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WSBA No. 11356

SUPREME COURT OF THE STATE OF WASHINGTON

In re Mark Stansfield
Attorney, Respondent

RESPONDENT STANSFIELD'S BRIEF

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WSBA #6266

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COPY

TABLE OF CONTENTS

	Page
A. Assignments of Error	
<i>Assignments of Error</i>	
1. The Disciplinary Board (Board) Erred in Amending Finding 2.3.	1
2. The Board Erred in Deleting Finding 2.9	1
3. The Board Erred in Deleting Finding 2.12	1.
4. The Board Erred in Deleting Finding 2.13	1
5. The Board Erred in Adopting the Hearing Officer's Finding 2.15	1
6. The Board Erred in Adopting Finding 2.27 (Hearing Officer's Finding 2.29).	1
7. The Board Erred in Adopting Finding 2.30 (Hearing Officer Finding 2.32)	1
8. The Board Erred in Deleting Original Finding 2.40 (Hearing Officer's Finding 2.42B)	1
9. The Board Erred in Adopting New Finding 2.40	1
10. The Board Erred in Adopting Finding 2.41 (Hearing Officer Finding 2.42A)	1
11. The Board Erred in Adopting Finding 2.42 (Hearing Officer Finding #2.42B)	1
12. The Board Erred in Adopting Finding 2.43 (Hearing Officer Finding 2.42C)	2

13.	The Board Erred in Adopting Finding 2.46 (Hearing Officer Finding 2.45)	2
14.	The Board Erred in Deleting Finding 3.1	2
15.	The Board Erred in Deleting Finding 3.2.	2
16.	The Board Erred in Adopting the Hearing Officer's Finding that Mrs. Chavez was a Vulnerable Victim under ABA Standard 9.22(h)	2
17.	The Board Erred in Finding Only One Mitigating Factor under ABA Standard 9.32.	2
18.	The Board Erred in Increasing the Sanction from the Hearing Officer's Reprimand and Admonition Recommendation to a Six Month Suspension Recommendation	2
	<i>Issues Pertaining to Assignments of Error</i>	
1.	Was there substantial evidence to support the Board's Amendment of Finding 2.3? (Assignment of Error 1)	2
2.	Was there substantial evidence to support the Hearing Officer's Finding 2.9? (Assignment of Error 2)	2
3.	Did the Board Correctly Delete Finding 2.9? (Assignment of Error 2).	2
4.	Was there substantial evidence to support the Hearing Officer's Finding 2.12? (Assignment of Error 3)	3
5.	Did the Board Correctly Delete Finding 2.12? (Assignment of Error 3)	3
6.	Was there substantial evidence to support the Hearing Officer's Finding 2.13? (Assignment of Error 4)	3
7.	Did the Board Correctly Delete Finding 2.13? (Assignment of Error 4)	3

8.	Did the Board Correctly Adopt the Hearing Officer's Finding 2.15? (Assignment of Error 5)	3
9.	Did the Board Correctly Adopt Finding 2.27? (Hearing Officer's Finding 2.29). (Assignment of Error 6)	3
10.	Did the Board Correctly Adopt Finding 2.30 (Hearing Officer Finding 2.32)? (Assignment of Error 7)	3
11.	Was There Substantial Evidence to Support the Hearing Officer's Original Finding 2.40? (Assignment of Error 8)	3
12.	Did the Board Err in Deleting Original Finding 2.40? (Assignment of Error 8)	3
13.	Did the Board Err in Adopting New Finding 2.40? (Assignment of Error 9)	3
14.	Did the Board Err in Adopting Finding 2.41 (Hearing Officer Finding 2.42A)? (Assignment of Error 10)	4
15.	Did the Board Err in Adopting Finding 2.42 (Hearing Officer Finding #2.42B)? (Assignment of Error 11)	4
16.	Did the Board Err in Adopting Finding 2.43 (Hearing Officer Finding 2.42C)? (Assignment of Error 12)	4
17.	Did the Board Err in Adopting Finding 2.46 (Hearing Officer Finding 2.45)? (Assignment of Error 13)	4

18. Was there Substantial Evidence to Support the Hearing Officer's Finding 3.1? (Assignment of Error 14)	4
19. Did the Board Err in Deleting the Hearing Officer's Finding 3.1? (Assignment of Error 14)	4
20. Was there Substantial Evidence to Support the Hearing Officer's Finding 3.2? (Assignment of Error 15)	4
21. Did the Board Err in Deleting the Hearing Officer's Finding 3.2? (Assignment of Error 15)	4
22. Did the Board Err in Adopting the Hearing Officer's Finding that Mrs. Chavez was a Vulnerable Victim under ABA Standard 9.22(h)? (Assignment of Error 16).	4
23. Did the Board Err in Finding Only One Mitigating Factor under ABA Standard 9.32? (Assignment of Error 17)	4
24. Did the Board Err in Increasing the Sanction from the Hearing Officer's Reprimand and Admonition Recommendation to a Six Month Suspension Recommendation? (Assignment of Error 18)	5
B. Statement of the Case	5
1. Procedural History	5
2. Factual Background	6
3. Prior Discipline Record	12
C. Argument	12

1. The Disciplinary Board Incorrectly Amended Finding 2.3.	12
2. Despite Substantial Evidence to Support the Hearing Officer's Finding 2.9 the Disciplinary Board Incorrectly Amended the Hearing Officer's Finding 2.9	12
3. Substantial Evidence Supported the Hearing Officer's Finding 2.12	15
4. Substantial Evidence Supported the Hearing Officer's Finding 2.13 and the Board Improperly Struck this Finding	15
5. The Board Incorrectly Adopted the Hearing Officer's Finding of Fact 2.15.	16
6. The Record Shows that Finding 2.27 Is Erroneous	17
7. The Board Incorrectly Adopted Finding 2.30 (Hearing Officer Finding 2.32)	18
8. The Board Erred in Deleting the Hearing Officer's finding 2.40	20
9. As a Matter of Law, the Board Erred in Adopting Finding 2.41 (Hearing Officer Finding 2.42A)	21
10. The Board Erred in Adopting Finding 2.42 (Hearing Officer Finding 2.42B)	21
11. The Board Erred in Adopting Finding of Fact 2.43 (Hearing Officer Finding 2.42C)	22.
12. The Board Erred in Adopting Finding of Fact # 2.46 (Hearing Officer Finding 2.45)	22

13. The Board Erred in Deleting the Hearing Officer's Finding 3.1.	23
14. The Board Erred in Deleting the Hearing Officer's Finding 3.2	23
15. The Board Erred in Adopting the Hearing Officer's Finding that Mrs. Chavez was a "Vulnerable Victim."	24
16. The Board Erred in Finding Only One Mitigating Factor under ABA Standard 9.32.	25
17 The Board's Conclusion that Mr. Stansfield's Representation of Francisco Vargas Violated Former RPC 1.9(a) was Error	26
a. The Board Incorrectly Concluded that There Was Material Adversity	28
b. The Urquilla Probate and the Criminal Defense Were Not "Substantially Related"	38
c. The Board Should Not Have Considered the Urquillas Distress When They Saw Mr. Stansfield Appear as Mr. Vargas's Attorney	43
d. Mr. Stansfield's Actions on Behalf of Mrs. Chavez Were Di Minimis	44
e. ABA Standards Analysis	47
1. A Six Month Suspension is a Disproportionate Sanction.	49
F. Conclusion	49
 <u>Appendix</u>	
Case Law List	A-1

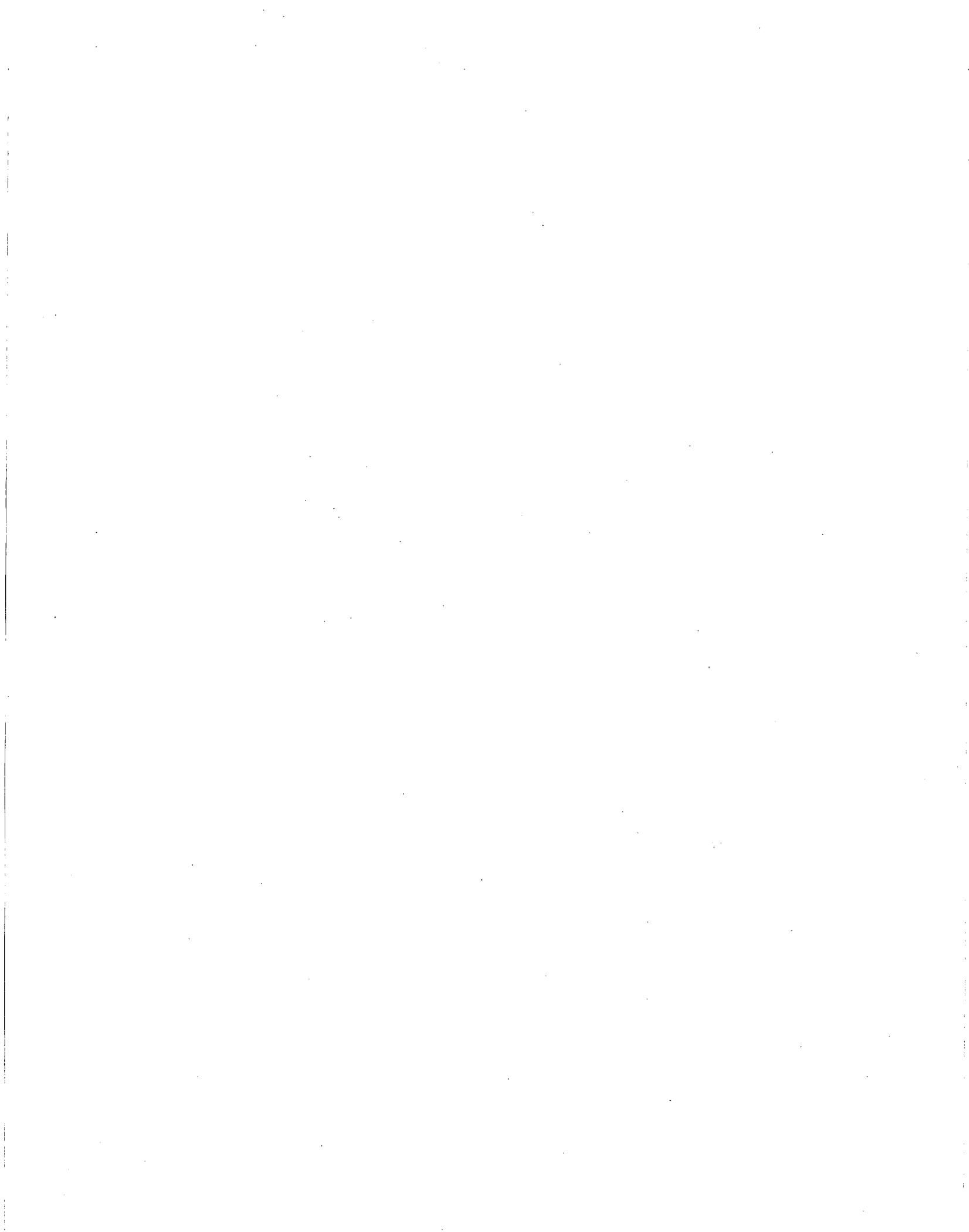
TABLE OF AUTHORITIES

Table of Cases

Page

Washington Cases

<i>Ino Ino v. City of Bellevuel</i> , 132 Wn.2d 103, 937 P.2d 154, <i>cert. denied</i> , 118 S.Ct. 856 (1998).....	13
<i>In re Blanchard</i> , `58 Wn.2d 317, 144 P.3d 286 (2006).....	24, 25
<i>In re Carmick</i> , 146 Wn.2d 582, 48 P.3d 311 (2002).....	17, 28
<i>In re Carpenter</i> , 160 Wn.2d 16, ___ P.3d ___ (2007).....	49
<i>In re Christopher</i> , 153 Wn.2d 669, 105 P.3d 976 (2005).....	17
<i>In re Dorney</i> , No. 200, 315-0 (June 21, 2007).....	25
<i>In re Greenlee</i> , 98 Wn.2d 786, 658 P.2d 1 (1983).....	46
<i>In re Lopngacre</i> , 155 Wn.2d 723, 122 P.3d 710 (2005).....	14
<i>In re Vetter</i> , 104 Wn.2d 779, 711 P.2d 284 (1985).....	46
<i>State v. Askham</i> , 120 Wn. App. 872, 883, 86 P.3d 1194 (2004).....	13
<i>State v. Hatfield</i> , 51 Wn. App. 408, 754 P,2d 136 (1988).....	41
<i>State v. Hunsaker</i> , 74 Wn. App. 38, 873 P.2d 540 (1994).....	28, 40, 41, 42, 43
<i>State v. Judge</i> , 100 Wn. App. 706, 675 P.2d 219 (1984).....	33



430 S.E.2d 569, 573 (1993).....35

Wyoming Cases

Simpson Performance Products, Inc. v. Horn, 2004 WY 69,
92 P.3d 283 (2004).....34, 35, 36

Statutes

RCW 7.69.03039
RCW 9.94A.500.....39
RCW 9.94A.750.....39
RCW 11.40.100.....19
...
RCW 46.61.520.....33

Court Rules

Washington Rules of Professional Conduct

Former RPC 1.2(f)5, 6, 45, 46, 50
Former RPC 1.7.....28, 30
Former RPC 1.9.....6, 37, 38
Former RPC 1.9 (a)5, 8,21, 22, 26, 27, 31, 32, 38, 43, 47, 49
Former RPC 1.9(b).....7, 27

Wyoming Rules of Professional Conduct

RPC 1.9.....34, 35

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1. The Disciplinary Board (Board) Erred in Amending Finding 2.3.
2. The Board Erred in Deleting Finding 2.9
3. The Board Erred in Deleting Finding 2.12
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6. The Board Erred in Adopting Finding 2.27 (Hearing Officer's Finding 2.29).
7. The Board Erred in Adopting Finding 2.30 (Hearing Officer Finding 2.32)
8. The Board Erred in Deleting Original Finding 2.40 (Hearing Officer's Finding 2.42B)
9. The Board Erred in Adopting New Finding 2.40
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12. The Board Erred in Adopting Finding 2.43 (Hearing Officer Finding 2.42C)
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6. Was there substantial evidence to support the Hearing Officer's Finding 2.13? (Assignment of Error 4)
7. Did the Board Correctly Delete Finding 2.13? (Assignment of Error 4)
8. Did the Board Correctly Adopt the Hearing Officer's Finding 2.15? (Assignment of Error 5)
9. Did the Board Correctly Adopt Finding 2.27? (Hearing Officer's Finding 2.29). (Assignment of Error 6)
10. Did the Board Correctly Adopt Finding 2.30 (Hearing Officer Finding 2.32)? (Assignment of Error 7)
11. Was There Substantial Evidence to Support the Hearing Officer's Original Finding 2.40? (Assignment of Error 8)
12. Did the Board Err in Deleting Original Finding 2.40? (Assignment of Error 8)
13. Did the Board Err in Adopting New Finding 2.40? (Assignment of Error 9)

14. Did the Board Err in Adopting Finding 2.41 (Hearing Officer Finding 2.42A)? (Assignment of Error 10)
15. Did the Board Err in Adopting Finding 2.42 (Hearing Officer Finding #2.42B)? (Assignment of Error 11)
16. Did the Board Err in Adopting Finding 2.43 (Hearing Officer Finding 2.42C)? (Assignment of Error 12)
17. Did the Board Err in Adopting Finding 2.46 (Hearing Officer Finding 2.45)? (Assignment of Error 13)
18. Was there Substantial Evidence to Support the Hearing Officer's Finding 3.1? (Assignment of Error 14)
19. Did the Board Err in Deleting the Hearing Officer's Finding 3.1? (Assignment of Error 14)
20. Was there Substantial Evidence to Support the Hearing Officer's Finding 3.2? (Assignment of Error 15)
21. Did the Board Err in Deleting the Hearing Officer's Finding 3.2? (Assignment of Error 15)
22. Did the Board Err in Adopting the Hearing Officer's Finding that Mrs. Chavez was a Vulnerable Victim under ABA Standard 9.22(h)? (Assignment of Error 16).
23. Did the Board Err in Finding Only One Mitigating Factor under ABA Standard 9.32? (Assignment of Error 17)

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B. Statement of the Case

1. Procedural History

On February 7, 2005 the Washington State Bar Association (WSBA) filed a three count formal complaint against Mr. Stansfield. BF 1-5. The three counts alleged misconduct with regard to Mr. Stansfield's involvement with the families of two persons killed in a motor vehicle accident and his subsequent representation at arraignment of the criminal defendant charged with causing the accident that killed the two victims. The WSBA did not pursue the third count and it was dismissed. DP 23.¹

Count 1 alleged that Mr. Stansfield had "willfully" appeared as an attorney for one of the victim's families (Chavez) without authority to do so in violation of former RPC 1.2(f),² a unique Washington RPC.

Count 2 alleged that Mr. Stansfield violated former RPC 1.9(a) because after he probated one of the victim's estates (Miguel Urquilla) and obtained the UIM policy limits for the estate, he represented the criminal

¹ The Disciplinary Board's majority's Order Modifying Hearing Officer's Decision fails to mention Count 3. DP 32-44.

² Former RPC 1.2(f) was not enacted with the September 1, 2006 RPC.

defendant charged with killing the victim at the defendant's arraignment for the charges arising from the accident.³

After a hearing the hearing officer entered Amended Findings of Fact and Conclusions of Law and Recommended a Reprimand for Mr. Stansfield's violation of former RPC 1.2(f) and an Admonition for his violation of RPC 1.9(a). DP 14, 24.

Mr. Stansfield appealed the Amended Findings, Conclusions and Recommendation to the Disciplinary Board. After briefing and oral argument, the Board (8-3) adopted some findings of fact, deleted some findings of fact and conclusions and increased the recommendation to a six month suspension. DP 32-44.

The three dissenters stated that they believed that there was substantial evidence to support the hearing officer's findings and concluded that the Board should recommend two Reprimands. DP 27-31

Mr. Stansfield filed a timely appeal to this Court.

2. Factual Background

Around 9 pm on May 9, 2003 Francisco (Frankie) Vargas Jr., with a blood alcohol level of .16/100ml, drove at a high rate of speed through a stop sign and "t-boned" and "submarined" Miguel Urquilla's pickup truck.

³ Count 2 of the Formal Complaint alleges that this conduct violated former RPC 1.9. While this RPC has two subsections, there is no evidence that Mr. Stansfield used former

After the collision, both vehicles came to rest upside down. Mr. Miguel Urquilla and Mr. Miguel Chavez, his passenger, were ejected from the pickup truck and killed. One of the three passengers in Mr. Vargas's vehicle also died. (Ex. #1 & Ex. 50 – police investigative report). Mr. Vargas carried no insurance. Ex. # 8.

Urquilla Estate

Later in May 2003 Mrs. Urquilla hired Mr. Stansfield to help her obtain UIM benefits. She told Mr. Stansfield that Farmers the company which insured Mr. Urquilla would tender policy limits only if Mr. Urquilla's estate was probated so that there was a personal representative. TR p.42-44. On June 3, 2003 Mr. Stansfield filed the Urquilla probate in Grant County Superior Court. Ex #11. Mrs. Urquilla was appointed as personal representative and Mr. Stansfield notified the insurer of the probate filing. EX. #11. By check dated June 26, 2003 Farmers transmitted the \$50,000 policy limits to Mr. Stansfield for distribution to the estate. EX. #22 & #24. On July 3, 2003 Mrs. Urquilla, as person representative, gave notice of an early distribution of the \$50,000 from the estate. EX. #26. On July 10, 2003, Mr. Stansfield who charged the Estate an hourly fee, distributed \$48,142.95 to the Estate and retained the balance for his fees and costs. EX #26.

client information to the former client's detriment in violation of former RPC 1.9(b).

On September 3, 2003 Mrs. Urquilla filed a Notice of Completion of the probate. EX. #34 & #35.

Chavez Estate

Around the same time that Mrs. Urquilla sought Mr. Stansfield's representation to probate her late husband's estate she told Mr. Stansfield that Mr. Chavez's widow lived in Guatemala and she was ill because of her shock at her husband's death. Mrs. Urquilla told Mr. Stansfield that Mrs. Chavez had given her authority to act as the personal representative of the Chavez estate. TR p. 62-63. Mr. Stansfield had her sign a fee agreement and various other documents as the personal representative of the Chavez estate. EX. #2 & #6. He also notified Farmers that he represented both victims. EX. #12.

In early July 2003 Mr. Stansfield wrote to Mrs. Chavez and had the letter translated into Spanish. His letter asked her to indicate whether she wanted him to handle her husband's probate. It gave her the choice of acting as personal representative or having Mrs. Urquilla act for her. EX. # 25. Mrs. Chavez failed to respond. On July 18, 2003 Mr. Stansfield mailed a follow up letter asking for Mrs. Chavez's response to his first letter. EX. #27. Again he received no response.

Therefore, any violation could only be of former RPC 1.9(a).

While Mr. Stansfield drafted documents to begin the Chavez probate they were never filed with the court and no probate was opened. EX #9.

On August 29, 2003 attorney Glenn K. Carpenter wrote to Mr. Stansfield and informed him that he had been retained to probate the estate on behalf of Mrs. Chavez and her children. EX. #30. On September 3, 2003 Mr. Stansfield wrote to the insurance adjuster and informed her that he has been replaced as the attorney for the Chavez estate and that all further correspondence should be sent to Mr. Carpenter. EX. #32. Mr. Stansfield also sent a notice of attorney's lien for \$2,299.32 in fees and costs he believed that he was entitled to be paid for his work on the Chavez matter. EX. #34. The lien was filed in Grant County and King County Superior Courts. EX. #33 & #34.

On September 12, 2003 Mr. Carpenter's paralegal wrote to Mr. Stansfield and requested that Mr. Stansfield itemize his lien claim. EX. #36. Mr. Stansfield responded the same day indicating that he would provide the itemization when Mr. Carpenter had provided a copy of his fee agreement. EX #37.

On January 12, 2004 the attorney for Farmers sent Mr. Carpenter a check for \$50,000 with Mr. Carpenter, Susanne Ruiz as personal representative and Mr. Stansfield as payees. EX #45. Farmers included

Mr. Stansfield on the check because he had sent Farmers a copy of his lien. EX. #45.

On January 14, 2004 Mr. Carpenter emailed Mr. Stansfield and also talked to him on the telephone about Mr. Stansfield authorizing him to sign Mr. Stansfield's name to the check. EX # 49. On January 22, 2004 Mr. Stansfield wrote to Mr. Carpenter to confirm their January 14, 2004 phone conversation. EX. #46. Mr. Stansfield sent a copy of his bill and concluded his letter: "I would be willing to compromise my bill, and await a response to this offer. I will do nothing further." Mr. Carpenter never responded to this letter. He did not respond: "Because as far as we could see, he had no authority to represent the family or the estate in any way." TR p. 265

In March, 2004 obtained two checks, one for \$45,000 payable to the Chavez Estate and Mr. Carpenter, and one \$5000 with the three payees on the original check. He deposited the larger check into his trust account and disbursed money to Mrs. Chavez. TR. p. 257.

On April 12, 2004 Susanne Ruiz the Chavez Estate's personal representative denied Mr. Stansfield's lien claim. EX R-2. Mr. Stansfield took no further action to enforce his lien.

Mr. Carpenter believed that it would be two years before Mr. Stansfield's claim was extinguished. TR p. 258. He held the \$5000 check

in his safe. TR p. 257. In November 2005 Mr. Stansfield first learned that Mr. Carpenter was still holding the \$5,000 check EX. R-3. With his cover letter (EX. R-3) he sent a formal notice of vacation of his lien. EX R-4. Mr. Carpenter then obtained the \$5000 and during the first week of January 2006⁴ he wired the funds to Guatemala . TR p. 258.

Vargas Arraignment

In September, 2003 Mr. Vargas received an information charging him with three counts of vehicular homicide in violation of RCW 46.61.520(1)(a) and two counts of vehicular assault in violation of RCW 46.61.502 and 522. EX. #48. His arraignment was set for September 22, 2003 at 9 am. EX. #48. The afternoon of the Friday before the arraignment Mr. Vargas and his parents, without an appointment, (TR p. 288) went to Ms. Stansfield's office seeking his services to represent Mr. Vargas in the criminal proceeding. TR p. 273. They gave Mr. Stansfield documents but he does not recall what documents he received or whether he reviewed them closely. TR p. 120-21. Mr. Stansfield agreed to undertake the representation for \$10,000 flat fee. EX. #40A.

On September 22, 2003 he appeared at Mr. Vargas's arraignment and filed his form notice of appearance, notice of demand for discovery,

⁴ The hearing was on January 31 and February 1, 2006.

preservation of evidence, jury trial and bill of particulars. EX. #39. TR p. 321.

After the arraignment Mr. Stansfield confirmed that he had appeared with the criminal defendant who had killed Mr. Urquilla. TR p. 318-19. He decided to stop representing Mr. Vargas and arranged substitute counsel for Mr. Vargas. EX R-1. Mr. Stansfield also sent all but \$250 of the flat fee to substitute counsel. TR p. 135. Later Mr. Vargas entered a guilty plea and was sentenced to 10 years and ordered to pay restitution. TR p. 283.

3. Prior Discipline Record

Mr. Stansfield has no prior discipline.

C. Argument

1. The Disciplinary Board Incorrectly Amended Finding 2.3.

The hearing officer's finding of fact 2.3 stated: "Mr. Vargas was the sole cause of the accident, driving his vehicle while under the influence of alcohol." The Board changed the finding to "Mr. Vargas drove his vehicle under the influence of alcohol." The Board made this change because the record did not support the hearing officer's finding. DP 33. The Board is supposed to review the Hearing Officer's findings to determine if substantial evidence supports a particular finding. ELC 11.12(b).

“Substantial evidence” exists when the record contains evidence of sufficient quantity to persuade a fair-minded, rational person that the declared premise is true. *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 112, 937 P.2d 154 (1997) *cert. denied*, 118 S. Ct. 856 (1998); *See also, State v. Askham*, 120 Wn. App. 872, 883, 86 P.3d 1194 (2004).

The Hearing Officer’s finding is supported by substantial evidence. Exhibit #50 the police report regarding the accident supports the finding that Mr. Vargas was solely responsible for the accident. On page 12 of that report, under penalty of perjury, the investigating detective stated that there was probably cause to believe that the collision was due to Mr. Vargas operating his vehicle while under the influence of alcohol and that the three deaths and two injuries were a “proximate result” of that collision.

Since there was substantial evidence to support the Hearing Officer’s finding 2.3 the Court should reinstate that finding and delete the Board’s substitute finding.

2. Despite Substantial Evidence to Support the Hearing Officer’s Finding 2.9 the Disciplinary Board Incorrectly Amended the Hearing Officer’s Finding 2.9

The hearing officer’s Finding of Fact 2.9 stated that: “The Respondent being compassionate by nature, took on the representation of

both estates for the respective families.” The Board majority rejected this finding as not established by the record. DP 24

The record shows that Mr. Stansfield charged an hourly rate rather than a contingent fee because he felt it was improper to take a contingent fee percentage of the recovery because the company had already offered policy limits and policy limits were low. TR p. 323-24. Mr. Stansfield testified that he was hired to satisfy the insurance company’s condition that there a personal representative must be appointed before they would release policy limits. TR p. 44. His fees were reasonable and there is no evidence that he took advantage of either widow. In fact he became concerned that Mrs. Urquilla was really trying to get control of the Chavez money and therefore he was concerned about protecting the Chavez funds. TR p. 329 -330.

In addition unlike Board, the hearing officer was able to observe and assess Mr. Stansfield’s attitude about his work for the two widows. This Court has given great weight to the hearing officer’s evaluation of the credibility and veracity of witnesses. *E.g. In re Longacre*, 155 Wn.2d 723, 735, 122 P.3d 710 (2005).

Substantial evidence supports the hearing officers finding 2.9 and the Court should delete the Board’s amended finding 2.9 and reinstate the hearing officer’s finding 2.9.

3. Substantial Evidence Supported the Hearing Officer's Finding 2.12.

The hearing officer's finding 2.12 stated that "Respondent's actions fall within the category of 'no good deed goes unpunished' and that Respondent's only motives were to get a good resolution so the families could receive the funds from the insurance company." The Board majority determined that the record would not support this finding. DP 48. However, this was Mr. Stansfield's testimony about his motives which the Hearing Officer believed. He based his finding on that testimony. TR p. 136, p. 324-326. Since the hearing officer was uniquely able to assess credibility, and attitude the Board should not have overturned this finding.

The Court should reinstate the hearing officer's finding of fact 2.12.

4. Substantial Evidence Supported the Hearing Officer's Finding 2.13 and the Board Improperly Struck this Finding

The hearing officer's finding 2.13 stated: "Respondent represented the Urquillas in a very professional manner and was more than fair with the Urquillas regarding settling claims with the insurance company and settling Mr. Urquilla's estate." DP 16. The Board without explanation struck this finding. DP 34.

The record shows that Mr. Stansfield charged an hourly fee to maximize the Urquillas recovery. He opened the probate the estate on June 3, 2003 about two weeks after he first met with Mrs. Urquilla. EX. #11. The same day he sent Farmers the documents naming Mrs. Urquilla as personal representative. EX #11 He obtained the insurance policy limits by the end of June (EX #24) and notified all the heirs of an early distribution of the policy proceeds. EX #26. He closed the estate 90 days after it was opened. EX. #34 & #35. This substantial evidence shows that the Board incorrectly struck the hearing officer's finding 2.13. The Court should reinstate this finding.

5. The Board Incorrectly Adopted the Hearing Officer's Finding of Fact 2.15.

The hearing officer and the Board found that Mr. Stansfield knew or should have known that he had a potential conflict representing both families without a waiver of that conflict. DP 17 & 35.

However, a potential for conflict is not an actual conflict. The record will not support this finding. Mr. Stansfield was only hired to do the probates so that the families could get the insurance proceeds. There was no potential for conflict between the two families because the insurance company paid the policy limits to both families.

If Mr. Stansfield had agreed to represent the surviving families in a wrongful death action then there was a potential for conflict because Mr. Chavez, the passenger might have made a claim against Mr. Urquilla the driver. However Mr. Stansfield's representation was limited to handling the probates.

Even a potential conflict does not by itself preclude representation. The question is whether the conflict will eventuate, and if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose reasonable courses of action that should be pursued on behalf of the client. ABA Annotated Model Rules of Professional Conduct R.1.7 cmt 4, 91-92 (4th ed. 1999).⁵ The record shows that Mr. Stansfield was hired for the limited purpose of probating the victims' estates so that the insurance company would pay the survivors the agreed upon policy limits. His limited representation did not create even a potential conflict. The Court must delete this finding.

6. The Record Shows that Finding 2.27 Is Erroneous

The Board's Finding 2.27 states that Mr. Carpenter asked Mr. Stansfield to endorse the check but did not hear back from Mr. Stansfield. The next finding states that Mr. Stansfield sent a January 22, 2004 letter to

⁵ This Court has stated that while Washington did not adopt the comments to the prior ABA Model Rules those comments are useful in understanding the policy behind the former RPC. *In re Carmick*, 146 Wn.2d 582, 595, 48 P.3d 311 (2002).

Mr. Carpenter which discussed their previous phone conversations about Mr. Stansfield's endorsement of the check. EX #46. This letter ends: "I would be willing to compromise my bill and await a response to this offer." Mr. Carpenter testified that he never responded to this offer. TR p. 265. Instead he got the insurance company in March 2004 to issue two checks one for \$45,000 payable to Mr. Carpenter and the Estate and one for \$5,000 payable to Mr. Carpenter, the Chavez estate and Mr. Stansfield. TR p. 256-57. The only mention of the alleged no response is Mr. Carpenter's ambiguous statement: "I either never heard back or he refused to do it. I can't remember right now." TR p. 252.

The record shows that finding 2.27 is contrary to the evidence and must be amended.

7. The Board Incorrectly Adopted Finding 2.30 (Hearing Officer Finding 2.32)

This finding states that Mr. Stansfield filed a lien that he had no apparent right to do. However, the record shows that Mr. Stansfield believed that he had taken steps to follow Mrs. Urquilla's instructions that he was to get her appointed the personal representative of the Chavez estate. While Mr. Carpenter believed that Mr. Stansfield had not earned any fee, at the time Mr. Stansfield filed his lien he was assuming that he had acted properly. He later discovered that Ms. Urquilla's

representations about her authority and Mrs. Chavez wishes were erroneous.

When he found this out, he was willing to compromise his lien but Mr. Carpenter never responded to this offer because he did not feel that Mr. Stansfield had earned any fees or incurred any reimbursable costs. TR p. 256

On April 12, 2004 the personal representative of the Chavez Estate sent Mr. Stansfield a denial of his lien claim for attorney's fees and costs. EX R-1. Mr. Carpenter believed that there was a two year statute of limitations on Mr. Stansfield's claim; however, RCW 11.40.100 gives an estate creditor whose claim is denied 30 days after the denial to sue the personal representative or: "the claim is forever barred." Thus by operation of law by May 15, 2003 Mr. Stansfield's claim could not be pursued.

Mr. Stansfield was unaware until November 2005 that Mr. Carpenter still had the \$5000 check in his safe. When he learned this he sent a cover letter explaining his legal analysis and enclosed his release of lien. EX. R-3

By the first week of January, 2006 Mr. Carpenter had sent the remaining \$5,000 to Guatemala. TR p. 258.

8. The Board Erred in Deleting the Hearing Officer's Finding #.40

The Hearing Officer's Finding 2.40 stated that Mr. Stansfield believed he was representing the Urquillas only to do the probate in order to receive funds which the insurance company had apparently set aside to pay this claim. The Board struck this finding because it conflicted with Finding 2.40 which was originally Finding 2.42B. There appears to be a typographical error. The hearing officer's finding 2.42B is now amended finding 2.42 not amended finding 2.40. DP 39 It appears that the Board meant to strike the Hearing Officer's original Finding 2.40 and not the hearing officer's original finding 2.42B.

The Board justified this deletion "Respondent's subjective believe [belief] about his representation is not material." DP 40. The ABA Sanction Standards require that any sanction determination start by evaluating the lawyer's mental state of negligence, knowledge or intent. Therefore Mr. Stansfield's subjective belief is a proper subject of factual findings.

Mr. Stansfield's testimony, and the fee agreement that Mrs. Urquilla signed, purportedly on behalf of Mrs. Chavez, stated: that Mr. Stansfield was hired to "probate the estate of Miguel Chavez and matters related thereto" both support the hearing officer's finding 2.40. EX #2.

Ivon Urquilla testified that her mother and she had signed a similar agreement regarding her father's estate. TR p. 179.

This substantial evidence shows the Board should not have deleted the hearing officer's finding 2.40. Mr. Stansfield's belief is material to determining his state of mind. The Court should reinstate the Hearing Officer's finding 2.40.

9. As a Matter of Law, the Board Erred in Adopting Finding 2.41 (Hearing Officer Finding 2.42A).

This finding states that the criminal proceedings and the Urquilla probate were "substantially related." As will be discussed in our argument that there was no violation of former RPC 1.9(a) the criminal prosecution and the probate were not substantially related as this term is used in the RPC. See Section 17 *infra*.

10. The Board Erred in Adopting Finding 2.42 (Hearing Officer Finding 2.42B).

Finding 2.42 states that the Urquillas asked Mr. Stansfield about a possible lawsuit against Mr. Vargas. This finding is incomplete. Ivon Urquilla testified that she and her mother asked about possibly suing Mr. Vargas because of her father's wrongful death. She admitted that Mr. Stansfield said that he could not help them with that kind of a suit: "We wanted him to see if there was any way that he could help us with this case. And he said that there wasn't anything he could do." TR p. 173-74.

Mr. Stansfield also testified that he was only hired to do the probates in order to obtain the insurance money. TR p. 136.

The conclusion that Mr. Stansfield violated former RPC 1.9(a) is premised, in part, on the possibility of a suit against Mr. Vargas being undermined by Mr. Vargas asserting that Mr. Urquilla was at fault for the deaths, this finding should show that Mr. Stansfield declined to represent the Urquillas for this type of claim.

11. The Board Erred in Adopting Finding of Fact 2.43 (Hearing Officer Finding 2.42C).

The Board adopted the hearing officer's finding that the interests of Mr. Vargas and the Urquilla estate were materially adverse. However, as discussed in our argument that Mr. Stansfield did not violate former RPC 1.9(a) there was no material adversity which would support a finding of violation of former RPC 1.9(a). See Section 17, *infra*. Therefore, the Court must strike this finding.

12. The Board Erred in Adopting Finding of Fact 2.46 (Hearing Officer Finding 2.45)

This finding states that Mr. Stansfield knew that because the Chavez claims had not been fully resolved and that because of his representation of Mr. Vargas in the criminal matter blame for the collision could have been placed upon Mr. Urquilla. This finding is contrary to the

law because Mr. Vargas could not escape his responsibility for his crimes by attempting to show that Mr. Urquilla had some fault.

This finding also ignores the substantial evidence that Mr. Stansfield only represented Mr. Vargas at arraignment. Even if, at trial, the defense had been permitted to try to defend Mr. Vargas and attach blame to Mr. Urquilla, Mr. Stansfield only represented Mr. Vargas at his arraignment.

13. The Board Erred in Deleting the Hearing Officer's Finding 3.1.

The Hearing Officer's Finding 3.1 stated: "After listening for approximately two days, arguments of counsel and review of the notes and exhibits, I find that Respondent had nothing but the best intentions in mind when representing any of the parties involved with the Association's Complaint." DP 21.

The Board struck this finding based upon the flawed assumption that: "Respondent's subjective state of mind is not relevant." DP 40. As discussed above the ABA Standards require all sanction analysis to begin by determining the lawyer's mental state. Thus Mr. Stansfield's subjective state of mind is relevant to this factor and the Court should reinstate this finding.

14. The Board Erred in Deleting the Hearing Officer's Finding 3.2

The hearing officer's finding 3.2 was that: "I find that Respondent's judgment could have been better in determining who he should be representing." The Board struck this finding because it was a "conclusion" that failed to cite any applicable legal standard. However, this finding is material to determination of Mr. Stansfield's mental state during the representation of the victims and Mr. Vargas. It is material to the ABA Sanction Standards analysis and the Court should reinstate this finding.

15. The Board Erred in Adopting the Hearing Officer's Finding that Mrs. Chavez was a "Vulnerable Victim."

This Court has stated that "[C]lients unfamiliar with the legal system, and clients who have cultural and language barriers are not vulnerable victims absent a showing of physical or mental disability or other characteristic that renders them 'particularly vulnerable.'" *In re Blanchard*, 158 Wn.2d 317, 332, 144 P.3d 286 (2006), quoting *In re Christopher*, 153 Wn.2d 669, 682, 105 P.3d 976 (2005)[additional citations omitted]. From August 29, 2003 until the first week of January 2006, Mrs. Chavez was represented by independent counsel, Mr. Carpenter, and another attorney Ms. Ruiz was the personal representative. When Mr. Stansfield sent Mrs. Chavez his letters she never responded.

Other than the letters Mr. Stansfield had no direct contact with Mrs. Chavez. She could not have been a vulnerable victim under the Court's definition. In *Blanchard* this Court rejected the idea that an older person was a vulnerable victim without some evidence of a physical or mental disability and also found no vulnerability because the older person's son accompanied her to the meetings with the attorney. 158 Wn.2d at 332-33.

Because she had two lawyers assisting her, Mrs. Chavez's interests were more protected than the elderly person in *Blanchard*. Mrs. Chavez was not a vulnerable victim and the Court must reject the application of this aggravating factor.

16. The Board Erred in Finding Only One Mitigating Factor under ABA Standard 9.32.

The hearing officer and the Board found that the absence of a prior disciplinary record was the sole ABA Standards mitigating factor. DP 22, 40-41, Standard 9.32 lists two other mitigating factors applicable to this matter: full and free disclosure to disciplinary board or cooperative attitude towards these proceedings Standard 9.32(e) and character or reputation. Standard 9.32(g).

Even though Ms. Dorney failed to self report and continued to insist that she had not committed any misconduct, this Court recently deferred to the Board's application of cooperation with disciplinary

proceedings as a mitigating factor. *In re Dornay*, No. 200, 315-0, slip opinion p. 19 (June 21, 2007). This record shows that Mr. Stansfield fully cooperated and the Court should consider this additional mitigating factor.

Mr. Stansfield also testified about his community service as a Rotary member, and his previous involvement with Habitat for Humanity and other volunteer projects. TR p. 336-37. His community service is evidence of his good character.

Also the hearing officer's findings which the Board deleted and the Court should reinstate demonstrate this mitigating factor. The hearing officer found that Mr. Stansfield acted compassionately when he undertook the representation of the families. Finding 2.9. He stated that Mr. Stansfield's actions showed that no good deed goes unpunished and that his motives were to get a good resolution for the families. Finding 2.12. The hearing officer found that Mr. Stansfield represented the Urquillas professional manner and he was more than fair to the family Finding 2.13. He also said that Mr. Stansfield had only the "best intentions." Finding 3.1

These findings show that Mr. Stansfield character should be considered as an additional mitigating factor.

17 The Board's Conclusion that Mr. Stansfield's Representation of Francisco Vargas Violated Former RPC 1.9(a) was Error

The Board concluded that Mr. Stansfield violated former RPC 1.9(a) because the Urquilla probate and the Vargas criminal proceeding were "substantially related" and Mrs. Urquilla's interests and Mr. Vargas's interests in the criminal proceeding were "materially adverse."⁶

The Board concluded that because Mr. Stansfield represented the Urquilla estate and after the probate was completed he appeared at Mr. Vargas's arraignment he violated former RPC 1.9(a).

An analysis of whether Mr. Urquilla's probate and the criminal case are the "same" matter or whether the two matters are "substantially related" and an analysis of whether Mr. Vargas's interests were "materially adverse" to Mrs. Urquilla's interests show that, as a matter of law, the Board incorrectly concluded that Mr. Stansfield violated RPC 1.9(a).

The probate proceeding and the criminal proceeding arose from the same accident but they are not the "same" matter. The issues in a civil probate case, what property is part of the estate and the issues in a criminal defense case, guilt or innocence are not the same.

⁶ There is no allegation that Mr. Stansfield violated former RPC 1.9(b) which prohibited the use of a former client's confidential information to the former client's detriment.

Since the probate and the criminal defense are not the same matter, the remaining issues are: (1) whether Mr. Stansfield's subsequent representation of Mr. Vargas meant that he represented a current client in a matter "substantially related" to his representation of his former client, Mrs. Urquilla, as the personal representative of her husband's estate, and (2) whether when Mr. Stansfield began representing Mr. Vargas there was material adversity between his former client and his current client.

a. The Board Incorrectly Concluded that There Was Material Adversity

The Board concluded that Mr. Vargas's interests and Mrs. Urquilla's interests were materially adverse. DP 39.

Former RPC 1.7 is used to analyze whether there is material adversity. The comments to former MRPC 1.7 specifically state that a lawyer's advocacy involving a change in legal position is not a violation of RPC 1.7.⁷ "A lawyer may represent parties having antagonistic positions on a legal question that has arisen in different cases, unless representation of either client would be adversely affected." Former ABA Annotated Model Rules rule 1.7, cmt. 9, 93 (4th ed. 1999).

If lawyers can simultaneously represent two clients with antagonistic views on a legal question, a lawyer can, while representing a

current client, also assert an antagonistic position to a former client. The only arguably antagonistic position Mr. Stansfield took was the routine and usual not guilty plea at Mr. Vargas's arraignment.

Other courts have addressed this issue when deciding whether there was a conflict of interest disqualifying defense counsel from representing a current client. The issue arose because at the time the defendant allegedly murdered the victim, another lawyer in the same law firm represented the deceased on unrelated charges.

A New Jersey intermediate appellate court upheld a trial court's denial of the state's motion to disqualify defense counsel based upon a former client conflict of interest. *In re Interest of S.G.*, 348 N.J. Super. 77, 791 A.2d 285 (2002), *reversed on other grounds*, 175 N.J. 132, 814 A.2d 612 (2003). S.G. was a juvenile being tried as an adult for second degree murder. The state alleged that on August 1, 2001 he had fired a gun into a crowd striking the victim, Hilton, who died from his wound on August 8, 2001. *Id.* at 81. On August 14, 2001 defense counsel entered an appearance for S.G. *Id.* When the shooting occurred another lawyer in the same firm represented Hilton on unrelated drug charges. *Id.* at 82.

⁷ This Court has stated that the Comments to the ABA Model Rules are useful in analyzing the policies behind the RPC. *In re Carmick*, 146 Wn.2d 582, 48 P.3d 311 (2002), quoting, *State v. Hunsaker*, 74 Wn. App. 38, 46, 873 P.2d 540 (1994).

The appellate court analyzed the possibility that some confidential information defense counsel learned while representing Hilton could be used to further S.G.'s defense. The court determined that this could not happen because there was no information the state could have obtained from Hilton or his family that would be relevant to the murder charge. *Id.* at 86-87. The court also found no direct adversity: "In a criminal trial, because the victim does not have standing to intervene, it is the State's interests that are directly at issue. Accordingly the [defense] firm's representation of S.G. is not directly adverse to the victim's interests. Therefore an actual conflict does not exist." *Id.* at 87.

The intermediate appellate court also observed that the issue of disqualifying counsel involved the defendant's (who had waived any conflict), Sixth Amendment right to counsel of his choice. *Id.* at 91.

The New Jersey Supreme Court granted review and reversed and disqualified the defense firm based upon the existence of a joint representation conflict violating RPC 1.7. *In re the Interest of S.G.*, 175 N.J. 132, 134-35, 814 A.2d 612 (2003). The court held that the defense firm remained counsel of record on Mr. Hilton's unrelated the drug charges until August 30, 2001 when the trial court formally dismissed the charges. "We hold that, during the period of dual representation [from August 14 – 30, 2001] that occurred here, the interests of the two clients

were adverse, resulting in a prohibited actual conflict. Accordingly the firm may not proceed with the defense, notwithstanding the defendant's desire to consent to the representation." *Id.* at 135.

Under Washington law a client's death deprives the lawyer of any authority to act, even if the lawyer does not know the client has died. *Vincent v. Vincent*, 16 Wn. App. 213, 554 P.2d 374 (1976)[even though the lawyer did not know his client had died the court found the lawyer acted "without the client's authority." *Id.* at 219]. *See also, Stella Sales v. Johnson*, 97 Wn. App. 11, 18, 985 P.2d 391 (1999), *citing, Bingham v. Zolt*, 683 F. Supp. 965, 976 (S.D.N.Y. 1988)[death of the client terminates the attorney client relationship]

A victim or the victim's family has no standing to intervene in a criminal prosecution. Therefore, the victim's and the criminal defendant's interests are not adverse. There is neither material adversity nor conflict of interest under former RPC 1.9(a). If there is no conflict when the defense firm represented the murder victim there certainly can be no conflict when the lawyer formerly represented only the victim's widow, Mrs. Urquilla, to probate the victim's estate and recover UIM benefits. The widow lacked any personal knowledge of any of the facts about the events which resulted in her husband's death, and the charges against Mr. Vargas.

Federal courts dealing with conflict of interest allegations in collateral attacks on criminal convictions have found no conflict of interest which demonstrated that the defendant received ineffective assistance of counsel when the defense lawyer had previously represented the murder victim. *E.g. Dixon v. Quarles*, 627 F. Supp. 50 (E.D.Mich.), *aff'd*, 781 F.2d 534, 535 (6th Cir. 1985), *cert. denied*, 479 U.S. 935, 107 S.Ct. 411, 93 L.Ed. 2d 362 (1986)). Other federal and state courts have reached similar conclusions. See Appendix A for citations.

Even if Mr. Stansfield had continued to represent Mr. Vargas until his sentencing, there was no material adversity between his former client's interests and the current client's interests. Former RPC 1.9(a) did not prohibit Mr. Stansfield's representation of Mr. Vargas.

The Board ignored the limited scope of Mr. Stansfield's representation. He withdrew after the arraignment.

The Board appears to have concluded that there was material adversity because Mr. Stansfield's representation of Mr. Vargas could have resulted in Mr. Urquilla being blamed for the accident. Finding 2.44. Because the Chavez claim had not been resolved, the Board found a potential conflict between the Chavez estate and the Urquilla estate. The Board believed that because Mr. Chavez's estate might have a claim

against the Urquilla estate Mr. Stansfield violated former RPC 1.9(a).
Finding 2.44.

The law shows that this concern does not exist.. The Court of Appeals affirmed a defendant's conviction for one count of vehicular homicide and two counts of vehicular assault.⁸ *State v. Roggenkamp*, 115 Wn.2d 927, 64 P.3d 92 (2003), *aff'd*, 153 Wn. 2d 614, 106 P.3d 196 (2005). Roggenkamp claimed that contributory negligence based upon the other driver's .13 blood alcohol level was a defense. As a matter of law contributory negligence is not a defense to negligent homicide. 115 Wn. App. at 954, *citing*, *State v. Judge*, 100 Wn.2d 706, 718, 675 P.2d 219 (1984)[internal citations omitted].

Contributory negligence would only have permitted Roggenkamp or Mr. Vargas to avoid criminal liability if that contributory negligence was an intervening cause: a force that operates to produce harm after the defendant has committed the act or omission. 115 Wn. App. at 945 n. 50, *citing*, *State v. Souther*, 100 Wn. App. 701, 710, 998 P.2d 350 (2000)[internal citation omitted]. In order to be an intervening force the force must be set in motion at an earlier time and operate after the actor has lost control of a situation and the actor neither knew nor should have

⁸ Roggenkamp was convicted under the same statute that Mr. Vargas was charged under: RCW 46.61.520 Ex.48.

known of its existence at the time of his negligent conduct. *Id.*, at n. 51, quoting, Restatement (Second) of Torts §441(a), comment a.⁹

The May 9, 2003 accident report demonstrates that there is no basis for Mr. Vargas to avoid criminal liability by arguing that Mr. Urquilla's actions were an intervening force. As a matter of law Mr. Urquilla's conduct was not an intervening force. Mr. Urquilla took no action before Mr. Vargas ran the stop sign that would be an intervening force. Mr. Urquilla had the right of way.

There was no legal basis for the Board's conclusion that there was material adversity because the criminal trial might result in the Chavez making a claim against Mr. Urquilla's estate. The lack of any basis for this speculation is demonstrated by the hearing officer's finding that Mr. Vargas was the sole cause of the accident. Findings 2.3(a finding that the Court should restore).

There are no other facts supporting the Board's conclusion that there was material adversity. The Wyoming Supreme Court in *Simpson Performance Products, Inc. v. Horn*, 2004 WY 69, 92 P.3d 283 (2004) found no material adversity and no RPC 1.9 violation.

⁹ In affirming Roggenkamp's conviction the Supreme Court stated that it was entirely in agreement with the Court of Appeals opinion and that opinion's reasoning. 153 Wn.2d at 630-31.

Simpson, a corporation, hired attorney Horn to investigate and determine if the corporation should file suit against NASCAR for claiming that one of Simpson's products, a seat belt, had failed and caused the death of a driver. 92 P.3d ¶2. After the investigation was completed the corporation's majority shareholder decided not to pursue litigation. *Id.* ¶9.

In response to the decision not to sue, Mr. Simpson, the company's founder and a minority shareholder resigned. He hired Horn to individually sue NASCAR for him. *Id.* ¶10. When Horn sued the corporation for his fee balance earned during the investigation, Simpson defended by alleging the Horn's representation of Mr. Simpson violated RPC 1.9 and he was not entitled to an additional fee. *Id.* ¶1.

The Wyoming Supreme Court rejected this argument. The court found no material adversity because material adversity is unclear in situations where the former client is not directly involved in the litigation but may somehow be affected by it. The court said that if the current representation may cause some identifiable detriment to the former client there is material adversity. In order to determine material adversity, the Court looked to cases involving RPC 1.7(a) conflicts. The Court concluded that: "[W]e must make a case-specific inquiry to determine the degree to which the current representation may actually be harmful to the former client. This fact intensive analysis focuses upon whether the

current representation may cause legal, financial, or other identifiable detriment to the former client.”.... 92 P.3d ¶20, *quoting, State ex rel. McClanahan v. Hamilton*, 189 W. Va. 290, 430 S.E.2d 569, 573 (1993)[other citations omitted].

The *Simpson* court also pointed out that it was also concerned “whether the attorney’s exercise of individual loyalty to one client might harm the other client or whether his zealous representation will induce him to use confidential information that could adversely affect the former client. *Id.* This case involves neither of these issues.

The *Simpson* court rejected the corporation’s claim that Mr. Simpson’s lawsuit would jeopardize their business relationship with their biggest customer, NASCAR, and found that Horn’s representation of Mr. Simpson was not materially adverse to the corporation. *Id.* ¶21.

Even if the Board’s potential conflict between the Chavez estate and Mrs. Urquilla existed, a potential conflict does not mean that the lawyer cannot represent a client. “A possible conflict does not itself preclude the representation.” ABA Annotated Model Rules of Professional Conduct, rule 1.7, cmt 4 p. 92 (4th ed. 1999).

The Board also found Mr. Stansfield’ representation of Mr. Vargas at the arraignment and the entry of a not guilty plea showed material adversity because Mr. Stansfield had previously told the insurance

company that Mr. Vargas was totally at fault. While true his prior statement was advocacy for a client, the Estate. Even the deputy prosecuting attorney admitted Mr. Stansfield' statement to the insurance company neither bound Mr. Vargas nor admitted his guilt. TR p. 237, ls. 12 -18.

The Board incorrectly concluded that Mr. Stansfield's representation of Mr. Vargas could have harmed Mrs. Urquilla. Mrs. Urquilla's recovery of policy limits was predicated upon Mr. Vargas being the at fault driver. However, by the time Mr. Stansfield began representing Mr. Vargas she had received the insurance funds. Therefore, even if Mr. Vargas, while represented by Mr. Stansfield, had been acquitted, that verdict would not have interfered with her ability to recover the insurance funds, and the insurance company had stated that Mr. Vargas was at fault. EX. #8.

While the three year wrongful death statute of limitations had not expired an acquittal could not have a serious impact upon Ms. Urquilla's legal rights. The police report shows that Mr. Vargas had no perceptible chance of acquittal. Even if Mr. Vargas was acquitted, that verdict would not prevent a successful civil suit against Mr. Vargas. In order to prevail as the plaintiff, Mrs. Urquilla would only have to meet the lower burden of proof in civil cases, preponderance of the evidence, and not the beyond a

reasonable doubt burden imposed upon the state in criminal cases. An acquittal would not and could not bar a civil suit and it would not permit Mr. Vargas to escape tort liability for Mr. Urquilla's death.

Former RPC 1.9 was not violated because Mr. Stansfield alleged, while representing Mrs. Urquilla, that Mr. Vargas was the at fault driver, but at the arraignment, Mr. Vargas entered a not guilty plea. Mr. Stansfield stopped representing Mr. Vargas after the arraignment. Every criminal defendant has a constitutional presumption of innocence and the state must prove guilt, a not guilty plea at arraignment only results in a potential trial. Criminal defendants rarely plead guilty at arraignment. This plea does not show the required material adversity.

b. The Urquilla Probate and the Criminal Defense Were Not "Substantially Related"

A lawyer only violates former RPC 1.9(a) if the representation involves material adversity and there is a "substantial relationship" between the prior representation (probating the Urquilla estate) and Mr. Stansfield's limited representation of Mr. Vargas.

The Board incorrectly found that the two representations were substantially related. Finding 2.4.

The Legal Background discussion of former ABA Model Rule RPC 1.9 explains "substantial relationship": "The subject matter of two

causes of action are 'substantially related' if the factual and legal issues are so similar that there is a genuine threat that any confidential information revealed in the previous case could be used against the former client in the present case." ABA Annotated Model Rules of Professional Conduct, 145-46 (4th ed. 1999).

Mr. Stansfield's representation of Mr. Vargas did not, and had he continued, would not involve any legal action against Mrs. Urquilla. His representation of Mr. Vargas could in no way prejudice her interests. Mrs. Urquilla was not a party to the criminal proceeding. She had no first hand knowledge of the events that caused her husband's death and therefore could not testify at the criminal proceeding. Thus, Mr. Stansfield's representation of Mr. Vargas could not involve the possible use of the Estate's confidential information during cross examination of Mrs. Urquilla. She had no personal knowledge of the accident and would not have been called as a witness.

There was also no possibility that Mr. Stanfield could have used confidential information if Ms. Urquilla exercised her right to make a victim's impact statement at sentencing. There is nothing in the statutory scheme allowing victim's impact statements that permits a criminal defense counsel to cross examine a person making a victim's impact statement. RCW 9.94A.500.

If Mr. Stansfield's representation had continued, he also could not have used his former client's confidential information to help Mr. Vargas avoid a restitution obligation. By statute, courts must, absent extraordinary circumstances, impose a restitution requirement on any convicted defendant regardless of whether the defendant is sentenced to prison. RCW 7.69.030. Restitution obligations incur interest at the same rate as civil judgments. RCW 9.94A.750 (8).

Mr. Stansfield represented Mr. Vargas only at the first appearance, his arraignment on the criminal charges arising out of the motor vehicle accident which caused Mr. Urquilla's and Mr. Chavez's death. The only substantive issues at that hearing were the entry of Mr. Vargas's plea and whether Mr. Vargas should be released on personal recognizance or bail, and if so the amount of bail. There was no possibility that at the arraignment, Mr. Stansfield could have used any confidential information gained while probating Mr. Urquilla's estate to advance Mr. Vargas's interests.

Washington authority defining "substantial relationship" is sparse because usually the substantial relationship is presumed. *State v. Hunsaker*, 74 Wn. App. 38, 42, 873 P.2d 540(1994)[citations omitted].

Most Washington cases analyzing whether there was a substantial relationship between the prior and current representation involved a current client taking direct action, filing suit, against a former client.

For example, in *Teja v. Saran*, 68 Wn. App. 793, 846 P.2d 1375, review denied, 122 Wn.2d 1008 (1999), a former client alleged that he previously consulted with the opposing lawyer about a possible claim against the defendant, Saran. 68 Wn. App. at 794. The Court of Appeals found that Teja had an attorney client relationship with the lawyer and that the lawyer should have been disqualified. *Id.* at 795-96. The Court of Appeals affirmed the defense judgment because Teja had not demonstrated that the conflict prejudiced him. *Id.* at 801-02.

State v. Hunsaker, 74 Wn. App. 38, 873 P.2d 540 (1994) involved the issue of whether a public defender could continue to represent Hunsaker when it appeared that one of the State's witnesses would be a former client of the same public defender office. 74 Wn. App. at 42. The Court of Appeals reversed the trial court's order prohibiting the State from calling that witness because the record failed to demonstrate that there was either a substantial relationship between the two representations or that the current client and the former client's interests were materially adverse. 74 Wn. App. at 46.

The *Hunsaker* Court noted that the only information about the former representation was that the witness had been convicted of custodial assault. *Id.* Based upon this limited information, the Court found the two matters totally unrelated. *Id.* The Court also noted that even if the matters were substantially related there had to also be material adversity. The Court found no such adversity and distinguished *State v. Hatfield*, 51 Wn. App. 408, 754 P.2d 136 (1988) because in that case the court found that the defendant's (current client's) interests were adverse to the former client who was to be called as a State's witness because both had an interest in blaming the other for the charged assault. 74 Wn. App. at 46, n.6.

Mr. Stansfield's representation of Mr. Vargas did not, and had he continued, could not involve any legal action against Mrs. Urquilla. His representation of Mr. Vargas would in no way prejudice her interests. While the Board believed that there was a potential that Mr. Vargas's defense might assist the Chavez estate in suing Mr. Urquilla's estate, as a matter of law, Mr. Urquilla's conduct was irrelevant to Mr. Vargas's defense. Mrs. Urquilla had no personal knowledge about any of the facts needed to prove Mr. Vargas's death. She would not be a witness at trial. Mr. Stanfield's representation of Mr. Vargas would never involve cross examination of his former client.

Substantial relationship is a term of art involving a three step factual analysis to determine whether there is a substantial relationship between two matters. *Hunsacker*, 74 Wn. App. at 44, *quoting*, Wolfram Modern Legal Ethics §7.4.3 at 370. First, the scope of the facts involved in the former representation must be reconstructed and the scope of the facts involved in the representation of the new client must be projected. *Id.* The facts involved in the first representation involved Mr. Urquilla's death, his insurance claim, and his estate matters. The second representation involved Mr. Urquilla's death, but that is the end of the similarity between the facts in the two representations. The other facts which might be involved in the criminal case involve Mr. Vargas's actions and his criminal liability for his conduct, as well as any defenses available to him.

The second step of the fact analysis is to assume that the lawyer obtained confidential client information about all the facts within the scope of the former representation. *Id.* The third step is based upon this assumption. As the third step the court must determine whether any factual matter in the former representation is so similar to any material factual matter in the subsequent representation that a lawyer would consider it useful in advancing the interests of the second client. *Id.*

There is no factual matter involved in the probate that Mr. Stansfield could have used to Mr. Vargas's advantage.

c. The Board Should Not Have Considered the Urquillas Distress When They Saw Mr. Stansfield Appear as Mr. Vargas's Attorney

The Board's conclusion about a violation of former RPC 1.9(a) states that the Urquillas were shocked to see Mr. Stansfield appear at the arraignment. DP 57. While they may have been shocked this fact is irrelevant. A former client does not have complete control over the clients a lawyer may represent after the attorney no longer represents that client. As the New Jersey Intermediate Appellate Court noted a defendant has a Sixth Amendment right to counsel of the defendant's choice.

The Board's mention of the Urquilla's shock introduces a factor which would have been relevant under the now largely discredited "appearance of impropriety" analysis. As a Comment to ABA MRPC 1.9 states this concept creates problems. The concept is so broad that it could include any new attorney client relationship that caused the former client concern. Using this approach would mean that the subjective judgment of the former client would control a lawyer's future representation.

Appearance of Impropriety is also not defined and is such a general concept that it fails to provide guidance about when a lawyer can

accept new representation. ABA Annotated Model Rules, R 1.9, cmt 5, 138 (4th ed. 1999).

d. Mr. Stansfield's Actions on Behalf of Mrs. Chavez Were Di Minimis

Mr. Stansfield has never denied that he sent letters to the insurance company or that he had Ms. Urquilla sign documents as the personal representative of the Chavez estate. At the beginning of the relationship Mr. Stansfield could reasonably rely upon Mrs. Urquilla's representations that Mr. Chavez's widow had stated that Mrs. Urquilla was authorized to act on her behalf and probate Miguel Chavez's estate.

He prepared probate documents for the widow's signature and sent them to her in Guatemala. His cover letter gave her the option of having Mrs. Urquilla act for her or for her to act as the personal representative of her husband's estate. When he received no response to his first letter he sent a second letter inquiring further. He received no response.

While waiting for a response, he provided Farmers with a copy of the accident report involving Mr. Urquilla and Mr. Chavez. When the insurance company indicated that it might close his file, Mr. Stansfield truthfully told them that he was waiting for the probate documents to be returned from Guatemala. Ex. #29.

Mr. Stansfield was entitled to rely upon Mrs. Urquilla's representations until he had information which contradicted those representations. Once Mr. Stansfield had that information he stopped all activities involving the Chavez estate.

The Board's conclusion that Mr. Stansfield violated former RPC 1.2(f) appears to be based upon Mr. Stansfield's conduct after he was notified that Mr. Carpenter was going to handle the Chavez probate. The Board concluded that Mr. Stansfield had no right to file an attorney's lien. However, when he filed the lien, he believed that he had performed work for Mrs. Chavez at her indirect request. The lien statute declares that a lawyer shall have a lien for the attorney's compensation and that is what Mr. Stansfield did.

He was willing to compromise his claim, but Mr. Carpenter never responded to this request for an offer. In April 2004 the lawyer personal representative of the Chavez estate denied that Mr. Stansfield was entitled to any funds. Since Mr. Stansfield failed to file suit against the estate, his right to compensation was terminated 30 days after the denial of the claim. However, Mr. Carpenter incorrectly believed that he had to wait two years before Mr. Stansfield's claim expired. TR p. 265. l. 18 – p. 266, l.11.

Mr. Stansfield only learned that Mr. Carpenter was still holding funds in November 2005 and when he learned that he prepared a release of lien.

Former RPC 1.2(f) provides: "A lawyer shall not willfully purport to act as a lawyer for any person without the authority of that person."

Two lawyer discipline cases upheld a finding that a lawyer had willfully appeared as an attorney for a party in an action or proceeding without authority. *In re Greenlee*, 98 Wn.2d 786, 658 P.2d 1 (1983) and *In re Vetter*, 104 Wn.2d 779, 711 P.2d 284 (1985). These cases show that willful conduct requires that the lawyer have some knowledge of facts which may not be disregarded. In May, 2003 Mr. Stansfield disregarded no facts in accepting her representations about his client's authority to represent the Chavez estate.

Mr. Stansfield's actions regarding the Chavez estate consisted of Mr. Stansfield telling the insurance company he represented the Chavez estate and drafting estate documents. He never filed any probate and he stopped any actions on behalf of the Chavez estate after Mr. Carpenter contacted him.

e. ABA Standards Analysis

While it is our position that the WSBA failed to prove Count 2, we must address the mandatory ABA Sanction Standards .

The WSBA failed to prove that Mr. Stansfield violated former RPC 1.9(a). For the sake of argument if the Court finds a violation, Mr. Stansfield when faced with a decision whether to represent a client the next business day decided to agree to represent the client. But he withdrew after that limited representation. His mental state was negligence because he failed to adequately determine the identity of the victims.

Thus Standard 4.34 applies because Mr. Stansfield's mental state was negligence, and his limited representation caused his former client the estate and the personal representative no harm. An admonition is, if the Court finds a violation, the appropriate sanction.

Because there is no former RPC 1.2(f) in the ABA Model Rules, there is no presumptive sanction standard. However it appears that Standard 7.1 is applicable. That Standard states that a lawyer who negligently violates a duty owed as a professional should receive either a Reprimand or an Admonition. Standards 7.3 & 7.4. Mr. Stansfield was negligent in assuming that Mrs. Urquilla was truthful when she told him that Mrs. Chavez wanted Mrs. Urquilla to handle the Chavez estate. He attempted to verify this statement but Mrs. Chavez never responded. About two months after he tried to get Mrs. Chavez to respond he was told

that Mr. Carpenter was going to handle the estate. Mr. Stansfield stopped any work on behalf of the Chavez estate.

We expect that the WSBA will argue that his filing of a lien shows knowledge but when he filed the lien he did not know that he had never had authority to act. He believed that he had had authority and that he should be paid.

His lien caused Mr. Carpenter to request that the insurance company reissue two checks so that funds could be disbursed. This delayed disbursement for two months. Thus Mrs. Chavez suffered some harm.

However by May 2004 his claim had been extinguished and the lien was invalid. Mr. Stansfield did not know that the check remained in Mr. Carpenter's safe until November 2005 when he immediately released the lien. Thus the lengthy delay in transmitting the \$5,000 to Mrs. Chavez was caused not by the lien but by Mr. Carpenter's failure to make any attempt to resolve the lien issue. This unfortunate error is not Mr. Stansfield's sole responsibility and does not warrant a finding that suspension is the presumptive sanction.

There are two aggravating factors and three mitigating factors which balance each other and do not warrant a deviation from the presumptive sanction of a Reprimand as set out in Standard 7.3.

1. A Six Month Suspension is a Disproportionate Sanction.

This Court recently imposed a 60 day suspension on a lawyer who actively represented a client in litigation where a former client was the opposing party. That lawyer never obtained a waiver of the former client conflict. *In re Carpenter*, 160 Wn.2d 16 (2007). If actual adverse representation of a former client combined with a prior current client conflict warrants only a 60 day suspension, the Boards recommended six month sanction is disproportionate and should be reduced to a Reprimand and an Admonition (assuming that the Court determines that Mr. Stansfield violated former RPC 1.9(a).

F. Conclusion

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

Dated July 25, 2007

Respectfully submitted,



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Appendix A

Federal Cases Denying Relief Based Upon a Conflict of Interest

Cases Cited By Intermediate Appellate Court in *In re Interest of S.G.* 348 N.J. Super. at 93

Mickens v. Greene, 74 F. Supp.2d 586, (E.D.Va. 1999), *judgment aff'd, sub nom, Mickens v. Taylor*, 240 F.3d 348 (4th Cir. 2001), *aff'd on other grounds*, 535 U.S. 162, 122 S.Ct. 1237 (2002).

Crisp v. Duckworth, 743 F.2d 580 588 (7th Cir. 1984) (finding no conflict where defense counsel previously represented murder victim in unrelated criminal action), *cert. denied*, 469 U.S. 1226, 105 S.Ct. 1221, 84 L.Ed. 2d 361 (1985).

Kirkpatrick v. Butler, 870 F.2d 276, 284 (5th Cir. 1989) (finding no conflict where defense counsel had friendship with, and had in the past represented, members of murder victim's family), *cert. denied*, 493 U.S. 1051, 110 S.Ct. 854, 107 L.Ed. 2d 848 (1990).

Moseley v. Scully, 908 F. Supp. 1120 (E.D.N.Y. 1995) (finding no actual conflict where counsel previously represented murder victim on unrelated charges), *aff'd*, 104 F.3d 356 (2nd Cir. 1996).

Similar State Court Decisions Cited in *In re Interest of S.G.* 348 N.J. Super. at 93 - 94

Catlett v. State, 962 S.W.2d 313 (Ark. 1998) (no actual conflict where defense counsel was high school classmate of victim's father, whom defense counsel had not seen for thirty years).

Ney v. State, 489 S.E.2d 509 (Ga.Ct.App.), reconsid. denied, (1997), cert. denied, (1998) (no actual conflict where defense counsel was related by blood to victim where defense counsel conducted thorough cross examination of victim);

State v. Wood, 967 P.2d 702 (Idaho 1998) (no actual conflict in murder prosecution where two members of defense counsel's law firm had personal association with victim's family), *cert. denied*, 526 U.S. 1118, 119 S.Ct. 1768, 143 L.Ed. 2d 798 (1999);

Ex Parte Bell, 501 So.2d 519 (Ala.App. 1987) (no actual conflict where defendant in murder prosecution represented by attorneys who had personally known victim).