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Supreme Court No. 200,479-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE DISCIPLINARY PROCEEDING AGAINST

MARK E. STANSFIELD,

Lawyer (Bar No. 11356).

**ANSWERING BRIEF OF THE
WASHINGTON STATE BAR ASSOCIATION**

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Appendix A – Exhibit 46 (Letter dated January 22, 2004 from Mr.
Stansfield to Mr. Carpenter)

Appendix B – ABA Standard 4.3

Appendix C – ABA Standard 7.0

I. COUNTERSTATEMENT OF THE ISSUES

1. Under former RPC 1.2(f), a lawyer may not willfully purport to act as a lawyer for any person without obtaining authority from that person. Here, Mr. Stansfield informed various parties that he represented the estate of Miguel Chavez, charged over \$2,300 to the estate and filed an attorney's lien against it, without ever being contacted by the decedent's spouse or family. Was the Disciplinary Board correct in concluding that he violated RPC 1.2(f)?

2. Under RPC 1.9(a), a lawyer who has represented a client in a matter may not represent another person in the same or a substantially related matter if the current and former client's interests are materially adverse, unless the former client consents after consultation. Here, Mr. Stansfield obtained an insurance settlement and probated the estate of Mr. Urquilla after his death in an auto accident caused by Mr. Vargas, then represented Mr. Vargas in the ensuing criminal proceedings without informing Mrs. Urquilla. Was the Disciplinary Board correct in concluding that Mr. Stansfield violated RPC 1.9(a)?

3. Under the ABA Standards, the presumptive sanction for knowingly representing conflicting interests is suspension. The Hearing Officer and Disciplinary Board found Mr. Stansfield acted knowingly when he violated former RPC 1.2(f) and RPC 1.9(a). Should the Court

affirm the Board's recommendation of a six-month suspension, the presumptive minimum?

II. COUNTERSTATEMENT OF THE CASE

A. PROCEDURAL FACTS

On February 7, 2005, the Washington State Bar Association (Association) filed a three-count Formal Complaint against Mr. Stansfield. Bar File (BF) 2; Clerk's Papers (CP) 1-5. On April 28, 2005, Mr. Stansfield filed his Answer to the Formal Complaint. BF 10; CP 6-11.

After the Hearing Officer granted three requests by Mr. Stansfield to postpone the hearing date, the case went forward on January 31 and February 1, 2006. On May 2, 2006, the Hearing Officer filed his Findings of Fact, Conclusions of Law and Recommendation. CP 65; Decision Papers (DP) 1-13. On June 6, 2006, he filed Amended Findings of Fact, Conclusions of Law and Recommendation, finding two counts of misconduct were proven by a clear preponderance of the evidence. DP 14-23.¹

First, the Hearing Officer found that by willfully purporting to act as a lawyer for a person without the authority of that person, Mr. Stansfield violated former RPC 1.2(f)² (Count 1); BF 71; DP 22. Second,

¹ The Association had withdrawn Count 3.

² The RPC were amended effective September 1, 2006; the citations here are to the provisions in effect at the time of the misconduct.

he found that by representing Francisco Vargas, Jr. (Mr. Vargas) in a matter substantially related to one in which he represented a former client (Rosa Urquilla) with materially adverse interests, Mr. Stansfield violated RPC 1.9(a). (Count 2); BF 71; DP 20, 23.3. The Hearing Officer recommended that Mr. Stansfield be reprimanded for Count 1 and admonished for Count 2. DP 23.

Mr. Stansfield appealed. BF 72; DP 25-26. The Disciplinary Board heard oral argument on January 19, 2007. BF 88. On March 15, 2007, the Board issued a decision striking some of the Hearing Officer's Findings of Fact, modifying others, and inserting several new Findings of Fact. DP 32-44. By a vote of 8 to 3, the Board ordered that Mr. Stansfield be suspended for six months. BF 90; DP 32, 43. The three dissenting members would have imposed a reprimand for each of the two counts, required restitution under the first count, and disgorgement of the fee under the second count, plus interest. BF 89; DP 27-31. On April 2, 2007, Mr. Stansfield filed a notice of appeal. BF 91.

B. SUBSTANTIVE FACTS

On May 9, 2003, a car driven by Mr. Vargas sped through a stop sign in Quincy, Washington and struck a pickup truck driven by Miguel Urquilla (Mr. Urquilla), in which Miguel Chavez (Mr. Chavez) was a

³ The Association withdrew Count 3.

passenger. FFCL 2.2; EX 1. Both Mr. Urquilla and Mr. Chavez were killed. EX 1. Mr. Vargas was 27 years old, under the influence of alcohol, and uninsured. FFCL 2.3, 2.5.; TR 39; EX 8, 21.

1. The Urquilla Estate

On or about May 20, 2003, Mr. Urquilla's widow, Rosa, and her daughter, Ivon, met with Mr. Stansfield. FFCL 2.4. Mrs. Urquilla did not speak English, so Ivon acted as interpreter. TR 37. They discussed obtaining uninsured motorist (UIM) benefits from Mr. Urquilla's insurance company and the need to probate his estate and have a personal representative appointed in order to collect the benefits. The Urquillas also expressed interest in bringing a wrongful death action against Mr. Vargas. FFCL 2.4, 2.5, 2.6, 2.42B; TR 172-74; EX 8, 51. Mr. Stansfield had Mrs. Urquilla sign a fee agreement. FFCL 2.6; DP 33. He advised her not to pursue a wrongful death claim, and proceeded to file the UIM claim with Mr. Urquilla's insurer. FFCL 2.6; TR 42, 173-74. On June 3, 2003, he filed probate documents for Mr. Urquilla's estate in Grant County Superior Court. EX 44.

Before making any payments on Mr. Urquilla's policy, the insurance company required full police and motor vehicle accident reports to verify the facts of the accident. TR 141-43; EX 8, 19. After Mr.

Stansfield gathered and sent the documentation, the company promptly issued payment. TR 296-300; EX 18, 21, 44, 50.

On September 4, 2003, Mr. Stansfield filed notice that probate of the estate had been completed. FFCL 2.13; EX 34, 35.

2. The Chavez Representation

Mr. Chavez's widow, Olga, lived in rural Guatemala and became very ill upon hearing of her husband's death. FFCL 2.4, 2.8; TR 185-86, 210, 215-16. She had seven children, was desperately poor, had only one year of schooling, was illiterate, and understood no English. TR 209, 212, 215, 248. Because Mrs. Chavez did not have the means or wherewithal to probate her husband's estate, Mrs. Urquilla wanted to make a claim against Mr. Urquilla's UIM coverage for the benefit of the Chavez family. FFCL 2.7, 2.8; TR 168-71, 182-83.

Mr. Stansfield had Mrs. Urquilla sign a fee agreement for the Chavez estate on May 21, 2003, as well as releases for Mr. Chavez's medical records and other information. FFCL 2.5, 2.6; TR 153-57; EX 2, 6. On one of the documents, Mr. Stansfield wrote "Personal Representative" after Mrs. Urquilla's signature, and on another he had Ivon write the same designation, although no probate had been filed and no personal representative had been appointed. TR 75-76, 78, 157-58; 160-61; EX 6, 10. Although Mr. Stansfield started to draft some form

pleadings for probate of the Chavez estate, he never completed or filed them. TR 328; EX 9. Nevertheless, he contacted the insurance company and the sheriff's office and informed them that he represented the estates of both Mr. Urquilla and Mr. Chavez. EX 7, 12, 18. He advised the insurer to contact him, not Mrs. Chavez directly. EX 12.

In June and July 2003, Mr. Stansfield wrote several letters to Mrs. Chavez to ascertain whether she wanted to hire him and whom she wanted to act as personal representative on behalf of the Chavez family. FFCL 2.14, 2.15, 2.20, 2.21, 2.23; TR 176-77, 195-96, 326, 328, 352; EX 13, 13A, 16, 25, 27. Mrs. Chavez never responded to these contacts and never said anything or took any action indicating that she wanted to hire Mr. Stansfield or wanted Mrs. Urquilla to represent the Chavez family or estate. FFCL 2.10, 2.22, 2.24; TR 211-12, 215, 247, 262, 326, 328. Instead, she executed a power of attorney authorizing her brother-in-law in Washington to find a lawyer. TR 212; EX 42. He hired Glenn Carpenter, who obtained a power of attorney from Mrs. Chavez, handled the UIM insurance claim, investigated possible civil claims against Mr. Vargas and Mr. Urquilla, and probated Mr. Chavez's estate. FFCL 2.25; TR 211-13, 245-49, 260-61, 263-64.

After Mr. Carpenter learned from the insurance adjuster that Mr. Stansfield had falsely claimed he was the attorney for the Chavez family,

he informed Mr. Stansfield by faxed letter on August 29, 2003 that he (Carpenter) had been retained by the Chavez family, and he asked Mr. Stansfield to stop representing them. FFCL 2.25; TR 90-91, 249-50; EX 30. In response, Mr. Stansfield drafted a Notice of Attorney's Lien against the Chavez estate for \$2,299.32 and, within two business days, sent it to the insurance company and to the Superior Courts of King County and Grant County, effectively encumbering the Chavez estate immediately. FFCL 2.26; TR 91-93, 97, 102-03; EX 31, 32, 33. He later billed \$2,304.07 for his work on the Chavez estate, a portion of which consisted of charges he had split between his invoices for the Urquilla estate and the Chavez matter. TR 107-12; EX 47. Mr. Carpenter's office requested itemization of the lien and a copy of the contract signed by the family of the deceased, to which Mr. Stansfield replied that he would comply if Mr. Carpenter provided a copy of his [own] fee agreement. TR 97-98, 100, 250-51, 331; EX 36, 37.

The insurance company issued its \$50,000 check for the Chavez claim on or about January 12, 2004, made out to the personal representative (Suzanne Ruiz), Mr. Carpenter, and Mr. Stansfield. FFCL 2.28; TR 103, 251-52; EX 45. Mr. Carpenter e-mailed Mr. Stansfield, asking permission to endorse his name on the check before depositing it, and assuring Mr. Stansfield that funds sufficient to cover his attorney's

lien would be kept in the personal representative's trust account. FFCL 2.29; TR 103-05, 252-55; EX 49. After speaking with Mr. Carpenter by telephone, Mr. Stansfield sent him a copy of his bill for the Chavez matter and offered to compromise it, but wrote that he would do nothing further and declined to endorse the check. FFCL 2.30; TR 105-07, 255-57; EX 46.

Without Mr. Stansfield's signature, the insurance check could not be processed nor the proceeds sent to the Chavez family. Mr. Carpenter eventually persuaded the company to split the benefit into two checks: one for \$45,000, which did not name Mr. Stansfield and could be negotiated for distribution without his signature, and another for \$5,000, which included his name. FFCL 2.31; TR 255-59. Mr. Carpenter and the personal representative expended a substantial amount of time dealing with Mr. Stansfield's lien, and it delayed the distribution of insurance proceeds to Mrs. Chavez. FFCL 2.32, 2.33; TR 259-60. The larger insurance installment was finally sent to Mrs. Chavez in March 2004, but she did not receive the remainder until January 2006. TR 257-59.

3. The Vargas Representation

From the first time he met with the Urquillas until he finished probate of the Urquilla estate in September 2003, Mr. Stansfield repeatedly generated and received documents that identified Mr. Vargas as

the driver responsible for the accident in which Mr. Urquilla and Mr. Chavez were killed. TR 162-63; EX 1, 44, 47. Mr. Stansfield's handwritten notes from his initial meeting with the Urquillas include the entry: "Tortfeasor / Driver Francisco Vargas." TR 301-02; EX 51. On May 22, 2003, Mr. Stansfield wrote the insurance company, "Our preliminary investigation indicates that Mr. Francisco Vargas was 100% at fault for this incident." EX 7. In early June 2003, Mr. Stansfield submitted the insurance benefit applications, naming Mr. Vargas as the party responsible for the accident. EX 10, 12. On June 11, 2003, he wrote the sheriff's office a letter stating that he understood that Mr. Vargas might be charged with vehicular homicide. EX 18. Approximately two weeks later, he sent the insurance company the accident report, which named "Francisco Vargas" as the driver. EX 21. On August 20, 2003, Mr. Stansfield wrote the company again, stating "It appears Mr. Francisco Vargas will probably be convicted of numerous felonies as a result of his actions, and be sentenced to a lengthy prison term." EX 29.

On or about September 19, 2003, Mr. Vargas and his mother visited Mr. Stansfield's office. Mr. Vargas had received a letter from the Grant County Prosecuting Attorney with a copy of the Information charging him with the vehicular homicide of Mr. Urquilla and Mr. Chavez, together with other offenses. FFCL 2.34, 2.36; TR 119-20, 145,

223-25, 269-70; EX 38. Mrs. Vargas, who had known Mr. Stansfield for about fifteen years, told him that she and her son were there with regard to the accident and gave him all of the documents that they had received from the Prosecuting Attorney. The Prosecutor's letter stated that Mr. Vargas had to appear in Grant County Superior Court for arraignment on Monday, September 22, 2003. TR 121, 125, 269; EX 48.

Mr. Stansfield agreed to represent Mr. Vargas for a fee of \$10,000. FFCL 2.38; TR 126, 271. The fee agreement the parties later signed stated that this amount covered all services, including settlement negotiations, pretrial motions, settlement by deferral, plea of guilty or a stipulation resulting in a guilty finding, or any other pretrial settlement, but if the case went to trial, it would cost an additional \$1,500 per day; the agreement also required a payment of \$1,000 for costs. EX 40A. Mr. Stansfield mentioned that "he had helped the Urquilla family, but that he would probably talk to somebody and he thought it would probably be okay for him to represent [Mr. Vargas]." TR 274-75.

The Vargases returned to Mr. Stansfield's office the following Monday morning before the arraignment, signed the fee agreement, and paid him \$10,000 in cash. FFCL 2.38; TR 126-28, 271-73; EX 40A. In the meantime, Mr. Stansfield prepared his notice of appearance, pleadings,

a request for discovery and a bill of particulars, and a demand for a jury trial. EX 39.

On September 22, 2003, Mr. Stansfield appeared with Mr. Vargas at arraignment and filed the pleadings mentioned above. TR 131-33, 232-33; EX 38, 39. Members of the Urquilla family also were present in court and were shocked and upset when they saw Mr. Stansfield come forward to represent Mr. Vargas. TR 201-02. After the arraignment, they spoke with Deputy Prosecutor Carolyn Fair, who had appeared for the state, and informed her of the situation. They later brought her documents relating to the work Mr. Stansfield had done for them, including those that mentioned Mr. Vargas as the guilty party in the accident. TR 202-03, 227-29. Ms. Fair spoke with her supervisor, the elected Prosecuting Attorney, who advised her to call Mr. Stansfield before moving to have him removed from the case. TR 229-31, 237; EX 29. They were concerned that, if Mr. Vargas were convicted and later learned of the accusatory statements Mr. Stansfield had written about him while representing the Urquillas, those statements could be used as grounds for a new trial or withdrawal of a guilty plea, and the prosecutors did not want to risk having to try such a serious case twice. TR 230-31. Ms. Fair called Mr. Stansfield's office and asked Mr. Stansfield's assistant whether Mr. Stansfield would voluntarily withdraw. TR 230-31.

Meanwhile, after the arraignment, Mr. Stansfield obtained and reviewed the court file and mailed Mr. Vargas an envelope full of documents from the accident investigation, including the police traffic collision report and two Grant County Sheriff's Office Investigation Narratives containing photographs of the accident and information taken from people at the time of the accident. TR 128, 275-78, 318-19; EX 50. These were copies of the same reports that Mr. Stansfield had gathered and kept in his client files for the Urquilla and Chavez matters. TR 275-78, 296-99; EX 21, 50.

Mr. Stansfield eventually found another lawyer willing to represent Mr. Vargas and filed a Notice of Substitution and Withdrawal on October 7, 2003. TR 133-35, 317-20; EX 38, R-1.

Mr. Stansfield never consulted with Mrs. Urquilla, his former client, about his representation of Mr. Vargas, or obtained her consent. CP 4, 10.

III. SUMMARY OF ARGUMENT

Mrs. Urquilla hired Mr. Stansfield to obtain insurance proceeds and probate the estate of her husband after he and his passenger, Mr. Chavez, were killed in a car accident. Based on Mrs. Urquilla's wish to help the family of Mr. Chavez, Mr. Stansfield also assumed representation of the Chavez estate, described himself to others as its lawyer, charged

that estate for his services, and issued a lien for his fee without ever being contacted by a member of the Chavez family. The family eventually hired its own lawyer, but when an insurance check containing Mr. Stansfield's name was issued to the Chavez estate, he refused to endorse it, thereby preventing the estate from receiving the funds. The Disciplinary Board properly found that he acted willfully and violated former RPC 1.2(f).

When Mr. Vargas hired Mr. Stansfield to represent him on charges that he killed Mr. Urquilla and Mr. Chavez, Mr. Stansfield knew that the criminal case arose out of the same event as the Urquilla probate, but accepted the representation without consulting Mrs. Urquilla or obtaining her consent. Much of the evidence Mr. Stansfield had collected and utilized in representing the Urquilla estate also supported the criminal charges, and the outcome of the criminal proceedings had the potential to adversely affect the Urquilla estate's interests. Although he eventually withdrew from the Vargas representation, Mr. Stansfield violated RPC 1.9(a).

Mr. Stansfield acted knowingly in representing the Urquillas and Mr. Vargas and purporting to represent the Chavezes. Because his conduct caused both potential and actual harm, and aggravating factors outnumbered the mitigating factor in this case, the Disciplinary Board recommended a six-month suspension. The Court should affirm.

IV. ARGUMENT

A. STANDARD OF REVIEW

The Court upholds the Hearing Officer's factual findings if they are supported by substantial evidence. In re Disciplinary Proceeding Against Poole, 156 Wn.2d 196, 208-09, 125 P.3d 954 (2006); In re Disciplinary Proceeding Against Guarnero, 152 Wn.2d 51, 58-59, 93 P.3d 166 (2004). The Court reviews conclusions of law de novo, and requires that they be supported by the findings of fact. Poole, 156 Wn.2d at 209. While the Court is not bound by the Disciplinary Board's recommendation as to sanction, it gives it "serious consideration" and accords it greater weight than that of the Hearing Officer, because the Board is the only body that hears the full range of disciplinary matters, giving it a "unique experience and perspective in the administration of sanctions." In re Disciplinary Proceeding Against Carpenter, 160 Wn.2d 16, 23, 155 P.3d 937 (2007).

B. THE DISCIPLINARY BOARD CORRECTLY ADOPTED THE HEARING OFFICER'S FINDINGS THAT MR. STANSFIELD WILLFULLY PURPORTED TO REPRESENT OLGA CHAVEZ WITHOUT HER AUTHORITY, IN VIOLATION OF FORMER RPC 1.2(f)

1. Substantial evidence supported the Hearing Officer's factual findings concerning Mr. Stansfield's purported representation of Mrs. Chavez.

The Hearing Officer found that Mr. Stansfield took on representation of both the Urquilla and Chavez families without any objective indication by Mrs. Chavez that she wanted him as her attorney. FFCL 2.9, 2.10; DP 16. The Disciplinary Board adopted these findings. Mr. Stansfield claims the Board erred because he had acted on the belief that he was following Mrs. Chavez's wishes, and his actions on her behalf were de minimis. But substantial evidence in the record shows that Mr. Stansfield's belief was objectively unreasonable, that he took or attempted to take significant action on her behalf, and that he did so willfully.

Within a day of Mrs. Urquilla's first visit to Mr. Stansfield's office, when she expressed a desire to help Mrs. Chavez by acting as her personal representative, Mr. Stansfield produced a fee agreement for Mrs. Urquilla to sign on behalf of the Chavez estate, and he later generated a billing statement consistent with it. EX 2, 47. At the same time, he had Mrs. Urquilla sign releases for various records he might need to establish the Chavez claim for benefits under Mr. Urquilla's uninsured motorist

policy. EX 4, 5, 6. A day later, he wrote a letter to the insurance company, listing Miguel Chavez as one of his clients. EX 7. In the letter, Mr. Stansfield specifically instructed the claims representative to deal with him directly concerning all matters relating to the claim, and requested that she not contact or attempt to contact his client directly. EX 7. He drafted a petition and related documents to begin probate of the Chavez estate. EX 9. In another letter to a different insurance claims representative, he wrote, "This office has been retained by the Estate of Mr. Chavez to represent them (sic) . . ." and included the same request to deal directly with him, and not contact the client. EX 12. When he wrote to the local sheriff's office to obtain a copy of the accident report, he stated, "I represent the estates of Miguel Urquilla and Miguel Chavez." EX 18.

These repeated, unqualified statements clearly show that Mr. Stansfield consistently held himself out to others as one authorized to act for Mrs. Chavez. Moreover, he did not do so accidentally or without purpose; rather, he testified that he intended to convey that he represented

the Chavez estate. TR 64-65. There was substantial evidence upon which to conclude that his conduct was willful,⁴ and that it violated RPC 1.2(f).

Mr. Stansfield defends his actions on the grounds that he was relying on the statements of Mrs. Urquilla, who allegedly told him that Mrs. Chavez (who lived in Guatemala) wanted her to represent the Chavez estate to obtain the insurance money.⁵ The Hearing Officer did not ascribe a statement to the Urquillas in these specific terms, but found that this conversation was the only knowledge Mr. Stansfield had regarding representation of Mrs. Chavez. FFCL 2.7, 2.8, 2.11; DP 16. Even if one accepts his claim that Mrs. Urquilla's statements initially justified his actions, that justification was short-lived, at best. As his drafted pleadings made clear, Mr. Stansfield knew he would need an affidavit from Mrs. Chavez, specifically authorizing Mrs. Urquilla to act on her behalf. EX 9. He never obtained one. Moreover, when Mr. Stansfield wrote to Mrs. Chavez several times, he did not ask her to confirm that she had already authorized Mrs. Urquilla to represent Mr. Chavez's estate, but rather asked Mrs. Chavez to indicate whether she wanted to hire him, and whether she

⁴ Webster's Third New International Dictionary of the English Language 2617 (2002) defines "willful" as "done deliberately; not accidental or without purpose; intentional, self-determined;" and Black's Law Dictionary 1630 (8th ed. 2004) defines it as "voluntary and intentional."

⁵ The testimony of Ivon Urquilla, Mrs. Urquilla's daughter who translated during the meeting with Mr. Stansfield, conflicts with Mr. Stansfield's recollection of this conversation. TR 167-71.

wished to have Mrs. Urquilla appointed or wanted to represent the estate herself. EX 13, 13A, 25, 27. As several months passed and Mrs. Chavez did not reply, Mr. Stansfield should have realized and conceded that he had no authority to represent her, and so advised the insurance representatives. Instead, he continued to generate billable hours on her account, while he did not, and could not, accomplish anything of substance on her behalf absent her authorization. The Hearing Officer properly found that Mr. Stansfield took on representation of both estates based only on his conversation with the Urquillas, that there was no objective action by Mrs. Chavez that she wanted him to do so, and that he filed a lien which he had no apparent right to do. FFCL 2.9, 2.10, 2.11, 2.32; DP 16, 19.

In his brief, Mr. Stansfield claims that his actions on Mrs. Chavez's behalf were de minimis, consisting only of telling the insurance company that he represented the estate, and drafting estate documents. Respondent's Brief (RB) at 45-47. This misstates the record. Mr. Stansfield also wrote the sheriff's office that he represented the estate. EX 18. He generated a bill of over \$2,300 to the estate. EX 47. He filed a lien against the estate claiming he did so as its attorney. While it may be true that he did little for the estate, he did it all claiming he represented the Chavez estate—except when he wrote to Mrs. Chavez. In those letters, he

did not tell her he already represented her, he asked if he could represent her, and she never answered yes. TR 80-81, 211-112; EX 13, 13A, 25, 27.

As the Hearing Officer and the Disciplinary Board found, Mr. Stansfield knew or should have known that there was a significant reason he should not represent Mrs. Chavez: Mr. Stansfield testified that, shortly after Mrs. Urquilla retained him, she became insistent about obtaining insurance payment for the Chavez claim, and he became nervous and concerned that the Urquillas wanted to gain control over any settlement money that might be paid to the Chavez estate. TR 66-68, 71, 84-85, 99, 329-30; FFCL 2.17, 2.18, 2.19; DP 17.⁶ Under the circumstances, he should have recognized that the interests of the two clients—the one who actually hired him and the one he claimed to represent—were in conflict, and he could not represent both absent a waiver of that conflict.⁷ FFCL 2.17, 2.18; DP 17; see also TR 395-96. But rather than withdrawing immediately or seeking a waiver, he ignored the divergent interests of the

⁶ Although this testimony seemed intended to raise doubts about Mrs. Urquilla's motives, there were several simple explanations for her insistence: (1) Mrs. Chavez was destitute, and the shock of her husband's death incapacitated her for many weeks, TR 210, 248; and (2) when there were insufficient funds available to send Miguel Chavez's body back to Guatemala for burial, Mrs. Urquilla's mother ended up paying about five thousand dollars of her own money to cover the expense, TR 191-92, 257-58. She was eventually reimbursed after the Chavez family received the insurance settlement. TR 257-58.

⁷ Because Mr. Stansfield did not effectively establish an attorney/client relationship with Mrs. Chavez, he was not charged with a conflict of interest for representing the two estates simultaneously.

estates, then ignored Mrs. Chavez's silence toward his letters, and continued to bill the Chavez estate for another three months. EX 47. Cf. Carpenter, 160 Wn.2d at 28 (if a lawyer accepts dual representation and the clients' interests thereafter come into actual conflict, the lawyer must withdraw or obtain the clients' informed written consent to the ongoing, conflicting joint representation). His conduct in doing so was willful.

2. Substantial evidence supports the Disciplinary Board's finding that Mr. Stansfield's actions harmed Mrs. Chavez.

The Board concluded that Mr. Stansfield's conduct in purporting to represent the Chavez estate was knowing and that his filing of an attorney's lien to recover his fee caused actual economic injury to Mrs. Chavez because it delayed disbursement of the insurance proceeds to her. DP 41. These conclusions of law are supported by the findings of fact and should be upheld.

Mr. Stansfield attempts to minimize his responsibility for this delay by noting that he did respond to Mr. Carpenter, Mrs. Chavez's

lawyer, and offered to compromise his bill.⁸ This does not diminish the fact that, when he was asked to endorse the insurance check issued on January 12, 2004, he refused, and continued to refuse, which meant that the check could not be negotiated nor the proceeds forwarded to Mrs. Chavez. RB at 18; EX 45, 46, 49; TR 105-07, 251-59. The initial payment to Mrs. Chavez was delayed another two months, while successor counsel and the personal representative spent an additional ten to fifteen hours solving the deadlock; after they had two separate checks issued in March 2004, one of which was made out to Mr. Stansfield, he did not release his lien on the second check for another twenty-two months. TR 257-59.⁹

In June 2003, Mr. Stansfield had written that “the heirs (sic) financial condition is perilous.” EX 18. Yet, seven months later, when asked to perform one act that would finally allow the insurance proceeds to be paid to her, he refused. Given that Mrs. Chavez had seven children

⁸ In his brief, Mr. Stansfield argues that the Court should amend the finding (Hearing Officer’s FFCL 2.29, Disciplinary Board’s FFCL 2.27; DP 19, 37) that he did not respond to Mr. Carpenter’s request that he endorse the settlement check. RB at 17-18. But Mr. Stansfield specifically testified at hearing that he declined to sign the check. TR 105-107. While Mr. Stansfield did write to Mr. Carpenter, the fact remains that he did not respond to the request that he endorse the settlement check, and did not authorize Mr. Carpenter to sign it for him. Rather, after offering to compromise his bill, he wrote, “I will do nothing further.” (EX 46, a copy of which is appended to this brief.)

⁹ Mr. Stansfield states he did not know the second check was still being held, but he should have realized that it could not be negotiated without his endorsement. RB at 19; TR 214-15, 258-59.

and no earnings to support them in the meantime, any delay in the receipt of the funds caused her very significant harm.

C. THE DISCIPLINARY BOARD PROPERLY CONCLUDED THAT MR. STANSFIELD VIOLATED RPC 1.9(a) WHEN HE SWITCHED SIDES TO REPRESENT MR. VARGAS AFTER REPRESENTING THE URQUILLAS.

- 1. The Hearing Officer and the Disciplinary Board properly found that the matters in which Mr. Stansfield represented Mrs. Urquilla and Mr. Vargas were “substantially related.”**

The Hearing Officer found, and the Disciplinary Board agreed, that Mr. Stansfield violated former RPC 1.9(a), which provided:

A lawyer who has formerly represented a client in a matter shall not thereafter:

- (a) Represent another person in the same or a substantially related matter in which that person’s interests are materially adverse to the interests of the former client unless the former client consents in writing after full disclosure of the material facts[.]¹⁰

FFCL 2.42A; DP 20; FFCL 2.41; DP 39. Mr. Stansfield admits he did not inform Mrs. Urquilla of his representation of Mr. Vargas or obtain her consent, but he claims these steps were unnecessary because the Urquilla probate and the criminal proceedings against Mr. Vargas were not the same or substantially related matters, and they did not involve a current client taking direct action against a former client. CP 9; RB at 39.

¹⁰ Effective September 1, 2006, the wording and format of RPC 1.9(a) changed slightly, but the substance remained the same.

The threshold inquiry under RPC 1.9(a) is whether there is a substantial relationship between the former representation and the later one. The Disciplinary Board concluded that Mr. Stansfield's representation of the Urquilla estate was substantially related to his defense of Mr. Vargas on criminal charges of vehicular homicide. FFCL 2.41; DP 39. Mr. Stansfield argues that the two cases were not the same, that the insurance settlement and probate of the Urquilla estate had been completed before he appeared for Mr. Vargas in the criminal case, and thus they could not be affected in any way by the result of the criminal proceedings. RB at 27, 37. Substantial evidence supports the Disciplinary Board's conclusion.

An inquiry into the existence of a substantial relationship is fact-intensive. The Comments to RPC 1.9 state that the scope of a "matter" for purposes of the rule depends on the facts of a particular situation or transaction, and matters are substantially related if they involve the same transaction or legal dispute. Model Rules of Prof'l Conduct R. 1.9 cmt. 2,

3 (2002).¹¹ Washington courts determine whether matters are substantially related by examining the factual contexts of two representations. Hunsaker, 74 Wn. App. 38.¹²

Hunsaker sets forth a three-pronged test to determine the existence of a substantial relationship. First, the court reconstructs the scope of the facts involved in the former representation. Hunsaker, 74 Wn. App. at 44. Here, Mr. Stansfield was hired to obtain UIM benefits for the death of Mr. Urquilla, to probate his estate, and to obtain letters of administration; Mrs. Urquilla also wanted to explore the possibility of bringing a wrongful death claim against Mr. Vargas. TR 39-42, 141-43, 172-74, 325. Although Mr. Stansfield summarily claims that the relevant facts in this matter bore little similarity to those in the criminal prosecution, RB at 43, one need look no further than the documents in his Urquilla client file to conclude otherwise. The claim forms that Mr. Stansfield helped complete

¹¹ Although Washington did not formally adopt the commentary to the Model Rules until September 1, 2006, it previously considered the commentary to be instructive in exploring the underlying policy of the rules. In re Disciplinary Proceeding Against Haley, 156 Wn.2d 324, 334, 126 P.3d 1262 (2006); In re Disciplinary Proceeding Against McKean, 148 Wn.2d 849, 864, 64 P.3d 1226 (2003); Teja v. Saran, 68 Wn. App. 793, 798, 846 P.2d 1375, review denied 122 Wn.2d 1008, 859 P.2d 604 (1993); State v. Hunsaker, 74 Wn. App. 38, 873 P.2d 540 (1994).

¹² In his brief, Mr. Stansfield makes passing reference to whether there were legal issues common to the two cases. RB at 39-40. However, the existence of a substantial relationship does not depend upon whether the two representations involve common legal issues; the court in Hunsaker specifically considered and declined to adopt an analysis which focused upon the similarity of legal issues. Hunsaker, 74 Wn. App. at 43, 45.

before submitting them asked for the name of the person responsible for the accident. EX. 10. The insurance company conditioned payment of insurance benefits to the Urquilla estate upon receipt of documentation of Mr. Urquilla's death (a death certificate), the police report, and the motor vehicle accident reports, in order to verify the facts of the accident. TR 141-43; EX 8, 19. Mr. Stansfield complied by obtaining these documents from the sheriff's office, transmitting them to the insurance company, and retaining copies for his file, which he produced at hearing. EX 18, 21, 50.

Second, the court assumes that the lawyer obtained confidential client information about all the facts within the scope of the former representation. Hunsaker, 74 Wn. App. at 44.¹³ Mr. Stansfield dismissively states that Mrs. Urquilla had no first-hand knowledge of the events that caused her husband's death, and thus his representation of Mr. Vargas could not possibly involve use of confidential information gained from her. RB at 39. This is irrelevant where, as in this test, such confidences are assumed. Moreover, the accident reports show that the accident happened at a flat, treeless intersection with clear sightlines in all

¹³ It was not necessary for the Association to prove that Mr. Stansfield, in representing Mr. Vargas, used confidences or secrets he obtained from his representation of Mrs. Urquilla. Former RPC 1.9 is worded in the alternative, and allows for discipline whether or not such information was disclosed or used to the former client's detriment. Hunsaker, 74 Wn. App. at 47; Teja v. Saran, 68 Wn. App. at 798. Confidentiality breaches are addressed by other provisions in RPC 1.9, whereas former RPC 1.9(a) focuses on different concerns, one of which is loyalty, discussed infra.

directions, and there was no sign that the drivers had taken any type of action prior to impact--no tire marks or any marks that would suggest braking or evasive maneuvers. EX 50. Given these circumstances, one can imagine a number of facts that, if true, Mrs. Urquilla could have confided to shed light on the accident. She might have known that the brakes on the family's truck were bad, or that her husband had night blindness, or that he called her before heading home and had been drinking, any of which might explain his failure to see and avoid Mr. Vargas's rapidly approaching car.

Third, courts determine whether any factual matter in the former representation is so similar to any factual matter in the latter representation that a lawyer would consider it useful in advancing the interests of the client in the latter representation. Hunsaker, 74 Wn. App. at 43. Here, certain basic facts were central to both the Urquilla insurance matter and the Vargas criminal case: the circumstances of the accident and whether or not Mr. Vargas was responsible for the death of Mr. Urquilla. More important, both cases rested upon much of the same evidence, such as the police and sheriff's reports. TR 128, 275-78, 297-98; EX 21, 50. Any additional information Mrs. Urquilla might have imparted concerning the accident could later be useful in an attempt to create a reasonable doubt about Mr. Vargas's guilt.

Another factor supporting the conclusion that the Urquilla and Vargas matters were substantially related is the brief lapse of time between the two cases. Information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related. RPC 1.9, cmt. 3; State ex rel. Wal-Mart Stores, Inc. v. Kortum, 251 Neb. 805, 559 N.W.2d 496 (1997). Where a significant period has passed between prior and current representations, some courts have declined to find a substantial relationship between representations. See, e.g., Somascan Plaza, Inc. v. Siemens Med. Sys., Inc., 187 F.R.D. 34 (D.P.R. 1999) (eight-year interval); Szoke v. Carter, 974 F. Supp. 360 (S.D.N.Y. 1997) (ten years). Although there need not be a career-long disqualification of the lawyer, “at least a decent interval should transpire before the lawyer attempts to appear against the interests of the former client.” Charles W. Wolfram, Modern Legal Ethics 362 n. 5 (1986). That did not happen here. The interval between Mr. Stansfield’s active representation of the Urquilla estate and his agreeing to represent Mr. Vargas was a mere two weeks: he completed the Urquilla probate on September 4, 2003, and met with the Vargases on September 19, 2003. EX 34. The circumstances of this case are so striking they invite the question posed in the commentary to RPC 1.9: “The underlying question

is whether . . . the subsequent representation can be justly regarded as a changing of sides in the matter in question.” RPC 1.9, cmt. 2. Here, the answer is yes.

2. Substantial evidence supports the Hearing Officer and Disciplinary Board finding of material adversity between the interests of the Urquilla estate and of Mr. Vargas.

The Disciplinary Board adopted the Hearing Officer’s finding that the interests of Mrs. Urquilla and Mr. Vargas were “materially adverse.” FFCL 2.42C, DP 20; FFCL 2.43, DP 39. The record evidence supports this finding.

To determine whether interests are “materially adverse,” one must conduct a fact-intensive inquiry. Courts tend to focus on the degree to which the current representation may result in legal, financial, or other identifiable detriment to the former client. ABA/BNA Lawyers’ Manual on Professional Conduct 51:220 (2002). The term “material” does not apply only to financial considerations. Rather, Black’s Law Dictionary defines “material” as “having some logical connection with the consequential facts; of such a nature that knowledge of the item would affect a person’s decision-making; significant; essential.” 8th ed. at 998.

Analyzing the factual context here, the evidence shows that the interests of the Urquillas and Mr. Vargas were materially adverse in many respects. For example, it was in the Urquillas’ interest to place all blame

on Mr. Vargas for the deaths; in fact, Mr. Stansfield did exactly that while representing them, when he wrote the insurance representative that “Our preliminary investigation indicates that Mr. Francisco Vargas was 100% at fault for this incident,” and “Mr. Vargas will probably be convicted of numerous felonies as a result of his actions, and be sentenced to a lengthy prison term.” EX 7, 29. Conversely, it was in Mr. Vargas’s interest to attempt to deny, deflect or lessen the blame.¹⁴ It was in the Urquillas’ interest to see Mr. Vargas convicted, and in his to be acquitted; it was in their interest to see him punished for their loss, and in his to escape punishment; it was in theirs to have a voice at a sentencing hearing to explain the effect of their tragic loss, and in his to minimize or limit the effect of their testimony. In representing Mr. Vargas, Mr. Stansfield would have to take opposite positions on many of the issues common to the two representations.

Material adversity existed on another level, as well. At the very first meeting with Mr. Stansfield, the Urquillas expressed interest in bringing a civil suit against Mr. Vargas for Mr. Urquilla’s death, but Mr. Stansfield instructed them not to. FFCL 2.4, 2.42B; DP 15, 20, 33, 40; TR

¹⁴ While contributory negligence is not a defense to a vehicular homicide, it would not be unheard of for a defendant to allude to the part a victim’s conduct played in the result, in an effort to plant reasonable doubt in a juror’s mind.

41-42, 172-74.¹⁵ The fact that Mr. Stansfield was unwilling to do so did not necessarily close the matter, because the Urquillas had a viable cause of action and could have pursued it later, either with him or with other counsel. While the results of the criminal case against Mr. Vargas would not be dispositive in a civil suit, it is unquestionable that a conviction for vehicular homicide would make it easier for them to show liability and obtain a monetary recovery and, conversely, an acquittal could make it more difficult to persuade a civil jury that he was liable.

The Hearing Officer (FFCL 2.43-2.45; DP 20-21) and Disciplinary Board (FFCL 2.44-2.46; DP 39) also found that, because Mr. Chavez was a passenger in Mr. Urquilla's truck when he was killed, his estate had potential causes of action against both Mr. Vargas and Mr. Urquilla. Thus, an acquittal could make a lawsuit by the Chavez estate against the Urquilla estate more viable. The possible lawsuit by the Chavez estate was not merely hypothetical: Mr. Carpenter, who represented the Chavez estate, testified that he seriously explored civil actions against both Mr.

¹⁵ Mr. Stansfield's testimony on this issue was at variance with that of Ivon Urquilla, who testified that the family was unsure about what property Vargas had and wanted Mr. Stansfield to see what could be done about suing Mr. Vargas, but he said it was impossible, there was nothing he could do. TR 173-74.

Vargas and Mr. Urquilla, and it was a close decision for him not to do so. TR 248-49, 260-61.¹⁶

Mr. Stansfield argues that, since a lawyer's advocacy involving a change in legal position is not a violation of RPC 1.7, one may represent successive clients with antagonistic positions on a legal question under RPC 1.9. RB at 28-29. This argument is unsound for several reasons. First, the adversity in this case was primarily factual, not legal. The Commentary and cases on which Mr. Stansfield relies do not involve successive representations based on factually related matters.¹⁷ Second, the Commentary language on which Mr. Stansfield relies was dropped

¹⁶ In any event, material adversity can exist whether or not the two clients are opposing parties in the same proceedings. See, e.g., American Airlines, Inc. v. Sheppard, Mullin, Richter & Hampton, 96 Cal. App. 4th 1017, 117 Cal. Rptr. 2d 685 (2002) (lawyer who represented airline in suit against manufacturer could not later act as Rule 30(b)(6) witness for another entity in a suit against the same manufacturer without prior client's consent; court stated, "It is inconsequential that [airline] was not a party to the [second] lawsuit. The proscription against adverse representation . . . can exist even though a prior client is not a party to the litigation"); National Medical Enterprises v. Godbey, 924 S.W.2d 123 (Tex. 1996) (law firm disqualified from representing plaintiffs in a lawsuit against a corporation when a lawyer at the firm had been paid by the corporation to represent a former employee; even if that employee not a party in the later suit, the matters were substantially related and the second representation was prohibited).

¹⁷ See, e.g., Dixon v. Quarles, 627 F. Supp. 50 (E.D. Mich.), aff'd, 781 F.2d 534, (6th Cir. 1985), cert. denied, 479 U.S. 935, 107 S.Ct. 411, 93 L.Ed. 2d 362 (1986) (collateral attack on conviction failed; no conflict of interest where lawyer representing murder defendant had earlier defended his victim on unrelated tax charges); 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) (lawyer not disqualified from representing murder defendant after another member of same firm had represented the murder victim on unrelated drug charges); and other cases cited in RB, Appendix A.

when the ABA amended Rule 1.7 and Comment 9 in 2002, and this Court did not adopt it when it amended the RPC in 2006. Compare ABA, Annotated Model Rules of Prof'l Conduct at 93 (4th ed. 1999) with Annotated Model Rules of Prof'l Conduct at 109 (5th ed. 2003) [hereinafter Annotated Model Rules]. The language that replaced it will be discussed below.

3. Mr. Stansfield's conduct violated the principle of loyalty upon which RPC 1.9(a) is based.

Notably, RPC 1.9(a) exists not only to protect client confidences—which are addressed in other parts of the Rule—but a lawyer's loyalty to his former client. The new comment 9 to Model Rule 1.7 in both the Annotated Model Rules and Washington's amended RPC states

In addition to conflicts with other current clients, a lawyer's duties of loyalty and independence may be materially limited by responsibilities to former clients under Rule 1.9 . . .

The principle was enunciated in the seminal conflict of interest decision, T.C. Theatre Corp. v. Warner Bros. Pictures, Inc., 113 F. Supp. 265, 267 (S.D.N.Y. 1953), which interpreted Canon 6 of the ABA Canons of Ethics, a precursor to RPC 1.9:

A lawyer's duty of absolute loyalty to his client's interest does not end with his retainer. . . . [w]here any substantial relationship can be shown between the subject matter of a former representation and that of a subsequent adverse representation, the latter will be prohibited. . . . [T]he former client need show no more than that the matters

embraced within the pending suit wherein his former attorney appears on behalf of his adversary are substantially related to the matters or cause of action wherein the attorney previously represented him, the former client. . . . Only in this manner can the lawyer's duty of absolute fidelity be enforced and the spirit of the rule relating to privileged communications be maintained.

Disloyalty to a former client can take the form of "treachery to the former client's misplaced continuing trust." Wolfram, Legal Ethics at 361. Here, when Mr. Stansfield switched sides to represent Mr. Vargas in the criminal matter, the Urquillas unsurprisingly felt that he had betrayed their trust, and they filed a grievance. TR 201-03, 228-29. See also ABA/BNA Lawyers' Manual on Professional Conduct 51:206-51:208 (2002) ("side switching" implicates policies of loyalty and protecting client confidences).

Side switching also raises risks to the new client. A lawyer's attempt to protect confidentiality and loyalty to his former client can create a corresponding risk to the second client in the form of a "hobbled representation." Wolfram, Legal Ethics at 362; see also Geoffrey C. Hazard, Jr. & W. William Hodes, The Law of Lawyering §§13.8 at 13-25 (3d ed. 2001 & Supp. 2005) (new client might fear lawyer's loyalty to former client would hinder ability to provide diligent representation in new matter). Here, in fact, the prosecutor testified that her office was

concerned that questions might be raised about Mr. Stansfield's advocacy for Mr. Vargas, which could have jeopardized any conviction. TR 230-31.

In his testimony and in his brief, Mr. Stansfield claimed that he was only hired to do probate and obtain the insurance money for the Urquillas, and had finished by the time he represented Mr. Vargas. RB at 16-17; TR 42, 44, 136, 325. But the duties of loyalty and confidentiality continue not only after representation of the former client has ended; they even survive the former client's death. Annotated Model Rules, supra at 170.

Indeed, considerations of loyalty affect not only a client's trust, but public perception of the legal system. In Teja v. Saran, the Court of Appeals stated:

[A]ttorney side switching undermines the integrity of the legal system in the eyes of the public. Members of the community have the right to consult an attorney without later having that attorney appear on the other side of the same issue.

68 Wn. App. at 801. The Hearing Officer recognized this as well. TR 402. For all of these reasons, the Court should affirm the Disciplinary Board's conclusion that Mr. Stansfield violated RPC 1.9(a).

4. Mr. Stansfield cannot justify his actions on the basis that they were de minimis.

Mr. Stansfield suggests that this Court should excuse his representation of Mr. Vargas because of its short duration. RB at 23, 32,

40. While the duration of the conflicted representation may be relevant to the issue of sanction, it is irrelevant to the finding of a violation. The evidence clearly shows that Mr. Stansfield intended to represent Mr. Vargas to the conclusion of the criminal proceedings, and that intention triggered his violation of RPC 1.9(a).

When Mr. Stansfield was initially approached about representing Mr. Vargas, there was no pressing necessity for him to enter the case immediately. If he sympathized with Mrs. Vargas's anxiety to have someone go to court immediately with her son, he could have agreed to appear only at the first court date, for an hourly fee, to allow her time to find another attorney.

Instead, Mr. Stansfield told the Vargases that he could represent Mr. Vargas for a \$10,000 fee, they hired him, and he went to court the next business day, a Monday. TR 126, 271. Just before the arraignment, he had the Vargases sign a fee agreement and he accepted their payment of \$10,000 cash. TR 127-28, 271-73; EX 40A. The agreement did not limit the scope of his representation in any way; rather, it specified that the fee was non-refundable and that it covered all services, including negotiations, pretrial motions, settlement by way of deferred sentence, plea of guilty or stipulation, and set an additional fee of \$1,500 per day if the case went to trial. It also required a \$1,000 deposit for costs, including

witness fees, research, investigator fees, photographs, travel and accommodations, and videotaping. EX 40A. With his Notice of Appearance, Mr. Stansfield filed a Notice of Demand for Discovery, Preservation of Evidence, Jury Trial, and Bill of Particulars. EX 39.

Far from suggesting a temporary, de minimis engagement for purposes of arraignment, substantial evidence shows that Mr. Stansfield specifically and intentionally committed himself for the entire duration of the case. It was only after the prosecutor called his office asking whether he would withdraw or if she would have to file a motion to force the issue, that he withdrew and a substitution of counsel was filed. TR 230-32; EX 38, R-1.¹⁸ Under the circumstances, his belated withdrawal does not negate the violation. In re Knappenberger, 338 Or. 341, 108 P.3d 1161 (2005) (imposing 3-month suspension because lawyer should have known of conflict and rejecting argument that no violation should be found when lawyer represented one client against a former client for less than two weeks, ended the representation as soon as possible after he discovered it, and consulted with ethics counsel). Mr. Stansfield tries to justify his representation by referring to Mr. Vargas's Sixth Amendment right to

¹⁸ Mr. Stansfield denied receiving the prosecutor's message, which had been left with his legal assistant; he claimed he stopped representing Mr. Vargas because he was "uncomfortable." He testified that in a small town one had to be careful, even if there was no technical conflict, to save face. TR 317-20.

counsel of his choice. RB at 44. He does not acknowledge, however, that the right includes the right to conflict-free counsel. Wood v. Georgia, 450 U.S. 261, 271, 101 S. Ct. 1097, 67 L. Ed. 2d 220 (1981); State v. Dhaliwal, 150 Wn.2d 559, 566, 79 P.3d 432 (2003).

5. Substantial evidence supports the Disciplinary Board's finding that Mr. Stansfield's representation of Mr. Vargas caused harm.

The Hearing Officer made no specific finding concerning injury in relation to Count 2, but by recommending an admonition he implicitly found little or no actual or potential injury to the client. DP 23. The Disciplinary Board, however, concluded that ABA Standard 4.32, not 4.34¹⁹, applied to Mr. Stansfield's conduct, and found injury and potential injury to the client, as well as to the public and its perception of the profession. DP 57.²⁰ Its conclusion was well-founded in the evidence.

Mrs. Urquilla's sister, who attended Mr. Vargas's arraignment with her, testified that they were upset and in shock when they saw Mr. Stansfield appear for the defendant; the prosecutor confirmed that they

¹⁹ See Appendix B, ABA Standard 4.3.

²⁰ Although Standard 4.32 only refers to injury or potential injury to the client, this Court has also considered harm to the public and the reputation of the profession when a conflict of interest has been proven. See Carpenter, 160 Wn.2d at 31; In re Disciplinary Proceeding Against Halverson, 140 Wn.2d 475, 486, 998 P.2d 833 (2000).

were extremely upset. TR 201-03, 228-29.²¹ As discussed above, the outcome of the criminal case could impair the ability of the Urquilla or Chavez families to recover any civil damages for wrongful death. Additionally, when the prosecutor learned that Mr. Stansfield had previously represented the Urquilla estate and had written strong statements of belief in Mr. Vargas's guilt, she immediately became concerned that the statements could later be used by Mr. Vargas to invalidate a guilty plea or support a motion for a new trial; the Grant County Prosecuting Attorney, Mr. Knodell, shared her concern. TR 229-31. Given that a triple²² homicide case was at stake, clearly a trial or retrial would consume significant resources of his office and taxpayer money. Finally, the public's view of the legal profession and its integrity could easily be harmed by a perception that a lawyer's loyalty could be "bought off" by a new client who had more money or a bigger case.

Mr. Stansfield's conduct also caused injury to the Vargases. Mrs. Vargas testified that Mr. Stansfield kept \$200 or \$250 from the \$10,000 that they had paid, and refunded the balance. The family had to start over

²¹ Mr. Stansfield argues that the Disciplinary Board should not have considered this emotional distress, and equates it to applying an "appearance of impropriety" standard, but his reasoning is strained and unsupported by any authority. RB at 44-45. The Court has recognized that a client's emotional distress constitutes injury for purposes of lawyer discipline. See, e.g., In re Disciplinary Proceeding Against Lopez, 153 Wn.2d 570, 591, 106 P.3d 221 (2005).

²² One of Mr. Vargas's passengers also died in the accident.

with a new attorney, and had to come up with funds to pay him a full \$10,000 at the outset of his representation; the representation eventually cost them another \$3,000, even though the case ended in a guilty plea. TR 281-82. Finally, there was further potential injury to Mr. Vargas in that Mr. Stansfield's previously expressed certitude about his guilt could have influenced the zeal with which he represented Mr. Vargas.

D. THE ABA STANDARDS SUPPORT A SIX-MONTH SUSPENSION.

The American Bar Association's Standards for Imposing Lawyer Sanctions (1991 ed. & Feb. 1992 Supp.) [hereinafter ABA Standards] guide the determination of appropriate sanctions in bar discipline cases. In re Disciplinary Proceeding Against Greenlee, 158 Wn.2d 259, 273, 143 P.3d 807 (2006); Halverson, 140 Wn.2d at 492. Applying the ABA Standards involves a two-step process. The first is to determine a presumptive sanction by considering (1) the ethical duty violated, (2) the lawyer's mental state, and (3) the extent of the actual or potential injury caused by the misconduct. In re Disciplinary Proceeding Against Dann, 136 Wn.2d 67, 77, 960 P.2d 416 (1998). The second is to consider any aggravating or mitigating factors that might alter the presumptive sanction. Id.

In this context, “injury” means harm to a client, the public, the legal system or the profession that results from a lawyer’s misconduct. ABA Standards, Definitions. Injury may be actual or potential. Id. “[A] disciplinary proceeding does not require a showing of actual harm. . . . The rationale is the need for protection of the public and the integrity of the profession.” Halverson, 140 Wn.2d at 486.

1. The presumptive sanction for Mr. Stansfield’s violation of former RPC 1.2(f) is suspension.

In violating former RPC 1.2(f), Mr. Stansfield violated the duty a lawyer owes as a professional, and his misconduct is assessed under ABA Standard 7.0 (see Appendix C). As discussed above, Mr. Stansfield took concrete steps to depict himself as the lawyer for the Chavez estate.²³ None of these actions was inadvertent; he knowingly wrote unqualified statements of purported representation to those entities whose action was necessary to obtain the insurance settlement for the estate, and he filed an attorney’s lien based upon his assertion that he represented the estate. Consciousness that his conduct violated the RPC is not a prerequisite to a finding of knowledge. Greenlee, 158 Wn.2d at 274; In re Disciplinary

²³ Although the Hearing Officer found that he had good motives for doing so, FFCL 2.9, 2.12; DP 16, there was no record evidence to support those findings and the Disciplinary Board correctly struck them. In any event, this Court found, in State v. Stenger, 111 Wn.2d 516, 523, 760 P.2d 357 (1988), that, under the law relating to professional conflicts of interest, it is immaterial that a lawyer acted in good faith and had only the best interest and motivation for his actions.

Proceeding Against Egger, 152 Wn.2d 393, 416, 98 P.3d 477 (2004). As discussed above, Mr. Stansfield's actions caused very significant actual harm to Mrs. Chavez. His conduct therefore falls within ABA Standard 7.2, and the presumptive sanction is suspension.

2. The presumptive sanction for Mr. Stansfield's violation of former RPC 1.9(a) is suspension.

ABA Standard 4.3 (see Appendix B) applies to cases involving conflicts of interest. Mr. Stansfield does not dispute that, when he agreed to represent Mr. Vargas, he knew the criminal case involved the same accident that killed Mr. Urquilla. As discussed above, he took purposeful action to initiate the representation with clear indications that he intended to continue for the duration of the proceedings. His actions caused actual and potential harm to the Urquilla family, the Vargases, the profession, and the public.

Given Mr. Stansfield's state of knowledge and the actual and potential harm in this case, ABA Standard 4.32 is the most applicable provision, and suspension the presumptive sanction.

3. The aggravating and mitigating factors do not justify a departure from the presumptive sanction.

Both the Hearing Officer and the Disciplinary Board found three aggravating factors: multiple offenses, vulnerability of the victim, and substantial experience in the practice of law. ABA Standard 9.22(d), (h)

and (i); FFCL 3.5, DP 22; FFCL 3.1, 3.2, DP 40. Mr. Stansfield challenges the second factor, arguing that Mrs. Chavez was not vulnerable because she was represented by independent counsel from August 29, 2003 until January 2006. RB at 24. His argument ignores the abundant evidence of her vulnerability: namely, she was unprotected during the very months that he purported to represent her, when he was sending her letters that essentially solicited her business, and when he had instructed the insurance company not to contact her directly, thereby preventing her or anyone connected with her from even knowing of his activity on her behalf. Not only was she without counsel at the time, but she was in a foreign country, with only one year of schooling, illiterate in her own language and with no knowledge of English, made ill and traumatized by her husband's sudden death, with no earnings but having to provide for seven children. TR 176, 186, 209-12, 215. The evidence supporting this aggravating circumstance is overwhelming, and the finding should stand.

The only mitigating factor found by the Hearing Officer and the Disciplinary Board was Mr. Stansfield's absence of a prior disciplinary record. ABA Standard 9.32(a); FFCL 3.6, DP 22; FFCL 3.3, DP 40-41. For the first time before this Court, Mr. Stansfield mentions two additional mitigating factors: (1) cooperation with the disciplinary proceedings, and (2) character and reputation. ABA Standard 9.32(e) and (g). Because this

argument was never presented at hearing or before the Disciplinary Board, it is not properly before the Court and should be disregarded. RAP 2.5(a).

In any event, neither mitigating factor applies here. As to cooperation, “an attorney is expected to cooperate fully with the disciplinary process.” In re Disciplinary Proceeding Against Whitt, 149 Wn.2d 707, 721, 72 P.3d 173 (2003). Whitt and other cases held that cooperation was not a mitigating factor. Id. at 721. Although the Court recently ruled that cooperation could be considered a mitigating factor in some circumstances, In re Disciplinary Proceeding Against Dornay, 160 Wn.2d 671, 688, 161 P.3d 333 (2007), in that case the Board had found the factor applied. The Court merely deferred to that decision. Here, the Board made no such finding, and the record contains no evidence of cooperation over and above what is to be expected of any lawyer.

As to character and reputation, the only testimony on this issue was Mr. Stansfield’s own; he called no other witnesses. Although use of the Washington Rules of Evidence is not mandatory in disciplinary proceedings, they may be used as guidelines. ELC 10.14(d). Under those rules, proof of character ordinarily must be made by testimony as to reputation. ER 405(a) does not permit proof of character in the form of an opinion, especially a defendant’s own opinion. State v. Mercer-Drummer, 128 Wn. App. 625, 632, 116 P.3d 454 (2005), review denied 156 Wn.2d

1038, 134 P.3d 233 (2006). Mr. Stansfield's reliance on his own self-serving testimony as character evidence is unavailing.

4. A six-month suspension is appropriate in this case.

The ABA Standards provide that suspension should generally be for a period of time equal to or greater than six months, a position which this Court has adopted in numerous disciplinary decisions. See ABA Standard 2.3; Poole, 156 Wn.2d at 196; McKean, 148 Wn.2d at 874; Halverson, 140 Wn.2d at 475. In Halverson, the Court stated that a minimal suspension is more appropriate in a case where there are either no aggravating factors and at least some mitigating factors, or where the mitigating factors clearly outweigh any aggravating factors. Id. at 497. Here, as the aggravating factors outweigh the mitigating factors, a six-month suspension is justified.

5. Mr. Stansfield fails to meet his burden of proving that suspension is disproportionate.

In proportionality review, the Court compares the case at hand with "similarly situated cases in which the same sanction was either approved or disapproved." In re Disciplinary Proceeding Against VanDerbeek, 153 Wn.2d 64, 97, 101 P.3d 88 (2004).

Mr. Stansfield maintains that a six-month suspension is disproportionate here. RB at 50. But he bears the burden of bringing cases to the court's attention to demonstrate the disproportionality of the

sanction imposed. VanDerbeek, Id. at 97; In re Disciplinary Proceeding Against Cohen, 150 Wn.2d 744, 763, 82 P.3d 224 (2004). He cites only one case, Carpenter, 160 Wn.2d at 31-32, in which the sanction was a two-month suspension. But in Carpenter, the Disciplinary Board found an equal number of aggravators and mitigators. Carpenter, Id. at 29-30. Here, by contrast, both the Disciplinary Board and the Hearing Officer found three aggravating factors outweighing a single mitigating factor. Given this difference, Mr. Stansfield has failed to meet his burden of showing that the recommended six-month suspension is disproportionate.

E. THE DISCIPLINARY BOARD'S MODIFICATION OF CERTAIN FINDINGS OF FACT WAS AN APPROPRIATE EXERCISE OF ITS AUTHORITY UNDER ELC 11.12(d).

The Disciplinary Board struck a number of factual findings when it amended the Hearing Officer's decision. Mr. Stansfield argues that the Board erred in doing so. RB, Assignments of Error (AE) 1-4, 8, 13, 14. The Disciplinary Board's action, however, was appropriate and fell within the authority granted it under ELC 11.12.

The Disciplinary Board reviews findings of fact (FF) for substantial evidence. ELC 11.12(b). On these grounds, it struck FF 2.3 (AE 1) which stated that Mr. Vargas was the sole cause of the accident, as unsupported by the record; indeed, the police reports and reconstruction

(Ex 50) only stated that Mr. Vargas was the proximate cause of the accident, not the sole cause.

The Board struck FF 2.9 (AE 3) for the same reason: there was no evidence that Mr. Stansfield had a “compassionate nature,” and he cites no testimony that he took the cases for that reason or any particular reason; at best, the evidence simply showed that he heard what the client wanted done, agreed to do it, and charged an hourly rather than a contingent fee.

The Board struck FF 2.12 (AE 3) the statement “no good deed goes unpunished,” a gratuitous, irrelevant comment incapable of being proven by the record, and the statement that Mr. Stansfield’s “only motives were to get a good resolution so the families could [get the insurance money].” The record is silent on his motives; he simply testified about what the Urquilla family hired him to do (some of which he refused) and that he thought it was more fair to charge them hourly when they had already negotiated the full settlement with the insurer themselves. The record shows no particular benevolence or solicitude; to the contrary, Mr. Stansfield testified Mrs. Urquilla soon made him nervous and he wanted to avoid her. There was no credibility determination to be made in this regard.

The Board struck FF 2.13 (AE 4), that Mr. Stansfield was “more than fair” with the Urquillas in settling their claims and the estate. He

straightforwardly performed the required services and was paid for them; there was no testimony establishing whether the amount of time he took was shorter, or the fee he took was more reasonable, than would be expected for an estate of that size or level of complexity.

The Board struck FF 2.40 (AE 8) that Mr. Stansfield believed he represented the Urquillas only with regard to probate, to get the insurance money. His “belief” was not relevant as a state of mind under the ABA Standards; what he knew he was doing, or intended to do, or failed to perceive as his duty, is what matters under the Standards, and the Hearing Officer made the requisite findings in that respect.

The Board struck FF 3.1 (AE 13) that he had “nothing but the best intentions” in mind; as in FF 2.12, there was no testimony about his intentions or good motives, but simply his statements about what he understood the client’s goal to be—receiving the insurance settlement—and how it could be accomplished. Under Stenger, his motives are immaterial. 111 Wn.2d at 523.

Finally, the Board struck FF 3.2 (AE 14), in which the Hearing Officer stated, “I find that Respondent’s judgment could have been better in determining who he should be representing,” a vague conclusion which references no relevant legal standard applicable to this case.

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In each of these instances, the Disciplinary Board took care to ensure that the findings conformed with the evidence, and to satisfy the requirement that it state its reasons for making a change in the Findings. ELC 11.12(e). There was no error.

V. CONCLUSION

For the reasons stated above, the Disciplinary Board's decision and sanction recommendation should be affirmed.

RESPECTFULLY SUBMITTED this first day October, 2007.

WASHINGTON STATE BAR ASSOCIATION

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Disciplinary Counsel

Certificate of Service

I certify that I caused a copy of the foregoing Answering Brief of the Washington State Bar Association and Appendices dated October 1, 2007 to be mailed to Respondent's counsel Leland G. Ripley at P.O. Box 1058, Lake Stevens, WA 98258-1058 by first-class mail, postage prepaid, on the first day of October, 2007.

Natalea Skvir
Disciplinary Counsel

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Mr. Carpenter:

I spoke with Ms. Chandler this morning and advised her that two pages of the Association's brief needed minor correction; I am enclosing the corrected version of the Association's Answering Brief, with Appendices, for filing with the Court in In re Disciplinary Proceeding Against Mark E. Stansfield, Supreme Court No. 200,479-2.

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