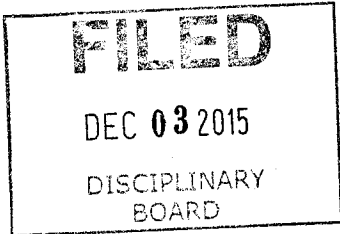


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BEFORE THE
DISCIPLINARY BOARD
OF THE
WASHINGTON STATE BAR ASSOCIATION

In re
CHRIS ALAN MONTGOMERY,
Lawyer (Bar No. 12377).

Proceeding No. 13#00109
FINDINGS OF FACT, CONCLUSIONS
OF LAW AND HEARING OFFICER'S
RECOMMENDATION

The undersigned Hearing Officer held the hearing on July 13 - 17, 2015, and July 22, 2015, under Rule 10.13 of the Rules for Enforcement of Lawyer Conduct (ELC). Respondent Chris Alan Montgomery (Respondent) appeared at the hearing with his counsel Leland Ripley. Disciplinary Counsel Jonathan Burke appeared for the Office of Disciplinary Counsel (ODC) of the Washington State Bar Association. At the hearing, approximately 30 witnesses were sworn and presented testimony, and over 100 exhibits were admitted into evidence. Given the complexities of this case, the parties stipulated to extend the deadline for filing this Recommendation.

OVERVIEW

The Formal Complaint filed by Disciplinary Counsel stems from a series of events, all related, beginning in 2011 with the sale of 124 acres of grazing and timberland near Republic, Washington. At the time of the sale, the property was owned by DM, a man in his mid to late-

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1 | sixties who lived in Republic. DM's mental capacity has been assessed twice by mental health
2 | professionals, once in 2005 and again in 2012. These assessments found that DM has a low IQ
3 | of 65, "mild mental retardation," attention deficit disorder, and problems with executive
4 | functioning. EX 1, EX 46, EX 47.

5 | DM was able to work as a janitor for the local school for 20 years before retirement. It is
6 | noted in the 2005 assessment that DM cannot read or write, and does not understand written
7 | documents or financial transactions to any appreciable degree. EX 1. For example, DM was
8 | forced into early retirement when a new supervisor was appointed at the school. EX 1. DM is
9 | recorded in the first assessment as stating, "the new guy didn't like me and gave me early out
10 | papers to sign, but I did not know what I was signing." EX 1 at 1.

11 | Respondent operates a law firm in Colville, Washington as a sole practitioner. In late
12 | 2011, Respondent briefly represented the Gianukakis family after they agreed to purchase the
13 | property from DM. Respondent was not involved in the details of the agreement. The property
14 | sale did not include interest or security, and was for less than the appraised value of the
15 | property, giving rise to a lawsuit against the Gianukakis family by DM's family. DM's family
16 | believed that the terms of the sale were unfair, and that the Gianukakis family benefitted from
17 | DM's diminished capacity.

18 | In response to the lawsuit, the Gianukakis family brought DM to Respondent's office,
19 | where a meeting took place over the course of 1.6 hours. The Gianukakis family signed a
20 | second new client agreement and ultimately paid for Respondent's legal services. At the
21 | meeting, the Gianukakis family provided Respondent with a copy of the summons, complaint,
22 | and lis pendens, all of which showed that DM's brother was pursuing a claim against the
23 | Gianukakis family on DM's behalf under a written power of attorney. The complaint clearly
24 | alleged that DM has diminished capacity and does not understand financial transactions,

1 including the sale of property to the Gianukakis family.

2 At the meeting, Respondent read these documents, then queried DM with the intention
3 of determining whether he had diminished capacity. Respondent decided on his own that DM
4 did not lack capacity, and has since acknowledged having provided legal services to both DM
5 and the Gianukakis family at the meeting. Respondent did not obtain a written conflict of
6 interest waiver. Ultimately, because DM wanted the sale to go forward, Respondent prepared
7 additional documents for the sale of the property, as well a document revoking the power of
8 attorney provided by DM to DM's brother. Respondent prepared the second document with the
9 intention of revoking the brother's authority to pursue the lawsuit against the Gianukakis family.
10 DM signed each of these at the meeting.

11 Respondent then sent a letter to DM's brother, as well as the attorney of record for the
12 lawsuit, informing them that they did not have authority to act on DM's behalf and threatening
13 additional action if they did not withdraw immediately. EX 26. Respondent also entered a
14 Notice of Appearance in the same lawsuit on behalf of the Gianukakis family. EX 25.
15 Unfortunately, this dispute quickly compounded, resulting in a petition for guardianship being
16 filed and a guardian ad litem being appointed. EX 35, EX 36. It also resulted in a petition for a
17 vulnerable adult order for protection being filed against John Gianukakis, and the granting of a
18 temporary restraining order against him. EX 43.2. This latter action was eventually dismissed
19 by the Court for insufficient evidence to find financial exploitation. EX 44.

20 Respondent continued to represent the Gianukakis family throughout these proceedings.
21 He filed a Notice of Appearance in the vulnerable adult action and argued on behalf of the
22 Gianukakis family at the hearing. He also contacted the GAL in the guardianship proceedings
23 and again made arguments in favor of the Gianukakis family. A written conflict of interest
24 waiver was not obtained from either DM or the Gianukakis. The majority of this

1 Recommendation focuses on the conflict of interest issues that stem from Respondent's
2 representation of DM and the Gianukakis family at the March 22, 2012 meeting, as well as
3 Respondent's representation of the Gianukakis family in the subsequent actions.

4 It should be noted at the onset of this Recommendation that Respondent has practiced
5 law for more than 30 years, and does not have any history of discipline. He is the former
6 president of the Stevens County Bar Association. He has also served as a scoutmaster for the
7 Boy Scouts of America for more than 30 years, and has tutored over 27 kids to be Eagle Scouts.
8 Respondent is active in his community and provides considerable legal services on a pro bono
9 basis. He is clearly dedicated to his wife and family. Moreover, no less than two sitting Superior
10 Court Judges appeared at the hearing to offer character testimony on Respondent's behalf. In
11 sum, for the record, Respondent has a reputation for being a good man and a good attorney.

12 **FORMAL COMPLAINT FILED BY DISCIPLINARY COUNSEL**

13 The Formal Complaint filed by Disciplinary Counsel charged Respondent with the
14 following counts of misconduct:

15 Count I – By having direct contact with DM during the pendency of the lawsuit,
16 Respondent violated RPC 4.2.

17 Count II – In the alternative, to the extent that DM was an unrepresented party on March
18 22, 2012, by drafting legal documents for DM and/or having DM sign the Revocation and
19 Release, and/or the PM letter, and/or the Kovarik letter, Respondent violated RPC 4.3.

20 Count III – By having direct contact with PM through the PM letter during the pendency
21 of the lawsuit, Respondent violated RPC 4.2.

22 Count IV – By providing legal services to DM and to the Gianukakis on March 22,
23 2012, in connection with the pending lawsuit and/or sale of Hall Creek Property while there was
24 a conflict of interest, Respondent violated RPC 1.7.

1 Count V – By accepting compensation from the Gianukakises for providing legal
2 services to DM on March 22, 2012, Respondent violated RPC 1.8(f).

3 Count VI – By representing the Gianukakises in the vulnerable adult action without
4 obtaining informed consent in writing from DM, Respondent violated RPC 1.9(a), RPC 1.9(b),
5 and/or RPC 1.9(c).¹

6 Count VII – By representing the Gianukakises in the vulnerable adult action without
7 obtaining informed consent in writing from the Gianukakises, Respondent violated RPC 1.7.²

8 Count VIII – By dealing with DM, as described in the formal complaint, Respondent
9 violated RPC 8.4(c) and RPC 8.4(d).

10 Based on the pleadings in the case, and the testimony and exhibits at the hearing, the
11 Hearing Officer makes the following findings of fact pursuant to ELC 10.14(b) by a clear
12 preponderance of the evidence.

13 **FINDINGS OF FACT**

14 **A. Findings Regarding Respondent's Background**

15 1. Respondent was admitted to the practice of law in the State of Washington on May
16 17, 1982.

17 2. Respondent operates a law firm in Colville, Washington as a sole practitioner.

18 3. Respondent employs a paralegal and two legal assistants.

19 4. Respondent's law practice focuses on real estate law (50 percent) and estate
20 planning and elder law (35-40 percent).

21 5. When Respondent provides estate planning to related clients, such as husband and
22 wives, he has them sign conflict waivers.

23 ¹ ODC has agreed to dismiss the count that Respondent violated RPC 1.9(b).

24 ² ODC has agreed to dismiss Count 7.

1 6. When Respondent performs estate planning, he typically recommends a power of
2 attorney to clients and typically prepares a power of attorney for clients as an alternative to a
3 guardianship because guardianships are expensive.

4 7. Respondent has had experience representing clients with mental disabilities and
5 diminished capacity.

6 8. Respondent has been a scoutmaster in the Boy Scouts of America (Boy Scouts)
7 since 1992 and was a den leader for three years before that. He has tutored over 27 kids to be
8 Eagle Scouts. He has received many awards for his contributions to the Boy Scouts and remains
9 very active in scouting leadership. In 1999, he received the prestigious Silver Beaver award. He
10 is the coordinator for the local "Community Flag Program" sponsored by Kiwanis and Boy
11 Scout Troop 921.

12 9. Respondent has volunteered to be a judge in Gonzaga Law School's Moot Court
13 and Client Counseling Competitions.

14 10. Respondent has provided pro bono services, for which he received award
15 certifications from the Washington State Bar Association for several years.

16 11. Respondent formerly served as Stevens County Bar Association president, at
17 which time he moderated legal classes for non-lawyers.

18 12. Respondent served as an adjunct faculty member at Spokane Community College,
19 Colville Campus, for over 30 years and teaches business law.

20 13. Respondent teaches non-credit community classes regarding trusts and landlord
21 tenant law.

22 **B. Findings Regarding DM**

23 14. During all material times, DM was a man in his mid to late sixties who lived in
24 Republic, Washington. He has only completed the eighth grade. DM has never married and has

1 no children.

2 15. DM's mental capacity has been assessed twice by mental health professionals,
3 once in 2005 and once in 2012. These assessments found that DM has a low IQ of 65, "mild
4 mental retardation,³" attention deficit disorder, and problems with executive functioning. EX 1,
5 EX 46, EX 47. DM cannot read or write with any proficiency. He has difficulty understanding
6 mathematics and financial matters. His disabilities are lifelong disabilities.

7 16. The testimony Dr. Brian Campbell, Ph.D. regarding his assessment of DM's
8 disabilities and vulnerability is credible. It was given significant weight. EX 46 and EX 47. In
9 addition, the 2005 assessment of DM by Dr. Mahlon Dalley, Ph.D. was consistent with Dr.
10 Campbell's assessment and is also credible. EX 1.

11 17. DM frequently exhibits a desire to please people. Sometimes he does this by telling
12 people what they want to hear, while other times he gifts his possessions to people when they
13 admire or compliment those possessions.

14 18. DM has a history of purchasing old items for more than their value, and does not
15 fully understand the value of money. He has difficulties making correct change when paying for
16 items. He performed labor services for less money than a reasonable person would accept. He
17 has difficulty understanding the concept of interest or financial transactions in general.

18 19. DM would go for considerable time without bathing and exhibited poor hygiene
19 unless cared for by one of his family members.

20 20. DM's disabilities make him vulnerable to manipulation. EX 1 at 3, EX 46 at 14,
21 EX 47 at 3.

22 21. Although many local people were aware of DM's limitations, many did not know
23

24 ³ This diagnosis is now referred to as "intellectual disability" in DSM V.

1 the extent of his disabilities because DM learned to use coping mechanisms. These coping
2 mechanisms include repeating the same jokes and statements, misstating facts, and affirming
3 that he understood things when he did not.

4 22. DM can drive a vehicle and has a valid driver's license.

5 23. DM lived with his mother until she passed away in 2005. He assisted her with
6 errands, including driving her to town. DM lived independently at the same location after his
7 mother passed away.

8 24. DM has several family members. His brother (PM) and nephew live in Spokane,
9 Washington, while another nephew lives in Seattle, Washington. After the passing of his
10 mother, DM's brother would visit and help him by paying bills, monitoring finances, cleaning
11 house, and doing laundry.

12 25. DM's family described his limitations in various ways, including (1) he could not
13 use a CD or DVD player after being shown, (2) he could not divide an apple into thirds, (3)
14 when instructed to put \$20.00 of gas into his tank, he filled it up instead and did not have
15 sufficient funds to cover the transaction, (4) he did not understand that his income in his bank
16 account came from social security or retirement, and (5) at one time stored large amounts of
17 cash in the vase on the mantle rather than place it in the bank.

18 26. DM worked as a custodian for the Republic School District for approximately 20
19 years until retirement. He performed his custodial duties independently, and did not need to
20 have someone work alongside him. He would frequently interact with members of his
21 community when purchasing items or performing other errands. Many community members
22 testified that DM seemed to live independently, though many also understood that DM had
23 limitations.

24 27. DM's mental limitations manifested in such a way that people would often need

1 more than one meeting or experience with him to fully appreciate his condition. DM's brother
2 testified as follows: "If you are around my brother for one day you would think that he is totally
3 independent and strong willed and can do anything." TR 141: 13-25. DM's brother further added
4 that by day three, a person would notice that DM tells the same jokes sometimes several times a
5 day, and uses the same phrases over and over. TR 141-142.

6 28. DM is capable of making some decisions in a general sense, as well as
7 understanding moral issues of right versus wrong, but cannot understand financial transactions
8 to any appreciable degree, including transactions involving the purchase and sale of property,
9 interest, transfer and recording of titles or deeds, appraisals, land valuation, or similar issues.

10 **C. Findings Regarding the Sale of Hall Creek Property**

11 29. In 1986, DM purchased 124 acres of grazing and timberland near Republic,
12 Washington (hereafter, the Hall Creek Property). EX 905.

13 30. In 2002, DM granted Brian and Debra Gotham (the Gothams) a First Right to
14 Purchase the Hall Creek Property. EX 3.

15 31. In 2012, the tax assessed value of the Hall Creek Property was \$160,900. EX 4.

16 32. John Gianukakis (Gianukakis) was interested in purchasing the Hall Creek
17 Property from DM. On several occasions, Gianukakis asked DM if he would sell the property
18 and he declined. In 2011, Gianukakis asked again and DM agreed.

19 33. On October 28, 2011, DM signed a handwritten agreement to sell the Hall Creek
20 Property to Gianukakis and his wife, Penny Gianukakis (collectively referred to as the
21 Gianukakis), for \$100,000 with \$10,000 due at closing and \$500 monthly payments. EX 6.

22 34. The agreement did not provide DM with security and charged no interest on the
23 \$90,000 balance. Respondent was not involved with the agreement, nor was he involved with
24 the preparation or signing of this document.

1 35. Gianukakis asked Roberta Weller to assist him in drafting a Land Agreement.
2 Weller is retired and formerly worked for an attorney and title company. She drafted the Land
3 Agreement.

4 36. Weller spoke with DM about selling the Hall Creek Property. DM told Weller that
5 he desired to sell the property to Gianukakis, and that he understood the property would no
6 longer be his.

7 37. On October 30, 2011, Weller read the agreement to DM, and notarized the
8 agreement after he signed it. Respondent had no involvement with the preparation or signing of
9 this document.

10 38. During November and December 2011, after DM had agreed to sell the property,
11 Gianukakis received legal advice from Respondent's law firm regarding the existing first right
12 to purchase the Hall Creek Property that had been provided to the Gothams. EX 3. It is clear and
13 unequivocal from the record that Respondent entered into an attorney-client relationship with
14 the Gianukakises at this time, and provided them with legal advice regarding this first right to
15 purchase.

16 39. Gianukakis did not speak directly with Respondent. Instead, Gianukakis spoke
17 with Respondent's paralegal, who then spoke to Respondent, obtained advice, then contacted
18 Gianukakis again. Gianukakis visited Respondent's office, dropped off paperwork, and
19 completed a client intake form. EX 8.

20 40. On December 23, 2011, Respondent's office sent a bill to Gianukakis for legal
21 services. EX 9.

22 41. On January 2, 2012, the Gianukakises agreed in writing to give the Gothams a First
23 Right to Purchase Agreement on the Hall Creek Property. EX 13. On January 2, 2013, the
24 Gothams signed a Waiver of the First Right to Purchase. EX 906. Respondent did not prepare

1 these documents.

2 42. On January 9, 2012, a purchase and sale agreement was prepared by Weller. DM
3 executed a quitclaim deed transferring the Hall Creek Property to the Gianukakis. The
4 Gianukakis paid the initial \$10,000 and several \$500 monthly payments. EX 14. Respondent
5 did not provide the form or prepare the document.

6 43. Weller reviewed the property sale with DM, who indicated understanding that he
7 was selling the property to Gianukakis. Weller discussed interest with DM, who indicated that
8 he did not want to charge interest because it would be charging more money. Weller discussed
9 security with DM, who indicated that he did not want security because he trusted Gianukakis.

10 44. On January 10, 2012, the Gianukakis entered into an agreement to rent the Hall
11 Creek Property to the Gothams for four years for livestock grazing. EX 15. Respondent did not
12 provide the form or prepare the document.

13 **D. Findings Regarding the First Lawsuit Filed Against John Gianukakis**

14 45. DM's brother (PM) and DM's family did not know about the sale of the Hall Creek
15 Property.

16 46. In January and February 2012, PM, DM, and other family members received estate
17 planning services from lawyer Lynn St. Louis that included preparing trusts and powers of
18 attorney. The family intended to place real property, including the Hall Creek Property, into a
19 trust.

20 47. In late February, PM discovered that DM had signed papers selling the Hall Creek
21 Property to the Gianukakis. When DM was questioned about the sale by family members, it
22 became apparent that he did not understand the details surrounding the sale. DM acknowledged
23 selling the property to Gianukakis, however, he also believed that would still be able to use the
24 property and that he still owned the property until Gianukakis made all of his payments.

1 48. On March 1, 2012, DM executed a General Durable Power of Attorney (GDPOA)
2 prepared by lawyer Lynn St. Louis naming PM as his attorney-in-fact. EX 17. The GDPOA
3 provided, among other things, that PM had authority to hire legal counsel on DM's behalf and
4 bring a lawsuit in DM's name. EX 17.

5 49. On March 12, 2012, and March 13, 2012, CM, PM's daughter-in-law, contacted
6 Gianukakis and requested that he rescind the sale of the Hall Creek Property because DM did
7 not understand the full consequences of signing the documents. CM told Gianukakis that DM
8 was vulnerable and tended to do whatever people tell him.

9 50. Gianukakis expressed disagreement with CM's description of DM and declined to
10 rescind his purchase of the Hall Creek Property.

11 51. DM's family hired lawyer Nick Kovarik (Kovarik), a Spokane lawyer, to represent
12 DM. Using the GDPOA, PM authorized Kovarik to file a lawsuit to rescind the sale of the Hall
13 Creek Property due to DM's diminished capacity and his inability to understand the terms of the
14 sale.

15 52. On March 13, 2012, Kovarik filed a lawsuit against the Gianukakis and recorded
16 a lis pendens against the Hall Creek Property. EX 18, EX 18.1, EX 19. At that time, Kovarik
17 had not yet spoken to DM, who lived in Republic, Washington.

18 53. The summons, complaint and lis pendens filed and recorded by Kovarik state, in
19 pertinent part, "PM, Attorney in Fact for DM, a Single Man, Plaintiff" in the caption. EX 18,
20 EX 18.1, EX 19. The complaint also states on its first line, "Plaintiff DM, by and through his
21 attorneys of record, Dunn & Black, P.S., hereby allege ..." EX 18 at 1. The summons also states
22 on its first line, "A lawsuit has been started against you in the above-entitled Court by DM,
23 Plaintiff." EX 18.1 at 1.

24 54. All three documents are signed by Kovarik as attorney for plaintiff. EX 18, EX

1 18.1, EX 19.

2 55. The complaint identified PM as the attorney-in-fact for DM and stated that the
3 GDPOA authorized PM to sue in DM's name and on his behalf. EX 18 at 1.

4 56. Respondent has testified that he does not consider DM to be the plaintiff set forth
5 in these documents. Rather, Respondent believes that PM is the plaintiff and therefore Kovarik
6 is the attorney for PM (and not for DM). Upon consideration, this argument does not have merit.
7 The summons, complaint and lis pendens list DM as plaintiff and initiate a lawsuit in his name.

8 57. On March 18, 2012, the Gianukakis were served with the summons, complaint
9 and lis pendens along with a transmittal letter sent by Kovarik. The transmittal letter states in its
10 opening line, "We represent DM and his family." EX 20. It explained that plaintiff DM is a man
11 of diminished capacity who cannot understand the nature, terms, and effect of financial or
12 business transactions. EX 20.

13 58. After receiving the complaint and other pleadings, Gianukakis called CM and
14 requested three days to consider whether to agree to rescind the sale.

15 59. Gianukakis went over to DM's house and met with DM to discuss the sale and
16 lawsuit. DM told Gianukakis that he felt bound by his handshake to go forward with the sale of
17 the Hall Creek Property.

18 60. On or around the same day, Gianukakis contacted Respondent's office and made an
19 appointment. Gianukakis invited DM to attend the meeting.

20 61. On March 22, 2012, the Gianukakis picked up DM at his house and drove him to
21 Respondent's law office where they met with Respondent. Gianukakis and his wife were both
22 present at the meeting.

23 **E. Findings Regarding the March 22, 2012 Meeting**

24 62. The Gianukakis filled out a client intake sheet at Respondent's office identifying

1 themselves as the client. EX 910.

2 63. Respondent knew beforehand that he was meeting with Gianukakis regarding a
3 new real estate matter. EX 924, EX 925. Respondent's calendar states, "NEW John Gianukakis
4 R.E. Issue." EX 924.

5 64. Respondent testified that prior to the March 22nd meeting, he did not review the
6 first Gianukakis file from November through December 2011 and he believed the Gianukakis
7 to be new clients. His testimony that he did not review this information, and that he did not
8 "connect the dots" between these two events is credible.

9 65. At the beginning of the meeting, Respondent was informed about the lawsuit and
10 provided with the summons, complaint and lis pendens. See EX 32.

11 66. Respondent testified that he read the summons, complaint and lis pendens at the
12 onset of the meeting before deciding to speak with DM about his side of the story.

13 67. Respondent acknowledged reading the complaint, which includes: "Plaintiff DM,
14 by and through his attorneys of records, Dunn & Black, P.S., hereby alleges . . . Plaintiff DM is
15 a single man who is unable to understand the nature, terms and effect of financial and business
16 transactions." EX 18 at 1.

17 68. Respondent also acknowledged having read the allegations in the complaint
18 regarding the property sale:

19 At all times material hereto, Plaintiff was a man of diminished capacity. At the time
20 of this particular transaction (sale of the Subject Property), he did not have ability to
21 comprehend the value of his possessions, the nature, terms and effect of the
22 transaction. He cannot read or write with proficiency. EX 18 at 2.

22 69. At all pertinent times, Kovarik had not withdrawn from representing DM and PM
23 in the pending lawsuit against the Gianukakis. The Court docket was available online and
24 showed that Kovarik represented both DM and PM in this action.

1 70. During the meeting, DM informed Respondent he could not read or write and had
2 attended school through eighth grade. This information confirmed the allegation in the
3 complaint that DM could not read or write with any proficiency.

4 71. During the meeting, Respondent asked DM several questions intended to
5 determine whether DM had diminished capacity. Respondent has testified that based upon DM's
6 answers to these questions, he did not believe DM to have diminished capacity.

7 72. Respondent's testimony is credible only to the extent that he did not know with
8 absolute certainty that DM had diminished capacity at the time of the meeting, however, it is
9 clear from the record that Respondent was on notice of DM's limited capacity based upon the
10 summons and complaint. Respondent knew, or should have known, that DM had diminished
11 capacity at the time of the meeting.

12 73. At a minimum, Respondent should have inquired further before taking any actions
13 that could possible harm DM or his interests. This would not include interviewing DM, and
14 would have included contacting DM's legal counsel Kovarik.

15 74. During the meeting, Respondent told DM that he liked him and that he found DM
16 to be "very smart."

17 75. During the meeting, Respondent discussed with DM the sale of the Hall Creek
18 Property. Respondent has testified that DM still wanted to sell the property to the Gianukakises
19 because they shook hands on the deal. Respondent's testimony that DM still wanted to sell the
20 property to the Gianukakises is credible.

21 76. Respondent testified that DM said that Kovarik was not his attorney. Respondent's
22 testimony is credible to the extent that DM still desired to sell the property, did not tell anyone
23 to initiate the lawsuit, and did not understand how or why Kovarik was appointed to represent
24 him. It is clear from the record and the testimony in this case that DM did not understand the

1 complexities of the property sale, the power of attorney provided to his brother PM, or his legal
2 representation by Kovarik.

3 77. Respondent did not call Kovarik and discuss this matter with him. Respondent did
4 not seek additional paperwork, including any medical reports indicating DM's capacity, from
5 Kovarik.

6 78. The meeting between Respondent, the Gianukakises and DM lasted approximately
7 1.6 hours. Respondent had his staff present to witness the meeting and DM's subsequent signing
8 of several documents.

9 79. Respondent testified that during this meeting he provided legal representation to
10 both DM and the Gianukakises. The facts and testimony in this case strongly support this to be
11 true. Respondent provided legal services to both parties.

12 80. It should be noted that Respondent appears to have provided conflicting accounts
13 regarding his role in these events. He initially claimed that he was merely acting as a scrivener
14 who memorialized the agreement between DM and the Gianukakises at the March 22, 2012
15 meeting. EX 501 at 4¶2. He later told Brian McCarthy, ODC's Investigator, that he was DM's
16 "advocate" (TR 538: 7-15) and then testified at the hearing that he provided legal advice to DR.
17 TR 444: 13-16.

18 81. Respondent acknowledged that he did not obtain a written conflict of interest
19 waiver from DM or the Gianukakises at any time.

20 82. Respondent testified that he believed the interests of DM and the Gianukakises
21 were aligned because both parties wanted to sell/purchase the property and both parties did not
22 want the lawsuit against the Gianukakises to continue. This is credible only to the extent that
23 Respondent may have believed these two things to be true at the time of the meeting. However,
24 Respondent's analysis should not have ended there. There is a clear and unequivocal conflict of

1 interest presented in this scenario that becomes even worse over time. This will be discussed in
2 further detail below. Respondent's position that a conflict of interest did not exist is not credible.

3 83. Under the circumstances, at this point in the timeline, there are some troubling
4 issues worthy of mention. First, Respondent has acknowledged that he is not a trained medical
5 professional and could not make the determination whether DM had diminished capacity. He is
6 correct. Respondent could not determine whether DM had the capacity to understand the
7 property sale or the other documents drafted by Respondent at the meeting. The risk that DM
8 had diminished capacity was known to Respondent, who should not have proceeded with the
9 meeting given this risk.

10 84. Second, a similar concern applies to DM's "desire" at the meeting to revoke the
11 power of attorney and therefore terminate Kovarik's representation, especially when the
12 complaint specifically alleges that DM lacks the capacity to understand such matters (and that
13 Kovarik is serving as DM's attorney for DM's protection). It was inappropriate for Respondent
14 to meet with DM and to ultimately participate in what amounts to the termination of opposing
15 counsel, especially given the fact that opposing counsel was hired to protect DM's interests as a
16 person with diminished capacity. The welfare of the person with diminished capacity is of chief
17 concern in such situations. To meet with DM and revoke the power of attorney without even
18 consulting Kovarik first seems particularly egregious.

19 85. Accordingly, Respondent's testimony that he did not understand that DM was
20 represented by Kovarik is not credible, given the unequivocal statements in the summons and
21 complaint as well as the very real possibility that DM did not have the capacity to understand
22 Kovarik's representation and/or make the decision at the meeting that amounted to terminating
23 Kovarik's representation.

24 86. WSBA Ethics Opinion #1307 regarding RPC 4.2 is instructive. The opinion, titled

1 "Communication with represented party; lawyer contacted by adverse party" states as follows:

2 The Committee reviewed your inquiry concerning a lawyer's obligations when
3 contacted by an adverse party whom the lawyer knows to be represented by
4 counsel, and the adverse party states that he or she wants to discuss the matter
5 directly without the involvement of his or her counsel. The Committee was of the
6 opinion that the lawyer would have an ethical obligation to resolve the factual
7 question of whether the adverse party continued to be represented by counsel. The
8 Committee was of the opinion that **before having direct contact with an
9 adverse party**, the lawyer should require that the other lawyer has actually
10 withdrawn, have the consent of the other lawyer to have direct contact with the
11 adverse party, or **have a letter from the adverse party discharging his or her
12 counsel**. [Emphasis added.]

8 87. None of these things occurred prior to the meeting. Kovarik did not withdraw and
9 he did not consent to the contact between DM and Respondent. Moreover, DM did not present a
10 letter prior to the March 22, 2012 meeting terminating Kovarik. Accordingly, Respondent
11 engaged in conversation and contact with DM, knowing that DM was represented by Kovarik in
12 a pending lawsuit against Respondent's clients the Gianukakis.

13 88. It is almost nonsensical to argue that DM was not represented by Kovarik at the
14 time of the meeting. The evidence presented clearly shows that the power of attorney used to
15 hire Kovarik was signed by DM, who indicated this to Respondent during the meeting. This
16 gave PM the authority to hire Kovarik on DM's behalf. The fact that DM did not like the lawsuit
17 and/or did not understand that Kovarik was his attorney, and subsequently revoked the power of
18 attorney that was used to appoint Kovarik, makes little difference as to whether he was
19 represented by Kovarik when Respondent met with him.

20 89. It is clear that DM was represented by Kovarik up until Respondent finished
21 interviewing DM and then concluded that it was appropriate for Respondent to assist in
22 revoking the power of attorney. Whether it continued to be true once DM, through Respondent,
23 revoked the power of attorney is not particularly relevant for our purposes.

24 90. It should be noted that a version of this argument has been presented by

1 Respondent. Respondent argues that if DM had capacity to sign a power of attorney for his
2 brother, then he had capacity to revoke the power of attorney (and terminate Kovarik) while
3 sitting in Respondent's office (and by extension that this somehow retroactively applies to
4 Kovarik's appointment). This argument is misplaced for the reasons set forth above. Kovarik
5 was clearly DM's attorney when Respondent met with him.

6 91. Respondent's chief concern should have been whether DM was represented by
7 Kovarik when Respondent interviewed him about the property sale and produced several legal
8 documents for DM's signature. Clearly, DM was represented by Kovarik. His other main
9 concern should have been whether he could even meet with DM while also representing the
10 Gianukakises and not create a conflict of interest between the parties, which he could not.

11 92. Respondent knew before conferring with DM that anything DM stated during the
12 meeting could be used in favor of the Gianukakises in the pending lawsuit.

13 93. Respondent did not inform DM about the potential implications of statements he
14 made during the meeting.

15 94. Respondent had the Gianukakises and several staff members present at the meeting
16 as witnesses to DM's statements and behavior knowing that they could be called as witnesses in
17 any legal proceedings.

18 95. Even if Respondent believed that DM was not represented by Kovarik, Respondent
19 knew that it was his duty to refer DM to independent legal counsel and to cease any further
20 communication because there were obvious conflicts of interest between DM and Respondent's
21 existing clients, the Gianukakises. These conflicts include the fact that DM and the
22 Gianukakises were opposing parties in a pending lawsuit, as well as purchaser and seller of the
23 property at issue in the pending lawsuit.

24

1 **F. Findings of Fact Regarding Revocation of GDPOA and Release of Lis Pendens,**
2 **Promissory Note and Deed of Trust**

3 96. During the meeting, DM disclosed to Respondent that he had recently signed a
4 General Durable Power of Attorney (GDPOA) making his brother PM his attorney-in-fact.

5 97. Respondent asked DM whether he wanted to consult with independent counsel or
6 have a medical exam. DM declined both. A written conflict of interest waiver was not obtained
7 from DM or the Gianukakises.

8 98. Respondent asked whether DM wanted the land back. DM did not. DM expressed
9 that he believed "A deal's a deal."

10 99. Respondent had his staff conduct a search through the title company. There was no
11 record of the GDPOA being recorded in Steven County, Ferry County or Spokane County, nor
12 with the Court in Ferry County.

13 100. Respondent explained to DM that a Revocation of Power of Attorney and Release
14 of Lis Pendens would keep his brother from interfering with the sale of his property.

15 101. Respondent also suggested that DM sign documents to make the lis pendens
16 ineffective.

17 102. It is highly unlikely that DM understood Respondent's explanation regarding these
18 documents, especially the lis pendens, given Dr. Campbell and Dr. Dalley's assessment of DM's
19 mental abilities.

20 103. Respondent did not inform DM of the implications and potential risk of harm that
21 could result by revoking the GDPOA.

22 104. Respondent knew from his substantial trust and estates practice that clients with
23 limited understanding are sometimes protected by a power of attorney and that revoking the
24 GDPOA may leave DM vulnerable unless and until a guardianship was established, which

1 | could be very expensive to DM and provide DM with less independence.

2 | 105. Respondent knew or should have known from the pending lawsuit that there was a
3 | significant risk that the revocation of the GDPOA may result in guardianship proceedings.
4 | Respondent never revealed this risk to DM.

5 | 106. Respondent drafted a Revocation of General Power of Attorney and Release of Lis
6 | Pendens ("Revocation and Release"). EX 21. Respondent read the document to DM and/or had
7 | the document read to DM in front of the Gianukakises and a member of Respondent's staff.

8 | 107. Respondent summarized this document and asked whether DM understood it. DM
9 | answered in the affirmative. DM did not ask questions of substance regarding his legal rights or
10 | the nature of these legal documents.

11 | 108. DM signed the Revocation and Release.

12 | 109. Respondent clearly provided legal services and advice to DM while simultaneously
13 | representing the Gianukakises while both parties were present.

14 | 110. Respondent's primary reason for obtaining the Revocation and Release was for
15 | the Gianukakises' benefit in the pending lawsuit. Specifically, the Revocation and Release was
16 | then used in Respondent's demand to Kovarik that the pending lawsuit against his clients, the
17 | Gianukakises, be immediately dismissed. EX 28.

18 | 111. Respondent also prepared additional documents, including a Promissory Note,
19 | Deed of Trust, Request for Reconveyance, and Escrow Instructions for the sale of the Hall
20 | Creek Property. EX 21, EX 22, EX 23, EX 24, EX 30.1.

21 | 112. Respondent informed DM that the Promissory Note, Deed of Trust, and Escrow
22 | Instructions would protect him. By doing so, Respondent again provided legal advice to DM.

23 | 113. DM signed these documents as well.

24 | 114. Respondent's drafting of the Promissory Note, Deed of Trust, and Escrow

1 Instructions raises the specter that he was protecting the interests of his clients, the
2 Gianukakises, by making the transaction appear more conventional, thereby assisting them in
3 their defense in the pending lawsuit. EX 43 at ¶ 11, EX 922 at 5. However, Respondent's
4 testimony that he was simply helping both parties by drafting conventional documents is to
5 some degree credible given that DM and the Gianukakises formerly agreed to the sale, and both
6 expressed a desire at the meeting to have the sale go forward. The Court also considered this
7 issue, which is discussed in more detail below.

8 115. The Promissory Note prepared by Respondent did not charge interest on the
9 outstanding balance. EX 22. Respondent later acknowledged that this is unusual, but maintains
10 that DM did not want interest. Respondent has testified that he did not believe it was his
11 position to rewrite or renegotiate the terms of the underlying sale.

12 116. However, Respondent knew or should have known that DM did not fully
13 understand the concept of interest or the concept of present value. DM does not understand
14 financial transactions, let alone complex financial transactions such as interest, amortization
15 schedules, and security.

16 117. An objective lawyer would have realized that a clear and unequivocal conflict of
17 interest existed, and that there was a real risk that DM did not understand these proceedings
18 based upon DM's decisions and behavior. While Respondent should not have met with DM in
19 the first place, at this point in time, he should also have insisted that DM obtain independent
20 legal counsel (or consult with his current legal counsel) and withdrawn from this meeting.

21 118. For example, an independent attorney would have likely advised DM to charge
22 interest on the \$90,000 15-year loan. But Respondent could not do so because he was
23 simultaneously representing the Gianukakises and recommending interest (or renegotiating the
24 terms of sale) would be contrary to the Gianukakises' financial interests.

1 119. During the meeting, Respondent obtained information from the Ferry County
2 Assessor's Office reflecting that the current fair market value for Hall Creek Property was
3 \$160,900. The Ferry County Assessor's office had changed the value from \$170,000 in 2011 to
4 \$160,900 in 2012.

5 120. An objective lawyer representing DM would have almost certainly suggested that
6 the \$100,000 sale price may be too low given the assessed value of the Hall Creek Property, or,
7 at a minimum, would have investigated this issue further and made sure that DM understood the
8 nature of this transaction. This is yet another red flag that should have caused Respondent to
9 insist on independent legal counsel for DM. An objective attorney would have immediately
10 withdraw from representing DM and the Gianukakises in a transaction of this nature.

11 121. Respondent did not recommend to DM that the sale price should be higher, given
12 the assessed value of Hall Creek Property. Again, to do so would be contrary to the financial
13 interests of the Gianukakises, his paying clients.

14 122. Because DM was shown to have diminished capacity in 2005, which was again
15 confirmed in 2012, it is credible that he did not appreciate or understand these transactions, and
16 that he required someone to protect his interests at this meeting. Respondent could not represent
17 the interests of DM and the Gianukakises at the same time. Their interests were not aligned.

18 **G. Findings of Fact Regarding Respondent's Contact with PM**

19 123. Respondent sent the Revocation and Release directly to PM along with a letter
20 stating that PM's power as attorney-in-fact was revoked. EX 26. Respondent wrote the letter at
21 the March 22nd meeting and had DM sign it after it was read to him. EX 26. A copy of the letter
22 was sent to Kovarik. EX 26.

23 124. At the time Respondent sent these documents to PM, Respondent knew that PM
24 was represented by Kovarik in the lawsuit filed against the Gianukakises. Respondent has

1 acknowledged this during these proceedings.

2 125. Respondent's testimony that he needed as a matter of law to send the letter directly
3 to PM to effectively revoke the GDPOA is not credible.

4 126. Respondent's letter discusses the impact of the Revocation and Release in
5 connection with the pending lawsuit, and also includes Respondent's Notice of Appearance in
6 the pending lawsuit on behalf of the Gianukakises. EX 25, EX 26.

7 127. Respondent also sent Kovarik a letter that same day threatening to seek attorney
8 fees for filing a frivolous lawsuit if the lawsuit was not dismissed within ten days. EX 28. This
9 letter also included copies of the Revocation and Release and Respondent's Notice of
10 Appearance.

11 128. By doing so, Respondent had direct contact with PM who was represented by legal
12 counsel in the pending lawsuit.

13 **H. Findings of Fact Regarding Payment by the Gianukakises**

14 129. The Gianukakises paid for the legal services provided by Respondent, including
15 the services related to preparing the Revocation and Release for DM. EX 33. Respondent
16 charged the Gianukakises 4.1 hours of attorney time, which represented the 1.6 hour meeting as
17 well as additional legal services. EX 31.

18 130. Respondent acknowledged at the hearing that he accepted compensation from the
19 Gianukakises for providing legal services to DM. TR 444: 13-16.

20 131. Respondent did not obtain informed consent from DM or the Gianukakises before
21 accepting compensation from the Gianukakises.

22 **I. Findings Regarding Respondent's Role in the Guardianship and Vulnerable Adult**
23 **Statute Case**

24 132. Respondent had no contact with DM after the March 22, 2012 meeting.

1 133. On or around March 28, 2012, Linda Hansen (Hansen) discussed the March 22nd
2 meeting with DM. Hansen later testified at the hearing that DM believed he still owned the Hall
3 Creek Property until it was fully paid off. TR 212-214. Hansen also testified that DM had no
4 recollection or understanding of the significance of the documents that he signed at the March
5 22nd meeting, including the Revocation and Release. TR 212-214.

6 134. DM's lack of understanding regarding the property transaction was also confirmed
7 in interviews by Craig Hirt from Adult Protection Services (TR 196-205) and other witnesses.
8 This testimony is credible. DM did not fully recall or understand the documents that he signed
9 at the March 22nd meeting, nor did he understand the terms of the sale other than in the most
10 basic of terms (e.g., that he agreed to sell the property).

11 135. As a result of the sale, DM's family decided to move DM to Spokane for his
12 protection.

13 136. The Revocation and Release sent by Respondent to Kovarik and PM effectively
14 delayed the lawsuit filed by Kovarik until after a guardianship was established in July 2012. EX
15 49-51.

16 137. DM's family hired lawyer Chis Lee (Lee) to pursue the guardianship for DM, as
17 well as a Vulnerable Adult Protection Action (VAP Action) against Gianukakis relating to the
18 sale of the Hall Creek Property. DM's nephew was the petitioner for both actions.

19 138. On April 2, 2012, the guardianship action for DM was commenced. The court
20 appointed lawyer Helen Hokom (Hokom) to serve as DM's guardian ad litem (GAL).

21 139. The reason for filing the guardianship was largely due to the sale of Hall Creek
22 Property and the subsequent revocation of the GDPOA. EX 35 at 4-5.

23 140. On April 2, 2012, the VAP Action for DM was filed against Gianukakis.

24 141. One of the stated reasons for filing the VAP Action was to restrain the sale or

1 encumbrance of the Hall Creek Property by Gianukakis. EX 43.1 at 4, 8. EX 43.2 at 2.

2 142. Respondent entered a Notice of Appearance in the VAP Action on behalf of the
3 Gianukakises. EX 43.3. Respondent's representation of the Gianukakises also extended to some
4 degree to the pending guardianship. EX 42, EX 52 at 2.

5 143. It is clear and unequivocal from the record that Respondent continued to represent
6 the Gianukakises after the March 22, 2012 meeting by providing them with ongoing legal
7 services in all three proceedings, as follows: (1) the lawsuit filed by Kovarik against the
8 Gianukakises, (2) the guardianship proceedings, and (3) the VAP Action. This representation
9 included drafting letters, filing pleadings, appearing at the VAP Action hearing, arguing in favor
10 of the Gianukakises' position and against DM's stated position, and providing other legal
11 services on behalf of the Gianukakises.

12 144. Respondent's subsequent representation of the Gianukakises was substantially
13 related to Respondent's representation of DM on March 22, 2012. EX 35, EX 43.1.

14 145. Respondent did not obtain a written conflict of interest waiver from DM or the
15 Gianukakises at any time.

16 146. An ongoing conflict of interest existed between the Gianukakises and DM. For
17 example, the VAP Action and the guardianship both involved the purchase and sale of the Hall
18 Creek Property, including the documents Respondent drafted for DM and the Gianukakises. EX
19 35, EX 43.1, EX 43.2.

20 147. Pleadings in these actions raise material allegations involving Respondent's role as
21 legal counsel for DM and the Gianukakises with regard to the Revocation and Release.

22 148. For example, the petition of guardianship alleges:

23 "The general durable power of attorney has proved ineffective because, as recent
24 events confirm, [DM] can be unduly influenced to terminate such durable power
of attorney documents. To prevent future similar occurrences, a guardianship is

1 needed." EX 35 at 5.

2 149. For example, the Petition for Vulnerable Adult Order for Protection alleges:

3 "On or around March 22nd, 2012, in a brazen act of exploitation, respondent
4 Gianukakis drove DM down to an attorney in Colville, WA. The attorney had DM
5 sign a revocation of all general durable Powers of Attorney held by PM which
6 were referenced in the complaint against respondent Gianukakis. The attorney had
7 DM remove the lis pendens on the property. The attorney had John grant DM a
deed of trust, and had DM sign a re-conveyance of the property for the following
terms ... The same attorney entered a Notice of Appearance on behalf of
respondent Gianukakis in the action brought by PM as DM's attorney in fact." EX
43.1 at 7-8.

8 150. On April 6, 2012, Lee sent a number of documents to Respondent, including the
9 2005 DSHS Physicians Certification for Medicaid stating that DM "can't read or write except
10 name" and was diagnosed with "mental retardation" and an IQ of 65. EX 2. EX 38.

11 151. Mr. Lee's letter stated that:

12 It is clear at the time that you met with [DM] you knew that he was a party in
13 litigation against John Gianukakis and represented by Mr. Kovarik. You also were
14 aware that the complaint set forth that [DM] "is a single man of diminished
15 capacity who is unable to understand the nature, terms and effect of financial and
16 business transactions." That statement is contained in the same paragraph that is
referenced in the revocation. Nevertheless, you met with [DM], a person of
diminished capacity, unrepresented, in your office, having been taken there by
your client, and had him execute a document that was favorable to your client in a
litigation you later appeared as counsel. EX 38 at 2.

17 152. Respondent did not reply to Lee's allegations.

18 153. On April 16, 2012, Respondent wrote a letter to Hokom on behalf of the
19 Gianukakises stating, "I highly recommend that a current independent Physician and/or Clinical
20 Psychologist re-evaluate the condition of DM, as the Physician Statement provided to me is
21 dated July 6, 2005." EX 42 at 2. This same letter asked the GAL to have independent legal
22 counsel appointed for DM to represent his best interests. EX 42 at 2.

23 154. It is clear from the record, including the allegations in the pleadings and letters,
24 that the underlying conflict of interest between DM and the Gianukakises should have been well

1 known to Respondent by this time. This conflict of interest could not be waived under RPC 1.7.
2 Regardless, Respondent continued to ignore these issues and represent the Gianukakises without
3 attempting to obtain a conflict of interest waiver from either DM or the Gianukakises.

4 155. Accordingly, Respondent knowingly continued to represent the Gianukakises
5 while a clear conflict of interest existed. A reasonable attorney would not believe that the
6 interests of DM and the Gianukakises were aligned or that he or she could continue under the
7 circumstances.

8 **J. Additional Findings Regarding the Vulnerable Adult Statute Case and**
9 **Guardianship Proceedings**

10 156. As part of the preparation for the vulnerable adult hearing, the family arranged for
11 DM to be evaluated by Dr. Brian Campbell, PhD, a Spokane Psychologist. EX 46, EX 47.

12 157. On May 21, 2012, Dr. Campbell issued an assessment and letter explaining his
13 findings. EX 46, EX 47. Dr. Campbell recommended that a guardianship be established to
14 protect DM. EX 46, EX 47.

15 158. According to the assessment, Dr. Campbell's testing reflected substantial
16 compromised verbal and language abilities, problem solving, executive functioning,
17 concentration, attention, reading, mathematics, and general intellectual abilities. EX 46, EX 47.
18 Dr. Campbell opined that the Hall Creek Property real estate transaction should be "invalidated
19 based on DM's inability to read, comprehend, and appreciate the nature or consequences of the
20 transaction." EX 46 at 15.

21 159. On May 23, 2012, Respondent was provided with copies of the assessments
22 performed by Dr. Campbell in 2012 and by Dr. Mahlon in 2005. This was the first time
23 Respondent received either assessment.

24 160. On May 25, 2012, prior to the guardianship hearing, the Court held a hearing

1 regarding the VAP Action. EX 44.

2 161. Respondent attended the May 25, 2012 hearing and argued at length on behalf of
3 the Gianukakises. EX 44. It should be noted that Lee, attorney for DM at the hearing,
4 specifically alleged overreaching by Respondent at the March 22, 2012 meeting:

5 "But he did something that put DM, a person with an 65 IQ who can't read and
6 write, in an aspect of extreme danger because there was now nobody, nobody who
7 had any authority to act or protect him ... basically they were willing to leave DM
unprotected and in question about who could do anything for him because DM
signed a document that said I'm revoking all my powers of attorney." EX 44 at 11.

8 162. It is clear that Lee was implying impropriety on behalf of Respondent with regard
9 to his representation of DM at the March 22, 2012 meeting, which is a foreseeable argument
10 under the circumstances. This serves as additional evidence of the ongoing conflict of interest
11 created by Respondent's dual representation at the March 22, 2012 meeting. An objectively
12 reasonable attorney would not have presented argument on behalf of the Gianukakises at the
13 VAP Action when that same attorney represented the opposing party in the underlying
14 transaction. This is a clear violation of RPC 1.7.

15 163. During this hearing, the Court found that DM was a vulnerable adult under the
16 statute who is susceptible to exploitation. EX 44 at 19-20. However, the Court ruled that the
17 evidence before it for its "limited purposes" was "insufficient to find that there has been an act
18 of financial exploitation within the definition of RCW 74.34.020." EX 44 at 25. The Court
19 specifically reserved several issues for the other proceedings, including whether there was a
20 basis for undoing the property transaction, issuing an injunction, or for damages. EX 44 at 25.

21 164. It is worth noting that the Court expressed some concern over the events of March
22 22, 2012, as follows:

23 "Now as Mr. Lee points out, that can cut both ways. Come see my attorney and
24 we'll get you past this issue with your brother which you evidently just signed
recently providing him with the ability to be your attorney-in-fact. That does

1 concern me. There's not really much of a record developed for how that occurred.
2 But I focus on the real estate portion ..." EX 44 at 24.

3 165. The Court goes on to analyze the case from the perspective of RCW 74.34.020. It
4 is not particularly useful in the instant case to revisit these arguments and conclusions, suffice it
5 to say that the Court did not tackle any of the ethical concerns regarding conflict of interest
6 alleged by the Office of Disciplinary Counsel in these proceedings.

7 166. On June 4, 2012, Hokom issued her GAL report recommending, among other
8 things, that a permanent limited guardianship be established for DM and that PM be appointed
9 full guardian of DM's estate and limited guardian of the person. EX 48 at 1.

10 167. It was the GAL's opinion that DM did not have capacity to sign legal documents.
11 EX 48 at 5. The GAL's recommendation was consistent with the neurological assessments
12 performed by Dr. Campbell in April and May 2012. See EX 46, EX 47.

13 168. On June 29, 2012, the court adopted Hokom's recommendations and appointed
14 PM as DM's full guardian of the estate and limited guardian of the person. EX 48.1 at 9.

15 169. In the same Order, the court ordered DM's estate to pay GAL fees and costs of
16 \$4,763.54 and Lee's legal fees of \$7,557.70. EX 48.1 at 13, EX 300 at 36.

17 170. After the guardianship was established, Gianukakis engaged in direct negotiations
18 with PM to resolve the original lawsuit.

19 171. On July 27, 2012, the Gianukakis signed a stipulation agreeing to rescind the
20 sale of the Hall Creek Property thereby resolving the lawsuit filed by Kovarik. EX 48-50.

21 172. On August 8, 2012, the Court entered a stipulated dismissal, thereby dismissing the
22 lawsuit. EX 51.

23 173. DM's family incurred \$35,632.67 in attorney fees between March 22, 2012 and
24 June 29, 2012. These fees can be attributed primarily to DM's desire to sell the Hall Creek

1 Property to Gianukakis, which was inconsistent with his family's desires and wishes for DM.

2 174. While the Office of Disciplinary Counsel has asked that these fees be attributed in
3 full to Respondent's behavior in drafting the Revocation and Release, to be fair, this did not
4 occur in a vacuum. Our analysis must take into account the fact that DM agreed to sell the
5 property to Gianukakis long before Respondent's involvement, and Gianukakis declined to give
6 up the property without a fight. Moreover, the Court ultimately declined to find financial
7 exploitation by Gianukakis after reviewing the appraisals and other evidence material to those
8 proceedings. DM's family did not prevail in that action.

9 175. Accordingly, the petition for guardianship was as much a function of DM's family
10 protecting DM from his own decisions as anything else. Clearly, Respondent was not involved
11 in the initial agreement to sell the property, nor did he suggest the terms of the underlying sale.
12 While it can be argued that Respondent's behavior prolonged these proceedings to some degree,
13 this does not rise to a clear preponderance of the evidence required to make Respondent
14 responsible for all legal fees incurred by DM's family, especially since the Gianukakis might
15 just as well have hired another attorney in the place of Respondent and kept fighting. In sum,
16 the other factors contributed to the attorney fees to a much greater degree.

17 **K. Findings Regarding Respondent's Post Grievance Conduct**

18 176. There are several troubling issues surrounding Respondent's conduct following the
19 grievance filed against him on or around August 21, 2013. First and foremost, Respondent has
20 declined to take meaningful responsibility for his actions. These actions include, but are not
21 limited to representing DM and the Gianukakis at the March 22, 2012 meeting, continuing to
22 represent the Gianukakis for several months thereafter in related proceedings, accepting
23 payment for DM's representation from the Gianukakis, and having direct communication
24 (twice) with an opposing party represented by legal counsel. Some of these issues are clearer

1 | than others, however, it is difficult to accept Respondent's position that he did not know a
2 | conflict of interest existed between DM and the Gianukakises. This is particularly difficult to
3 | accept given the allegations in the above pleadings, the letters in the file, and Respondent's
4 | zealous representation of the Gianukakises' interests over those of DM.

5 | 177. In addition, on September 4, 2013, Respondent submitted a response to the
6 | grievance provided by the Office of Disciplinary Counsel. EX 501. In his response, Respondent
7 | maintained that DM was not of diminished capacity. His response also omitted any documents
8 | reflecting DM's diminished capacity, including Dr. Campbell's assessment, Dr. Mahlon's
9 | assessment, and the declarations filed in support of the VAP Action. However, the record
10 | clearly shows that Respondent was in possession of these documents at the time. While it is
11 | generally understood that an attorney wants to present his best case, Respondent's behavior
12 | raises the specter of misrepresentation by omission or, at a minimum, an attempt to finesse the
13 | facts in this case to conceal his mistakes.

14 | 178. Respondent's response avoided any discussion of the RPC 4.2 issue and the
15 | conflict of interest issues. EX 501.

16 | 179. On March 19, 2015, the Office of Disciplinary Counsel sent Requests for
17 | Admission asking Respondent to admit that DM has diminished capacity. EX 600 ¶¶ 2, 80, 81,
18 | 82, 83, 84, 85, 86, 87, 88, 92, 93. Respondent denied or did not admit these requests for
19 | admission. EX 601. Instead, Respondent answered only that he did not know about DM's
20 | diminished capacity on March 22, 2012. EX 601.

21 | 180. This was again reflected in Respondent's testimony at the hearing when he argued
22 | at length with ODC counsel about the premise behind these Requests for Admission.
23 | Respondent stressed multiple times that he did not know DM had diminished capacity at the
24 | March 22, 2012 meeting, and implied that the analysis should end there. However, this is not

1 | credible for the reasons set forth above. Respondent knew the allegations in the summons and
2 | complaint, and went forward with his representation of DM nonetheless.

3 | 181. Whether Respondent took a calculated risk, or just declined to believe the
4 | allegations in the complaint, he was ultimately shown to be incorrect. It would have been more
5 | in line with Respondent's reputation for him to acknowledge this fact, which has been proven
6 | several times over, rather than continue to fight this issue.

7 | 182. In sum, Respondent's behavior suggests an inability to recognize one of the
8 | primary concerns in this case, that is, that DM has diminished capacity and has been vulnerable
9 | to exploitation throughout these proceedings. This very fact made Respondent's decisions at the
10 | March 22, 2012 meeting that much more dangerous for DM, who lacks the capacity to make
11 | meaningful financial decisions for himself. This was the real threat of harm in this case, which
12 | will be discussed in more detail below.

13 | CONCLUSIONS OF LAW

14 | VIOLATION ANALYSIS

15 | The Hearing Officer finds that the Office of Disciplinary Counsel proved the following
16 | by a clear preponderance of the evidence:

17 | 183. **COUNT 1.** By having direct contact with DM on March 22, 2012, after being
18 | provided with the summons, complaint and lis pendens reflecting that DM was represented by
19 | Kovarik, Respondent violated RPC 4.2.

20 | 184. It is clear from the record that DM was represented by Kovarik at the time of the
21 | March 22, 2012 meeting. Respondent admits having read the summons, complaint and lis
22 | pendens before meeting with DM. This includes the portions set forth above that indicate DM
23 | was the named plaintiff in a lawsuit against Respondent's existing clients the Gianukakis.

24 | 185. Respondent's testimony that he believed DM's brother to be the only person

1 represented in the lawsuit is not credible.

2 186. Respondent's behavior of reading these documents and then questioning DM at
3 length to determine, among other things, whether he was actually represented by legal counsel
4 was inappropriate. WSBA Ethics Opinion #1307 regarding RPC 4.2 is instructive in this regard.
5 Furthermore, given DM's diminished capacity, it is clear that he did not understand the nature of
6 Kovarik's legal representation.

7 187. **COUNT 2.** Count 2 is presented in the alternative to Count 1. Having found
8 Respondent to have committed Count 1, Count 2 is no longer pending.

9 188. **COUNT 3.** By having direct contact with DM's brother, PM, knowing that he was
10 a represented person in a pending lawsuit, Respondent violated RPC 4.2.

11 189. Respondent admits sending a letter and Notice of Appearance to PM, and sending
12 copies to Kovarik. Respondent acknowledges that PM was represented by Kovarik at the time.
13 WSBA Ethics Opinion #1000 regarding RPC 4.2 is instructive in this regard. By doing so,
14 Respondent had direct contact with a party represented by legal counsel.

15 190. **COUNT 4.** By simultaneously providing legal representation and services to DM
16 and to the Gianukakises on March 22, 2012, in connection with the pending lawsuit in which
17 DM and the Gianukakises were opposing parties, and in connection with the sale of the Hall
18 Creek Property in which DM was the seller and the Gianukakises were the purchasers,
19 Respondent violated RPC 1.7.

20 191. The interests of DM and the Gianukakises were directly adverse in the pending
21 lawsuit to such an extent that the conflict of interest was not waivable.

22 192. To the extent that any conflicts could be waived, Respondent failed to obtain
23 informed consent in writing from DM and the Gianukakises as required by RPC 1.7.

24 193. **COUNT 5.** By accepting compensation from the Gianukakises for providing legal

1 services to DM on March 22, 2012, Respondent violated RPC 1.8(f).

2 194. Respondent failed to obtain informed consent from DM regarding this issue.

3 195. The record shows that there was interference with Respondent's independent
4 professional judgment and with the attorney-client relationship, including (1) Respondent had
5 the Gianukakises present during the entire time that he provided legal services to DM; (2)
6 Respondent failed to advise DM regarding issues of confidentiality, including the fact that those
7 present could be called as potential witnesses in future proceedings; (3) Respondent failed to
8 reasonably protect DM's interests knowing that he may be a person of diminished capacity; (4)
9 Respondent failed to take reasonable steps to make sure that DM's interests in the property sale
10 were protected; and (5) by revoking the GDPOA, Respondent left DM without protection unless
11 and until a guardianship was filed.

12 196. **COUNT 6(1).** By representing the Gianukakises in the lawsuit filed by Kovarik,
13 and by representing the Gianukakises in the VAP Action, without obtaining informed consent in
14 writing from DM, Respondent violated RPC 1.9(a).

15 197. These matters were substantially related to the legal representation provided to DM
16 at the March 22, 2012 meeting. Respondent's representation in these proceedings was materially
17 adverse to his former client DM.

18 198. **COUNT 6(2).** By using information from his former representation of DM in
19 subsequent legal proceedings, Respondent violated RPC 1.9(c).

20 199. Respondent revealed information relating to his representation of DM during the
21 VAP Action and related guardianship. This was to the advantage of the Gianukakises and
22 disadvantage of DM. EX 922, EX 923, EX 45 at 10.

23 200. **COUNT 7. DISMISSED BY THE OFFICE OF DISCIPLINARY COUNSEL.**

24 201. **COUNT 8(1).** The Office of Disciplinary Counsel has not shown by a

1 | preponderance of the evidence that Respondent's behavior rises to the level of violating RCP
2 | 8.4(c), engaging in conduct involving dishonesty.

3 | 202. There has been considerable testimony in these proceedings regarding the sale
4 | price of the property and whether this was a reasonable figure given similar property values.
5 | There is no evidence that Respondent intentionally endorsed this purchase price because it
6 | favored his clients, the Gianukakises, in an attempt to exploit DM. To the contrary, the evidence
7 | shows that DM wanted to sell the property for this price, and the agreement was entered into
8 | long before Respondent's involvement.

9 | 203. Furthermore, there are disagreements as to the actual value of the property. Similar
10 | evidence was considered by the Court in the VAP Action, including appraisals of comparable
11 | properties. The Court did not find exploitation.

12 | 204. **COUNT 8(2).** By meeting with DM while knowing that he is a person of
13 | diminished capacity, and/or when the facts available to Respondent indicated this to be true,
14 | Respondent violated RPC 8.4(d), engaging in conduct that is prejudicial to the administration of
15 | justice.

16 | 205. The facts in this case overwhelmingly show that DM has diminished capacity. This
17 | truth was readily available to Respondent who consciously chose to ignore it even though the
18 | risk of harm to DM was foreseeable and considerable.

19 | 206. Respondent received written notice of DM's diminished capacity in the summons,
20 | complaint and lis pendens, and decided to meet with him anyway. Ultimately, Respondent
21 | assisted in revoking the power of attorney, stripping DM of his protections provided by his
22 | existing legal counsel. An objectively reasonable attorney would not have met with DM under
23 | these circumstances, and would not have prepared documents intended to terminate opposing
24 | counsel's role in a pending lawsuit.

1 **PRESUMPTIVE SANCTION ANALYSIS**

2 207. **COUNT 1.** Respondent communicated with DM in violation of RCP 4.2.

3 208. ABA Standard 6.32 states that suspension is generally appropriate when a lawyer
4 engages in communication with an individual when the lawyer knows that such communication
5 is improper, and causes injury or potential injury to a party or causes interference or potential
6 interference with the outcome of the legal proceeding.

7 209. Respondent knew that DM was represented by Kovarik at the time of the March
8 22, 2012 meeting, and elected to meet with him anyway for approximately 1.6 hours.
9 Respondent knew that such communication was improper, and knew that his actions at the
10 March 22, 2012 meeting had a potential to injure DM, who has diminished capacity.

11 210. Suspension is the presumptive sanction for Respondent's behavior under ABA
12 Standard 6.32.

13 211. **COUNT 2.** Count 2 is presented in the alternative to Count 1. Having found
14 Respondent to have committed Count 1, Count 2 is no longer pending.

15 212. **COUNT 3.** Respondent had direct contact with DM's brother, PM, in violation of
16 RPC 4.2.

17 213. ABA Standard 6.34 states that admonition is generally appropriate when a lawyer
18 engages in an isolated instance of negligence in improperly communicating with an individual
19 in the legal system, and causes little or no actual or potential injury to a party or the outcome of
20 the legal proceedings.

21 214. Respondent sent correspondence directly to PM with the purpose of revoking the
22 power of attorney. Respondent may have negligently believed this to be lawful at the time. This
23 was an isolated event. Because Respondent also sent a copy of the letter and his Notice of
24 Appearance to PM's attorney, the potential for harm was not substantial.

1 215. Admonition is the presumptive sanction for Respondent's behavior under ABA
2 Standard 6.34.

3 216. **COUNT 4.** Respondent represented both DM and the Gianukakises in violation of
4 RPC 1.7.

5 217. ABA Standard 4.32 states that suspension is generally appropriate when a lawyer
6 knows of a conflict of interest and does not fully disclose to a client the possible effect of that
7 conflict, and causes injury or potential injury to a client.

8 218. Respondent knew that a conflict of interest existed between DM and the
9 Gianukakises at the March 22, 2012 meeting. DM and the Gianukakises were opposing parties
10 in a lawsuit, and were the buyer and seller of the property at issue in the lawsuit. Respondent
11 could not have reasonably believed that their interests were aligned.

12 219. Respondent knew that his actions had a potential to injure DM, who has
13 diminished capacity.

14 220. Suspension is the presumptive sanction for Respondent's behavior under ABA
15 Standard 4.32.

16 221. **COUNT 5.** Respondent accepted compensation from the Gianukakises for
17 providing legal services to DM in violation of RPC 1.8(f).

18 222. ABA Standard 4.32 states that suspension is generally appropriate when a lawyer
19 knows of a conflict of interest and does not fully disclose to a client the possible effect of that
20 conflict, and causes injury or potential injury to a client.

21 223. Respondent failed to obtain informed consent from DM regarding this issue.

22 224. Respondent knew that his actions had a potential to injure DM, who has
23 diminished capacity. Respondent failed to properly protect DM's interests, and placed the
24 interests of his other clients, the Gianukakises, ahead of DM's interests.

1 225. Suspension is the presumptive sanction for Respondent's behavior under ABA
2 Standard 4.32.

3 226. **COUNT 6(1)**. Respondent represented the Gianukakises after the March 22, 2012
4 meeting without obtaining informed consent from DM in violation of RPC 1.9(a).

5 227. ABA Standard 4.32 states that suspension is generally appropriate when a lawyer
6 knows of a conflict of interest and does not fully disclose to a client the possible effect of that
7 conflict, and causes injury or potential injury to a client.

8 228. Throughout these proceedings, the interests of the Gianukakises were materially
9 adverse to DM, who was the opposing party in a pending lawsuit to rescind the sale of the Hall
10 Creek Property.

11 229. Respondent failed to obtain informed consent from either party regarding this
12 issue.

13 230. Suspension is the presumptive sanction for Respondent's behavior under ABA
14 Standard 4.32.

15 231. **COUNT 6(2)**. Respondent used information obtained through his representation of
16 DM in subsequent legal proceedings in violation of RPC 1.9(c).

17 232. ABA Standard 4.31(c) states that disbarment is generally appropriate when a
18 lawyer, without the informed consent of a client, represents a client in a matter substantially
19 related to a matter in which the interests of a present or former client are materially adverse, and
20 knowingly uses information relating to the representation of a client with the intent to benefit
21 the lawyer or another, and causes serious or potentially serious injury to a client.

22 233. Respondent knowingly used information relating to his representation of DM when
23 he submitted the Gianukakises' supporting declarations that describe DM's actions at the March
24 22, 2012 meeting. EX 922 at 5, EX 923 at 2.

1 234. A close review of the declarations shows that they were used to argue that DM did
2 not authorize the lawsuit against the Gianukakises and desired to sell the property to the
3 Gianukakises. EX 922 at 5, EX 923 at 2.

4 235. The VAP Action was eventually dismissed, the guardianship established, and the
5 sale of the Hall Creek Property rescinded by agreement of the parties. While DM's interested
6 were not seriously harmed in the long term, it is clear that Respondent's actions had the
7 potential to harm DM, who has diminished capacity.

8 236. However, there are few details in these declarations involving the March 22, 2012
9 meeting. Moreover, the declarations set forth the testimony of John Gianukakis, who also
10 attended the meeting. The content of this testimony also appears in other documents and was
11 generally known by everyone involved to be at the heart of the dispute. The extent of
12 Respondent's involvement in the content in these declarations it is not clear from the record,
13 though one of these documents has the name of Respondent's firm in the lower right corner and
14 was obviously prepared by Respondent's firm.

15 237. While it does raise the specter of using information gleaned from a previous client
16 against that client at a later proceeding, this scenario seems to fit better with ABA Standard 4.32
17 (above) and the previous analysis involving conflict of interest. Respondent knew of the
18 conflict, did not disclose the conflict, and caused potential injury to DM.

19 238. Suspension is the presumptive sanction for Respondent's behavior under ABA
20 Standard 4.32.

21 239. **COUNT 7. DISMISSED BY THE OFFICE OF DISCIPLINARY COUNSEL.**

22 240. **COUNT 8.** Respondent met with DM while knowing that he is a person of
23 diminished capacity, and/or when the facts available to Respondent indicated this to be true, in
24 violation of RPC 8.4(d).

1 241. ABA Standard 7.2 states that suspension is generally appropriate when a lawyer
2 knowingly engages in conduct that is a violation of a duty owed as a professional and causes
3 injury or potential injury to a client, the public, or the legal system.

4 242. Respondent is bound by our Rules of Professional Conduct. The preamble of these
5 rules states that we, as attorneys, have an obligation to maintain the highest standards of ethical
6 conduct. The preamble states as follows:

7 "Virtually all difficult ethical problems arise from conflict between a lawyer's
8 responsibilities to clients, to the legal system and to the lawyer's own interest in
9 remaining an ethical person while earning a satisfactory living. The Rules of
10 Professional Conduct often prescribe terms for resolving such conflicts. Within
11 the framework of these Rules, however, many difficult issues of professional
12 discretion can arise. Such issues must be resolved through the exercise of
sensitive professional and moral judgment guided by the basic principles
underlying the Rules. These principles include the lawyer's obligation
conscientiously and ardently to protect and pursue a client's legitimate interests,
within the bounds of the law, while maintaining a professional, courteous and
civil attitude toward all persons involved in the legal system."

13 243. Respondent's behavior toward DM throughout these proceedings shows a certain
14 disregard for DM's welfare and protection. Respondent did not place DM's wellbeing on equal
15 footing with his other clients, the Gianukakises. Nor did Respondent exercise reasonable
16 precautions or act in an objectively reasonable manner prior to meeting with DM, a man with
17 diminished capacity who was particularly vulnerable.

18 244. Suspension is the presumptive sanction for Respondent's conduct under ABA
19 Standard 7.2.

20 245. **PRESUMPTIVE SANCTION.** Where there are multiple ethical violations, the
21 "ultimate sanction imposed should at least be consistent with the sanction for the most serious
22 instance of misconduct among a number of violations; it might well be and generally should be
23 greater than the sanction for the most serious misconduct." In re Disciplinary Proceeding
24 Against Petersen, 120 Wn.2d 833, 854, 846 P.2d 1330 (1993) (quoting ABA Standards at 6).

1 Here, the presumptive sanction for the most serious instances of misconduct is suspension.

2 **ANALYSIS OF AGGRAVATING FACTORS**

3 246. After misconduct has been established, aggravating and mitigating circumstances
4 may be considered in deciding what sanction to impose. The following aggravating factors in
5 ABA Standard 9.22 apply to this case.

6 247. **Multiple Offenses.** Respondent engaged in multiple violations, including RPC 4.2,
7 RPC 1.7, RPC 1.8(f), RPC 1.9(a) and (c), and RPC 8.4(d). However, this cuts both ways.
8 Almost all of these violations stem from Respondent's representation of DM and the
9 Gianukakis and involve the inherent conflict of interest between these two clients. It is worth
10 remembering that Respondent met with DM on March 22, 2012, and the lawsuit regarding the
11 Hall Creek Property was settled between the parties on August 8, 2012. EX 50. This series of
12 events spanned approximately four and a half months.

13 248. **Refusal to Acknowledge Wrongful Nature of Conduct.** Respondent has not
14 acknowledged the wrongful nature of his misconduct other than to suggest during testimony that
15 he would have done things differently if he knew about DM's diminished capacity at the time of
16 the meeting. In re Disciplinary Proceeding Against McGrath, 178 Wn. 2d 280, 305, 308 P.3d
17 615 (2013) (Failure to admit wrongful conduct applies 'to an attorney who admits he engaged in
18 the alleged conduct' and yet 'denies the conduct was wrongful.').

19 249. **Vulnerability of Victim.** The Supreme Court held that to show a vulnerable
20 victim, "the record must show an attorney's victims were 'under [a] physical or mental
21 disability or [were] otherwise particularly vulnerable.'" In re Disciplinary Proceeding Against
22 VanDerbeek, 153 Wn.2d 64, 93, 101 P.3d 88, 96-97 (2004). There is overwhelming evidence
23 from the assessments by Dr. Campbell and Dr. Mahlon and other witnesses that DM suffered
24 from mild mental retardation, serious cognitive and mental disabilities, and was particularly

1 vulnerable to exploitation.

2 **250. Substantial Experience in the Practice of Law.** Respondent's own testimony
3 reflects that he has had substantial experience in the practice of law. Respondent was admitted
4 to practice in 1982 and has had significant experience with legal matters. Respondent has had
5 experience representing clients with mental disabilities and diminished capacity.

6 **ANALYSIS OF MITIGATING FACTORS**

7 251. The following mitigating factors in ABA Standard 9.32 apply to this case.

8 **252. Absence of a Prior Disciplinary Record.** Respondent has no prior discipline.

9 **253. Character and Reputation.** Respondent presented substantial evidence and
10 witnesses demonstrating his good character and reputation. Two Superior Court Judges
11 appeared and testified on behalf of Respondent.

12 **Absence of a Dishonest or Selfish Motive.** Despite Respondent's mistakes, the record
13 does not reflect that he had a dishonest or selfish motive. Rather, it appears that an otherwise
14 good attorney got caught up in the over-zealous representation of his clients, the Gianukakises,
15 and (knowingly) turned a blind eye to the ethical duties and responsibilities he owed to DM
16 from the moment they sat down together in Respondent's office.

17 254. The aggravating factors slightly outweigh the mitigating factors by 4 to 3 in
18 number. The vulnerability of DM is of particular concern. That said, many of these ethical
19 violations stem from the same issue (conflict of interest) in a short time span, and the evidence
20 presented in favor of Respondent's reputation and character is compelling. The property was
21 returned and no apparent harm came to DM. Respondent was not involved in the original
22 agreement between DM and the Gianukakises. Ultimately, the guardianship is in DM's best
23 interest to prevent him from making similar decisions again. Accordingly, a balancing of the
24 aggravating and mitigating factors justifies a decrease in the degree of discipline to be imposed.

RECOMMENDATION

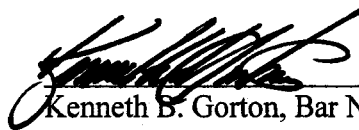
255. "A period of six months is generally the accepted minimum term of suspension."

In re Cohen, 149 Wn.2d 323, 67 P.3d 1086, 1094 (2003).

256. Here, there is nothing to be gained by suspending Respondent for more than six months given the facts of this case. The minimum presumptive sanction should be imposed.

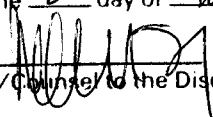
257. The Hearing Officer recommends that Respondent be suspended from the practice of law for six (6) months. His reinstatement should be conditioned upon (1) the successful completion of 6.00 CLE credits in the area of ethics specifically dealing with conflict of interest, and (2) paying any costs and expenses assessed in this disciplinary proceeding.

DATED this 3 day of DECEMBER, 2015.


Kenneth B. Gorton, Bar No. 37597
Hearing Officer

CERTIFICATE OF SERVICE

I certify that I caused a copy of the FOI, COI & HO's Recommendation
to be delivered to the Office of Disciplinary Counsel and to be mailed
to Wanda Ripley Respondent/Respondent's Counsel
at PO BOX 130 DUNSM, WA 98019, by Certified/first class mail
postage prepaid on the 3rd day of December, 2015


Clerk/Counsel to the Disciplinary Board