IN THE SUPREME COURT OF THE

STATE OF WASHINGTON

In re Disciplinary Proceeding Against GEORGE PAUL TREJO, JR. Attorney at Law (Bar No. 19758).	Supreme Court No. 200,477-6 WSBA Public No. 05#00008.

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APPEAL FROM WASHINGTON STATE BAR ASSOCIATION DISCIPLINARY BOARD

APPELLANT'S AMENDED OPENING BRIEF

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I. INTRODUCTION

The Appellant, George Paul Trejo, Jr. was admitted to the practice of law in the State of Washington on October 1, 1990. Since that time, his law office has been in Yakima, Washington. He practices almost exclusively in the field of criminal defense.

The Appellant appears before this Court requesting that his livelihood not be taken from him for what he submits was negligent oversight of his sole employee and good faith issues surrounding deposits into his trust account, that, in retrospect, should have been deposited in trust.

Throughout the course of these proceedings, the Appellant has been more than cooperative always seeking to improve his law practice. In fact, his openness with the audit led to additional violations being filed against him.

The Appellant in seeking to avoid the deprivation of his livelihood does not mean to downplay the errors he committed in the administration of his law office. The issue is whether these errors compel a finding that a suspension is warranted.

The Appellant takes extreme gratification and satisfaction in the privilege that has been bestowed upon him to practice law. He is proud to be a lawyer. His legal skills have garnered him an outstanding reputation

in his field. To date, the Appellant has represented individuals in 30 States across the country - having appeared in over 40 different federal districts. He has represented individuals in over half the States across the country. The Appellant has also achieved over 20 Not Guilty Verdicts in a variety of felony cases in State and Federal Courts The one thing that has plagued him is a lack of business skills. However, it is significant to note that despite the problems in the past, he continues to make great strides in the administration of his practice.

Granted, the Appellant has previously been sanctioned by the WSBA twice. A previous sanction evolved from his failure to use written fee agreements in his criminal cases. He previously issued initial letters to his new clients without written fee agreements. That problem was addressed and resolved as all case since have written fee agreements. Quite frankly, he is constantly attempting to improve his skills.

In regard to the previous trust account violation, the Appellant subsequently purchased Safeguard Business Forms to keep track of deposits. Unfortunately, given his lack of business skills, the forms were not properly tracked and his sole employee abused his trust.

In reference to the facts that led to the instant proceeding, the Appellant was extraordinarily cooperative. He was entirely forthright

from the beginning with the WSBA Auditor, Trina Doty. His extreme cooperativeness was far beyond that which was required. It is now used to his detriment. His sincerity and honesty was done in the spirit of attempting to rectify any and all problems he had with the administrative aspect of his practice of law. Interestingly, if the Appellant was working for a mid to large size firm, the violations and issues before this court probably would not even exist since an accounting department would handle these issues.

Despite the issues presented, the Appellant is an asset to the legal community. He frequently represents individuals on a pro bono basis both in the State of Washington and outside this State. The Appellant enjoys representing less fortunate individuals who are in need of assistance. He has represented individuals for free in serious felony cases involving capital murder to complex drug conspiracies. Now, he is facing a three-month suspension from the practice of law that would deprive him of his livelihood, for what stems from the negligent supervision of a long-term employee.

The Appellant's lack of business skills is essentially a culmination of life experiences and inexperience. The Appellant grew up in a small town of 3,000 people where most people performed field

labor in the neighboring lemon orchards. He was the first person in his family, including aunts, uncles and cousins, to graduate from college.

Prior to working his way through college, the Appellant worked as a garbage man, construction worker, auto detailer, and all aspects of restaurant work. He worked his way through his undergraduate education (majoring in speech communication) and law school. The only firm he ever worked for was during his second and third year of law school: Law Offices of Federico Castelan Sayre in Southern California.

Throughout the course of his college education, the appellant did not develop business skills. Even after commencing the practice of law, the law office management responsibility was performed by his wife-law partner until the firm disbanded in 1995.

For the first several years the Appellant practiced law, he worked with his then wife, Myrna Contreras-Trejo with the law firm of Contreras-Trejo & Trejo. At their firm, Ms. Contreras handled all the books for his personal life and the law firm. Following the dissolution of the marriage and law practice, the Appellant opened up his own law practice as a sole practitioner. The lack of business skills became evident as is evidenced by the prior and instant disciplinary action. The

Appellant, as is common with most sole practitioners, relied and trusted his sole employee to his detriment.

Overall, for the totality of facts and circumstances more fully set forth herein, the Appellant respectfully submits that a suspension would be far too punitive in nature and respectfully requests a lesser sanction.

II. ASSIGNMENTS OF ERROR

A. Substantial evidence was not presented to find by a clear preponderance of the evidence the following findings of fact based exclusively upon the testimony of the WSBA auditor:

i. FOF 20- that the Appellant was attempting to hide funds from his spouse;

ii. FOF 22- that there were 66 instances where non-refundable retainers were deposited into the trust account.

B. The Appellant should receive a Reprimand and not be Suspended from the practice of law.

III. ISSUES PRESENTED

A. Whether the unsubstantiated testimony of the WSBA auditor, who claimed the Appellant was attempting to

avoid a judgment from his ex-spouse, is sufficient to establish by clear and convincing evidence that such a judgment did in fact exist without the introduction of any other corroborative evidence such as the judgment?

B. Whether an attorney acts knowingly or negligently when he or she fails to adequately supervise an office employee who misuses his trust account?

IV. STATEMENT OF THE CASE

Procedural History

On May 15, 2005, the Washington State Bar Association filed a four count amended formal complaint under Rule 10.3(a) of the Rules for Enforcement of Lawyer Conduct (ELC) alleging the Appellant had committed the following violations:

> Count 1: By failing to maintain adequate records of funds in his trust account sufficient to identify all client balances and failing to reconcile the check register and bank statements, Appellant violated RPC 1.14(b)(3).
>
> Count 2: By commingling earned fees with client funds and having insufficient funds in his trust account, Appellant violated RPC 1.14(a).
>
> Count 3: By failing to exercise adequate supervision over Ms. Alvarez (his non-lawyer assistant), Appellant violated

RPC 5.3(a) and/or (b).

> Count 4: By failing to file the required tax returns, failing to pay the taxes when due, and/or continuing to do business in South Dakota without a valid sales tax license, Appellant violated RPC 8.4(b) (commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness a lawyer in other respects and/or RPC 8.4(i) (commit an act which reflects disregard for the rule of law). Bar File (BF) 10.[1]

On October 18, 2005, a disciplinary hearing was held before Hearing Officer Richard Price. On February 21, 2005, the Hearing Officer filed his Findings of Fact, Conclusions of Law and Recommendation. The Hearing Officer found, by a clear preponderance of the evidence, that Appellant had violated RPC 1.14(b)(3), RPC 1.14(a), and RPC 5.3(a) and RPC 5.3(b) as alleged in Counts 1, 2 and 3. The Hearing Officer found that the Association had not proved that Appellant had violated RPC 8.4(b) or RPC 8.4(i) as alleged in Count 4 and dismissed that count. The Hearing Officer recommended that Appellant be suspended from the practice of law for six months. BF 55 at p. 22.

On March 15, 2007, following oral argument, the Disciplinary

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[1] The original complaint was amended to add Count 4. Prior to the hearing and the addition of Count 4, the parties received a fax from the hearing examiner suggesting a resolution of the original complaint by way of a diversion. This is why the Appellant stipulated to Counts 1, 2, 3 and not 4. See BF 233. In any event, the Appellant focused his efforts at the hearing on Count 4. At the conclusion of the first day of the hearing, the hearing examiner suggested the parties focus on the other 3 remaining counts he considered potentially more serious.

Board filed an Order Modifying Hearing Officer's Finding of Fact and Decreasing Sanction Recommendation. BF 72. "The vote on this matter was 8-3 with two dissenting board members voting to approve a six month suspension and a single dissenting board member, the lay member, seeking a 2-year suspension.

In the Disciplinary Board Order, the Board deleted three of the hearing examiner's finding of facts[2] and performed a new analysis for the appropriate sanction. In doing so, the Disciplinary Board reduced the honorable hearing examiner's recommended 6-month suspension and recommended a 3-month suspension. BF 72.

The Appellant respectfully submits that a Reprimand coupled with a lengthy probationary period to include monthly sessions with the WSBA Law Office Management Assistance Program (LOMAP) would be an appropriate sanction.

Appellant's Background

The Appellant has practiced law in Yakima, Washington since being admitted to the Washington State Bar Association on October 1, 1990. BF 55 at 35 (a). He has been a solo practitioner since June 1995. BF 55 at 35 (b). Between October 1, 1990 and June 1995, the Appellant practiced law with his, now ex-wife, in Yakima, Washington. Id.

[2] Finding of Facts 24, 25, and 33.

During the previous several years, the only business the Appellant ever personally owned and operated is his law practice. BF 55 at 35 (c). At the time of the underlying investigation, he only had one employee, Ms. Alvarez, who had worked for him for the previous 9 years. BF 55 at 35 (c).

The Appellant's caseload is limited to the defense of individuals' accused of criminal charges. The Appellant also devotes a substantial amount of time each year on a pro bono basis to a variety of other felony charges. BF 55 at 35 (e).

As for the Appellant's law practice, it is undisputed that he is respected criminal defense attorney. He does not advertise and has represented individuals across the country. In the past, the Appellant has represented individuals accused of Aggravated First Degree Murder and other homicides for free: State v. Julio Delgado, Yakima County; State v. Charles Coachman, Yakima County. The Appellant also represented numerous other individuals for free in State and Federal Courts who have been accused of other serious charges. BF 55 at 35 (e).

The Appellant has never been sanctioned, disbarred, or otherwise disciplined by any Judge in any State or Federal Court with the exception of United States v. Jorge Ibarra. In the Ibarra case, he was sanctioned $150.00 by the Honorable Judge Thomas Zilly, U.S.D.C., W.D., WA

(Seattle) for appearing 15 minutes late in a telephonic hearing. The reason he was late was because he was involved in another hearing before the Honorable Edward Shea in the U.S.D.C., E.D. WA (Spokane). BF 55 at 35 (f).

In 1995, the Appellant was honored by the Washington State Bar Association, Young Lawyers Division with being the Outstanding Young Lawyer of the Year. BF 55 at 35 (g). He is a member of the National Association of Criminal Defense Lawyers. BF 55 at 35 (h). The Appellant has achieved "advocate" status with the American Trial Lawyers Association. BF 55 at 35 (i). The Appellant has also spoken at Continuing Legal Education Seminars before the Washington State Trial Lawyers Association and the Criminal Law Institute sanctioned by the Washington State Bar Association. BF 55 at 35 (j).

The Appellant has been the lead counsel in over 70 jury trials in felony cases as well as complex civil cases. These cases ranged from Aggravated Murder Death Penalty to complex Medical Negligence matters. BF 55 at 35 (k). He also served as co-Liaison Counsel for approximately 5 years in the Hanford Litigation, CY-91-3015-AAM. BF 55 at 35 (l). The Appellant has also achieved over 20 Not Guilty Verdicts in a variety of felony cases in State and Federal Courts. BF 55 at 35 (m).

Statement of Facts

At the outset, it is significant to note the Appellant never challenged most of the facts at issue in this matter. The Appellant entered into evidence his own Declaration admitting Counts 1, 2, and 3. BF 233 at 2 and 3[3].

Appellant is a solo practitioner who maintains an office in Yakima. Appellant had one employee, Maria Alvarez, to whom he delegated complete responsibility for his IOLTA account.

On May 1, 2003, AmericanWest Bank notified the Association that Appellant's IOLTA account was overdrawn. BF 55 at 3. Trina Doty, CPA and Association auditor, notified Appellant of the overdraft and requested an explanation. BF 55 at 4. Appellant explained that his employee had floated checks in his trust account in the following manner. Ms. Alvarez wrote checks from the trust account to herself and deposited them in her personal account. She then wrote personal checks and deposited them into the trust account. She knew that there was not sufficient money in her personal account to fund the checks that she wrote to the trust account but the delay in banking resulted in most checks being cleared by both banks – the Alvarez personal account and the Appellant's

[3] Hereinafter any number appearing following the Bar File (BF) number refers to the numbered paragraph within the document.

trust account. In writing these checks, an overdraft occurred in Appellant's IOLTA account. BF 55 at 5. Upon being confronted by the Appellant, Ms. Alvarez also admitted taking payments from two clients for her own personal use. BF 55 at 6. On May 18, 2003, Ms. Alvarez signed a confession in which she agreed not to steal money, and write or cash checks without Appellant's authorization. BF 55 at 10.

Upon being notified of the non-sufficient funds check being returned from AmericanWest Bank, Ms. Doty conducted an audit of Appellant's IOLTA account on June 26, 2003 for the period January 2002 to May 2003. BF 55 at 11. Following the audit, Ms. Doty explained her findings to the Appellant and made suggestions on changes that should be made to his office practices.

In his declaration/admission, Appellant admitted that he failed to maintain adequate records of the funds in this trust account, violating RPC 1.14(b) and (c). BF 40. Prior to the audit, he kept track of funds in the trust account via a handwritten disbursement journal that listed the checks written out of the trust account on a Safeguard Business Journal form. The journal entries consisted of the check number, the date on which a check was issued, the payee, the amount of the check, and in some cases, the name of the client associated with the check. BF 55 at 12. The journal did not have a running balance, nor did it show deposits. No individual

client ledgers were maintained. The audit disclosed that three paid checks issued from the trust account were not included in this ledger. These were the unauthorized checks written by Ms. Alvarez to herself. Appellant admitted in his Declaration that he did not review monthly bank statements or reconcile them to the trust account in violation of RPC 1.14(b)(3). BF 40.

The audit also found an unidentified difference between the trust account check register and the bank statements. The trust account had $15.94 that could not be identified to a client.

Based upon the conduct of his employee, the Appellant admitted there were insufficient funds in his trust account and that he violated RPC 1.14(a). BF 40. On five occasions, there were insufficient funds in the trust account to pay clients. These occasions were the result of Ms. Alvarez's misappropriation of funds. The shortages lasted from a few days to a few weeks and resulted in delayed payment to a client who received a Labor & Industries check every two weeks. BF 55 at 18. Ms. Alvarez explained to the Appellant she was undergoing personal problems with her husband that resulted in severe financial obligations for her and her 3 children. Ms. Alvarez was separated from her husband during this time. BF 40 at 22.

The Association relied exclusively on the testimony of Ms. Doty to

establish the Appellant was allegedly attempting to hide funds to avoid an alleged judgment held by his ex-wife by utilizing his trust account.

The Appellant does not claim Ms. Doty intentionally lied in these proceedings. He simply contends she mistakenly confused this matter with his previous Admonition where there was such a concern by the Appellant.

During the audit period, the Appellant received a periodic check on behalf of a Washington State Labor & Industries client that was deposited into his trust account. BF 55 at 18. This was the only civil client the Appellant represented during the audit period. BF 40 at 33. Each time a check from the State was received, a corresponding check was written from the trust account either on the same day or shortly after the deposit was made. Id. Although Ms. Doty testified this was not the proper, AmericanWest bank authorized this procedure since it was a State check.

After the audit was conducted and the employee's misconduct was uncovered, the L&I client was pensioned by the Department of Labor and Industries. BF 40 at 34. After considering the situation as it related to staff misconduct to this particular client, the Appellant decided to waive any future claim that he had for attorney's fees on this client's pension reserve. Id. This waiver of attorney fees amounted to thousands of dollars from the reserve to the benefit of the client. Id.

There were instances where potential non-refundable retainers were wire transferred to the trust account. The reason the Appellant categorizes these wire transfers as potential non-refundable retainers is because they were paid by third parties for individuals in custody. Of course, it is a question of law as to whether the funds at issue were the Respondent's prior to receiving consent from the actual client versus the third party who paid the fees.

There was an incident where an appearance of personal and client funds were commingled in the trust account. Cash was deposited into the trust account and a trust account check was issued to an attorney in Indiana to whom money was owed. BF 55 at 26. This was money paid to the Indiana attorney who had agreed to serve as local counsel for the Appellant and a client.

Appellant admitted in his Declaration that he failed to adequately supervise Ms. Alvarez, his non-lawyer assistant, in violation of RPC 5.3(a) and (b). BF 40. Appellant's lack of supervision of Ms. Alvarez allowed her to misappropriate funds from the trust account and mishandle the account. However, there is no dispute the Appellant did not participate in the misconduct with his employee. Instead, it was the negligent oversight of his employee that permitted her misconduct to take place.

V. ARGUMENT

I. Standard of Review

This Court has final authority over lawyer discipline matters. In re Disciplinary Proceeding Against Carpenter, 155 P.3d 937, (2007); In re Disciplinary Proceeding Against Guarnero, 152 Wn.2d 51, 58, 93 P.3d 166 (2004). The Court reviews conclusions of law de novo and will not disturb challenged findings of fact if they are supported by substantial evidence. Id. The Association must prove misconduct by a clear preponderance of the evidence. Id.

II. THE ASSOCIATION FAILED TO PRODUCE SUBSTANTIAL EVIDENCE TO PROVE MATERIAL FINDINGS OF FACT BY A CLEAR PREPONDERANCE OF THE EVIDENCE

This Court gives considerable weight to a hearing officer's findings of fact and will uphold those findings so long as they are supported by 'substantial evidence.' See In re Disciplinary Proceeding Against Guarnero, 152 Wn.2d 51, 58, 93 P.3d 166 (2004) (citing ELC 11.12(b)). This court has consistently stated that on appeal "[w]e will uphold the hearing officer's findings of fact if they are supported by a clear preponderance of the evidence, even if the evidence is disputed." In re Disciplinary Proceeding Against Anschell, 141 Wn.2d 593, 606, 9 P.3d 193 (2000).

Ultimately, the Bar has the ultimate "burden of establishing an act of misconduct by a clear preponderance of the evidence." In re Disciplinary Proceeding Against Allotta, 109 Wn.2d 787, 792, 748 P.2d 628 (1988). "Clear preponderance' is an intermediate standard of proof . . . requiring greater certainty than "simple preponderance" but not to the extent required under "beyond a reasonable doubt." Id.

A. There was insufficient proof as to Finding of Fact No. 20.

Finding of Fact 20 reads as follows:

> Appellant told Ms. Doty that he did not maintain a bank account in Washington other than his trust account because he did not want his creditors, including his former wife, to be able to attach his person assets, i.e. bank account.

Appellant challenges this Finding of Fact. The only evidence presented at hearing to support the Hearing Officer's finding was testimony from Ms. Doty, the Association auditor. She testified that Appellant told her that he had issues with his "ex-wife". According to Ms. Doty, the Appellant told her "she was looking to attach, so he didn't want to have any personal accounts in Washington State." TR 249. She even suggested to him that he have funds wire transferred to his California account. TR 255-256.

In any event, it is respectfully submitted that Ms. Doty's testimony, standing alone, does not constitute "substantial evidence." See

generally, State v. Bernal, 109 Wn. App. 150, 152, 33 P.3d 1106 (2001) (Washington's version of the corpus delicti rule requires that the State produce evidence, independent of the accused's statements, sufficient to support a finding that the charged crime was committed by someone.") This Court must require more evidence to support such a finding.

It may be that Ms. Doty was merely confused with statements the Appellant made in relation to the 2001 Admonition that Appellant received. In that Admonition, the Appellant was in the midst of his divorce proceeding when the acts of misconduct took place. He candidly admitted the following finding: "You are concerned that your trust account might be garnished to satisfy an outstanding domestic relations judgment against you." BF A7.

B. There was insufficient proof as to Finding of Fact No. 22

Finding of Fact 22 states: "Between January 2002 and May 2003, there were sixty-six (66) instances where the funds deposited into Appellant's trust account were non-refundable retainers that Appellant considered fully earned fees." BF 55 at 22.

The conclusory statement by Ms. Doty that there were 66 instances where non-refundable retainers were deposited into the Appellant account is not supported by substantial evidence. Ms. Doty did not present a single deposit corresponding to a single client to support her

assertion. It is impossible to analyze, let alone cross-examine, a witness on such an assertion. How do we know the wire transfers deposited into Appellant's trust account were earned fees as claimed by Ms. Doty? Do we assume so simply because she says so? Or, alternatively, does this court require more in order to determine that "substantial evidence" and not merely "testimony" has been produced to support a finding of fact. Or could it be that many of these wire transfers, were in fact client funds that were correctly deposited into his trust account[4] or at least a good faith dispute existed as to where the funds should be deposited?

The evidence presented at hearing was that there was a total of $150,599.66 deposited in the trust account during the period of January 2002 to May 2003. BF 55 at 22; BF 40 at 27.

Ms. Doty further testified that, when discussing the nature of the fees with Appellant, he was "very up front that they were earned fees. I can't think of any instance, actually, where he said something was client money that I didn't agree with." TR 251-253. Appellant has admitted in his Declaration that at times when he received a check from a client, he "deposited the check into his trust account regardless of whether the funds

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[4] As noted in the Disciplinary Board Order, " . . it is not clear how [the auditor] determined the money in Mr. Trejo's trust account was an earned fee. . . . . The state of this record makes full review impossible. Although this is a concern, there are enough proven trust violations to justify the recommended sanction." BF 72 at p. 4, fn. 5.

were client funds, fully earned fees or non-refundable retainers." BF 40 at 37. However, for purposes of our analysis, there certainly was some evidence the Appellant deposited fully earned fees into his trust account but there not substantial evidence to support the finding that this took place on 66 different occasions.

C. The Appellant properly placed certain funds in Trust

During the course of the hearing, the Appellant cross-examined Ms. Duty as to what he should do when a third party pays the fees for a person who is incarcerated but counsel has yet to receive direct approval to represent the incarcerated individual. It is the Appellant's contention these fees are not earned, even under a written non-refundable retainer, until the client consents or signs the agreement. Therefore, Ms. Doty was mistaken in concluding that the fees were fully earned. As such, the Appellant was correct in depositing these fees in his trust account.

When presented with Appellant's hypothetical at the hearing, Ms. Doty testified she would advise Appellant not to take the fee until after the client had consented to the representation. TR 311-312. In Appellant's case, Ms. Doty testified that she based her opinion that fees were fully earned on her reading of the written fee agreements. However, this position fails to take into account that a criminal defense attorney, or any attorney for that matter, requires the consent from his or her actual client

to represent the individual. Ms. Doty's independent determination these fees were fully earned and should not have been placed in the trust account was erroneous and not supported by the evidence.

D. The Appellant did not Consistently Commingle Funds.

The hearing examiner found that the Appellant "consistently and repeatedly commingled client funds and personal funds in his IOLTA Trust Account." BF 55 at p. 16. Yet the evidence does not support this finding.

RPC 1.14 (a) provides in pertinent part:

> All funds of clients paid to a lawyer, . . . shall be deposited in one . . interest-bearing trust account maintained as set forth in section (c), and no funds belonging to the lawyer . . shall be deposited therein except as follows:
> . . . .
>
> (2) Funds belonging in part to a client and in part presently or potentially to the lawyer . . must be deposited therein, but the portion belonging to the lawyer . . . may be withdrawn when due . . .

As noted by the WSBA, "[t]his simple concept, that client funds must be deposited to the client trust account and lawyer funds must never be deposited to the client trust account, gets complicated when put into practice." The complexity of this concept can be more fully appreciated by the WSBA article; Managing Client Trust Accounts,

Rules, Regulations and Common Sense. http://www.wsba.org/media/publications/pamphlets/managing.htm

The aforementioned article discusses the concept of advance fee deposit versus retainers.

> **Advance Fee Deposits v. Retainers** - Retainers are client payments, which are fully earned when paid. Retainer payments are not refundable and the lawyer is entitled to keep the funds regardless of whether any services are performed.
>
> Any funds received from a client in advance of performing legal services must be defined by the above Ethics Opinion 186. Standard and advance fee deposits must be deposited to a client trust account while retainers must never be deposited to a client trust account. You may use different terminology, but if your agreement with a client, whether written or verbal, leads the client to believe that they are making a refundable deposit for future services, those funds are an advance fee deposit and remain the client's funds until earned. Conversely, if by your agreement with the client it is clearly understood that the funds they are paying are non-refundable, those funds are a retainer earned upon receipt by the lawyer. Id. (Ethics Opinion 186 Attached hereto as an addendum).

In light of this guidance from the Bar Association, the Appellant respectfully submits that the auditor was mistaken in her opinions as well as the Hearing Examiner in his Findings. See, TR 311-313.

The Appellant respectfully submits facts were not proven by a clear preponderance of the evidence to sanction the Appellant for legitimate wire transactions to his trust account. Although the Appellant did not properly label the nature of the funds received in the trust account, it is now clear that until such time that the Appellant received consent to represent a client, not from the third party-payee, the funds received were an Advanced Fee Deposit that were required to be placed in trust. The evidence adduced at the hearing, via Ms. Doty, does nothing more than offer a conclusory statistic without differentiating between advance fee deposits and mere deposits. There certainly was not "substantial" evidence to support this finding.

III. THE APPELLANT ACKNOWLEDGED HE VIOLATED RPC 1.14(b) (3) and RPC 1.14 (a) BUT NOT ALL OF THE FACTS ALLEGED IN THE UNDERLYING PROCEEDING

In pertinent part, RPC 1.14 provides:

> (a) All funds of clients paid to a lawyer or law firm, including advances for costs and expenses shall be deposited in one or more identifiable interest bearing trust accounts maintained as set forth in section (c), and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:

> (2) Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due…
> (b) A lawyer shall:
> 3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer…

Based on the evidence at hearing, the Hearing Officer correctly concluded that Appellant violated RPC 1.14(b)(3). He also correctly concluded that Appellant violated RPC 1.14(a). This was never in dispute by the Appellant. He admitted to having violated these RPCs prior to the hearing. BF 40 at 2. However, as previously argued, there are certain aspects of the means by which the violations took place that the Appellant disputes.

IV. THE APPELLANT ACKNOWLEDGED HE VIOLATED RPC 5.3 (b) BUT NOT ALL OF THE FACTS ALLEGED IN THE UNDERLYING PROCEEDING

RPC 5.3(b) requires a lawyer who has direct supervisory authority over a non-lawyer to make reasonable efforts to ensure that the non-lawyer's conduct is compatible with the professional obligations of the lawyer. Here, Appellant turned the responsibility for his trust account and the processing of his trust account to his staff member. This enabled her to misuse the trust account on twelve separate occasions and misappropriate client funds on two occasions. Appellant admitted in his

Declaration and the Hearing Officer properly concluded that Appellant violated this rule. BF 55 at p. 16 § IV (6); BF 40 at 2.

V. THE APPELLANT'S MENTAL STATE IS KEY TO THIS COURT'S ULTIMATE DETERMINATION

The key issue presented to this Court is the Appellant's mental state. Anschell II, 149 Wn.2d at 506. The ABA Standards define each mental state as follows:

Knowledge is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result.

Negligence is the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation. ABA Standards, Definitions at 7.

The mental states can be examined with the following illustrations.

Premeditation: You planned it out. Murder by poison, murder by lying in wait. It has been held to involve "the mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short". State v. Gentry, 125 Wn.2d 570, 598 (1995). (First Degree Murder)

Willful: This is the lawyer's word for "intentional". It's not planned, but it was done on purpose. You picked up something heavy and bashed someone over the head with it, intending that they would die, and they died. It was a willful act. (Second-degree murder).

Sometimes it's obvious which is which, but sometimes it's hard to distinguish premeditation and willful, because there is a moment in time, however small, during which you are planning what you do before you do it.

Basically, knowledge boils down to knowing what the effect is going to be, and doing it anyway. For example, a person takes the last parachute and jumps off a burning plane, leaving someone behind, knowing the person left behind will die. There was no intention to kill the person left behind, but it was obvious the result would be that death would ensue for that person.

In the case at bar, given no prior bad acts on the part of the Appellant's long term staff member, there was a lack of knowledge as to what the effect was going to be by entrusting her with the office accounting. Therefore, the mental state cannot rise to the level of knowledge.

This discussion concerning the mental state is important because it will determine the presumptive sanction. When misconduct is

'knowingly' committed, the presumptive sanction or starting point in determining the appropriate sanction is suspension.[5] If the misconduct is a result of negligent acts, the presumptive sanction is less than suspension. This is precisely the finding that the Appellant argues should be made in this case – the mental state was negligence.

THE ACTUAL OR POTENTIAL INJURY

The third and final factor in determining the presumptive sanction in attorney discipline matters is the actual or potential injury caused by the lawyer's misconduct. Anschell II, 149 Wn.2d at 507. While injury is defined as harm to a client, the public, the legal system, or the profession, potential injury is defined as harm to a client, the public, the legal system or the profession that is reasonably foreseeable at the time of the lawyer's misconduct, and which, but for some intervening factor or event, would probably have resulted from the lawyer's misconduct. ABA Standards, Definitions at 7.

The potential injury identified by the Honorable Hearing Examiner

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[5] It is important to recall at all times that even a finding of Knowledge in this case before this Court does not necessitate a suspension. As previously set forth, the ABA Standards state, in pertinent part, that in imposing sanctions, there must be: ". . . room for flexibility and creativity in assigning sanctions in particular cases of lawyer misconduct." ABA Standards, Preface at 1.

and the Association, are not potential injuries but rather injuries based upon speculation.

VI. A SUSPENSION IS NOT WARRANTED FOR COUNT 1

Counts 1 and 2 are based on Ms. Doty's initial August 25, 2003, audit that occurred after the Association received an overdraft notice from the bank that managed Mr. Trejo's trust account. It's also based on her review of all of Mr. Trejo's records. It's based on the agreement that Ms. Alvarez signed and which was presented to Ms. Doty and the Association as well, wherein, Ms. Alvarez admitted certain amounts of misconduct. There are no facts that rise to the level of knowledge on the part of the Appellant so a suspension is not warranted.

A. THE APPELLANT'S MENTAL STATE FOR COUNT 1 WAS NEGLIGENCE SO A SUSPENSION IS NOT WARRANTED

There is no dispute that the Appellant delegated the accounting and reconciling of his trust account to Ms. Alvarez. TR 428. However, unlike a medium or large firm, or government attorneys, the law practice of sole practitioners is significantly different. It is a practice based upon significant trust. Firms with one employee must trust that employee. Unfortunately, in this case, the trust was misplaced.

Conspicuously absent from the record is any prior unethical conduct by the Appellant's only employee – Ms. Alvarez. She was a

trusted employee for nearly 10 years. She was the Appellant sole employee for over 5 years. The record is devoid of any previous acts of misconduct on the part of Ms. Alvarez.

The Appellant disputes the Hearing Examiner's finding that he was attempting to protect assets due to a pending divorce. There were issues surrounding his divorce at the time of his prior discipline but not at the time of the underlying investigation that spawned this proceeding. Significantly the Appellant's divorce case was final at the time of the audit. More importantly, the finding that the Appellant was attempting to protect assets was not supported by substantial evidence nor established by a clear preponderance of the evidence.

The reason the Association argued to the hearing examiner that the Appellant's mental state was knowing, was because: "It ***appears*** he was attempting to protect assets by operating that way. . . He knew or should have known this wasn't the correct way to operate his business here in Washington. It was a conscious decision, so it's knowing." TR 452. Similarly, there was no evidence whatsoever presented that the manner in which the Appellant was operating his business was contrary to the laws of the State of Washington.

The Hearing Examiner determined that had the Appellant kept complete records, reconciled his account, managed the account in the way

it should be managed, Ms. Alvarez couldn't have did what she did. This is an overly broad assertion. At best, the Appellant would have definitely detected the misconduct sooner. However, the appropriate inquiry must be what was the Appellant's state of mind when this took place. Did he intentionally allow his employee to abuse his earned attorney fees or mishandle the trust account? Of course not. Was he negligent in supervising her and, as a result, she misused the trust account? Definitely. However, it is beyond belief to claim the Appellant was knowingly complicit in his employee's misconduct – he was, however, negligent.

VII. A SUSPENSION IS NOT WARRANTED FOR COUNT 2

The Appellant incorporates the argument and facts set forth infra at heading VI as though fully set forth herein.

A. THE MENTAL STATE FOR COUNT 2 WAS NEGLIGENCE SO A SUSPENSION IS NOT WARRANTED

The Hearing Examiner found, based upon the argument of the Association that the Appellant's mental state was knowing. TR 428. Given the good faith dispute over where certain funds should be placed, coupled with the Association's acknowledgement in the previously cited article, that the ". . . simple concept, that client funds must be deposited to the client trust account and lawyer funds must never be deposited to

the client trust account, gets complicated when put into practice," the Appellant's state of mind was not knowing.

According to Ms. Doty's testimony, the Appellant should not accept payment, even by placing it in the IOLTA account, until the client consents. Quite frankly, the law does not impose such a stringent requirement. Even if it did, the Appellant acted negligently as that term is used in ABA Standard 4.14.

B. A SUSPENSION IS NOT WARRANTED BECAUSE THERE WAS LITTLE OR NO INJURY IN REGARD TO COUNT 2

Mr. Negrete suffered little or no injury simply because his labor and industry payments were delayed due to the Appellant's employee's malfeasance with his trust account. Despite the Hearing Examiner relying upon Ms. Doty's testimony, that there were several shortages in the Appellant's trust account (TR at 266), it should also be noted that Mr. Negrete's labor and industry trust checks were never returned for non-sufficient funds.

It is also significant that the Appellant's practice was, and is, almost exclusively devoted to criminal cases with signed written non-refundable retainer agreements. Although Ms. Doty testified there would be a great potential for injury because, had something happened to Mr. Trejo or something come up and someone else had to try and

determine what his clients were owed, "there's no way to do this without having client ledgers." However, as Ms. Doty testified, there was only 1 client who had funds regularly going through the Appellant's trust account. TR 310, lines 2-8. In addition, it is extreme to claim that there was no way to reconstruct the balance without having client ledgers since this is precisely what Ms. Doty did during her investigation.

If there was a minor injury suffered by the Appellant's Labor and Industry client, it was the delay of a check – not attempting to cash a check on an account with insufficient funds. The delay was due to the Appellant negligently overseeing his sole employee.

It is respectfully submitted the aforementioned constitutes little or no injury for purposes of § 4.14 of the ABA Standards for Imposing Lawyer Sanctions. §4.14 differentiates between levels of injury. See generally, In Re Disciplinary Proceeding against Dynan, 152 Wn.2d 601, 98 P.3d 444 (2004) Of course, even §4.13 addresses situations where injury (not little injury) flows to a client. If this is the determination that is made, then a Reprimand is the appropriate sanction. Under either scenario, a suspension is not warranted. This is especially true given the benefit the client ultimately received by way of the Appellant waiving any claim to attorney fees on Mr. Negrete's pension reserve with the Department of Labor and Industries.

VIII. THE APPELLANT DID NOT KNOWINGLY ALLOW HIS EMPLOYEE TO MISUSE HIS TRUST ACCOUNT FOR PURPOSES OF COUNT 3

There was never any dispute by the Appellant that he violated Count 3 by failing to exercise adequate supervision over his only non-lawyer assistant. The Appellant negligently supervised his employee's handling of his trust account. He did not "knowingly" allow her to abuse his trust or misuse the trust account.

The Association argues that ABA Standard 7.0 appears to be the Standard that applies to the failure to supervise. However, the Appellant respectfully submits that ABA Standard 5.1 may be more appropriate.

§ 5.1 provides in pertinent part, " . . . the following sanctions are generally appropriate in cases . . . with conduct involving dishonesty, fraud, deceit or misrepresentation."

The essence of this particular count involves dishonesty and deceit by the Appellant's only employee. Therefore, it would seem that this is the most appropriate standard.

The two most appropriate sections detailing sanctions are:

> 5.13 Reprimand is generally appropriate when a lawyer knowingly engages in any other conduct that involves dishonesty, fraud, deceit, or misrepresentation and that

adversely reflects on the lawyer's fitness to practice law; and

5.14 Admonition is generally appropriate when a lawyer knowingly engages in any other conduct that reflects on the lawyer's fitness to practice law

The Appellant will not reiterate his position but continues to maintain that the appropriate mental state is negligence despite the Association's position that knowingly should apply.

IX. THE PRESUMPTIVE SANCTION FOR THE VIOLATIONS OF RPC 1.14(a), 1.14(b)(3), and 5.3(a) and (b) IS A REPRIMAND

This Court requires that the American Bar Association's Standards for Imposing Lawyer Sanctions (1991 ed. & Feb. 1992 Supp.) (ABA Standards) be applied in all lawyer discipline cases. In re Disciplinary Proceeding Against Halverson, 140 Wn.2d 475, 492, 998 P.2d 833 (2000); In re Disciplinary Proceeding Against Johnson, 114 Wn.2d 737, 745, 790 P.2d 1227 (1990).

Application of the ABA Standards to arrive at a disciplinary sanction is a two-stage process. First, the presumptive sanction is determined by considering (1) the ethical duty violated, (2) the lawyer's mental state, and (3) the extent of the actual or potential harm caused by the misconduct. In re Disciplinary Proceeding Against Dann, 136 Wn.2d 67, 77, 960 P.2d 416 (1998). The second is to consider any aggravating or

mitigating factors that might alter the presumptive sanction. Id.

The Hearing Officer improperly concluded that the presumptive sanction for Appellant's violations of RPC 1.14(a), RPC 1.14(b)(3), and RPC 5.3(a) and (b) was suspension. It should have been a reprimand.

X. THE STANDARDS FOR LAWYER SANCTIONS ARE FLEXIBLE

It is significant to note that the background section of the ABA Standards states: "{T}he Sanctions Committee recognized that any proposed standards should serve as a model which sets forth a comprehensive system of sanctions, but which leaves room for flexibility and creativity in assigning sanctions in particular cases of lawyer misconduct." ABA Standards, Preface at 1. Determining if the Appellant acted "knowingly" or "negligently" determines the presumptive sanction. However, it is respectfully submitted that this Court this should not forget the big picture: there is flexibility and creativity in determining the sanction.

Ultimately, this honorable Court examines the totality of facts and circumstances in this case and determines whether or not this Appellant be suspended from the practice of law? The choices are obvious, Mr. Trejo shall be barred from his sole source of livelihood for a period of time, or he will receive the public humiliation of a public

sanction. In either scenario, the sanction is severe. See, ELC 13.3 (a) (Sanctions). The key issue to resolve is whether or not a suspension is warranted.

A. EVEN IF A SUSPENSION IS WARRANTED, THIS COURT HAS DISCRETION TO IMPOSE LESS THAN 3 MONTHS

Even if the Court determines a suspension is warranted, it is significant to note that there are numerous reported cases where less than a three-month suspension has been imposed:

In re Anschell, 141 Wn.2d at 616-17 (citing In re Johnson, 94 Wn.2d 659, 618 P.2d 1322 (1980) (60-day suspension where attorney had received a prior reprimand for neglecting legal matters);

In re Jamieson, 98 Wn.2d 865, 658 P.2d 1244 (1983) (60-day suspension for prolonged neglect of a probate matter, even after being contacted six times by the Department of Revenue concerning the case, and each time failing to respond);

In re Loomos, 90 Wn.2d 98, 579 P.2d 350 (1978) (30-day suspension for failing to complete a probate as agreed);

In re Yates, 78 Wn.2d 243, 473 P.2d 402 (1970) (45-day suspension where attorney received a prior reprimand and censure for neglect of client matters);

In re Kennedy, 97 Wn.2d 719, 649 P.2d 110 (1982) (60-day suspension for multiple instances of neglect, including failure to arrive in court when expected, and failure to notify client that summary judgment had been granted in a case);

In re Greenlee, 82 Wn.2d 390, 510 P.2d 1120 (1973) (30-day suspension for failure to promptly probate an estate);

In re Vandercook, 78 Wn.2d 301, 474 P.2d 106 (1970) (30-day suspension for neglect and delay in handling divorce action where attorney had been disciplined on three prior occasions for similar misconduct);

In re Felice, 112 Wn.2d 520, 772 P.2d 505 (1989) (30-day suspension for attorney's neglect of guardianship duties, even after being informed by DSHS of the deplorable conditions in which his ward was living);

In re Nelson, 87 Wn.2d 77, 549 P.2d 21 (1976) (60 day suspension for neglect of four client matters).

In this case, assuming the Court decides a suspension is the appropriate punishment, after taking into account the ABA policy of leaving room for flexibility and creativity in assigning sanctions, a suspension far less than three months would be appropriate. See, ABA Standards, Preface at 1.

XI. ANY PRESUMPTIVE SANCTION CAN BE LESSENED BASED UPON MITIGATING FACTORS

As the aforementioned discussion demonstrates, the severity of the sanction is dependent upon, first, the mental state--whether the Appellant acted "knowingly, or negligently" --and, second, "the extent of the actual or potential injury caused by the . . . misconduct." ABA Standards at 5 (II. Theoretical Framework), std. 3.0; In re Disciplinary Proceeding Against Johnson, 114 Wn.2d 737, 745, 790 P.2d 1227 (1990) (requiring application of analytical framework of ABA Standards). However, even given a presumptive sanction of a suspension, the "flexibility and creativity in assigning sanctions in particular cases of lawyer misconduct," (ABA Standards, Preface at 1) mitigated sanctions are available.

In, In re Disciplinary Proceeding Against Haskell, 136 Wn.2d 300, 962 P.2d 813 (1998), the court departed from the presumptive sanction of disbarment and imposed a sanction of suspension, despite equal aggravating and mitigating factors. As indicated by the Court, "in reaching this determination, we have been little-influenced by mitigating and aggravating factors which essentially cancel each other out." Id. at 321. Indeed, **the imposed sanction is designed to protect the public and deter further misconduct, and not to punish**. In re

Disciplinary Proceeding Against Hankin, 116 Wn.2d 293, 298, 804 P.2d 30 (1991) (emphasis added) (citing Noble, 100 Wn.2d at 95).

Therefore, this Court must determine if it decides to impose a suspension, if it is being imposed to punish the Appellant. If the purpose of sanctioning the Appellant is to deter further misconduct and to protect the public, the public humiliation of a public sanction is adequate.

XII. THE EXISTENCE OF MITIGATING FACTORS UNDER ABA STANDARDS § 9.32 DO NOT REQUIRE THIS COURT TO IMPOSE A SUSPENSION

It is important to keep in mind that mitigating factors are any considerations or factors that may justify a reduction in the degree of discipline to be imposed. Mitigating factors include but are not necessarily limited to:

(b) absence of a dishonest or selfish motive;

(c) personal or emotional problems;

(d) timely good faith effort to make restitution or to rectify consequences of misconduct;

(e) full and free disclosure to disciplinary board or cooperative attitude toward proceedings;

(g) character or reputation;

(l) imposition of other penalties or sanctions;

(m) remorse.

Mitigating circumstances are not necessarily limited. The reason, by implication, is the ABA Standards that states, in part that the comprehensive system of sanctions leaves: ". . . room for flexibility and creativity in assigning sanctions in particular cases of lawyer misconduct." ABA Standards, Preface at 1. Therefore, it was error to discredit in its entirety the good faith effort of the Appellant to waive thousands of dollars in his attorney fees as a self-imposed punishment for, what turned out to be, minimal injury to his Labor and Industries client.

"Mitigation or mitigating circumstances are any considerations or factors that justify a reduction in the degree of discipline to be imposed." ABA Standards §9.32. The ABA Standards state, in pertinent part, that in imposing sanctions, there must be ". . . room for flexibility and creativity in assigning sanctions in particular cases of lawyer misconduct." ABA Standards, Preface at 1.

A. The Appellant did not have a Dishonest or Selfish motive

The Appellant did not engage in misconduct for a dishonest or selfish motive. It is significant that the evidence upon which the Hearing Examiner based his findings upon came via the audit by Ms.

Doty. In particular, the Appellant in an effort to make sure he was doing things properly fully disclosed to Ms. Doty information that led to the filing of charges outside of the purpose of the audit. This type of disclosure that went far beyond even the purpose of the particular purpose of the audit is indicative of a lack of dishonest or selfish motive. Most importantly, the Appellant was not attempting to hide from an alleged judgment held by his ex-wife.

B. The Appellant manifested full and free disclosure and a cooperative attitude throughout the underlying proceedings

The Appellant submits that it was error for the hearing examiner and disciplinary board to not find this as a mitigating factor. This is an unusual case of full and free disclosure unlike In Re Disciplinary Proceeding Against Dynan, 152 Wn.2d 601 (2004) and In Re Disciplinary Proceeding Against Whitt, 149 Wn.2d 707 (2003).

The Appellant's cooperation in the matter before the Board actually caused additional charges to be filed against him. This case is entirely unlike Whitt, supra, where the attorney lied and did not adequately cooperate. In the case at bar, the Appellant's extraordinary cooperation subjected him to additional charges. As such, it should be a factor to consider for purposes of mitigation.

C. The Appellant made good faith efforts to make restitution or rectify the consequences of his employee's misconduct

Although this mitigating factor was not applied in the proceedings below, TR 444; BF 63, the Appellant respectfully submits that it was error not to consider it in mitigation. The Appellant attempted to lessen the consequences of the underlying misconduct by providing a substantial benefit to his Labor and Industries client. Shortly after fulfilling his legal services to Mr. Negrete by securing him a pension, the Appellant waived his right to collect attorney fees on the pension reserve. This was an extraordinary good faith attempt to rectify the consequences of the injury to Mr. Negrete and/or the consequences of the misconduct.

The fact of the matter is the Appellant's client received an extraordinary benefit of thousands of dollars in attorney fees that the Appellant waived in good faith. This is a substantial benefit that was provided to the client at a substantial cost to the Appellant. Although there is no case specifically addressing this issue, it is respectfully submitted it is something that should be considered in mitigation of the sanction.

D. The Appellant maintains a good character and reputation in the community

The Appellant testified at the hearing concerning what he gives back to the community in terms of speaking at local schools, pro bono work. TR 370. However, the Hearing Examiner found that this is insufficient because he offered only bare assertions. Fortunately, the Disciplinary Board found this mitigating factor exists. BF 72 at p. 4, line 8.

E. The Appellant's voluntary waiver of his attorney fees on his client's labor and industry's pension is a penalty or sanction and mitigating factor

The Hearing Examiner found this was not a mitigating factor. Yet this does not take into account, the thousands of dollars that benefited his client. There weren't any other penalties or sanctions as a result of his misconduct. TR 446. However, there is no case law that suggests the self-imposed penalty cannot be considered as a mitigating factor. Again, it is submitted this is the type of situation that the ABA standards suggest that flexibility in mitigation/sanctions is appropriate.

F. The Appellant did not have a dishonest motive

The Association claims that there was a dishonest or selfish motive because the Appellant deposited $117,782 of what they characterized as earned fees in the trust account from January 2002 to

May 2003. As Ms. Doty testified, there were 9 instances when funds client funds were deposited into the Appellant's Trust Account. TR at 255.[6]

The Association argued that since the Appellant did not maintain a Washington State business / personal account during the audit period that there was a selfish or dishonest motive. This position defies logic because the evidence established that the Appellant had a bank account in California where he often resided with his significant other. Given the nature of his criminal practice, he frequently traveled across the country. It was convenient to have the account in California. Similarly, once the Association inferred at the March 2004 audit, that there was an appearance of impropriety in not having a business / personal bank account in Washington, the Appellant opened and continues to maintain an account with Bank of America since April 2004. TR 313. Therefore, it is the Appellant's position the Association failed to produce substantial evidence, to establish by a clear preponderance of

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[6] Q. (Ms. Slater continuing.) And how many times were clients' funds deposited into the trust account?

A. Excluding the L & I client, because we know that that went in on a regular basis every two weeks, there were nine other instances that I felt there was client money being deposited. TR at 255.

the evidence, a dishonest or selfish motive simply because the Appellant did not have a personal bank account in the State of Washington.[7]

It is also significant to note that there is no law that requires a person residing in Washington to maintain a business checking account in the State of Washington. There is no evidence whatsoever that the Respondent in all the years of his practice ever failed to maintain an IOLTA account. If in fact the Appellant intended to escape creditors, he would not have had a personal or business account anywhere. After all, under the under the full faith and credit clause of Article IV of the U.S. Constitution States other states must respect the laws and final judgments of all other states. As such, creditors can attach any bank account in any State with a valid judgment.

The situation in the case at bar was significantly different when the Appellant received his Admonition. The reason the Appellant associated counsel in the Perez case (the Admonition case) was due to extreme financial difficulties he was having during his divorce of his now ex-wife, who was a divorce attorney. BF A at p. 7, Paragraph 4.

In the same light, the Hearing Officer found that Appellant deposited funds in the IOLTA account to protect the funds from his ex-

[7] It should be noted that in other contexts the Association agrees that the Appellant did not have a dishonest or selfish motive. TR 444.

wife. As previously argued herein, the mere testimony by Ms. Doty does not support a finding by a clear preponderance of the evidence, supported by substantial evidence, that the Appellant was attempting avoid an alleged judgment by his ex-wife. Moreover, the Association failed to produce any evidence of such a judgment. No evidence of such a judgment could be produced because no such judgment existed.

In addition, the Association reliance upon the fact the Appellant did not maintain a personal checking account in Washington but did so in California is misplaced. The fact that the Appellant maintains a relationship with his significant other in California for the past few years coupled with his frequent travels throughout the country does not make this arrangement unusual or dishonest.

Assuming arguendo, that this honorable court determines the existence of a dishonest motive due to personal financial difficulties, the Court has reduced the presumptive sanction due to an attorney's financial problems. In re Burtch, 112 Wn.2d 19, 770 P.2d 174 (1989) (45-day suspension for pattern of misconduct involving three violations of RPC .1.5(b) (failure to communicate fees); six violations of RPC 1.3 and 3.2 (lack of diligence and failure to expedite litigation); two violations of RPC 1.4 (failure to keep client fully informed); two violations of RPC 1.15(d) (failure to return client documents and

unearned fees); one violation of RLD 13.3 (failure to file a timely trust account declaration) and; one violation of RLD 2.8 (failure to cooperate with disciplinary investigation) (The sanction was reduced by the mitigating factor of the attorney's financial turmoil).

XIII. THIS COURT SHOULD APPLY ADDITIONAL MITIGATING FACTORS

The Appellant submits the same mitigating factors apply for all three counts. In addition, this Court should apply additional mitigating factors.

A. The Appellant made a timely good faith effort to make restitution or rectify the consequences of misconduct

Appellant argues that this mitigating factor should apply because he voluntarily waived thousands of dollars in attorney fees in the Negrete matter (the L & I client). There are no cases directly on point for this issue. The Hearing Officer concluded that this mitigator only applies if the actions to rectify the consequences of the mistake are both timely and in good faith.

In this case, the Appellant timely determined to waive additional fees shortly after Mr. Negrete was pensioned and his learning of his employee's misconduct. Therefore, the Appellant respectfully requests this Court to determine this is an appropriate mitigator.

B. The Appellant made full and free disclosure during the underlying investigation while maintaining a cooperative attitude

This Court has held the mitigator listed under ABA Standards std. 9.32(e) does not apply in Washington discipline cases. In re Disciplinary Proceeding Against Dynan, 152 Wn.2d 601, 98 P3d 444 (2004), citing In re Disciplinary Proceeding Against Whitt, 149 Wn.2d 707, 721, 72 P.3d 173 (2003). However, the Appellant respectfully submits that this case is distinguishable and the previous case law should be overruled.

The policy in promoting full disclosure beyond the scope of a bar association investigation would be furthered if the target of the investigation would be more inclined to provide information beyond the scope of the Bar inquiry. Alternatively, the target of an investigation would feel as though he or she should only provide as limited information as that which is sought by the Bar investigator. What course of action would best serve the Association and the community? It is respectfully submitted that by allowing this factor to potentially be considered as a mitigating factor, targets of bar investigations would be more inclined to fully disclose all aspects of their office procedures instead of feeling as though they are subjects of a police department internal investigation and limit the scope of their responses.

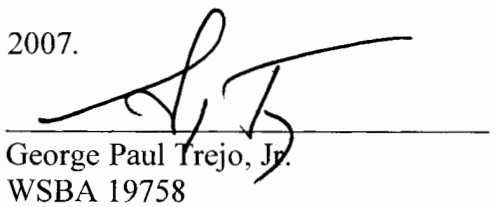
In light of the aforementioned, it is respectfully submitted that this

Court should overrule previous cases and hold that an attorney's full and free disclosure during an investigation may serve as a mitigating factor.

CONCLUSION

The Appellant respectfully submits that this court should reverse the Disciplinary Board and hold that any misconduct be sanctioned with a reprimand. Alternatively, it is respectfully submitted that a 30-day suspension would be adequate to deter future misconduct and protect the community. In either case, the probationary period should include monthly sessions with the WSBA Law Office Management Program (LOMAP).

Dated this 20th day of August 2007.



George Paul Trejo, Jr.
WSBA 19758

CERTIFICATE OF SERVICE

It is hereby certified that on August 20, 2007 the Appellant's Opening Brief was emailed, sent via first class mail postage prepaid and/or hand delivered to the person(s) indicated below:

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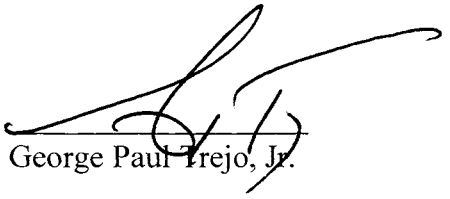
Dated this 20th day of August 2007.



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