

Case No.: 200,568-3

SUPREME COURT OF THE STATE OF WASHINGTON

**In re Stephen K. Eugster,
an Attorney at Law
WSBA No. 2003**

OPENING BRIEF OF APPELLANT

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I. Introduction

This is a disciplinary proceeding against attorney Stephen Eugster, admitted to practice on January 2, 1970. Eugster has no prior disciplinary record. The Bar solely relied on admittedly confusing,¹erroneous and inapposite findings² to recommend Eugster be disbarred based on his two to three month representation of Marion Stead, an 87 year old widow. In particular, the Bar recommends Eugster be disbarred based on “knowingly filing a petition for guardianship that was not well grounded in fact against a former client without making a reasonable inquiry about the client’s mental condition.”³ The Bar’s recommendation⁴ is procedurally, factually and legally flawed. It ignores the fact that Eugster had a contractual, ethical and/or legal duty to take protective action for the benefit of Marion.

RPC 1.13 states:

¹Adding to the confusion is the numbering of for the FOF by the Board (e.g. multiple uses of the same numbers); numbering of the exhibits sent to the Disciplinary Board. The exhibit list runs 1-82; 204-207 and then begins again with 1-134 without distinguishing if they are from Eugster or the Bar, when and for what phase of the case.

²Attached as Exhibit A is Eugster’s challenges to the FOF and COL.

³Count 5 and 8 [RPC 1.15(d); 3.4 and CR 11] FOF & COL at pg. 25.

⁴The first assigned error refers to the Hearing Officer’s Denial of Eugster’s Motion to Dismiss.

CLIENT UNDER A DISABILITY: (a) When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client. (b) When the lawyer reasonably believes that the client cannot adequately act in the client's own interest, a lawyer may seek the appointment of a guardian or take other protective action with respect to a client.⁵

The standard is subjective reasonableness on a prospective basis.

What did the lawyer reasonably believe at the time? The undisputed facts are that Marion, an 87 year old widow, was psychologically impaired⁶ and did not handle her own finances. Eugster reasonably believed that Marion was not acting consistent with her best interests, her financial objectives and/or her estate plan based on her own actions and the involvement of third parties.

The Board and Hearings Officer completely ignored Eugster's arguments under RPC 1.13.⁷ They ignored basic principles of

⁵Emphasis added. RPC 1.13 (in effect in 2204) has since been revised to 1.14 [Client with Diminished Capacity].

⁶Marion had "psychologic conditions with major depressive disorder" for which she took various medications and was in counseling. Ex. 85 (Guardianship Medical/Psychological Report at VI). "Psychologic conditions" refers to a variety of mental disorders, including severe phobias, dysrationalia, and PTSD. See Webster's New World Medical Dictionary.

⁷Eugster repeatedly raised RPC 1.13 in his answer [CP 63], briefs and motions. See, e.g. Brief of Respondent at page 6 [R. *Did Eugster have a right to rely on RPC 1.13 and if he did, did he violate RPC 1.13?*]; page 19 [*Nothing is said that Eugster did not have the power under law to bring guardianship proceeding. Nothing is said about RPC 1.13.*] The only mention of RPC 1.13 is in passing at

guardianship law which allow “any person” to petition for a guardian.⁸

This complete disregard is evidenced by the FOF which shrilly characterize Eugster’s pursuit of the guardianship action as being “against”⁹ Marion rather than for her best interests.¹⁰ They ignored Eugster’s argument¹¹ that he had a duty as an “interested person”¹² and “permissive reporter”¹³ to report suspected “financial exploitation”¹⁴ of a vulnerable adult¹⁵ and/or petition for an order of

page 23 of the FOF. There is no finding that Eugster violated or did not act reasonably under RPC 1.13.

⁸RCW 11.88.030-.040 (requiring personal service on the ward). See FOF 3.3 at pg. 24 [“He humiliated her in the common room at her home when he had her served by a uniformed officer with the Guardianship papers.”]

⁹See, e.g. FOF pg. 28 [Count 9]

¹⁰See, e.g. *In re Guardianship of Karan*, 110 Wn.App. 76, 38 P.3d 396 (2002) [The primary reason to establish a guardianship is to preserve the ward’s property for his or her own use; it is not for the benefit of others.]

¹¹CP 23 [Brief of Respondent at 23].

¹²RCW 74.34.020(9) "Interested person" means a person who demonstrates to the court's satisfaction that the person is interested in the welfare of the vulnerable adult, that the person has a good faith belief that the court's intervention is necessary, and that the vulnerable adult is unable, due to incapacity, undue influence, or duress at the time the petition is filed, to protect his or her own interests.

¹³RCW 74.34.020 (12) "Permissive reporter" means any person, including, but not limited to, an employee of a financial institution, attorney, or volunteer in a facility or program providing services for vulnerable adults. [Emphasis added]

¹⁴RCW 74.34.020 (2)(d) "Exploitation" means an act of forcing, compelling, or exerting undue influence over a vulnerable adult causing the vulnerable adult to act in a way that is inconsistent with relevant past behavior, or causing the vulnerable adult to perform services for the benefit of another. [Emphasis added]

¹⁵Marion was a “vulnerable adult” under the statute. She was “(a) Sixty years of age or older who has the functional, mental, or physical inability to care for himself or herself.” She was also a person who had been admitted to a “facility.” RCW 74.34.020 (15) and .021

protection.¹⁶ RPC 1.13, RCW 11.88.030(1)¹⁷ and these reporting statutes confer qualified immunity¹⁸ on Eugster and any disclosures of confidential information.¹⁹

II. Assignments of Error

- A. The Board erred in entering the order of January 25, 2007, modifying the Hearing Officer's Findings which were, "as a whole" confusing, and adopting the Hearing Officer's disbarment recommendation. Those Findings of Fact and Conclusions of Law are so confusing and erroneous they deny Eugster due process. [See App. A].
- B. The Hearings Officer erred in denying Eugster's Motions to Dismiss²⁰ the case based on RPC 1.13 and/or state law.

III. Issues Presented

- A. Did Eugster intentionally fail to abide by a client's or former client's objectives when he exercised his ethical duty and legal authority to petition for guardianship?
- B. Did Eugster intentionally use a client's or former client's secrets and confidences to her disadvantage when he petitioned for guardianship?

¹⁶RCW 74.34.110

¹⁷cc Any person or entity may petition for the appointment of a qualified person, trust company, national bank, or nonprofit corporation authorized in RCW 11.88.020 as the guardian or limited guardian of an incapacitated person. No liability for filing a petition for guardianship or limited guardianship shall attach to a petitioner acting in good faith and upon reasonable basis. [Emphasis added]

¹⁸See e.g. Washington's anti-SLAPP law [RCW 4.24.500 - .510].

¹⁹RCW 74.34.050 ["Conduct conforming with the reporting and testifying provisions of this chapter shall not be deemed a violation of any confidential communication privilege."]. There are no FOF describing what exactly was disclosed.

²⁰CP 538 et seq.; there were several motions to dismiss and orders denying them. See, e.g. CP 707-708; 726-728 (8/24/2006).

- C. If Eugster reasonably believed a client or former client could not adequately act in her own best interests, either because of her mental disability or “for some other reason,” was he entitled to petition for guardianship under RPC 1.13 and/or state law, including RCW 11.88.030(1)?
- D. Did Eugster engage in “conduct prejudicial to the administration of justice” by filing for guardianship pursuant to RPC 1.13 and/or state law, including RCW 11.88.030(1)?
- E. Is it a violation of due process to discipline Eugster for filing for guardianship pursuant to RPC 1.13 and/or state law, including RCW 11.88.030(1)?
- F. Did the Hearing Officer apply the wrong burden of proof?
- G. Did the Hearing Officer and Board fail to give full consideration to mitigating factors and proportionality in making their recommendation?

IV. Statement of the Case

A. Initial status, understanding and objectives when Marion met Eugster in 2004.

In late June 2004 Marion Stead, an 87 year old widow²¹ who had recently moved into an assisted living facility, contacted Eugster regarding concerns she had about her estate and financial affairs.²² She was upset²³ and not speaking to her only child, Roger Samuels,²⁴

²¹Her husband, John Stead, passed away on February 4, 2004. Hearing TR 260:25

²²TR 406.

²³Marion was troubled about being in an assisted living facility (Parkview). She was dismayed that her only son, Roger Samuels, had not been visiting her enough and that he might be going to Europe in the next few days without visiting her before doing so. TR 410. According to Roger, “I thought my mother had flipped

who was up to that point managing her financial affairs for free. She “was very upset over Roger and wanted him to no longer be in charge of her affairs.”²⁵ Marion believed by “removing Roger from control of her affairs she could rekindle her relationship with him.”²⁶

However, she did not want to permanently remove him from all duties if Eugster found he was being a good, dutiful son.²⁷

Marion was confused about her rights under a complex estate plan²⁸ created in October 2003 by attorney David Hellenthal.²⁹ Under that plan, Marion and her then-living husband, John, named Roger as

... I realized she was under extreme emotional pressure. John was visibly wasting away, and she was extremely agitated about his condition, and that’s why she was in such a near hysterical state.” Hearing TR 259:8-12.

²⁴The Bar Complaint states: “During the summer of 2004, Respondent became aware that Ms. Stead’s relationship with Mr. Roger Samuels was strained to the point that Ms. Stead and Ms. Roger Samuels were not speaking to each other.” Complaint at 5:17-19. These conflicts with FOF 2.26 which states: “The guardianship action destroyed what was left of Ms. Stead’s relationship with her son, Roger. They last spoke after a guardianship hearing.”

²⁵FOF 2.18

²⁶See FOF 2.23; See also FOF 2.21 for Count 1.

²⁷The reason why Marion agreed to have Roger named as successor to Eugster on certain estate documents was the idea that Roger would be allowed to take over again on Eugster’s finding that Roger was acting appropriately. See, Ex. 30 & 52 [Eugster letter to Marion (8/13/04)]

²⁸Before contacting Eugster, Mr. and Mrs. Stead contacted attorney Summer Stahl regarding her dissatisfaction with the plan. FOF 2.14 “Ms. Stahl’s testimony that Ms. Stead said she didn’t want the trust was reiterated by Mr. Eugster, and several persons interviewed by the Guardian ad Litem.” FOF 2.14.1

²⁹Hellenthal was a specialist in “elder law” who could provide “guidance in financial planning for long term care, especially asset preservation within medical Assistance limitations.” See Ex. 15. Note, the FOF incorrectly states that Eugster prepared these new documents. FOF 2.13

personal representative of their estates,³⁰ Attorney-in-Fact under their durable powers of attorney for property management³¹ and trustee of a Supplemental Needs Trust for Surviving Spouse.³² The purpose of the trust was preservation of estate assets for the surviving spouse within medical assistance limitations.³³ The residual beneficiary of their estate was their only grandchild (Emilie), Roger's daughter.³⁴

Roger was independently financially secure and provided his services as Attorney-in-Fact and trustee free of charge.³⁵ As Trustee, Roger had "absolute discretion" to make or withhold payments under the Testamentary Supplemental Needs Trust created by John's will, including providing Marion an allowance so long as it did not

³⁰Ex. 2.1

³¹Ex. 2 at para. 2: "My Attorney-in-Fact shall have all the powers of an absolute owner over my assets and liabilities...." These includes authority to sell real and personal property, deal with financial/securities/brokerage accounts and add/remove property from any trust created by her or for her benefit.

³²Also referred to as the John Stead Trust or simply as the testamentary trust. Ex. 55. The trust was funded from the spouse's 50% share of the marital property and became irrevocable upon the death of the first spouse. Ex. 2.1, p. 4, para. C This left the surviving spouse (Marion) with control of the remaining 50% of the community estate.

³³Ex. 16: Correspondence from Roger to Eugster regarding his parents changing their estate plan.

³⁴See Last Will, Ex. 2.1 at p. 10 [Trust for Emilie Sammons]. John and Marion's immediate family consisted of her son, Roger and her granddaughter, Emilie Sammons. Ex. 15 [Marion Stead Will].

³⁵Under her Durable Power of Attorney for Property, Roger, as her Attorney-in-Fact, was "entitled to reasonable compensation for all services rendered on my behalf, including care management...." Ex. 2, para. 9 According to FOF 2.12, "Roger worked in hospitals until an inheritance from his father's family made working for a living unnecessary."