis under ELC 7.3 because Respondent asserted that he was "totally and completely incompetent" and "totally incapable" of acting as a lawyer for himself. The Disciplinary Board unanimously recommended a two-year disciplinary suspension under ELC 13.3 as a sanction for Respondent's ethical misconduct. Does the two-year disciplinary suspension recommended by the Board exceed the three-year maximum term of a disciplinary suspension under ELC 13.3(a) because Respondent was previously suspended under a different rule for a different reason?

## I. COUNTERSTATEMENT OF THE CASE

### A. SUBSTANTIVE FACTS

In July 2008, Stephen Keen and his mother Margaret Keen hired Respondent to prepare some estate planning documents. Findings of Fact, Conclusions of Law, and Hearing Officer's Recommendation (FFCLR)<sup>1</sup> ¶ 5; EX 19 at 1. Neither Margaret Keen nor Stephen Keen had any prior relationship with Respondent. FFCLR ¶ 6. At the time, Margaret Keen was 91 years old, and Stephen Keen was 65 years old. FFCLR ¶ 6. Both were mentally competent but physically disabled. FFCLR ¶ 6. Margaret Keen had poor eyesight and difficulty reading, a fact of which Respondent was aware. FFCLR ¶¶ 15-16; TR<sup>2</sup> 31-32, 183. Respondent charged Ms. Keen a flat fee of \$3,000 for the preparation of her estate planning documents. FFCLR ¶ 5; EX 19 at 1, EX 23. The full amount was paid in two payments of \$1,500 each on July 31 and September 11, 2008. FFCLR ¶ 5; EX 19 at 1-2.

Respondent prepared a lengthy, complex estate plan for Margaret Keen that included (1) the Last Will of Margaret Stephen Keen, EX 105 at HALL001209-1216, EX 121, (2) the Stephen Keen Trust, EX 104, (3) the

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<sup>1</sup> The FFCLR are at BF 57 and attached as Appendix A.

<sup>2</sup> "TR" refers to the transcript of the February 2013 disciplinary hearing, BF 56. The transcript of the August 2011 disciplinary hearing, BF 36, was admitted as an exhibit at the February 2013 disciplinary hearing and is referenced herein as EX 135.

Living Will of Margaret Stephen Keen, EX 106, and (4) a General Durable Power of Attorney, EX 107. FFCLR ¶ 9; EX 105. The Last Will that Respondent prepared named Stephen Keen the executor, and named Respondent himself the successor executor with the power to “hire himself in regard to any issues arising under” the Last Will or the Stephen Keen Trust. FFCLR ¶ 27; EX 105 at HALLOO1212-13, 1216, EX 121 at HALLOO1576-77, 1579. The Stephen Keen Trust was the designated beneficiary in the Last Will. FFCLR ¶¶ 12, 27; EX 105 at HALLOO1212, EX 121 at HALLOO1576. Margaret Keen was the grantor and the trustee of the Stephen Keen Trust, and Stephen Keen was the trust beneficiary. FFCLR ¶¶ 9, 13; EX 104 at HALL000190.

The Stephen Keen Trust was a special needs trust intended to provide Stephen Keen with the benefit of Margaret Keen’s estate without disqualifying him from receiving need-based government benefits such as Supplemental Security Income (SSI) and Medicaid. FFCLR ¶ 9; EX 104 at HALL000190-192, EX 135 at 190. The trust instrument that Respondent prepared for Margaret Keen’s signature included the following provisions:

- Respondent himself was named the successor trustee in the event that Margaret Keen ceased to serve as trustee for any reason. FFCLR ¶ 9; EX 104 at HALL000198. Respondent

knew when he prepared the trust instrument that Margaret Keen was in failing health and would not serve as trustee for long. FFCLR ¶ 14; TR 32; EX 32-34.

- Respondent, as trustee, would be paid two percent of the trust corpus or \$8,000 per year, whichever was greater, in quarterly payments. FFCLR ¶ 10; TR 29; EX 104 at HALL000208. Respondent knew when he prepared the trust instrument that Margaret Keen's estate was valued at approximately \$400,000. FFCLR ¶ 9; TR 97.
- Respondent, as trustee, could hire himself to "work as attorney for the Trust," to work on "other legal matters related to the business of the Trust," and to bill the trust "at his usual hourly rate" (which he did not specify) for such work. FFCLR ¶ 11; EX 104 at HALL000208.

In the Living Will that Respondent prepared for Margaret Keen's signature, Respondent himself was appointed to act as Margaret Keen's "Health Care Representative" in the event that Stephen Keen was "unavailable" for any reason. FFCLR ¶ 23; EX 106 at HALL001525. In that capacity, Respondent would have the following powers, among others:

- The power to review and/or disclose Margaret Keen's medical

records. EX 106 at HALL001525-1526.

- The power to arrange for Margaret Keen's admission to a hospital, nursing home, or other facility; and the power to make decisions concerning visitation. EX 106 at HALL001526-1528.
- The power to employ or discharge medical providers and the power to arrange for pain-relief drugs and/or procedures, including "unconventional pain-relief therapies." EX 106 at HALL001526-1528.
- The power to request, require, or consent to a "Do Not Resuscitate" order. EX 106 at HALL001530.

In the Power of Attorney that Respondent prepared for Margaret Keen's signature, Respondent himself was named the "alternate agent" for Margaret Keen. FFCLR ¶ 23; EX 107 at HALL001533. In that capacity, Respondent would have all the powers granted to the "agent," Stephen Keen, in the event that Stephen Keen was unable or unwilling to serve. EX 107 at HALL001533. Respondent could simply execute an affidavit stating that Stephen Keen was unable or unwilling to serve, and such affidavit would be "conclusive evidence" that Respondent himself had all the powers granted to the "agent." EX 107 at HALL001533. As "agent," Respondent would have extensive decision-making authority, in his "sole and absolute discretion," over all of Margaret Keen's assets, her living

arrangements, her healthcare, and the welfare of her disabled child, Stephen Keen. EX 107 at HALL001534-49.

Respondent mailed all these documents, as well as others, to Margaret Keen on September 3, 2008. FFCLR ¶ 15; EX 22. On October 28, 2008, Respondent went to Margaret Keen's home and had her execute the documents. FFCLR ¶ 17; TR 27. Even though he knew that Margaret Keen had difficulty reading, Respondent did not read the documents to her, although he explained some of the provisions of the estate plan and some of the "concepts" behind the documents. FFCLR ¶¶ 15-16; TR 31-32; EX 32. But because he was eager to become the trustee of the Stephen Keen Trust, and thereby reap the financial benefits that would result from the provisions he himself had drafted, Respondent did not fully or even adequately explain the risks and disadvantages of the plan that he had devised. FFCLR ¶¶ 18-21, 24-26.

For example, Respondent did not explain that there were better and less expensive alternatives to having a lawyer such as himself serve as trustee. FFCLR ¶¶ 18, 25; TR 141-42, 144-45. Respondent did not explain, in a way that could be reasonably understood, the many ways in which the estate plan he had drafted would allow him to pay himself from the trust corpus. FFCLR ¶¶ 18, 21. And Respondent did not explain the various roles he had given himself, or the risks to Margaret and Stephen

Keen of allowing Respondent to assume those roles. FFCLR ¶ 24; TR 178-80, 185-86. As a result, neither Margaret nor Stephen Keen understood that Respondent had put in place a plan under which he, a virtual stranger to them, would have extensive powers over their finances, their healthcare, and their lives. FFCLR ¶ 22; TR 178-80, 185-86.

On December 29, 2008, Stephen Keen paid Respondent \$2,050. TR 35-36; EX 19 at 5. Respondent used \$49<sup>3</sup> of the \$2,050 to fund the trust, although there was no good reason to fund the trust at all before Margaret Keen's death. FFCLR ¶ 32; TR 40-41, 138-39, 148, 150-51. At no time did the trust corpus ever exceed \$49. FFCLR ¶ 32; TR 41; EX 31. Of the remaining \$2,001, \$2,000 was the quarterly fee Respondent charged for acting as trustee of the Stephen Keen Trust. FFCLR ¶ 30; TR 35-37, 39-40. Respondent knew, however, that he was not the trustee of the Stephen Keen Trust, because Margaret Keen had not yet relinquished that position. FFCLR ¶ 31; TR 37; EX 27. If Respondent had been the trustee, and if the trustee had been entitled to compensation at the rate of two percent of the trust corpus per year, then Respondent would have been entitled to about \$0.25 per quarter. FFCLR ¶ 33. But Respondent had drafted the trust instrument so that the trustee would be paid at least

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<sup>3</sup> According to Respondent's counsel, the trust was funded with \$49 instead of \$50 because "[t]hat's all Mr. Hall had in his wallet" when he went to the bank. TR 246, 267-68.

\$2,000 per quarter, whether the trust contained \$4 or \$400,000. FFCLR ¶ 10; TR 29; EX 104 at HALL000208.

On January 7, 2009, barely two months after Respondent had become successor trustee of the Stephen Keen Trust by virtue of the trust agreement he had drafted, Respondent had Margaret Keen sign a Declination to Serve as Trustee of the Stephen Keen Special Needs Trust. FFCLR ¶ 35; TR 33-34, 37; EX 27. By that time, Margaret Keen was 92 years old, living in a nursing home, and, according to Respondent, “no longer competent” to act as trustee. TR 32-34, 37; EX 32. Respondent thereby became trustee of the Stephen Keen Trust. TR 42.

In March 2009, Stephen Keen was looking for an assisted living facility for himself. TR 178. A consultant with whom he met asked to review his and his mother’s estate planning documents. TR 178-79. The consultant, Victoria DeVine, pointed out to Stephen Keen that Respondent was named as a successor fiduciary in those documents. TR 179-80. Mr. Keen was surprised and upset by this, because it was not what he or his mother had intended. FFCLR ¶ 39; TR 179-80. When Margaret Keen learned of this, she was surprised and upset too, because she would never have knowingly designated Respondent, whom she barely knew, as her fiduciary with respect to her finances, her healthcare, her will, and the Stephen Keen Trust. FFCLR ¶¶ 39-41; TR 185-86.

Margaret and Stephen Keen hired lawyer Jamie Clausen to prepare new estate planning documents reflecting their true intentions. FFCLR ¶¶ 38-41; TR 176-86; EX 7-10, 12. In the new documents that Ms. Clausen prepared, Margaret Keen's niece, Nancy Caputo, was named Margaret Keen's successor attorney-in-fact for finances and property, her successor agent for healthcare decisions, the successor executor of her will, and the successor trustee of the Stephen C. Keen Special Needs Trust. TR 180; EX 7-9. This was what Margaret and Stephen Keen had intended all along, and what they had expected Respondent's estate planning documents to provide for. FFCLR ¶¶ 39, 41; TR 179-80, 185. On March 20 and 26, 2009, Margaret and Stephen Keen executed the new estate planning documents that Ms. Clausen prepared at their request. FFCLR ¶¶ 39, 41, TR 180-81; EX 7-10, 12. Unlike Respondent, Ms. Clausen read the documents to Margaret Keen before they were signed. TR 183, 185. Ms. Clausen charged Margaret Keen a flat fee of \$1,050 for preparing her estate planning documents. TR 182; EX 36 at 3.

Margaret and Stephen Keen asked Ms. Clausen to send a letter to Respondent. TR 192-94; EX 24, 123. Before doing so, Ms. Clausen repeatedly left telephone messages for Respondent, but he did not respond. EX 24. On April 7, 2009, Ms. Clausen sent Respondent a letter in which she informed him (a) that her clients never approved of Respondent's

having placed himself in the role of a successor fiduciary, and (b) that all the estate planning documents that Respondent drafted for Margaret Keen had been revoked. FFCLR ¶ 42; EX 24. Ms. Clausen informed Respondent that her clients were “very concerned” about those documents, and that they requested that he return the originals so they could be destroyed. EX 24. Ms. Clausen also informed Respondent that her clients requested a refund of the fees they paid, since the documents Respondent prepared for them contained terms they did not approve, which required them to have new estate planning documents drafted. EX 24.

Respondent refused to return the documents and refused to accept that his services had been terminated. FFCLR ¶¶ 43, 58; TR 55-57, 59-62; EX 1 at 5, EX 2 at 1, EX 5, EX 13, EX 21 at 3, EX 25, EX 29. Respondent would later explain, with considerable understatement, that his “pride” took over. FFCLR ¶ 43; TR 56-57, 63-64. Respondent’s initial response was an email to Ms. Clausen in which he complained that her April 7, 2009, letter was “unprofessional as to border on libel.” EX 25. He told Ms. Clausen that he did not feel “comfortable” dealing with her, and that “the next step” was to “get adult protective services involved.” EX 25. That was a fairly mild response, as compared to what Respondent would do later.

Margaret and Stephen Keen wrote to Respondent themselves, but

neither they nor Ms. Clausen received a response. EX 139. Stephen Keen was upset by Respondent's refusal to return the original documents, so he filed a grievance against Respondent with the Office of Disciplinary Counsel. FFCLR ¶ 45; TR 156, 162-63, 195; EX 139. In a November 28, 2009 letter to Disciplinary Counsel, Respondent acknowledged that he had the original documents but was "reluctant" to return them to his former clients. EX 21. On February 22, 2010, after multiple requests, Respondent provided some of his client file to Disciplinary Counsel, but he insisted that the original estate planning documents be returned to him, claiming that he needed them to file a lawsuit against Ms. Clausen and Stephen Keen. FFCLR ¶ 48; TR 157-61; EX 29.

Meanwhile, on February 21, 2010, Respondent demanded that Margaret or Stephen Keen pay him \$4,273.25, which he claimed he was owed "under the trust agreement." FFCLR ¶¶ 46-47; EX 29. Those charges were unreasonable and unnecessary. FFCLR ¶ 47. Respondent sent his demand to Disciplinary Counsel, and directed her to advise Stephen Keen that the bill "must be paid in two weeks" or else Respondent would "turn it over to collections." TR 158; EX 29. Respondent also maintained that he was still entitled to an additional \$2,000 per quarter "since the creation of the trust," even though the trust corpus never exceeded \$49, and even though he had no contact with

Margaret or Stephen Keen since March 2009 or earlier. TR 42, 46, 58-59; EX 29. Then, on May 25, 2010, Respondent sent a “reconstructed” invoice for \$4,373.25 directly to Stephen Keen. FFCLR ¶ 53; TR 42-44, 77; EX 1,<sup>4</sup> 125 at HALL001584-86. The cover letter addressed to Stephen Keen states: “To be paid within 10 days of May 25, 2010 or will be submitted for collection at 12% interest compounded monthly.” EX 1.

On the same day he sent the \$4,373.25 invoice to Stephen Keen, Respondent made a bizarre, unannounced visit to Jamie Clausen’s home office.<sup>5</sup> FFCLR ¶¶ 49-51; TR 70-72, 196-201. Respondent came to Ms. Clausen’s door at about 5:30 p.m. wearing a motorcycle helmet and told her that they “needed to talk right now.” TR 197. Respondent spoke in a loud, angry voice, and made “animated” hand gestures. Ms. Clausen was afraid that Respondent would frighten her infant daughter, so she stepped onto the porch and closed the door behind her. TR 197-98. Respondent told Ms. Clausen that she had “committed malpractice,” that she was “in big trouble,” that she needed to “fix the problem,” and that she must “withdraw the bar complaint [she] had filed,” or else he would “make [her] pay.” TR 198. Ms. Clausen reminded Respondent that she had not

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<sup>4</sup> The invoice and cover letter comprise the last four pages of EX 1.

<sup>5</sup> Ms. Clausen’s account of the visit, which the hearing officer found credible, FFCLR ¶¶ 49-50, is at TR 196-201. Respondent’s account, which the hearing officer found *not* credible, FFCLR ¶ 51, is at TR 70-72.

filed a bar complaint against him. TR 198. Respondent began yelling at Ms. Clausen, repeatedly calling her an “idiot,” and telling her that she was “going to get sued” and “going to get disbarred.” TR 199.

Respondent’s yelling was so loud that Ms. Clausen’s husband came to the door to try to calm Respondent down, while Ms. Clausen went inside to be with her infant daughter. TR 199. Respondent then began yelling at Ms. Clausen’s husband. TR 199. Respondent told Ms. Clausen’s husband that if he, Respondent, “went down,” then Ms. Clausen was “going down” too, and that he, Respondent, would “make [her] pay.” TR 199. Eventually, Ms. Clausen went back outside and told Respondent she would call the police unless he left. TR 199-200. As he was leaving, Respondent told Ms. Clausen that she was “making a mistake,” and that she had “a lot to lose,” considering that she had “a new baby and a young family and a big house.” TR 200. Respondent repeated that if he “went down,” then she would “go down and he would make [her] pay.” TR 200. Ms. Clausen found Respondent’s visit “frightening.” TR 200-01.

But Respondent would not leave bad enough alone. Immediately after his visit to Ms. Clausen’s home office, Respondent sent Ms. Clausen a long, rambling letter full of references to Communist Russia, Nazi Germany, Pol Pot, Hitler, Stalin, and the “quest to establish a corporate dictatorship.” FFCLR ¶ 52; TR 201; EX 130. Respondent faulted Ms.

Clausen for cooperating with the Association's investigation of Stephen Keen's grievance, told her that he would likely file a lawsuit against her, and advised her to report the matter to her professional malpractice carrier. EX 130. Respondent also told Ms. Clausen that confessing her alleged misdeeds (whatever those were) would be "good for [her] soul." EX 130.

Ms. Clausen was "more cautious" as a result of Respondent's visit and his follow-up letter. TR 202. She had to provide Respondent's letter to her malpractice insurance carrier, which caused her premiums to rise, and she had to pay a deductible for the potential claim. She also had to deal with some negative comments about her that Respondent posted on the internet. TR 203-4.<sup>6</sup>

On May 26, 2010, Respondent went to the Association's office to pick up the documents he had provided on February 22, 2010. TR 160-61; EX 5, 13. Respondent still refused to return the original estate planning documents to his former clients, who had requested them more than a year earlier. TR 160-61; EX 5, 13. Respondent claimed he needed the original documents for a lawsuit he intended to file against Stephen Keen, which would be based on statements Stephen Keen had made to the Association concerning his grievance. EX 5. Disciplinary Counsel informed Respondent in writing that such statements were absolutely privileged

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<sup>6</sup> Specifically, on <http://www.avvo.com>.

under ELC 2.12. FFCLR ¶ 54; EX 5. Nevertheless, Respondent continued to threaten suit against Stephen Keen and others for statements made to the Association concerning the grievance. FFCLR ¶ 55.

On May 28, 2010, James Lassoie, the “trust protector” under the Stephen Keen Trust that Respondent drafted, notified Respondent in writing that he had been removed as trustee and that Linda Orf, Stephen Keen’s former wife, had been appointed successor trustee. FFCLR ¶ 56; TR 204-05; EX 3-4. Mr. Lassoie requested that Respondent return all the assets of the trust, including the original trust instrument. EX 3-4. Once again, Respondent refused. FFCLR ¶ 56; TR 60-62; EX 132. Respondent sent Mr. Lassoie a long, rambling letter in which he threatened suit against Stephen Keen, Ms. Clausen, and Ms. Orf, asked Mr. Lassoie to “investigate these people,” and encouraged Mr. Lassoie to “see [his] own lawyer.” EX 132.

Respondent continued to make baseless accusations against Stephen Keen, Jamie Clausen, Linda Orf, and others. FFCLR ¶ 57; TR 68-69, 161-62; EX 135 at 132-34. He continued to threaten suit against them for statements they made to the Association concerning Stephen Keen’s grievance. FFCLR ¶ 55. He continued to refuse to acknowledge that he was removed as the trustee of the Stephen Keen Trust. FFCLR ¶ 58. And

he continued to refuse to return the \$49 trust corpus or the original estate planning documents to his former clients. FFCLR ¶ 58.

**B. PROCEDURAL FACTS**

On December 10, 2010, the Association filed a four-count Formal Complaint alleging as follows:

**COUNT 1**

By making himself the alternate trustee for the Stephen Keen Trust, as well as by giving himself powers as the alternate power of attorney and health care representative for Mrs. Keen, without communicating adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct, Respondent violated RPC 1.4(b) and/or RPC 1.7(a)(2).

**COUNT 2**

By charging a \$2,000 "quarterly flat fee" for managing the trust before he had become trustee for the trust and/or by charging Stephen Keen for drafting letters to himself and/or by charging an hourly rate for performing trustee duties for which he was already charging a flat fee, Respondent violated RPC 1.5 and/or RPC 8.4(c).

**COUNT 3**

By refusing to return original estate planning documents after repeated requests, Respondent violated RPC 1.15A(f) and/or RPC 1.16(d).

**COUNT 4**

By threatening Ms. Clausen if she did not withdraw the grievance filed against him, and/or by threatening to file a lawsuit against Ms. Clausen and Stephen Keen for providing information to the Association, Respondent

violated RPC 8.4(d).

BF 2 ¶¶ 54-57; FFCLR at 2.

The disciplinary hearing commenced on August 2, 2011. BF 36 at 1; EX 135 at 1, 8. On the third day of the hearing, Respondent asserted that he was incapable of properly defending the disciplinary proceeding because of a mental or physical incapacity. BF 36 at 295-97; EX 135 at 295-97. The hearing officer ordered a supplemental disability proceeding under ELC 8.3(a), and ordered that the disciplinary proceeding be deferred under ELC 8.3(d)(2). BF 34-35. Because Respondent had asserted his own incapacity, the Association petitioned this court for Respondent's interim suspension under ELC 7.3 and 8.3(e).<sup>7</sup> On August 18, 2011, this court suspended Respondent on an interim basis under ELC 7.3.<sup>8</sup> As of this date,

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<sup>7</sup> ELC 8.3(e) provides that when supplemental proceedings have been ordered, disciplinary counsel must petition the Supreme Court for interim suspension under ELC 7.2(a)(1) or automatic suspension under ELC 7.3. ELC 7.3 provides that when a lawyer asserts his own incapacity, the lawyer must be suspended on an interim basis pending the conclusion of the disability proceedings. The rule further provides that this court may terminate the interim suspension on petition of either party.

<sup>8</sup> In re Alan Hall, Supreme Court No. 200,975-1, Order Granting Petition for Automatic Interim Suspension Pursuant to ELC 7.3 (August 18, 2011).

Respondent remains suspended under ELC 7.3.<sup>9</sup>

The disciplinary hearing resumed on February 25, 2013, with Respondent represented by counsel. TR 1-2; FFCLR at 1-2. On April 2, 2013, the hearing officer entered his Findings of Fact, Conclusions of Law, and Hearing Officer's Recommendation. BF 57. The hearing officer concluded that Respondent committed all the violations alleged in the Formal Complaint. FFCLR ¶¶ 59-63. The hearing officer determined that suspension was the presumptive sanction for all four counts under standards 4.12, 4.32, and 7.2 of the ABA Standards for Imposing Lawyer Sanctions. FFCLR ¶¶ 64-73. The hearing officer found seven aggravating factors: (1) prior disciplinary offenses, (2) dishonest or selfish motive, (3) multiple offenses, (4) refusal to acknowledge the wrongful nature of the conduct, (5) vulnerability of victims, (6) substantial experience in the practice of law, and (7) indifference to making restitution. FFCLR ¶ 77. There were no mitigating factors. FFCLR ¶ 78. The hearing officer recommended that Respondent be suspended from the practice of law for two years, and that his reinstatement be conditioned on a fitness to

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<sup>9</sup> On May 8, 2012, Respondent petitioned this court to terminate his interim suspension. In re Alan Hall, Supreme Court No. 200,975-1, Petition to Remove Suspension Pursuant to ELC 7.3 (May 8, 2012). By letter dated May 21, 2012, the Supreme Court Clerk informed Respondent and counsel that the court would await additional information before further considering Respondent's petition. In re Alan Hall, Supreme Court No. 200,975-1, Letter from Supreme Court Clerk Ronald R. Carpenter to counsel & Mr. Hall (May 21, 2012). Since that date, the court has been kept apprised of the progress of the disciplinary proceeding.

practice examination. FFCLR ¶ 79.

The hearing officer's decision came before the Disciplinary Board for review under ELC 11.2(b)(1). On September 19, 2013, the Board unanimously adopted the hearing officer's findings, conclusions, and recommendation by a vote of 13-0. BF 74.<sup>10</sup>

## II. ARGUMENT

### A. STANDARD OF REVIEW

The ultimate responsibility for lawyer discipline rests with this court. In re Disciplinary Proceeding Against Marshall (Marshall II), 167 Wn.2d 51, 66, 217 P.3d 291 (2009). Nevertheless, the court gives great weight to the hearing officer's findings of fact and his evaluation of the credibility of witnesses, because the hearing officer is in the best position to make such judgments. In re Disciplinary Proceeding against Rodriguez, 177 Wn.2d 872, 885, 306 P.3d 893 (2013); Marshall II, 167 Wn.2d at 66-67.

A party's brief must include a separate assignment of error for each finding of fact the party contends was improperly made. RAP 10.3(g). Assignments of error must be supported by argument, legal authority, and references to the record. In re Disciplinary Proceeding Against Behrman, 165 Wn.2d 414, 422, 197 P.3d 1177 (2008). This court

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<sup>10</sup> The Board's order is attached as Appendix B.

will only review a claimed error that is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto. RAP 10.3(g). Unchallenged findings of fact are treated as verities on appeal. In re Disciplinary Proceeding Against Cramer, 168 Wn.2d 220, 230, 225 P.3d 881 (2010); Marshall II, 167 Wn.2d at 66.

Challenged findings of fact will be upheld if they are supported by substantial evidence. Marshall II, 167 Wn.2d at 66-67. Substantial evidence is “evidence sufficient to persuade a fair-minded, rational person of the truth of a declared premise.” In re Disciplinary Proceeding Against Marshall (Marshall I), 160 Wn.2d 317, 330, 157 P.3d 859 (2007) (internal quotation marks omitted). The hearing officer is entitled to draw reasonable inferences from circumstantial evidence, and a reviewing body must view the evidence and the inferences therefrom in the light most favorable to the party who prevailed in the highest forum that exercised fact-finding authority. In re Disciplinary Proceeding Against Cohen (Cohen I), 149 Wn.2d 323, 332-33, 67 P.3d 1086 (2003); Sunderland Family Treatment Services v. City of Pasco, 127 Wn.2d 782, 788, 903 P.2d 986 (1995).

A lawyer who challenges findings of fact must do more than argue his version of the facts while ignoring adverse evidence. Marshall II, 167 Wn.2d at 67. He must present argument as to why specific findings are

unsupported, and he must cite to the record to support his argument. Id.; RAP 10.3(a)(6). Findings of fact will not be overturned based simply on an alternative explanation of the facts or on a version of the facts previously rejected by the hearing officer and the Disciplinary Board. Marshall II, 167 Wn.2d at 67.

Conclusions of law are reviewed de novo, and will not be disturbed if they are supported by the findings of fact. In re Disciplinary Proceeding Against Hicks, 166 Wn.2d 774, 781, 214 P.3d 897 (2009). The Board's unanimous sanction recommendation should be affirmed unless the court can articulate clear and specific reasons for rejecting it. In re Disciplinary Proceeding Against Guarnero, 152 Wn.2d 51, 59, 93 P.3d 166 (2004).

**B. THE EVIDENCE AND THE FINDINGS OF FACT SUPPORT THE BOARD'S UNANIMOUS CONCLUSIONS OF LAW.**

The hearing officer and the Board unanimously concluded that Respondent committed the violations alleged in Counts 1-4 of the Formal Complaint. FFCLR ¶¶ 60-63; BF 74. Respondent assigns error to those four conclusions of law on the grounds that his conduct was “reasonable,” “proper,” and “justified.” Petitioner's [*sic*] Brief (PB) at 1-2. But he does not assign error to, or otherwise challenge, any of the specific factual findings that support the hearing officer's and the Board's conclusions of

law. Id. The court will therefore treat those findings as proven. Cramer, 168 Wn.2d at 229-30; Marshall II, 167 Wn.2d at 66.

**1. THE EVIDENCE AND THE FINDINGS OF FACT SUPPORT THE BOARD'S UNANIMOUS CONCLUSION THAT RESPONDENT VIOLATED RPC 1.4 AND RPC 1.7 AS CHARGED IN COUNT 1.**

RPC 1.4(b) provides that a lawyer shall “explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.” RPC 1.7 provides in pertinent part that a lawyer shall not represent a client if the representation involves a concurrent conflict of interest, unless each affected client gives informed consent, confirmed in writing. Under RPC 1.7(a)(2), 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 personal interest. The hearing officer and the Board unanimously concluded that Respondent violated RPC 1.4 and 1.7 as charged in Count 1. FFCLR ¶ 59-60; BF 74.

This conclusion is supported by the following findings of fact, among others: FFCLR ¶¶ 9-11, 15-16, 18-27, 39-41. Respondent has not assigned error to any of these factual findings, which are therefore treated as verities on appeal. Cramer, 168 Wn.2d at 230; Marshall II, 167 Wn.2d

at 66; RAP 10.3(g). They are, moreover, supported by substantial evidence in the record, as discussed below.

It is undisputed that the trust instrument Respondent drafted named Respondent himself the successor trustee, entitling him to at least \$8,000 per year upon becoming trustee. FFCLR ¶ 9-10; EX 104 at HALL000198, 208. It is undisputed that as trustee, Respondent could hire himself to work “as attorney for the Trust” and on “other legal matters related to the business of the Trust,” and to bill the trust for such work. FFCLR ¶ 11; EX 104 at HALL000208. It is undisputed that the will Respondent drafted named Respondent himself the successor executor with the power to “hire himself in regard to any issues arising under” the will or the trust. FFCLR ¶ 27; EX 105 at HALLOO1212-1213, EX 121 at HALLOO1576-77, 1579. And it is undisputed that the power of attorney Respondent drafted named Respondent himself “alternate agent” for Margaret Keen, potentially giving him control over all of her assets. FFCLR ¶ 23; EX 107 at HALL001533-49. Clearly these provisions were in Respondent’s personal interest. Consequently, there was a “significant risk” that his representation of Margaret and Stephen Keen would be materially limited by his personal interest, and there was, therefore, a “concurrent conflict of interest” under RPC 1.7(a)(2).

The testimony of Barbara Isenhour, a recognized expert on estate planning and special needs trusts, in particular, TR 134-37; EX 45, also supports the hearing officer's findings of fact. Ms. Isenhour testified that "no lawyer is a good choice as trustee" of a special needs trust, and that professional trust agencies are "a much better option" because they are cheaper, more knowledgeable, and better qualified to handle the issues likely to arise in administering a special needs trust. TR 140-42, 144-45; EX 135 at 202-05. For these reasons, and others, it is not "the norm" for lawyers to serve as trustees. TR 140, 144; EX 135 at 207. There is, moreover, an "inherent conflict" when the lawyer who drafts the trust instrument puts himself in a position where he can hire himself and pay himself to do additional legal work. EX 135 at 209-10. Jamie Clausen's testimony was in accord with Ms. Isenhour's. TR 188-89.

There is also substantial evidence in the record that Respondent's clients did not give their "informed consent" to the "inherent conflict" that Respondent created. RPC 1.7(b)(4); EX 135 at 209. "Informed consent" is "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." RPC 1.0(e). Whether "informed consent" has been given is a question of fact that is not conclusively resolved merely by the

client's signature on a document that the lawyer prepared, especially one that the client cannot read.

Here, there is substantial evidence that Respondent knew Margaret Keen could not read the documents that he prepared for her signature, and that he (unlike Jamie Clausen) did not read the documents to her. FFCLR ¶¶ 15-16; TR 31-32, 183. More importantly, there is substantial evidence that Margaret and Stephen Keen were both surprised and upset when they eventually learned, inadvertently, how Respondent had inserted himself into the positions of successor executor, successor trustee, alternate "Health Care Representative," and "alternate agent" under the General Durable Power of Attorney. TR 179-80, 185-86. They would not have been so surprised or upset if Respondent had "communicated adequate information and explanation about the material risks of and reasonably available alternatives" to the provisions in question. RPC 1.0(e). Finally, there is substantial evidence that Respondent vehemently denied, and continues to deny, that any such "risks . . . and reasonably available alternatives" even existed. EX 135 at 110-12. There is, therefore, substantial evidence to support the hearing officer's findings, FFCLR ¶¶ 18-22, 24-26, that Respondent's clients did not give the "informed consent" required under RPC 1.7, and that Respondent did not explain

matters to the extent necessary to permit “informed decisions,” as required by RPC 1.4(b).

**2. THE EVIDENCE AND THE FINDINGS OF FACT SUPPORT THE BOARD’S UNANIMOUS CONCLUSION THAT RESPONDENT VIOLATED RPC 1.5 AND RPC 8.4(c) AS CHARGED IN COUNT 2.**

RPC 1.5(a) provides that a lawyer shall not make an agreement for, charge, or collect an unreasonable fee. RPC 8.4(c) provides that it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation. The hearing officer and the Board unanimously concluded that Respondent violated RPC 1.5 and 8.4(c) as charged in Count 2. FFCLR ¶¶ 59, 61; BF 74. This conclusion is supported by the following findings of fact, among others: FFCLR ¶¶ 10, 28-34, 36, 46-47, 53. Respondent has not assigned error to any of these factual findings, which are therefore verities on appeal. Cramer, 168 Wn.2d at 230; Marshall II, 167 Wn.2d at 66; RAP 10.3(g). They are, moreover, supported by substantial evidence in the record.

First, it is undisputed that in December 2008, Respondent charged and collected a \$2,000 quarterly fee for acting as trustee of the Stephen Keen Trust. TR 35-37, 39-40. It is also undisputed that Respondent was not the trustee of the Stephen Keen Trust when he charged and collected the \$2,000 quarterly fee, and that the trust corpus never exceed \$49. TR

37, 41; EX 27, 31. And it is undisputed that Respondent later sent Stephen Keen an additional \$4,373.25 bill “for services rendered” in connection with the Stephen Keen Trust, that he demanded that the bill be paid within 10 days, and that he threatened to send the bill to collection and file suit unless it was paid. TR 42-44; EX 1,<sup>11</sup> 125 at HALL001584-86.

Even if the proposition were not self-evident, there is substantial evidence in the record that charging a \$2,000 fee for managing a \$49 trust is unreasonable. According to Barbara Isenhour, an expert on special needs trusts, the role of the trustee of a special needs trust is “to manage the money that is in the trust.” TR 139. “Whether it's \$50 or \$400,000, [the trustee's] role is limited to using the funds in the way that the trustor directs [the trustee] to do it.” TR 139, 147-49, 152. Furthermore, even if the Stephen Keen Trust had been funded with \$400,000, instead of \$49, a \$2,000 quarterly fee would have been “above what is normal” in the relevant locality. TR 140. A typical trustee's fee for a \$400,000 trust would be \$3,000 to \$4,000 *per year*, well below the \$2,000 per quarter that Respondent charged for “managing” a \$49 trust. TR 141-42. According to Ms. Isenhour, “it's just a matter of common sense” that if a trust is unfunded, or only “barely funded,” it is unreasonable to charge \$2,000 per quarter to manage it. TR 147-53.

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<sup>11</sup> The bill and cover letter comprise the last four pages of EX 1.

There is also substantial evidence in the record that the additional charges totaling \$4,373.25 that Respondent submitted after the grievance was filed were “unreasonable and unnecessary.” FFCLR ¶ 47. These charges include, among others, one hour of attorney time on December 28, 2008 for Respondent’s preparation and review of a boilerplate memorandum to himself concerning the administration of a special needs trust. FFCLR ¶29; TR 110; EX 110, 125 at HALL001584. Barbara Ilenhour testified that many of the charges on Respondent’s bill were “not appropriate” and were “just unnecessary churning of fees.” TR 147. There is, therefore, substantial evidence to support the hearing officer’s finding, FFCLR ¶ 47, that the fees Respondent charged were unreasonable.

**3. THE EVIDENCE AND THE FINDINGS OF FACT SUPPORT THE BOARD’S UNANIMOUS CONCLUSION THAT RESPONDENT VIOLATED RPC 1.15A(f) AND 1.16(d) AS CHARGED IN COUNT 3.**

RPC 1.15A(f) provides that a lawyer must promptly pay or deliver to a client or third person the property which the client or third person is entitled to receive. RPC 1.16(d) provides that upon the termination of representation, a lawyer must surrender all papers and property to which the client is entitled. The hearing officer and the Board unanimously concluded that Respondent violated RPC 1.15A(f) and 1.16(d) as charged in Count 3 by refusing to return his former clients’ original estate planning

documents. FFCLR ¶¶ 59, 62; BF 74. This conclusion is supported by the following findings of fact, among others: FFCLR ¶¶ 42-43, 48, 56, 58. Respondent has not challenged any of these factual findings, which are therefore verities on appeal. Cramer, 168 Wn.2d at 230; Marshall II, 167 Wn.2d at 66; RAP 10.3(g).

Instead of presenting argument as to why any specific findings of fact are unsupported, and instead of citing to the record to support his argument, Respondent simply asserts that refusal to return the documents to which his former clients were entitled was motivated by a “good faith” belief that it was for their own good. PB at 29-30. While that may be Respondent’s version of the facts, it is not one that the hearing officer or the Board was bound to accept. See Marshall II, 167 Wn.2d at 67 (findings of fact will not be overturned based on alternative version of facts rejected by hearing officer); see also FFCLR ¶ 57 (Respondent’s actions motivated by “pride”). Furthermore, there is ample evidence in the record that Respondent’s actions were motivated by spite, and by his desire to use his former clients’ documents in a lawsuit against them, not by any “good faith” effort to protect their interests. See, e.g., EX 5.

**4. THE EVIDENCE AND THE FINDINGS OF FACT SUPPORT THE BOARD'S UNANIMOUS CONCLUSION THAT RESPONDENT VIOLATED RPC 8.4(d) AS CHARGED IN COUNT 4.**

RPC 8.4(d) provides that it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice. Conduct prejudicial to the administration of justice includes lawyer conduct that interferes with enforcing the law, including the law of lawyer discipline, as well as clear violations of accepted practice norms. In re Disciplinary Proceeding Against Poole (Poole II), 164 Wn.2d 710, 730, 193 P.3d 1064 (2008). The hearing officer and the Board unanimously concluded that Respondent violated RPC 8.4(d) as charged in Count 4 by threatening Jamie Clausen and Stephen Keen because of the grievance that Stephen Keen filed with the Association. FFCLR ¶¶ 59, 63; BF 74. That conclusion is supported by the following findings of fact, among others: FFCLR ¶¶ 49-52, 55, 57. Respondent has not challenged any of these factual findings, which are therefore verities on appeal. Cramer, 168 Wn.2d at 230; Marshall II, 167 Wn.2d at 66; RAP 10.3(g).

Furthermore, Jamie Clausen's testimony and Respondent's own prolific and highly intemperate writings provide ample evidence to support the hearing officer's and the Board's findings of fact. TR 196-204; EX 1-2, 13, 25, 40-41. Respondent contends, however, that his threats

were “reasonable” because they were “aimed at *promoting* justice and *upholding* practice norms.” PB at 31 (emphasis in original). While that may be Respondent’s version of the facts, it is not one that the hearing officer or the Board was bound to accept. See Marshall II, 167 Wn.2d at 67; see also FFCLR ¶ 51 (Respondent’s testimony “not credible”). The hearing officer and the Board could reasonably infer that going to Ms. Clausen’s home and making threats that implicated her family in order to induce her to withdraw a grievance that she never filed was not reasonably calculated to promote justice or uphold practice norms.

**C. THIS COURT SHOULD AFFIRM THE BOARD’S UNANIMOUS RECOMMENDATION OF A TWO-YEAR SUSPENSION.**

The ABA Standards for Imposing Lawyer Sanctions (1991 ed. & Feb. 1992 Supp.) (ABA Standards)<sup>12</sup> govern sanctions in lawyer discipline cases. Marshall I, 160 Wn.2d at 342. First, the court considers whether the Board determined the correct presumptive sanction, considering the ethical duty violated, the lawyer’s mental state, and the actual or potential injury caused by the lawyer’s misconduct. Id. The lawyer’s mental state and the extent of the injury are factual issues best determined by the hearing officer. In re Disciplinary Proceeding Against Longacre, 155 Wn.2d 723, 743-44, 122 P.3d 710 (2005). Next, the court considers the

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<sup>12</sup> The applicable ABA Standards are attached as Appendix C.

aggravating or mitigating factors. Marshall I, 160 Wn.2d at 342. Finally, the court considers whether the proportionality of the sanction and the degree of unanimity among Board members justify a departure from the Board's recommendation. Id.

**1. THE PRESUMPTIVE SANCTION FOR COUNTS 1-4 IS SUSPENSION.**

a. Count 1

ABA Standards std. 4.3 applies to conflicts of interest. FFCLR ¶ 64. The hearing officer and the Board correctly determined that suspension is the presumptive sanction for Count 1 under ABA Standards std. 4.32 because (a) Respondent knew there were conflicts of interest, (b) Respondent did not fully disclose the possible effects to his clients, and (c) Respondent's clients were injured because they did not fully understand the role that Respondent would have in their estate plan or the potential costs. FFCLR ¶ 65-66. Respondent does not challenge the evidentiary basis of any of these factual determinations.<sup>13</sup> He simply asserts that "no sanction is appropriate" because there was no violation of RPC 1.7. But the hearing officer's and the Board's conclusion was to the contrary, and, as discussed above, that conclusion is supported by the evidence and the findings of fact.

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<sup>13</sup> Respondent in fact concedes that he knew there were conflicts of interest. PB at 34.

b. Count 2

ABA Standards std. 7.0 applies to charging unreasonable fees. FFCLR ¶ 67. The hearing officer and the Board correctly determined that suspension is the presumptive sanction for Count 2 under ABA Standards std. 7.2 because Respondent's conduct was knowing, and because Respondent caused injury by extracting fees that were "clearly excessive" and by threatening a lawsuit to extract even more. FFCLR ¶ 68. Respondent does not challenge the evidentiary basis of these factual determinations. He simply asserts, yet again, that "no violation occurred," or that if one did occur, it was merely a negligent violation. PB at 35. But the hearing officer and the Board could reasonably find, and did find, that Respondent knew what he was doing when he charged a \$2,000 quarterly fee for "managing" a \$49 trust, and when he repeatedly demanded an additional \$4,373.25 after his "pride" took over.<sup>14</sup> See Longacre, 155 Wn.2d at 743-44 (lawyer's mental state a factual issue best determined by hearing officer).

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<sup>14</sup> "Knew" in this context means the lawyer had "the conscious awareness of the nature or attendant circumstances of the conduct," not the conscious awareness that the conduct violated the RPC. In re Disciplinary Proceeding Against Egger, 152 Wn.2d 393, 415-16, 98 P.3d 477 (2004) (citing ABA Standards, Definitions at 7).

c. Count 3

ABA Standards std. 4.1 applies to Respondent's refusal to return his former clients' original estate planning documents. FFCLR ¶ 69. The hearing officer and the Board correctly determined that suspension is the presumptive sanction for Count 3 under ABA Standards std. 4.12 because Respondent knew he was dealing improperly with the original documents that he refused to return, and because he caused stress and aggravation to the Keens. FFCLR ¶¶ 70-71. These are factual determinations best made by the hearing officer, Longacre, 155 Wn.2d at 743-44, and Respondent does not challenge their evidentiary basis.

Respondent simply asserts, once again, that there was no violation of RPC 1.15A(f) or 1.16(d) because his refusal to return his former clients' property was in "good faith" and was calculated to "protect his clients' interests." PB at 35. But the hearing officer's and the Board's findings were to the contrary, as discussed above. Respondent also argues that there was no injury, since his former clients had copies of the documents, and because they had new documents prepared. Id. But that argument ignores the hearing officer's finding that "The Keens . . . suffered much stress and aggravation in not knowing whether Respondent would continue to attempt to bring more assets under control of the Trust, given the fact that he refused to recognize that he had been terminated as trustee

. . .” FFCLR ¶ 70. Jamie Clausen’s testimony provides substantial evidence to support that finding. TR 192-95.

d. Count 4

ABA Standards std. 7.0 applies to “Respondent’s efforts to derail the Association’s investigation by threatening Ms. Clausen and Mr. Keen.” FFCLR ¶¶ 72-73; see In re Disciplinary Proceeding Against Scannell, 169 Wn.2d 723, 744, 239 P.3d 332 (2010) (ABA Standards std. 7.0 applies to violations of duty to cooperate in disciplinary investigations); Poole II, 164 Wn.2d at 732 (ABA Standards std. 7.2 applied to violation of RPC 8.4(d) by failing to cooperate in disciplinary investigation). The hearing officer and the Board correctly determined that suspension is the presumptive sanction for Count 4 under ABA Standards std. 7.2 because Respondent’s conduct was knowing, and because Respondent caused injury to Mr. Keen, Ms. Clausen, and the disciplinary system. FFCLR ¶¶ 72-73.

Respondent does not assign error to these factual findings or present any argument as to why they are unsupported by the evidence. He merely asserts that “there was no violation” because his threats were motivated by a “good faith desire” to “protect” his former clients (including, apparently, the former client that he threatened). PB at 36. In other words, he merely argues his version of the facts while ignoring

adverse evidence. See Marshall II, 167 Wn.2d at 67. But findings of fact will not be overturned based simply on an alternative explanation of the facts, or on a version of the facts previously rejected by the hearing officer and the Board. Id. There is, moreover, ample evidence that Respondent was motivated by malice, spite, and an overweening “pride,” not by a “good faith desire” to “protect” anyone. See, e.g., TR 56-57, 63-64, 68-69, 161-62, 196-201; EX 130, 132, 135 at 132-34.

**2. THERE ARE SEVEN AGGRAVATING FACTORS, AND NO MITIGATING.**

The hearing officer and the Board found seven aggravating factors under ABA Standards std. 9.22: (1) prior disciplinary offenses,<sup>15</sup> (2) dishonest or selfish motive, (3) multiple offenses, (4) refusal to acknowledge the wrongful nature of the conduct,<sup>16</sup> (5) vulnerability of

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<sup>15</sup> Respondent received a reprimand in 2005 for violations of RPC 1.1 (competence), RPC 1.4 (communication), RPC 1.3 and 3.2 (diligence, failure to expedite litigation), RPC 3.1 (frivolous claim), APR 9(d)(1) and 9(d)(5) (failure to supervise legal intern), RPC 1.5(a) (charging unreasonable fee). EX 38-39.

<sup>16</sup> This aggravating factor is appropriate where a lawyer admits that he engaged in the alleged conduct but denies that it was wrongful, or where he rationalizes the improper conduct as an error. In re Disciplinary Proceeding Against Ferguson, 170 Wn.2d 916, 943-44, 246 P.3d 1236 (2011) (citing In re Disciplinary Proceeding Against Holcomb, 162 Wn.2d 563, 588, 173 P.3d 898 (2007)). It is also appropriate where the lawyer is unrepentant and continues to justify his actions despite abundant contrary evidence and his own conflicting testimony, or where the lawyer makes spurious excuses in an attempt to explain away his violations as mere technicalities. Id. at 944-45 (citing Greenbaum v. State Bar, 15 Cal.3d 893, 544 P.2d 921, 126 Cal. Rptr. 785 (1976) and Stanley v. Bd. of Prof'l Responsibility, 640 S.W.2d 210 (Tenn. 1982)). All of these circumstances are present in this case.

victims, (6) substantial experience in the practice of law,<sup>17</sup> and (7) indifference to making restitution.<sup>18</sup> Respondent summarily asserts that these aggravating factors “do not apply,” but he provides no argument to support that assertion. PB at 36. The Court should therefore conclude that the aggravating factors found by the hearing officer and the Board are verities. See In re Disciplinary Proceeding Against Whitney, 155 Wn.2d 451, 466-67, 120 P.3d 550 (2005).

Respondent has the burden of proving any mitigating factors. In re Disciplinary Proceeding Against Carpenter, 160 Wn.2d 16, 30, 155 P.3d 937 (2007). In this case, the hearing officer and the Board found no mitigating factors. Respondent asserts that the following three mitigating factors apply, although he provides no argument to support that assertion: (1) absence of a dishonest or selfish motive, (2) personal or emotional problems, and (3) remoteness of prior offenses. PB at 36. The first of these is clearly inconsistent with the hearing officer’s findings. FFCLR ¶ 77. Second, while there was ample evidence of outrageous behavior by Respondent, there was no evidence of any particular personal or emotional “problems” that would excuse it. An excess of “pride” is not such an excuse. Third, the offenses that resulted in Respondent’s 2005 reprimand

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<sup>17</sup> Respondent was admitted to practice in 1974. FFCLR ¶ 1.

<sup>18</sup> “To date, Respondent has not returned the \$49 in the trust as demanded by the trustee.” FFCLR ¶ 58.

occurred in 1998-2001. EX ¶ 38. They are not “remote,” especially considering that they include charging an unreasonable fee in violation of RPC 1.5(a). See, e.g., In re Disciplinary Proceeding Against Van Camp, 171 Wn.2d 781, 813, 257 P.3d 599 (2011); In re Disciplinary Proceeding Against VanDerbeek, 153 Wn.2d 64, 92, 94, 101 P.3d 88 (2004).

**3. THE BOARD’S UNANIMOUS SANCTION RECOMMENDATION IS ENTITLED TO GREAT DEFERENCE, AND RESPONDENT HAS PROVIDED NO REASON TO REJECT IT.**

The Association has proven not one but four counts of serious misconduct, and suspension is the presumptive sanction for each of the four counts. When the presumptive sanction is suspension, the appropriate range is generally six months to three years, but the generally accepted minimum term of six months is only appropriate in cases where the mitigating factors clearly outweigh the aggravating factors. Hicks, 166 Wn.2d at 786; Behrman, 165 Wn.2d at 426. Here, the aggravating factors, including a prior sanction for charging an unreasonable fee, are numerous and substantial, and there are no mitigating factors. And, unfortunately, Respondent’s testimony and his conduct throughout the proceeding demonstrate that he has no insight into the nature of his misconduct or the harm he has caused. Given all these circumstances, the two-year

suspension recommended by the hearing officer and the Board is appropriate.

The Disciplinary Board is the only body to hear the full range of disciplinary matters, so it has “a unique experience and perspective in the administration of sanctions.” In re Disciplinary Proceeding Against Vanderveen, 166 Wn.2d 594, 609, 211 P.3d 1008 (2009). Where the Board's sanction recommendation is unanimous, it is entitled to great deference, and should be affirmed unless there is a specific reason for rejecting it. In re Disciplinary Proceeding Against Day, 162 Wn.2d 527, 538, 542, 173 P.3d 915 (2007); Guarnero, 152 Wn.2d at 59; see also Vanderveen, 166 Wn.2d at 616. Here, the Board's decision, including its sanction recommendation, was unanimous, BF 74 at 1, and Respondent has provided no good reason for the court to reject it. The Board's Unanimous Sanction Recommendation should therefore be affirmed.

**4. REGARDLESS OF RESPONDENT'S INTERIM SUSPENSION UNDER ELC 7.3, A TWO-YEAR DISCIPLINARY SUSPENSION UNDER ELC 13.3 DOES NOT EXCEED THE THREE-YEAR MAXIMUM TERM OF A DISCIPLINARY SUSPENSION.**

Respondent contends that the Board “failed to adhere to ELC 13.3” because a two-year disciplinary suspension<sup>19</sup> under ELC 13.3 added to his interim suspension under ELC 7.3 could result in an aggregate period of suspension exceeding three years. PB at 32-33. But what Respondent fails to appreciate is that these are two different suspensions under two different rules for two entirely different reasons.

On August 18, 2011, this court suspended Respondent on an interim basis under ELC 7.3 because Respondent himself asserted that he was “totally and completely incompetent” and “totally incapable” of acting as a lawyer for himself. BF 34; EX 135 at 295-97. Unlike a disciplinary suspension under ELC 13.3, an interim suspension under ELC

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<sup>19</sup> The hearing officer’s decision states that Respondent should be suspended for “a minimum period of two years,” and that “reinstatement from suspension should be conditioned on a fitness to practice examination.” FFCLR ¶ 79. Taken in context, this means that Respondent should be suspended *for a fixed period of two years*, and that his reinstatement thereafter should occur whenever he has complied with the specific condition recommended, as well as the more general conditions set forth in ELC 13.3(b)(1). See ELC 13.1(c)(6) (in addition to sanctions, other requirements may be imposed), 13.3(a) (suspension must be for fixed period not exceeding three years), 13.3(b)(1)(B) (return to active status after suspension requires compliance with any specific requirements ordered). Consistent with this reading of FFCLR ¶ 79, the Board’s order states that the Board reviewed a decision “recommending a 2-year suspension with reinstatement fitness to practice exam.” BF 74.

7.3 is not based on a finding of misconduct. And unlike a disciplinary suspension under ELC 13.3, an interim suspension under ELC 7.3 has no fixed duration, because it is based on the premise that the public should be protected from a lawyer who asserts his own incapacity until such time as this court has adequate assurances that the lawyer is not incapacitated. See ELC 7.3, 8.3(a), 8.3(e).

On the other hand, a disciplinary suspension under ELC 13.3 is a sanction for ethical misconduct. See ELC 13.1(a)(2). It is imposed only “[u]pon a finding that the lawyer has committed an act of misconduct.” ELC 13.1. Its purpose is to protect the public from lawyers who fail to discharge their ethical duties, not from those who lack the mental or physical capacity to act as lawyers. Compare In re Disciplinary Proceeding Against Whitt, 149 Wn.2d 707, 723, 72 P.3d 173 (2003) (purpose of disciplinary proceeding); with ELC 8.3(b) (purpose of supplemental proceeding); see also ELC 8.3(c) (supplemental proceedings not disciplinary proceedings). When and if a disciplinary suspension under ELC 13.3 is imposed in this case, it will begin on the date set by this court, and will last for a fixed period of time not exceeding three years. ELC 13.2, 13.3.

The fact that Respondent has been suspended under ELC 7.3 for his asserted incapacity does not preclude him from being suspended for up

to three years under ELC 13.3 for his ethical misconduct. To hold otherwise would effectively shield lawyers who assert their incapacity from being held accountable for their ethical misconduct. Consistent with the purpose of lawyer discipline, protecting the public requires that Respondent receive a substantial and public disciplinary suspension as a sanction for his multiple acts of ethical misconduct.

### **III. CONCLUSION**

Respondent took advantage of his elderly and disabled clients by drafting estate planning documents that benefited Respondent himself without the knowledge or informed consent of his clients, and by charging unreasonable, unnecessary, and excessive fees. After his clients discovered what he had done, Respondent refused to acknowledge that his services had been terminated, refused to return his clients' property, and actively interfered with a disciplinary investigation by threatening the grievant and his lawyer. The evidence and the findings of fact support the Disciplinary Board's unanimous conclusions that Respondent committed all four of the charged violations. The court should affirm the Board's unanimous conclusions, along with the Board's unanimous recommendation of a two-year suspension.

RESPECTFULLY SUBMITTED this 5/21 day of December, 2013.

WASHINGTON STATE BAR ASSOCIATION



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Scott G. Busby, Bar No. 17522  
Disciplinary Counsel

# APPENDIX A

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DISCIPLINARY BOARD

BEFORE THE  
DISCIPLINARY BOARD  
OF THE  
WASHINGTON STATE BAR ASSOCIATION

In re  
  
**ALAN F. HALL,**  
  
Lawyer (Bar No. 1505).

Proceeding No. 10#00084  
  
FINDINGS OF FACT, CONCLUSIONS OF  
LAW AND HEARING OFFICER'S  
RECOMMENDATION

In accordance with Rule 10.13 of the Rules for Enforcement of Lawyer Conduct (ELC), the undersigned Hearing Officer held the hearing on February 25 and 26, 2013. Respondent Alan F. Hall appeared at the hearing with his lawyer, Stephen Smith of Hawley, Troxell, Ennis & Hawley, LLP. Special Disciplinary Counsel, Rebecca Roe of Schroeter, Goldmark & Bender appeared for the Washington State Bar Association (the Association).

PROCEDURAL HISTORY

A Formal Complaint was filed in this matter on September 17, 2010. A hearing commenced on August 2, 2011. Respondent represented himself, Pro Se. On August 4, 2011, the third day of hearing, Respondent asserted that he was not competent to continue to represent himself in the proceedings because of mental incapacity. On August 4, 2011, these proceedings

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1 | were deferred. On August 31, 2011, Respondent appeared with counsel. Stephen C. Smith. This  
2 | matter was eventually reset for February 25, 2013. The parties agreed that this hearing officer  
3 | would continue to preside over the proceedings.

4 | FORMAL COMPLAINT FILED BY DISCIPLINARY COUNSEL

5 | The Formal Complaint filed by Disciplinary Counsel charged Respondent with the  
6 | following counts of misconduct:

7 | Count 1 - By making himself the alternate trustee for the Stephen Keen Trust, as  
8 | well as giving himself powers as the alternate power of attorney and health care representative  
9 | for Mrs. Keen without fully explaining the legal effects of these roles to Stephen Keen or to Mrs.  
10 | Keen, and/or without fully explaining the reasonably foreseeable ways that his role in their estate  
11 | plan conflicted with his own interests and how the conflict could have adverse effects on their  
12 | interests, Respondent violated RPC 1.4(b) and/or RPC 1.7(a)(2) and/or RPC 1.8(a).

13 | Count 2 - By charging a \$2,000 "quarterly flat fee" for managing the trust before he had  
14 | become trustee for the trust and/or by charging Stephen Keen for drafting letters to himself and/or  
15 | by charging an hourly rate for performing trustee duties for which he was already charging a flat  
16 | fee, Respondent violated RPC 1.5 and/or RPC 8.4(c).

17 | Count 3 - By refusing to return original estate planning documents after repeated requests  
18 | by his clients, Respondent violated RPC 1.15A(f) and RPC 1.16(d).

19 | Count 4 - By threatening Ms. Clausen if she did not withdraw the grievance filed against  
20 | him, and/or by threatening to file a lawsuit against Ms. Clausen and Stephen Keen for providing  
21 | information to the Association, Respondent violated RPC 8.4(d).

22 | Based on the pleadings in the case, the testimony and exhibits at the hearing, the Hearing  
23 | Officer makes the following:

FINDINGS OF FACT

1  
2           1.       Respondent was admitted to the practice of law in the State of Washington on May  
3 3, 1974.

4           2.       In 2005, Respondent was reprimanded based on his failure to communicate with a  
5 client, failure to provide competent representation, failure to act with diligence, asserting a  
6 frivolous claim for fees, charging unreasonable fees, and failure to supervise a legal intern.

7           3.       In the late 1990s, the Respondent began focusing his practice on elder law and  
8 estate planning. This focus included an knowledge and understanding of special needs trust  
9 planning.

10          4.       In 2007, Respondent decided to become a financial adviser and stockbroker. He  
11 took and passed several extensive Financial Industry Regulatory Authority ("FINRA") courses  
12 and exams. He then worked as a stock broker for Ameriprise for six months. He was terminated  
13 from Ameriprise because of failure to produce. He then returned to private practice as a lawyer.  
14 Ex. R-135, 8/2/2011 Transcript, pp. 101-102; 112-113.

15          5.       On July 29, 2008, Stephen Keen ("Stephen") and his mother Margaret Keen ("Mrs.  
16 Keen") (collectively "the Keens") hired Respondent to help with their estate planning.  
17 Respondent charged \$3,000 of which \$1,500 was paid July 31, 2008 and the remainder September  
18 11, 2008. Exhibit 19.

19          6.       At the time the Keens hired Respondent, Mrs. Keen was 91 years old and Stephen  
20 Keen was 65 years old. Both were physically disabled but mentally competent. Neither Stephen  
21 nor Mrs. Keen had any prior relationship with Respondent. Stephen held the power of attorney  
22 for Mrs. Keen with her other son, James, as her alternate attorney in fact.

23          7.       The Respondent has been a member of the Academy of Special Needs Trust

1 Attorneys and the National Alliance of Mental Illness.

2 8. Margaret Keen had two sons, Stephen and James Keen. Stephen was to solely  
3 benefit from Mrs. Keen's estate plan.

4 9. Respondent drafted an estate plan for Mrs. Keen that included a Special Needs  
5 Trust (the "Trust"), a Will, a new Durable Power of Attorney and Living Will. A Special Needs  
6 Trust was drafted to protect government benefits for Stephen if he received the value of Mrs.  
7 Keen's estate which was estimated to be about \$400,000. Mrs. Keen was named the Trustee of  
8 the Trust. The Trust named Respondent as the successor trustee.

9 10. The Trust provided that Respondent was to be compensated at a rate of \$8,000 per  
10 year or 2% of the trust corpus, whichever was greater. The Respondent calculated that amount  
11 based upon his estimate of Mrs. Keen's estate. The Respondent used percentages he learned from  
12 a conversation with an attorney at a CLE presentation.

13 11. The Trust also provided that as Trustee, Respondent could hire himself to work as  
14 attorney and pay himself his hourly rate in addition to his trustee's fees. R-104. Both this and  
15 the compensation provision were drafted into the Trust by the Respondent himself.

16 12. The Trust was named as beneficiary in Mrs. Keen's will.

17 13. Stephen was the sole beneficiary of the Trust.

18 14. At the time that the Special Needs Trust documents were executed on October 28,  
19 2008, Respondent was aware that Mrs. Keen's health was deteriorating and that she had limited  
20 ability to function as trustee of the Trust. Ex. 32. Respondent was also aware the majority of the  
21 trust would be funded after Mrs. Keen's death when he would become the successor Trustee.

22 15. Respondent provided the complex, legal, estate planning documents to the Keens  
23 for their review, approximately two months before they were signed. This was at a time when

1 Mrs. Keen was having difficulty reading. Transcript pp. 31-32.

2 16. The day the documents were executed, the Respondent was aware of Mrs. Keen's  
3 reading difficulties. In recognition of Mrs. Keen's condition the Respondent explained some  
4 provisions in the documents, and the concepts behind them. He did not read the documents to  
5 Mrs. Keen "word-for-word." Transcript p. 32:1-6.

6 17. The Respondent instructed Mrs. Keen to initial all pages of the documents, and  
7 then execute the signature page.

8 18. Respondent did not explain the compensation provisions of the Trust in a manner  
9 that could be reasonably understood by the Keens. Respondent did not explain to the Keens that  
10 there were lower-cost options for successor Trustees than himself. There is no document showing  
11 that the Keens were so advised. Respondent was anxious to become Trustee.

12 19. Respondent did not advise the Keens in writing of their right or the desirability of  
13 seeking the advice of independent legal counsel prior to naming himself as successor trustee of  
14 the Trust.

15 20. Respondent did not obtain the Keens' informed written consent to the essential  
16 terms regarding his power to appoint himself as successor trustee of the Trust, including whether  
17 the Respondent was representing himself or the Keens in granting himself the power to appoint  
18 himself as successor trustee of the Trust.

19 21. Respondent's conduct in not adequately explaining the effect of placing himself  
20 in the role of successor trustee was knowing, and for the purpose of benefiting himself.

21 22. The Keens were confused as to Respondent's role in their estate plan, did not  
22 understand that Respondent was appointed as alternate trustee, and did not understand the effect  
23 of that appointment.

1           23.     On October 28, 2008, Margaret Keen also signed a Living Will appointing Stephen  
2 as Mrs. Keen's health care representative and providing that if Stephen should be unavailable or  
3 unable to act, Respondent would serve as Mrs. Keen's health care representative. Respondent  
4 also prepared, and Mrs. Keen also signed on October 28, 2008, a Durable Power of Attorney.  
5 Stephen was appointed as Mrs. Keen's agent. Respondent provided he would be Mrs. Keen's  
6 alternate agent under the Durable Power of Attorney if Stephen was unable to serve. R-106, R-  
7 107.

8           24.     Respondent did not communicate adequate information and explanation to Mrs.  
9 Keen, or Stephen as her attorney in fact, about the material risk involved in appointing himself to  
10 these various roles.

11           25.     The Respondent did not explain to the Keens that there were reasonable  
12 alternatives available to them, other than having him function in these roles. These include  
13 professional guardianship agencies, which are more skilled and less expensive at providing these  
14 services.

15           26.     Although Respondent drafted waivers purporting to waive the conflict of interest  
16 in this matter, the waivers were inadequate to waive the conflicts of interest inherent in having  
17 Respondent appointed as trustee of a trust that he had drafted.

18           27.     Respondent also drafted a Will for Mrs. Keen that appointed Stephen as the  
19 executor, but named Respondent as successor executor if Stephen failed to serve for any reason.  
20 R-121. Respondent was permitted to hire himself to deal with any issues arising under the Will  
21 or Trust. The Will also directed that upon her death, Mrs. Keen's entire estate be paid into the  
22 Trust. This document was not signed by Mrs. Keen until February 6, 2009. Ex. R-121.

23           28.     On or about December 28, 2008, Respondent wrote a "Memorandum to Trustee  
24

1 Explaining Special Needs Trust," addressed from himself and to himself, stating "You have been  
2 appointed Trustee of the Special Needs Trust established by the Settlor for the benefit of Stephen  
3 Keen." This memorandum set out the duties of the trustee, the mechanics of establishing the Trust  
4 and stated that the trustee was to be paid \$2,000 per quarter for administering the Trust.

5 29. Respondent billed Stephen \$185 for the preparation of this memorandum.  
6 Respondent did not convey a copy of this memorandum to Mrs. Keen or to Stephen. Respondent's  
7 testimony that this was a document that he had sent to Mrs. Keen and later addressed to himself  
8 without changing the date is not credible.

9 30. On or about December 29, 2008, Respondent billed a \$2,000 quarterly trustee's  
10 fee for acting as trustee for the Trust. In fact, on December 28, 2008, Respondent was not trustee  
11 of the Trust. This amount was paid December 29, 2008 by Stephen Keen.

12 31. At the time Respondent charged the \$2,000 quarterly trustee's fee, he knew that  
13 he was not yet trustee of the Trust. Ex. 19, 20.

14 32. Sometime in December 2008, Respondent funded the Special Needs Trust by  
15 depositing into the Trust \$49.00. At no time did the Trust corpus ever exceed \$49.00.

16 33. If the Respondent were to have been paid 2% of the value of the trust corpus rather  
17 than the quarterly \$2,000, for services, the Respondent would have received approximately \$0.25.  
18 That the Respondent received \$2,000 rather than 2% of the existing trust corpus, was mandated  
19 by the compensation provision the Respondent drafted into the Trust.

20 34. The services the Respondent claims to have performed as trustee were of a type  
21 and nature more appropriate to the estate planning process (for which he was already  
22 compensated), than the administration of a trust containing \$49.00. Transcript pp. 142-143; 153:1-  
23 8, 19-24.

1           35.     On or about January 7, 2009, Mrs. Keen signed a document titled "Declination to  
2     Serve as Trustee of the Stephen Keen Special Needs Trust" ("Declination".) The Declination  
3     appointed Respondent as successor trustee. The Declination gave Respondent "sole, absolute,  
4     and unfettered" discretion to make distributions under the Trust. Ex. 27.

5           36.     Respondent had Stephen Keen separately pay for the services of CareForce. He  
6     also testified had there been a significant amount of money in the Trust, he would have had a  
7     stockbroker invest the money. Respondent would have continued to charge \$2,000 per quarter  
8     for unknown services.

9           37.     In March 2009, Stephen asked his ex-wife, Linda Orf, to come to Washington to  
10    help him move to an assisted living facility. Mr. Keen and Ms. Orf had been married and  
11    divorced, but remained friends. Stephen relied on Ms. Orf to help him to organize his affairs.  
12    Transcript pp. 228-229.

13          38.     In March 2009, Stephen hired lawyer Jamie Clausen to draft new powers of  
14    attorney and Wills for both himself and Mrs. Keen. The Keens were referred to Ms. Clausen by  
15    Victoria DeVine who worked with a professional elder care group.

16          39.     Ms. Clausen met with Stephen on March 20, 2009. He was upset because he  
17    believed that his niece, Nancy Caputo, had been appointed as alternate trustee. Neither he nor his  
18    mother believed they had authorized Mr. Hall to be successor trustee. Stephen Keen executed  
19    new estate documents prepared by Ms. Clausen that changed alternate trustees, agents, etc. Ex.  
20    10, 12.

21          40.     Ms. Clausen met with Mrs. Keen on March 26, 2009. Margaret Keen was  
22    disbelieving that Hall was named as the successor trustee and called Stephen to verify what Ms.  
23    Clausen told her.

1           41.     Mrs. Keen would not have named a stranger to perform these fiduciary roles. Mrs.  
2 Keen believed that the Trust had named Nancy Caputo, and not Respondent, as alternate trustee.  
3 The new Will that Ms. Clausen drafted left Mrs. Keen's assets to a new Special Needs Trust  
4 ("New Trust") with new fiduciaries. On March 26, 2009, Mrs. Keen voluntarily executed the  
5 new powers of attorney, the new Will and the new Special Needs Trust. Ex. 7, 8, 9, 36.

6           42.     On April 7, 2009, Ms. Clausen sent Respondent a certified letter informing him  
7 that all of the documents that he had drafted that were capable of being revoked had been revoked.  
8 The letter told Respondent that the clients requested the return of all original documents so that  
9 they could be destroyed. This letter was sufficient to terminate Respondent's services as the  
10 Keen's lawyer.

11           43.     Respondent refused to recognize that he had been terminated and refused to return  
12 the original estate planning documents. Respondent conceded he acted improperly.

13           44.     Stephen was particularly concerned about the original trust documents and the fact  
14 he was billed \$2,000 per quarter for a trust that had minimal money in it.

15           45.     On November 6, 2009, Stephen filed a grievance with the Association against  
16 Respondent.

17           46.     On February 21, 2010, Respondent submitted a bill to the Association, charging  
18 Stephen Keen an additional \$4,373.25 for legal work at the rate of \$185 per hour and stating that  
19 he would turn it over to collections if not paid. Respondent also stated that he believed that since  
20 he was still trustee of the trust, he was entitled to \$2,000 per month since the creation of trust  
21 which contained only \$49.00.

22           47.     The charge of \$2,000 per quarter for administration of a nominally funded trust  
23 was unreasonable. The additional legal work on the February 21, 2010 bill included hourly

1 | charges for items that constituted a trustee's duties for which he was also charging a \$2,000  
2 | quarterly trust fee. These charges were unreasonable and unnecessary.

3 |         48.     On February 23, 2010, at the Association's request, Respondent forwarded his  
4 | original file to the Association. Respondent refused to allow the original documents to be released  
5 | to the Keens. Respondent stated that he needed to keep the original documents because he  
6 | intended to file a lawsuit against Stephen for statements made to the Association in filing the  
7 | grievance and he believed that returning the documents to Stephen would result in the destruction  
8 | of evidence that he needed to prosecute this case.

9 |         49.     On May 25, 2010, Respondent went to Ms. Clausen's home, which also served as  
10 | her office. Respondent threatened her, stating that if she did not withdraw the grievance that  
11 | Stephen had filed with the Association, "she would be sorry." He told her he would file a lawsuit  
12 | for damages against her.

13 |         50.     During the meeting, Respondent became agitated and repeatedly called Ms.  
14 | Clausen an "idiot" and told her that she "had a lot to lose" because she had a new baby and a  
15 | young family and that if he "went down," she would "go down." Respondent did not leave Ms.  
16 | Clausen's home until she told him that she would call the police if he did not leave. Ms. Clausen  
17 | testified that the exchange was frightening and felt threatened by Respondent's behavior.  
18 | Transcript p. 200:12-19.

19 |         51.     Respondent's testimony that he was calm during this encounter and that Ms.  
20 | Clausen "lost it" was not credible.

21 |         52.     On the night of May 25, 2010, Respondent faxed Ms. Clausen a letter telling her  
22 | that he would file a lawsuit against her because he believed that she had a role in filing the  
23 | grievance with the Association. R-130.

1           53.     The same day, Respondent sent Stephen a letter demanding that Stephen pay him  
2 \$4,373.25 and threatened him with collection action if he did not pay. Respondent attached his  
3 February 21, 2010 billing to this letter.

4           54.     On May 26, 2010, the Association wrote to Respondent and informed him that Mr.  
5 Keen was entitled to the return of his original documents, but that because there was an issue they  
6 would retain the documents until the issue was resolved. The Association informed Respondent  
7 that, under ELC 2.12, statements to the Association were absolutely privileged and that no lawsuit  
8 could be brought against a grievant or witness for providing information to the Association.

9           55.     Respondent continued to threaten suit against Stephen Keen, Ms. Clausen and Ms.  
10 Orf for statements made to the Association. In his response to the Formal Complaint in this  
11 matter, Respondent attempted to cross claim against Stephen for attorneys fees, costs, expenses  
12 and damages for submitting a "perjured grievance." BF 10. The Association moved to strike this  
13 portion of Respondent's response, and this motion was granted. BF 18.

14           56.     On May 28, 2010, James Lassoie, the person who was appointed as "trust  
15 protector" of the Trust that Respondent drafted, and thus was given the power to remove the  
16 trustee, wrote to Respondent and removed him as trustee. The trust protector ordered Respondent  
17 to provide the successor trustee all assets of the Trust, including the original Trust documents.  
18 Respondent refused to provide the original documents or the assets of the trust to the new trustee.

19           57.     Throughout this matter, Respondent has made baseless accusations against Ms.  
20 Clausen and her motives in helping the Keens to change their estate plan and in assisting the  
21 Association in investigating Stephen's grievance. These allegations were made in bad faith and  
22 in an attempt to intimidate the Keens and/or Ms. Clausen into withdrawing the grievance.  
23 Respondent conceded that his actions after being informed of his termination as lawyer for the

1 Keens were due to pride.

2 58. Throughout this case, Respondent maintained that he is the trustee for the Trust,  
3 despite the fact that he was removed as trustee by the revocation of the Trust on April 7, 2009 and  
4 by trust protector. At the hearing, Respondent presented a document in which he resigned as  
5 trustee under the Trust. This document, dated September 17, 2011, was signed 16 months after  
6 Respondent was removed as trustee of the Trust and over two years after Respondent was notified  
7 that the Keens had drafted new estate planning documents and wanted to terminate his  
8 representation. To date, Respondent has not returned the \$49 in the trust as demanded by the  
9 trustee.

10 CONCLUSIONS OF LAW

11 Violations Analysis

12 59. The Hearing Officer finds that the Association proved the following:

13 60. Count 1 – Respondent drafted a document naming himself the alternate trustee,  
14 power of attorney and health care representative. He did not fully explain the legal effects of  
15 these roles to Stephen Keen or to Mrs. Keen, including the foreseeable ways that his role in their  
16 estate plan conflicted with his own interests and how the conflict could have adverse effects on  
17 their interests, thus Respondent failed to inform Keens there were less expensive and more skilled  
18 alternatives to him. Respondent violated RPC 1.4(b), RPC 1.7(a)(2), and RPC 1.8(a).

19 61. Count 2 - By charging a \$2,000 “quarterly flat fee” for managing the trust with a  
20 corpus of only \$49, and before he had become trustee for the trust, by charging Stephen Keen for  
21 drafting letters to himself, by charging an hourly rate for performing trustee duties for which he  
22 was already charging a flat fee, and by billing for unnecessary services given the minimal amount  
23 in the trust, Respondent charged an unreasonable fee in violation of RPC 1.5 and RPC 8.4(c).

1           62.     Count 3 - By refusing to return original estate planning documents after being  
2 discharged and after repeated requests by his clients, Respondent violated RPC 1.15A(f) and RPC  
3 1.16(d).

4           63.     Count 4 - By threatening Ms. Clausen if she did not withdraw the grievance filed  
5 against him, and by threatening to file a lawsuit against Ms. Clausen and Stephen Keen for  
6 providing information to the Association, Respondent violated RPC 8.4(d).

7 Sanction Analysis

8           64.     A presumptive sanction must be determined for each ethical violation. *In re*  
9 *Anschell*, 149 Wn.2d 484, 502, 69 P.3d 844 (2003). The following standards of the American  
10 Bar Association's Standards for Imposing Lawyer Sanctions ("ABA Standards") (1991 ed. &  
11 Feb. 1992 Supp.) are presumptively applicable in this case.

12           Count I – Conflict

13           4.3 Failure to Avoid Conflicts of Interest

14           ABA Standard 4.3 applies to Respondent's conduct in engaging in a conflict of interest.

15           Absent aggravating or mitigating circumstances, upon application of the  
16 factors set out in Standard 3.0, the following sanctions are generally appropriate  
in cases involving conflicts of interest:

17           4.31 Disbarment is generally appropriate when a lawyer, without the informed  
18 consent of client(s):

19           (a) engages in representation of a client knowing that the lawyer's interests are  
20 adverse to the client's with the intent to benefit the lawyer or another, and  
causes serious or potentially serious injury to the client; or

21           (b) simultaneously represents clients that the lawyer knows have adverse  
22 interests with the intent to benefit the lawyer or another, and causes serious  
or potentially serious injury to a client; or

23           (c) represents a client in a matter substantially related to a matter in which the  
24 interests of a present or former client are materially adverse, and  
knowingly uses information relating to the representation of a client with

1 the intent to benefit the lawyer or another and causes serious or potentially  
2 serious injury to a client.

3 **4.32 Suspension is generally appropriate when a lawyer knows of a conflict  
4 of interest and does not fully disclose to a client the possible effect of  
5 that conflict, and causes injury or potential injury to a client.**

6 4.33 Reprimand is generally appropriate when a lawyer is negligent in  
7 determining whether the representation of a client may be materially  
8 affected by the lawyer's own interests, or whether the representation will  
9 adversely affect another client, and causes injury or potential injury to a  
10 client.

11 4.34 Admonition is generally appropriate when a lawyer engages in an isolated  
12 instance of negligence in determining whether the representation of a client  
13 may be materially affected by the lawyer's own interests, or whether the  
14 representation will adversely affect another client, and causes little or no  
15 actual or potential injury to a client.

16 65. Respondent knew that he had a conflict of interest in naming himself as the  
17 alternate trustee of the special needs trust as well as other duties in the Keens estate planning  
18 documents. He did not fully disclose the possible effect of that conflict including the fact that  
19 there were other, cheaper options available to the Keens for a trustee, and that the terms of the  
20 trust allowed him to charge an unreasonable fee of \$2,000 per quarter even if the trust was  
21 nominally funded. The Keens were injured in that they did not fully understand the role that  
22 Respondent had in their estate plan and the potential fees that would be incurred when there were  
23 cheaper options available.

24 66. The presumptive sanction is suspension.

#### **Count II – Unreasonable Fees**

67. ABA Standard 7.0 applies to Respondent's misconduct in charging unreasonable fees.

#### ***7.0 Violations of Duties Owed as a Professional***

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 false or misleading communication about the lawyer or the lawyer's

1 services, improper communication of fields of practice, improper solicitation of  
2 professional employment from a prospective client, **unreasonable or improper**  
3 **fees**, unauthorized practice of law, improper withdrawal from representation, or  
4 failure to report professional misconduct.

5 7.1 Disbarment is generally appropriate when a lawyer knowingly engages in  
6 conduct that is a violation of a duty owed as a professional with the intent  
7 to obtain a benefit for the lawyer or another, and causes serious or  
8 potentially serious injury to a client, the public, or the legal system.

9 7.2 **Suspension is generally appropriate when a lawyer knowingly engages**  
10 **in conduct that is a violation of a duty owed as a professional and**  
11 **causes injury or potential injury to a client, the public, or the legal**  
12 **system.**

13 7.3 Reprimand is generally appropriate when a lawyer negligently engages in  
14 conduct that is a violation of a duty owed as a professional and causes  
15 injury or potential injury to a client, the public, or the legal system.

16 7.4 Admonition is generally appropriate when a lawyer engages in an isolated  
17 instance of negligence that is a violation of a duty owed as a professional,  
18 and causes little or no actual or potential injury to a client, the public, or  
19 the legal system.

20 68. Respondent knew that the fees that he charged Mr. Keen were unreasonable given  
21 that it was clearly excessive to charge \$2,000 per quarter to manage \$49.00. Aggravating the  
22 matter is the fact that 1) the Respondent drafted the compensation provision knowing that he  
23 would ultimately be the Trustee; and 2) the Respondent triggered the Trust himself by funding it  
24 with \$49. Mr. Keen was injured in that he paid Respondent trustee fees before Respondent  
became trustee of the trust, the duties Respondent performed at the time were more appropriate  
to the estate planning process for which he had already been compensated. Finally, the  
Respondent threatened to sue him for fees that Respondent asserted that he was owed even after  
he was terminated from the case.

**Count III- Failure to Return Originals**

69. ABA Standard 4.1 applies to Respondent's conduct in failing to return original

1 | estate planning documents to the Keens after he had been terminated:

2 | ***4.1 Failure to Preserve the Client's Property***

3 | Absent aggravating or mitigating circumstances, upon application of the  
4 | factors set out in 3.0, the following sanctions are generally appropriate in cases  
involving the failure to preserve client property:

5 | 4.11 Disbarment is generally appropriate when a lawyer knowingly converts  
6 | client property and causes injury or potential injury to a client.

7 | **4.12 Suspension is generally appropriate when a lawyer knows or should  
8 | know that he is dealing improperly with client property and causes  
injury or potential injury to a client.**

9 | 4.13 Reprimand is generally appropriate when a lawyer is negligent in dealing  
with client property and causes injury or potential injury to a client.

10 | 4.14 Admonition is generally appropriate when a lawyer is negligent in dealing  
11 | with client property and causes little or no actual or potential injury to a  
client.

12 | 70. Respondent knew that he was dealing inappropriately with client property when  
13 | he refused to return the original estate planning documents and the money that was in the trust  
14 | after Mr. Keen demanded that he do so through his new attorneys and through the trust protector  
15 | of the Trust. The Keens were injured in that they were unable to obtain their original documents  
16 | and suffered much stress and aggravation in not knowing whether Respondent would continue to  
17 | attempt to bring more assets under control of the Trust, given the fact that he refused to recognize  
18 | that he had been terminated as trustee and that the Keens had executed new estate planning  
19 | documents.

20 | 71. The presumptive sanction is suspension.

21 | **Count IV – Prejudice in the Administration of Justice**

22 | 72. ABA Standard 7.0 supra, is most applicable to Respondent's efforts to derail the  
23 | Association's investigation by threatening Ms. Clausen and Mr. Keen with a lawsuit if she did

1 not withdraw the grievance. Both Mr. Keen and Ms. Clausen were injured by the intimidating  
2 effect of Respondent's threatening conduct. In addition, the disciplinary system was potentially  
3 injured by Respondent's attempts to intimidate people who gave information to the Association  
4 about his conduct.

5 73. The presumptive sanction for count 4 is suspension.

6 ***SANCTION***

7 74. When multiple ethical violations are found, the "ultimate sanction imposed should  
8 at least be consistent with the sanction for the most serious instance of misconduct among a  
9 number of violations." *In re Petersen*, 120 Wn.2d 833, 854, 846 P.2d 1330 (1993).]

10 75. Based on the Findings of Fact and Conclusions of Law and application of the ABA  
11 Standards, the appropriate presumptive sanction is suspension.

12 76. "A period of six months is generally the accepted minimum term of suspension."  
13 *In re Cohen*, 149 Wn.2d 323, 339, 67 P.3d 1086 (2003).

14 77. The following aggravating factors set forth in Section 9.22 of the ABA Standards  
15 are applicable in this case:

- 16 (a) prior disciplinary offenses.  
17 (b) dishonest or selfish motive;  
18 (d) multiple offenses;  
19 (g) refusal to acknowledge wrongful nature of conduct;  
20 (h) vulnerability of victims;  
21 (i) substantial experience in the practice of law (Respondent was admitted to  
22 practice in 1974);  
23 (j) indifference to making restitution.

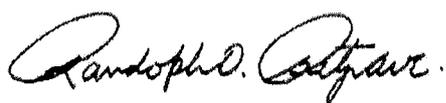
24 78. None of the mitigating factors set forth in Section 9.32 of the ABA Standards is  
applicable to this case.

Recommendation

79. Based on the ABA Standards and the applicable aggravating and mitigating

1 factors, the Hearing Officer recommends that Respondent Alan F. Hall be suspended for a  
2 minimum period of two years. Any reinstatement from suspension should be conditioned on a  
3 fitness to practice examination.

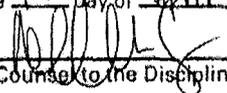
4 Dated this 31st day of March, 2013.

5  
6 

7 Randolph O. Petgrave, WSBA No. 26046  
8 Hearing Officer

9  
10  
11  
12 CERTIFICATE OF SERVICE

13 I certify that I caused a copy of the FOI, COL & HD<sup>IC</sup> Recommendation  
14 to be delivered to the Office of Disciplinary Counsel and to be mailed  
to STEPHEN SMITH, Respondent/Respondent's Counsel  
at OFFICE OF DISCIPLINARY COUNSEL, by certified first class mail  
15 postage prepaid on the 1st day of APRIL, 2013

16   
Clerk/Counsel to the Disciplinary Board

# APPENDIX B

SEP 19 2013

BEFORE THE  
DISCIPLINARY BOARD  
OF THE  
WASHINGTON STATE BAR ASSOCIATION

In Re

ALAN F. HALL,  
Lawyer (Bar No.1505)

Proceeding No. 10#00084

DISCIPLINARY BOARD ORDER  
ADOPTING HEARING OFFICER'S  
DECISION

This matter came before the Disciplinary Board at its September 6, 2013 meeting, on automatic review of Hearing Officer Randolph O. Petgrave's March 31, 2013, Findings Of Fact, Conclusions Of Law And Hearing Officer's Recommendation, recommending a 2-year suspension with reinstatement fitness to practice exam, following a hearing.

The Board reviews the hearing officer's finding of fact for substantial evidence. The Board reviews conclusions of law and sanction recommendations de novo. Evidence not presented to the hearing officer or panel cannot be considered by the Board. ELC 11.12(b).

Having reviewed the materials submitted, and considered the applicable case law and rules;

**IT IS HEREBY ORDERED THAT** the Hearing Officer's decision is adopted.<sup>1</sup>

Dated this 19<sup>th</sup> day of September 2013.



Nancy C. Ivarinen  
Disciplinary Board Chair

<sup>1</sup> The vote on this matter was 13-0. Those voting were: Bray, Broom, Butterworth, Carrington, Coy, Dremousis, Evans, Ivarinen, McInville, Mesher, Neiland, Ogura and Trippett.

074

CERTIFICATE OF SERVICE

I certify that I caused a copy of the DO ORDER ADOPTING TO R DECISION  
to be delivered to the Office of Disciplinary Counsel and to be mailed  
to STEVEN SMITH Respondent/Respondent's Counsel  
at OFF MAIN ST HOOD RIVER OR 97113 by Certified/first class mail  
postage prepaid on the 19th day of SEPTEMBER, 2013

[Signature]  
Clerk/Counsel to the Disciplinary Board

# APPENDIX C

## ABA Standards for Imposing Lawyer Sanctions

### 4.1 *Failure to Preserve the Client's Property*

Absent aggravating or mitigating circumstances, upon application of the factors set out in 3.0, the following sanctions are generally appropriate in cases involving the failure to preserve client property:

- 4.11 Disbarment is generally appropriate when a lawyer knowingly converts client property and causes injury or potential injury to a client.
- 4.12 Suspension is generally appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client.
- 4.13 Reprimand is generally appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client.
- 4.14 Admonition is generally appropriate when a lawyer is negligent in dealing with client property and causes little or no actual or potential injury to a client.

### 4.3 *Failure to Avoid Conflicts of Interest*

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:

- 4.31 Disbarment is generally appropriate when a lawyer, without the informed consent of client(s):
  - (a) 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 or another, and causes serious or potentially serious injury to the client; or
  - (b) simultaneously represents clients that the lawyer knows have adverse interests with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to a client; or
  - (c) represents a client in a matter substantially related to a matter in which the interests of a present or former client are materially adverse, and knowingly uses information relating to the representation of a client with the intent to benefit the lawyer or another and causes serious or potentially serious injury to a client.
- 4.32 Suspension is generally appropriate when a lawyer knows of a conflict of interest and does not fully disclose to a client the possible effect of that conflict, and causes injury or potential injury to a client.
- 4.33 Reprimand is generally appropriate when a lawyer is negligent in determining whether the representation of a client may be materially affected by the lawyer's own interests, or whether the representation will adversely affect another client, and causes injury or potential injury to a client.
- 4.34 Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence in determining whether the representation of a client may be materially affected by the lawyer's own interests, or whether the representation will adversely affect another client, and causes little or no actual or potential injury to a client.

## ***7.0 Violations of Duties Owed as a Professional***

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 false or misleading communication about the lawyer or the lawyer's services, improper communication of fields of practice, improper solicitation of professional employment from a prospective client, unreasonable or improper fees, unauthorized practice of law, improper withdrawal from representation, or failure to report professional misconduct.

- 7.1 Disbarment is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system.
- 7.2 Suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.
- 7.3 Reprimand is generally appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.
- 7.4 Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence that is a violation of a duty owed as a professional, and causes little or no actual or potential injury to a client, the public, or the legal system.

## ***9.2 Aggravation***

- 9.21 *Definition.* Aggravation or aggravating circumstances are any considerations or factors that may justify an increase in the degree of discipline to be imposed.
- 9.22 *Factors which may be considered in aggravation.* Aggravating factors include:
  - (a) prior disciplinary offenses;
  - (b) dishonest or selfish motive;
  - (c) a pattern of misconduct;
  - (d) multiple offenses;
  - (e) bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency;
  - (f) submission of false evidence, false statements, or other deceptive practices during the disciplinary process;
  - (g) refusal to acknowledge wrongful nature of conduct;
  - (h) vulnerability of victim;
  - (i) substantial experience in the practice of law;
  - (j) indifference to making restitution.
  - (k) Illegal conduct, including that involving the use of controlled substances.

## ***9.3 Mitigation***

- 9.31 *Definition.* Mitigation or mitigating circumstances are any considerations or factors that may justify a reduction in the degree of discipline to be imposed.
- 9.32 *Factors which may be considered in mitigation.* Mitigating factors include:

- (a) absence of a prior disciplinary record;
- (b) absence of a dishonest or selfish motive;
- (c) personal or emotional problems;
- (d) timely good faith effort to make restitution or to rectify consequences of misconduct;
- (e) full and free disclosure to disciplinary board or cooperative attitude toward proceedings;
- (f) inexperience in the practice of law;
- (g) character or reputation;
- (h) physical disability;
- (i) mental disability or chemical dependency including alcoholism or drug abuse when:
  - (1) there is medical evidence that the respondent is affected by a chemical dependency or mental disability;
  - (2) the chemical dependency or mental disability caused the misconduct;
  - (3) the respondent's recovery from the chemical dependency or mental disability is demonstrated by a meaningful and sustained period of successful rehabilitation; and
  - (4) the recovery arrested the misconduct and recurrence of that misconduct is unlikely.
- (j) delay in disciplinary proceedings;
- (k) imposition of other penalties or sanctions;
- (l) remorse;
- (m) remoteness of prior offenses.

## OFFICE RECEPTIONIST, CLERK

---

**From:** OFFICE RECEPTIONIST, CLERK  
**Sent:** Tuesday, December 31, 2013 9:13 AM  
**To:** 'Scott Busby'  
**Subject:** RE: In re Alan F. Hall, Supreme Court No. 201,255-8

Rec'd 12/21/2013

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:** Scott Busby [mailto:ScottB@wsba.org]  
**Sent:** Tuesday, December 31, 2013 9:05 AM  
**To:** OFFICE RECEPTIONIST, CLERK  
**Cc:** Stephen C. Smith; Chandler, Desiree R.  
**Subject:** In re Alan F. Hall, Supreme Court No. 201,255-8

Attached for filing are (1) the Answering Brief of the Washington State Bar Association, and (2) a Declaration of Service by Mail.

---

Scott G. Busby, Senior Disciplinary Counsel  
Washington State Bar Association  
1325 4th Avenue, Suite 600  
Seattle, WA 98101-2539  
Phone: (206) 733-5998  
Fax: (206) 727-8325  
[scottb@wsba.org](mailto:scottb@wsba.org)

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CLERK

  
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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re

ALAN F. HALL,

Lawyer (Bar No. 1505)

Supreme Court No. 201,255-8

DECLARATION OF  
SERVICE BY MAIL

The undersigned Disciplinary Counsel of the Washington State Bar Association declares that he caused a copy of the ANSWERING BRIEF OF THE WASHINGTON STATE BAR ASSOCIATION to be mailed by regular first class mail with postage prepaid on December 31, 2013, to:

Stephen C. Smith  
Hawley Troxell Ennis & Hawley LLP  
877 Main St Ste 1000  
Boise, ID 83702-5884

Dated this 31st day of December, 2013.

The undersigned declares under penalty of perjury under the laws of the state of Washington that the foregoing declaration is true and correct.

12-31-13 Seattle WA  
Date and Place

  
Scott G. Busby, Bar No. 17522  
Senior Disciplinary Counsel  
1325 4th Avenue – Suite 600  
Seattle, WA 98101-2539  
(206) 733-5998

 ORIGINAL

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