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I.

INTRODUCTION

This is an appeal from a decision of the Disciplinary Board of the Washington State Bar Association (hereafter, the “Disciplinary Board”), adopting the decision of Hearing Officer Randolph O. Petgrave, recommending a two-year suspension of attorney Alan F. Hall (“Hall”). Hall was accused of: 1) failing to adequately communicate and explain to his clients a proposed course of conduct and reasonably available alternatives in violation of Rule of Professional Conduct (hereafter, “RPC”) 1.4(b) and/or RPC 1.7(a)(2); 2) charging improper fees in violation of RPC 1.5 and/or 8.4(c); 3) failing to return client documents after repeated requests in violation of RPC 1.15A(f) and RPC 1.16(d); and 4) threatening another attorney and the client with lawsuits for providing information to the Washington State Bar Office of Disciplinary Counsel (“ODC”) in violation of RPC 8.4(d).

II.

ASSIGNMENTS OF ERROR

- A. The Disciplinary Board incorrectly found that Hall violated RPC 1.4(b) or RPC 1.7(a)(2) because he did, in fact, obtain his clients’ fully informed and written consent.
- B. The Disciplinary Board erred in finding that Hall violated RPC 1.5 or RPC 8.4(c) because the fees he charged his clients were reasonable and proper.

- C. The Disciplinary Board incorrectly found that Hall violated RPC 1.15A(f) and RPC 1.16(d) because Hall's refusal to return client documents was reasonable and justified based on his reasonable belief that the client was being unduly influenced and exploited.
- D. The Disciplinary Board erred in finding that Hall violated RPC 8.4(d) because his conduct was based on a reasonable attempt to promote justice and uphold practice norms.
- E. The Disciplinary Board failed to adhere to Rule of Enforcement of Lawyer Conduct (hereafter "ELC") 13.3 by imposing a two-year suspension where Hall had already been suspended for a period of two years pursuant to a disability.
- F. The Disciplinary Board's two-year suspension was otherwise excessive or improper based on the facts and circumstances of the case.

III.

STATEMENT OF THE CASE

Respondent-Appellant Alan F. Hall (hereinafter "Respondent" or "Hall") respectfully submits this brief in appeal of the Disciplinary Board's September 19, 2013 (Bar File No. 74) decision adopting the decision of Hearing Officer Randolph O. Petgrave issued on April 1, 2013 (Bar File No. 57). For ease of reference, and as the Disciplinary Board adopted the Hearing Officer's decision unanimously and in its entirety, both decisions are collectively referred to herein as the Disciplinary Board's decision. A summary of the factual background of this case with citation to the appellate records follows.

Alan Hall was admitted to the Bar in 1974. In the late 1990s, he began to focus his practice on elder law and estate planning, with a special emphasis in special needs trust planning. In 2008, he became a financial advisor and a stockbroker, taking several extensive Financial Industry Regulatory Authority (“FINRA”) courses and exams. He was hired in that capacity at Ameriprise Financial and worked there for six months before returning to the practice of law. He developed and maintained competence and expertise in estate planning and special needs planning and has been a member of the Academy of Special Needs Trust Attorneys as well as the National Alliance of Mental Illness and participated in continuing legal education and other courses.

Mr. Hall first met with Stephen Keen in late July 2008, and Stephen hired Mr. Hall in August 2008 to assist him and his mother, Margaret, in developing Margaret’s estate plan. Respondent’s Designated Exhibits (hereafter “Exh. R”) at R-105, R-124, R-125. At the time, Margaret was 91 years old and Steve was 65. Both of them were physically disabled but mentally competent. Notably, there was no evidence presented at the hearing to suggest otherwise. In fact, Jamie Clausen, who was the chief witness for the Washington State Bar Association (“WSBA” or the “Bar”), testified that indeed, both Stephen and Margaret Keene were competent at all times she interacted with them.

Stephen was Margaret's primary caregiver and had a duly executed Power of Attorney signed by Margaret pursuant to which he was agent. However, because Stephen was disabled, Margaret wished to set up a plan to provide for his increasing care needs. Exh. R-101, R-105. Mr. Hall understood from Stephen Keen that Margaret's estate was worth approximately \$400,000. Exh. R-101, R-105. Although Margaret had two sons, Stephen and James Keen, Stephen was to solely benefit from the plan. Exh. R-101, R-105. Margaret agreed to pay a flat fee of \$3,000 for Mr. Hall's estate planning services.

Pursuant to his clients' wishes, Mr. Hall prepared a complex estate plan for Margaret. Exh. R-101, R-105, R-124, R-125. Mr. Hall determined that his clients' wishes would best be served by a special needs trust naming Stephen as beneficiary, so that if Stephen ultimately had to be placed in a nursing home, he would not deplete the inheritance from his mother on nursing home expenses. Exh. R-101, R-105, R-124. At the same time, the plan was intended to conserve Margaret's assets to provide for her own care, particularly nursing home expenses. Exh. R-101, R-105, R-124. According to Mr. Hall's testimony, the plan was highly dependent on timing. Exh. R-101, R-105, R-124. A special needs trust would be set up and minimally funded, with the trust being named as beneficiary in Margaret's will. Exh. R-101, R-105, R-124. Margaret could then

additionally fund the trust at a strategic time, thereby providing for Stephen without disqualifying him from Social Security and Medicaid benefits while also spending down her own assets to qualify herself for those benefits. Exh. R-101, R-105, R-124.

This estate plan was developed and explained to both Margaret and Stephen during several meetings in August 2008, and Mr. Hall drafted the estate plan documents on August 30, 2008. Exh. R-125. The documents included: (1) the Will of Margaret Stephen Keen, (2) the Living Will of Margaret Stephen Keen, (3) the Durable Power of Attorney for Margaret Stephen Keen, (4) the Stephen Keen Trust (Special Needs Trust), and (5) letters retitling assets and changing beneficiary designations on Margaret's financial accounts. Exh. R-101, R-105. An Engagement Letter dated September 3, 2008, memorialized Mr. Hall's representation agreement with Margaret and Stephen, explained Mr. Hall's understanding of Margaret's estate, and summarized the workings of the estate plan he prepared. Exh. R-101, R-105. The letter was included in a bound estate plan packet that was initialed by Margaret Keen. Exh. R-105.

The Engagement Letter, which attached the proposed estate plan documents, was prepared in anticipation of a September 3, 2008 meeting with Margaret at her home. Exh. R-101, R-105, R-124, R-125. However, Margaret canceled that meeting. The Engagement Letter and documents

were instead picked up by Stephen on September 11, 2008. Exh. R-125. Although the WSBA characterized Mr. Hall's Engagement Letter as a "letter to himself" for which the client was billed, Mr. Hall's billing records - introduced at trial - show no such charge. Exh. R-125. Regardless, the letter was clearly addressed to Margaret and was work product for which Mr. Hall was certainly entitled to bill. Exh. R-101, R-105. There is also another letter in Mr. Hall's records dated September 3, 2008, which appears to be addressed to Mr. Hall from Mr. Hall. Exh. R-103. However, the original version of this letter was actually addressed to Margaret to inform her of her duties as trustee of the Stephen Keen Trust. Exh. R-103. Mr. Hall's name now appears on the letter because he later readdressed it to himself for his own files when his clients instructed him that he would replace Margaret as successor trustee. Mr. Hall simply failed to amend the letter's date. Again, Mr. Hall's billing records show no charge for this letter—either in September or later—even though it, too, was work product for which Mr. Hall could have rightfully billed. Exh. R-125.

In Mr. Hall's discussions with Margaret and Stephen, they both expressed that Margaret did not have any other relatives she wished to name as fiduciaries in the estate plan documents. Indeed, a letter dated October 29, 2008, from Stephen to Mr. Hall confirmed that Margaret

refused to allow any relatives other than Stephen to participate in her care. Exh. R-108. Her other son, James Keene, testified at the hearing regarding the same understanding—that he was to have no part in his mother’s life.

Accordingly, Margaret requested that Mr. Hall serve as successor executor of the will, successor trustee of the trust, and alternate agent of the power of attorney and living will. Mr. Hall believed he could competently perform these roles and that he was particularly well-suited to serve as successor trustee due to his investment expertise and intimate understanding of the timing issues involved in the estate plan.

Page 2 of the Engagement Letter memorializes Margaret’s wishes and Mr. Hall’s explanation of the conflict inherent in the same:

INFORMED CONSENT. Additionally, you have asked me to be your successor trustee under Stephen’s Special Needs Trust and your successor Executor under your will should Stephen not want to do it or cannot do it. I have informed you that generally the Code of Professional Conduct for lawyers does not favor this do [sic] to potential conflicts. For example if the estate needs legal services for a will contest or likewise as the Trust I may hire myself at my regular hourly rates. You are aware of this and consent to it. We have discussed other options as to whom else you could use in these positions and you still consent to me as your successor Trustee and Executor. You have further consented to me as your

alternate agent under your Power of Attorney and Living Will at reasonable compensation. You have had a chance to review this engagement letter along with the original documents with Stephen and any other individuals. If you have any question about any of these issues you should consult another attorney.

Exh. R-101, R-105.

On October 28, 2008, Margaret executed the estate plan documents. Exh. R-105. The Will of Margaret Stephen Keen named Stephen as executor and provided that Margaret's entire estate would be paid into the Stephen Keen Trust. Exh. R-105, R-121. The will named Mr. Hall as the alternate executor and allowed him to hire himself to deal with issues arising under the will or the Stephen Keen Trust. Exh. R-105, R-121. Specifically, the will provided:

5.6 INFORMED CONSENT It is my considered decision that my lawyer Alan F. Hall be my successor Executor under this will and that he may hire himself in regard to any issues under this will or under the STEPHEN KEEN TRUST referenced herein.

Exh. R-105, R-121. Each page of the will was initialed by Margaret, and the will was duly executed. Exh. R-105, R-121.

The Stephen Keen Special Needs Trust named Margaret as trustee and Stephen as sole beneficiary. Exh. R-104, R-105. Mr. Hall was named successor trustee, and the trust provided that he was entitled to be

compensated at a rate of \$8,000 per year or 2% of the trust corpus, whichever was greater. Specifically, the trust provided:

4.14 ALAN F. HALL AS TRUSTEE. It is my considered decision that Alan F. Hall be named as successor trustee. I am fully aware that Mr. Hall is an Attorney, that he prepared all of my estate planning documents including this Trust and that he will be compensated at the rate of two percent of the corpus and accumulated interest annually or \$8,000 per year whichever is greater and paid in quarterly payments the first of each quarter. I further understand that Mr. Hall may do work as attorney for the Trust as described in section 4.9 and other legal matters related to the business of the Trust. I understand that this may create a conflict in that he will be hiring himself. I also understand that he has expertise in these fields and that I trust him to bill the trust at his usual hourly rate.

Exh. R-104, R-105. The trust also named as "Trust Protector" Stephen's college roommate, James Lassoie. Exh. R-104, R-105. Like the will, each page of the trust was initialed by Margaret, and the trust was duly executed. Exh. R-104, R-105.

The Living Will of Margaret Stephen Keen named Stephen as Margaret's health care representative. Exh. R-105, R-106. In the event that he could not act, the living will provided that Mr. Hall would act as Margaret's health care representative. Exh. R-105, R-106. Each page of the living will was initialed by Margaret, and the document was duly

executed. Exh. R-105, R-106. Similarly, Margaret's Durable Power of Attorney named Stephen as agent and appointed Mr. Hall as alternate agent. Exh. R-105, R-107. Each page of the power of attorney was initialed by Margaret, and the document was duly executed. Exh. R-105, R-107.

Although the WSBA asserted that Mr. Hall began billing for work as trustee in September 2008, that is certainly not the case. Mr. Hall's billing records show that Mr. Hall performed work on and billed for the creation of Margaret's *estate plan* from July 29, 2008, through December 3, 2008. Exh. R-125. Margaret was charged \$3,000 for this work, the amount agreed upon for the estate plan. Exh. R-125. This agreed-upon fee was substantially commensurate with the 15.95 hours Mr. Hall worked on the estate plan at his regular \$185 hourly rate. Exh. R-125.

By December 2008, Margaret could no longer perform her duties as trustee, and Mr. Hall was instructed by the Keens that he would have to replace her as successor trustee. During that month, he performed work in preparation for his role as trustee and in his role as attorney for Margaret and Stephen in regard to the overall estate plan. Exh. R-125. For example, he dealt with an issue regarding the transfer on death ("TOD") provision of Margaret's Morgan Stanley investment account worth approximately \$250,000. Exh. R-112. Mr. Hall had requested that the

TOD provision be changed to name the Stephen Keen Trust as beneficiary, but Morgan Stanley failed to comply and Hall had to make additional requests. Exh. R-109, R-112. Mr. Hall additionally met with other financial institutions regarding the estate plan during December 2008. Exh. R-125. To prepare for his role as successor trustee, Mr. Hall outlined in detail and reviewed the specific trustee duties he would be responsible for carrying out. Exh. R-110, R-125. He also participated in several hours of continuing legal education on specific special needs trust and elder law issues related to the estate plan, for which he did not bill his clients. Exh. R-125. Mr. Hall also met with his clients several times during this period, keeping them well apprised of the tasks he was performing. Exh. R-125.

On January 7, 2009, Margaret executed a document in which she officially declined to serve as trustee and consented to Mr. Hall replacing her as successor trustee. Exh. R-116. The document was duly signed by Margaret, acknowledged by Stephen, and notarized. Exh. R-116. The notary later swore in an affidavit admitted into evidence at Hearing that Margaret was tested for competency on January 7, 2009, and answered all questions appropriately; the notary concluded that Margaret was competent and under no duress when she signed the declination. Exh. R-133. The notary also swore that Stephen was competent and under no

duress during the signing. Exh. R-133. The notary was also present and acted as witness when Margaret amended her will and the trust on February 6, 2009. Exh. R-133, R-121, R-122. Again, the notary concluded that both Margaret and Stephen were competent and under no duress. Exh. R-133. Also on January 7, 2009, Margaret signed a Disclosure Agreement naming the Stephen Keen Trust the beneficiary of her Morgan Stanley investment account and identifying Mr. Hall as trustee. Exh. R-117.

Pursuant to the trust instrument, in which Margaret agreed that Mr. Hall would be paid for his trustee services a fee of \$2,000 per quarter at the beginning of each quarter, Stephen wrote Mr. Hall a check for \$2,050 on December 29, 2008. Exh. R-111, R-125. The additional \$50 included in the check was to provide the initial \$49 Mr. Hall used to set up and fund the trust account at Key Bank on January 7, 2009. In addition to the trustee preparation and legal work he had done in December 2008, Mr. Hall's billing records show that he did a significant amount of work both as trustee and as attorney for the Keens from January 2009 through mid-March 2009. Exh. R-125.

In addition to preparing the trustee declination, will and trust amendments, and other legal documents for the Keens, Mr. Hall continued to deal with issues with Margaret's Morgan Stanley account. Exh. R-119,

R-125. Mr. Hall met with a Markow representative and another broker to discuss investment decisions regarding a new account. Exh. R-125. In addition to managing the financial condition of Margaret's overall estate, Mr. Hall also performed the many non-financial trust duties he was responsible for as trustee. Exh. R-125. For example, the trust required Mr. Hall to oversee Stephen's overall care. Section 2.4.3 of the trust provides:

My trustee or agents are requested to visit or contact STEPHEN at his residence at regular monthly intervals (or otherwise as determined appropriate by my Trustee) to inspect his living conditions, to inquire of care providers and, to the extent possible, to inquire of STEPHEN regarding his treatment by care providers; to let him know that he has a friend and advocate in addition to family members, to see that he has spending money for the items he may want (within the constraints of this Trust); to know that he is receiving any available educational and recreational programs, and to ensure that governmental assistance, private contractual benefits and trust funds are in fact being expended for his benefit.

Exh. R-104, R-105. Accordingly, Mr. Hall met regularly with Stephen regarding both legal matters and trustee matters. Exh. R-125. He also hired Care Force to inspect Stephen's living conditions and determine his level of health, at which point it became apparent that Stephen had a

severe drinking problem and was increasingly incapable of caring for himself. Exh. R-125, R-136.

Significantly, Mr. Hall's billing records show no individual charge for the \$2,000 quarterly trustee fee. Instead, Mr. Hall billed all of his work by the hour, whether performed pursuant to his trustee duties or otherwise, and he deducted the pre-paid \$2,050 from the final amount. Exh. R-125. From December 2008 through mid-March 2009, Mr. Hall records show 61.65 hours of work for the Keens at his regular rate of \$185. Exh. R-125. He recorded but did not charge for approximately 30 hours spent on continuing education regarding special needs trusts, financial planning, and public benefits. Exh. R-125. He included the cost of recording the Power of Attorney and startup money for the trust account in the bill, but wrote off costs relating to continuing education and a \$140 notary cost for the execution of the estate plan documents. Exh. R-125. Less the \$2,050 pre-paid trustee fee, the Keens' outstanding legal bill totaled \$4,373.25. Exh. R-125.

In March 2009, Mr. Hall was preparing to further fund the trust to provide for Stephen's increasing health care needs, including a move to an assisted care facility. Mr. Hall learned from Stephen that he was back in communication with his ex-wife, Linda Orf (hereafter, "Orf"), which was surprising to Mr. Hall because Stephen had previously told him that

Stephen had not been in contact with Orf for over 13 years. Mr. Hall shortly thereafter learned that Orf had flown to Seattle. From that point on, Mr. Hall lost all contact with the Keens and every effort to contact Stephen was stonewalled by Orf. Then, on April 7, 2009, Mr. Hall received a letter from an attorney, Jamie Clausen, who claimed to be representing the Keens and demanded the estate plan documents. This sudden turn of events raised Mr. Hall's suspicions that Orf was unduly influencing Stephen and Margaret and possibly committing elder abuse. Mr. Hall's concern was heightened by his lack of any direct contact with his clients. Acting out of this concern—as well as his desire to continue fulfilling his trustee duties—Mr. Hall expressed his concerns in an April 16, 2009 email to Clausen. Exh. R-123. In that email, he also requested a signed confirmation from his clients. Exh. R-123. He never received that confirmation.

In November 2009, a complaint against Hall was filed. Mr. Hall immediately wrote a letter to the WSBA explaining the factual situation leading up to the mysterious turn of events and expressing his concern that Orf was unduly influencing and possibly abusing Stephen and Margaret. Exh. R-124. Mr. Hall explained that it was beyond reason that the Keens would assert that they did not know of his fiduciary roles in the estate plan documents, considering the documents they signed, their payment to him

as successor trustee, and the constant contact he had with them in his capacity as trustee. Exh. R-124. He explained that this only added to his suspicions and compelled him to withhold his clients' documents from what he believed could only be an abusive situation controlled by Orf. Exh. R-124.

Still concerned about Stephen's well-being and the way the situation had been handled, Mr. Hall went to Clausen's home office on May 25, 2010, to try to explain his point of view and gain insight into what had happened to his clients. Exh. R-130. Although the WSBA alleged that Mr. Hall's behavior was "threatening," both he and Clausen testified that neither considered the behavior to be "threatening". Exh. R-130. The same day, Mr. Hall wrote to Clausen memorializing their conversation and gave a similar explanation of his position as in his letter to the WSBA. Exh. R-130. Mr. Hall had a similar exchange of letters with James Lassoie beginning May 28, 2010, in which Mr. Hall expressed his concerns about Orf, his clients' apparent new representation, and his pending disciplinary action. Exh. R-130. In that exchange, Mr. Hall pled with Lassoie to make an investigation into the elder abuse he believed was still occurring.

IV.
ARGUMENT

Hall respectfully asserts that the Disciplinary Board erred in both its Findings of Fact and Conclusions of Law. Simply stated, there was no evidence that Mr. Hall exploited his clients, as he in fact did everything a lawyer was required to do. In fact, he believed he was attempting to protect his clients from exploitation when he took the steps the Disciplinary Board believed merited discipline. Moreover, too much weight was given by the Disciplinary Board to the testimony of Jamie Clausen.

What the evidence at hearing demonstrated was Respondent was an attorney acting in his clients' best interests to *protect* them against exploitation. The conduct he engaged in was carried out in a good faith attempt to provide valuable legal services to Margaret and Stephen Keen ("Margaret" and "Stephen"), collect fair compensation for those services, and ultimately protect the Keens from what he saw as an exploitative situation. At hearing, the unrefuted evidence showed that Hall took the required steps to ensure that he obtained consent from the Keens for the actions he was taking. Apparently, the Disciplinary Board did not understand that testimony, which is crucial to this case.

As this brief will show, Hall did what any lawyer would do, which was obtain the consent of the Keens in writing, after explaining to them what his role would be. What more can the Bar ask of a lawyer? Is the lawyer supposed to be clairvoyant and know that his client would suddenly claim he did not understand what he was signing, even after having the papers for over a month?

In all, the sanction the Disciplinary Board has ordered—particularly the severe punishment of a two-year suspension from the practice of law on top of the two years Hall already has been suspended—is unfounded and unwarranted.

A. Standard of review.

“A hearing officer makes findings of fact, conclusions of law, and recommendations to the Board.” *In re Disciplinary Proceeding Against Dornay*, 160 Wn.2d 671, 680, 161 P.3d 333 (2007). On review of the Hearing Officer’s decision, the Board may then “adopt, modify, or reverse the hearing officer’s findings, conclusions, or recommendations.” *Id.* “The Board reviews findings of fact for substantial evidence. The Board reviews conclusions of law and recommendations *de novo*. Evidence not presented to the hearing officer or panel cannot be considered by the Board.” ELC 11.12(b). The Washington Supreme Court reviews the

Disciplinary Board's conclusions of law *de novo*. *In re Dornay*, 160 Wn.2d at 680.

Respondent suggests that at hearing, the WSBA failed to demonstrate by a clear preponderance that Mr. Hall violated the Rules of Professional Conduct in his representation of the Keens with regard to any of the four counts the WSBA alleges in its Formal Complaint. Further, assuming (without conceding) that Mr. Hall did commit a technical violation, the severe sanction of a suspension is unwarranted given that there are mitigating factors and the WSBA has no evidence that Mr. Hall's actions caused any harm to his clients. Furthermore, even if the two-year suspension is warranted, the two year suspension on top of the two years he already has been suspended as a result of invoking disability during the course of his first disciplinary hearing is contrary to the mandates of ELC 13.3.

B. Mr. Hall did not violate RPC 1.4(b) or RPC 1.7(a)(2) because he obtained Margaret's fully informed, written consent.

The Disciplinary Board erred in finding that Mr. Hall violated RPC 1.4(b) and RPC 1.7(a)(2) by "making himself" alternate trustee, power of attorney, personal representative, and health care representative without informing Margaret of the risks inherent in those appointments and obtaining written consent. On the contrary, the evidence at hearing

showed that Mr. Hall was *requested* by the Keens to fill those roles, took great care to explain to them the conflicts inherent in those appointments, and memorialized his clients' informed consent in writing.

RPC 1.4(b) provides, "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." RPC 1.7(a)(2) provides that "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest," including where "there is a significant risk that the representation of one or more clients will be materially limited by . . . a personal interest of the lawyer." However, RPC 1.7(b) provides that "[n]otwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing

WSBA Advisory Opinion 946 (1986) (formerly cited as WSBA Published Informal Opinion 86-1) confirms that there is no per se prohibition on an attorney being appointed to the role of executor. *See Estate of Shaughnessy*, 104 Wn.2d 89, 702 P.2d 132 (1985). Instead, the Committee has announced that in such a case:

The lawyer should disclose to the client the duties and obligations of an executor, the fees which the lawyer will charge for performing those services, the fees alternative executors would probably charge, and should advise the client that he or she is free to seek the advice of independent counsel. This disclosure should be in writing to ensure that the client understands its significance and to establish conclusively that it occurred.

WSBA Advisory Opinion 946. Indeed, “[t]he Committee does not believe the Supreme Court intended to prevent a lawyer from preparing a will in which the lawyer is named as executor in situations where the client is fully advised and affirmatively desires the lawyer to so serve.” *Id.* Further, neither Washington courts nor the Committee have applied these specific guidelines to a lawyer’s appointment to other fiduciary roles, such as trustee.

To the extent that the guidelines of WSBA Advisory Opinion 946 *do* apply to the case at hand, Mr. Hall met them. First, although the Disciplinary Board found that Mr. Hall *made himself* alternate trustee,

power of attorney, personal representative, and health care representative, the fact is that the Keens specifically *asked* Mr. Hall to fill these roles due to his expertise and the fact that they had no desire for any relative or other acquaintance to fill the roles. That was demonstrated at the hearing by Mr. Hall's testimony of the Keens' wishes and by Hall's many meetings with the Keens, the unrefuted evidence of their competence and ability to understand those meetings, and Margaret's signatures and initials on the estate plan documents. Mr. Hall reasonably believed he could continue to perform competent and diligent legal services despite the dual roles and demonstrated that ability by appropriately performing the dual roles of attorney and successor trustee for several months.

Finally, Mr. Hall took great care to ensure that Margaret understood the duties and obligations of the fiduciary roles he was accepting, the fees he would charge for those services compared to the alternatives, and that Margaret could seek independent counsel. His discussions with Margaret were memorialized in the Engagement Letter, as well as the estate plan documents. The Engagement Letter—which was part of a package initialed by Margaret—stated:

INFORMED CONSENT. Additionally, you have asked me to be your successor trustee under Stephen's Special Needs Trust and your successor Executor under your will should Stephen not want to do it or cannot

do it. I have informed you that generally the Code of Professional Conduct for lawyers does not favor this do [sic] to potential conflicts. For example if the estate needs legal services for a will contest or likewise as the Trust I may hire myself at my regular hourly rates. You are aware of this and consent to it. We have discussed other options as to whom else you could use in these positions and you still consent to me as your successor Trustee and Executor. You have further consented to me as your alternate agent under your Power of Attorney and Living Will at reasonable compensation. You have had a chance to review this engagement letter along with the original documents with Stephen and any other individuals. If you have any question about any of these issues you should consult another attorney.

Exh. R-105. This document alone bears all the requisite elements.

Further, the will provided:

5.6 INFORMED CONSENT It is my considered decision that my lawyer Alan F. Hall be my successor Executor under this will and that he may hire himself in regard to any issues under this will or under the STÉPHEN KEEN TRUST referenced herein.

Exh. R-105. And finally, the trust instrument provided:

4.14 ALAN F. HALL AS TRUSTEE. It is my considered decision that Alan F. Hall be named as successor trustee. I am fully aware that Mr. Hall is an Attorney, that he prepared all of my estate planning documents including this Trust and that he

will be compensated at the rate of two percent of the corpus and accumulated interest annually or \$8,000 per year whichever is greater and paid in quarterly payments the first of each quarter. I further understand that Mr. Hall may do work as attorney for the Trust as described in section 4.9 and other legal matters related to the business of the Trust. I understand that this may create a conflict in that he will be hiring himself. I also understand that he has expertise in these fields and that I trust him to bill the trust at his usual hourly rate.

Exh. R-105.

These documents were signed and plainly fulfilled all of the requirements to quell a conflict of interest under RPC 1.4(b), RPC 1.7(a)(2), and WSBA Advisory Opinion 946. Accordingly, the Disciplinary Board's contrary findings were error as a matter of law, and its findings and conclusions on those counts must be reversed.

C. Mr. Hall did not violate RPC 1.5 or RPC 8.4(c) because his fees were reasonable.

The Disciplinary Board erroneously found that Mr. Hall violated RPC 1.5 and RPC 8.4(c) by charging a flat fee for "managing an unfunded trust" before he was officially appointed trustee and for performing work "for which he was already charging a flat fee." Mr. Hall only performed the services requested of him by the Keens, never double-billed for those services, and provided significant value for the cost due to his additional investment and special needs trust expertise.

RPC 1.5(a) provides that a “lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses.” Reasonableness is based on a number of factors, including:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

...

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

...

(8) whether the fee is fixed or contingent; and

(9) the terms of the fee agreement between the lawyer and the client, including whether the fee agreement or confirming writing demonstrates that the client had received a reasonable and fair disclosure of material elements of the fee agreement and of the lawyer's billing practices.

Further, RPC 1.5(b) provides:

The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client. Upon the request of the client in any matter, the lawyer shall communicate to the client in writing the basis or rate of the fee.

Finally, RPC 1.5(f)(2) provides:

A lawyer may charge a flat fee for specified legal services, which constitutes complete payment for those services and is paid in whole or in part in advance of the lawyer providing the services. If agreed to in advance in a writing signed by the client, a flat fee is the lawyer's property on receipt, in which case the fee shall not be deposited into a trust account under Rule 1.15A. The written fee agreement shall, in a manner that can easily be understood by the client, include the following: (i) the scope of the services to be provided; (ii) the total amount of the fee and the terms of payment; (iii) that the fee is the lawyer's property immediately on receipt and will not be placed into a trust account; (iv) that the fee agreement does not alter the client's right to terminate the client-lawyer relationship; and (v) that the client may be entitled to a refund of a portion of the fee if the agreed-upon legal services have not been completed.

Here, Mr. Hall substantially complied with each of these rules.

First, Mr. Hall's work regarding the trust in December 2008—before Margaret's declination to serve as trustee on January 7, 2009—was done only pursuant to the Keens' instructions. In early December 2008, Mr. Hall was made aware that Margaret would no longer be able to serve as trustee, so he began performing work in preparation for his duties as trustee, in addition to continuing his general legal work on the estate plan. He billed his regular hourly rate for this work, which—as fully explained above—included a number of valuable services.

In December 2008, Mr. Hall prepared a memorandum which outlined in great detail the intricacies of the special needs trust and the trustee's duties regarding the same. Exh. R-110. The memo was simply a way for Mr. Hall to organize and record his thoughts regarding those complexities, a practice not uncommon among attorneys. And Mr. Hall did not also charge for "receiving duties" as the WSBA asserted, but rather simply spent another hour *reviewing* those trustee duties, which is similarly appropriate and reasonable based on the complexity involved. As explained above, the September 2008 letters are no basis for discipline because the Keens were not even billed for that work.

Further, Mr. Hall's fees for the months of January through March 2009 were similarly reasonable. Pursuant to Section 4.14, which explained in writing the terms of the trustee fee arrangement, Mr. Hall was

paid \$2,000 for his first-quarter trustee services, some of which had already been earned in December. Instead of somehow double-billing for that amount, Mr. Hall recorded all of his time from December 2008 through March 2009 and simply offset his hourly bill with the amount received pursuant to the trust agreement.

In all, Mr. Hall performed valuable legal services for his clients, backed by his expertise in investments and special needs trusts—which he bolstered throughout the representation through continuing legal education at no cost to the Keens. In addition to preparing a number of legal documents and arranging for their execution, he performed other services as legal advisor related to Medicaid and Social Security qualification, as well as the significant investment-related and personal duties required of him under the trust. The claims that the trust itself was “unfunded” ignores the fact that that was the strategy of the estate plan, and much of Mr. Hall’s time was spent managing Margaret’s \$400,000 estate in *preparation for* funding the plan at the proper time. Indeed, any value the Keens failed to realize from Mr. Hall’s services was caused by their own decision to cut short that intended funding strategy and start from scratch.

In sum, Mr. Hall provided valuable services to the Keens at a reasonable cost.

D. Mr. Hall did not violate RPC 1.15A(f) and RPC 1.16(d) because his refusal to return documents was based on a reasonable belief that his clients were being unduly influenced and exploited.

The Disciplinary Board erroneously found that Mr. Hall violated RPC 1.15A(f) and RPC 1.16(d) by refusing to return original documents when requested by attorney Clausen. Mr. Hall reasonably believed in good faith that his refusal to deliver what documents he had in his possession was in the best interests of his clients. RPC 1.15A(f) provides that “[e]xcept as stated in this Rule, a lawyer must promptly pay or deliver to the client or third person the property which the client or third person is entitled to receive.” The commentary to the rule specifies that it applies to “property held in any fiduciary capacity,” including “original documents affecting legal rights such as wills or deeds.” Further, RPC 1.16(d) provides that “[u]pon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client’s interests, such as . . . surrendering papers and property to which the client is entitled”

Here, although Mr. Hall admitted that he failed to return documents, in fact Mr. Hall acted out of a desire to *fulfill* his ethical obligations to his clients. First, RPC 1.16(d) states that a lawyer must take steps to “protect a client’s interests.” Second, RPC 1.15A(f) provides that

the lawyer must return property “to the client” that the client is entitled to receive. Here, based on the sudden cessation of communications between Mr. Hall and his clients at such an odd time, the sudden reappearance of Linda Orf in Stephen’s life, and Stephen’s diminishing health and severe alcoholism, it was reasonable for Mr. Hall to believe that simply turning over his client’s confidential documents was *not* in the Keens’ best interests. In other words, he was acting to *protect* his client’s interests by refusing to return the documents. Further, Mr. Hall never received a request for the documents signed by either Margaret or Stephen, further increasing his suspicions that complying with Ms. Clausen’s request would not result in the documents returning to his clients. And his clients’ reported disbelief at his assumption of the fiduciary roles they specifically asked him to assume further cast suspicion on the situation. Thus, while Mr. Hall’s refusal to return documents may have been over-zealous, that conduct was motivated by a desire to protect his clients in compliance with the rules rather than harm them in violation of the rules. *See also* Comment 4 to RPC 8.4 (“A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists.”).

E. Mr. Hall did not violate RPC 8.4(d) because his only “threat” was to bring legal action against Clausen and his communications were designed to protect his clients’ interests.

The Disciplinary Board erred in finding that Mr. Hall violated RPC 8.4(d) by “threatening” Clausen, Stephen, and Orf “for providing information to the WSBA and by making false and offensive comments to and about people involved in disciplinary process.” This is a mischaracterization. RPC 8.4(d) provides that “[i]t is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice.” The Washington Supreme Court has held that “the conduct prohibited by RPC 8.4(d) is more often associated with physical interference with the administration of justice or the violation of practice norms.” *In re Carmick*, 146 Wn.2d 582, 587, 48 P.3d 311, 318 (Wash. 2002).

Indeed, here Mr. Hall’s conduct was aimed at *promoting* justice and *upholding* practice norms. Although Mr. Hall did confront Ms. Clausen, the only “threat” involved in that confrontation was a reasonable one related to legally exposing what Mr. Hall believed to be professional misconduct on her part. Namely, Ms. Clausen apparently took at face value the accusation that Mr. Hall “named himself” fiduciary of the estate plan documents without their knowledge notwithstanding the overwhelming evidence to the contrary. Mr. Hall had a good faith fear

that Ms. Clausen was involved in overreaching on behalf of Ms. Orf. In all, Mr. Hall was simply trying to get to the bottom of this mystery, as it affected not only his own livelihood, but also his duty to his clients as attorney and trustee. Mr. Hall's communications with other involved parties were in furtherance of the same end.

F. The Disciplinary Board failed to adhere to ELC 13.3 by imposing a two-year suspension where Hall had already been suspended for a period of two years pursuant to a disability.

In its decision, the Disciplinary Board recommended that Respondent be suspended for a minimum of two years. In his opening brief, Mr. Hall suggested that a further two-year suspension would violate the provisions of ELC 13.3, which says the maximum suspension for misconduct is three years. The WSBA responded by asserting that only disciplinary suspensions are limited to three years, and that disability suspensions can theoretically go on forever. Left unsaid but implicit in the WSBA's argument is that Mr. Hall can be suspended for more than two years because he was unable to complete his first hearing, and then he can be suspended for an additional three years for misconduct, for a total *actual* punishment exceeding five or more years.

The Bar's position would be defensible if the Rule actually said what WSBA asserts it says. However, ELC 13.3 is very clear and very mandatory: "[a] suspension *must* be for a fixed period of time not

exceeding three years.” ELC 13.3 (emphasis added); *see also In re Discipline of Romero*, 152 Wn.2d 124, 135 n.16, 94 P.3d 939, 944 n.16 (2004) (“The maximum term of a suspension is three years.”).

ELC 13.3 does not say a lawyer can be suspended for whatever amount of time it takes to get him to hearing, and then suspended again after the hearing is over. It says a suspension arising from a single incident or course of conduct *must* be for a fixed period of time not to exceed three years. Respondent’s interpretation of ELC 13.3 is consistent with other Washington statutes, including RCW 9.94A.505, which sets the punishments for felony convictions.

RCW 9.94A.505(6) says the sentencing court in a felony case “shall give the offender credit for all confinement time served before the sentencing if that confinement was solely in regard to the offense for which the offender is being sentenced.” That same logic applies here. There is no question that the suspension of Mr. Hall from the practice of law on August 18, 2011, was directly related to this case. In fact, it occurred in the course of his disciplinary hearing on these charges when he determined he could not go on. From the moment he made that decision, he was suspended from the practice of law as a direct result of this case. Thus, because of the mandatory language of ELC 13.3, any further suspension cannot extend beyond August 17, 2014.

G. The Disciplinary Board’s two-year suspension was otherwise excessive or improper based on the facts and circumstances of the case.

The first step in the sanction analysis 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 Gillingham*, 126 Wn.2d 454 (1995); *In re Disciplinary Proceeding Against Dann*, 136 Wn.2d 67, 77, 960 P.2d 416 (1998). However, while “injury” may be actual or potential, the Disciplinary Board is still tasked with determining “the type of duty violated and the *extent* of actual or potential loss.” ABA *Standards*, at 11. Additionally, the second step in the process requires the Board to consider both aggravating *and* mitigating factors.

As for the presumptive sanctions asserted by the WSBA, suspension is indeed generally appropriate for a conflict of interest, but only “when a lawyer knows of a conflict of interest and does not fully disclose to a client the possible effect of that conflict, and causes injury or potential injury to a client.” ABA *Standard* 4.32. Here, as explained above, Mr. Hall—while knowing of the potential conflict of interest—fully disclosed to his clients in writing all the requisite elements under the rules and Committee guidance. Therefore, no injury or potential injury was involved and no sanction is appropriate.

Additionally, suspension is only generally appropriate for unreasonable fees where “a lawyer knowingly engages in such conduct” and “causes injury or potential injury to a client, the public, or the legal system.” *ABA Standard 7.2*. Here, Mr. Hall did not bill unreasonable fees for his work as lawyer and trustee. Even assuming that he did commit a technical violation of that duty, such violation would constitute negligence or even an “isolated instance of negligence” under *ABA Standard 7.3* or *ABA Standard 7.4*, warranting only reprimand or admonition. Further, no injury or potential injury was involved because no violation occurred.

Further, suspension is only appropriate for failure to return a client’s property where “a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury.” *ABA Standard 4.12*. Mr. Hall did not violate this duty because his actions were carried out in a good faith attempt to protect his clients’ interests. Even if a violation did occur, no injury or potential injury was risked because the clients had many of the original estate documents and copies of the rest and, regardless, they executed new estate documents with Ms. Clausen.

Additionally, suspension is only appropriate for conduct prejudicial for the administration of justice when a lawyer “engages in

communication with an individual in the legal system when the lawyer knows that such communication is improper, and causes injury or potential injury to a party or causes interference or potential interference with the outcome of the legal proceeding.” ABA *Standard* 6.32. Mr. Hall engaged in communications with Ms. Clausen and others with the good faith desire to get to the bottom of the paradoxical behavior reportedly being exhibited by his former clients, as well as protect those clients against exploitation. Thus, even if Mr. Hall committed a technical violation, he did not do so knowingly. Further, because there was no violation, there was no actual or potential injury.

Even assuming (without conceding) that a technical violation of one of the rules occurred, the aggravating factors asserted here—other than “prior disciplinary offenses” factor—do not apply to Mr. Hall. Rather, mitigating factors exist, including:

- (b) absence of a dishonest or selfish motive;
- (c) personal or emotional problems;
- ...
- (m) remoteness of prior offenses.

Thus, the Disciplinary Board erred in assessing the mitigating factors in this case.

V.

CONCLUSION

For the reasons stated above, the Petitioner respectfully requests that this Court reverse the decision of the Disciplinary Board and remand the matter for reevaluation.

RESPECTFULLY SUBMITTED THIS 2nd day of December, 2013.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By 

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Attorneys for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of December, 2013, I caused to be served a true copy of the foregoing PETITIONER'S BRIEF by the method indicated below, and addressed to each of the following:

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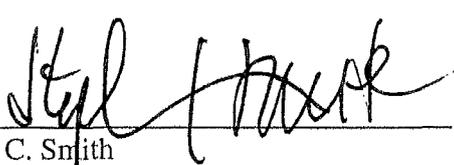
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Case Number: Court No.: 201,255-8; Proceeding No. 10#00084;

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