

No. 200,531-4

SUPREME COURT OF THE STATE OF WASHINGTON

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In re Disciplinary Proceedings Against

Young S. Oh,

Lawyer (Bar No. 29692)

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STATE OF WASHINGTON  
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REPLY BRIEF OF APPELLANT

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**RIGINAL**

**TABLE OF CONTENTS**

A. The Association Failed to Prove Count 1 ..... 1

    1. The Association's Repeated Proffer of Misleading Testimony by Ms. Koh Does not Prove Misconduct ..... 1

    2. The Association's Reliance on *Rideout* is Misplaced..... 3

    3. There Was No Finding That Ms. Koh Was Credible..... 5

    4. Ms. Koh's Testimony of Observing Ms. Lee Forge Signatures Should be Rejected as Pure Fantasy ..... 5

    5. Rejection of Ms. Koh's Testimony Eliminates the Association's Proof of Count 1 ..... 6

    6. The Hearing Officer Abused His Discretion By Denying Mr. Oh Additional Handwriting Samples ..... 7

B. On Count 4, Mr. Oh Used a Dedicated Account, not a "General Business Account," for Client Funds in 2001 and Early 2002.....9

C. On Count 5, There is No Authority for the Record-Keeping Standard to which the Hearing Officer Held Mr. Oh.....10

D. The Association Failed to Prove Count 7 ..... 12

    1. Ms. Fisher's Testimony Should be Rejected. .... 12

    2. The Association's Choice of Telephone Testimony was Irresponsible..... 14

    3. Mr. Oh Took Remedial Steps That Avoided

	All Actual and Potential Injury from Ms. Fisher's False Notary.....	15
E.	The Hearing Officer Abused His Discretion by Denying Mr. Oh's Motion to Vacate .....	16
F.	The Recommended Sanction Should be Rejected.....	18
	1. The Presumptive Sanction, if any, On Counts 1 and 7 is Reprimand.....	18
	2. The Presumptive Sanction, if any, On Counts 4 and 5 is Reprimand.....	19
	3. Stacking Sanctions Against Mr. Oh Would be Unprecedented.....	19
	4. Mitigating Factors Far Outweigh Virtually Non-Existent Aggravating Factors .....	20
	5. The Association May Not Appeal the Hearing Officer's Finding of Absence of Selfish or Dishonest Motive	22
	6. A Two-Year Suspension Would be Disproportionate.....	24
G.	Conclusion.....	24

## TABLE OF AUTHORITIES

### CASES

<i>Estate of Reilly</i> , 78 Wn.2d 623, 654, 479 P.2d 1 (1970) .....	3, 13
<i>In re Disciplinary Proceedings Against DeRuiz</i> , 152 Wn.2d 558, 582-83, 894, 99 P.3d 881 (2004).....	19, 20
<i>In re Disciplinary Proceeding Against Dornay</i> , 160 Wn.2d 671, 679, 685-86, 161 P.3d. 333 (2007).....	3
<i>In re Disciplinary Proceeding Against Kennedy</i> , 80 Wn.2d 222, 230, 492 P.2d 1346 (1972).....	3, 13
<i>In re Disciplinary Proceeding Against Little</i> , 40 Wn.2d 421, 430, 244 P.2d 255 (1952).....	7
<i>In re Disciplinary Proceeding Against Marshall</i> , 160 Wn.2d 317, 330, 335-36, 344-45, 157 P.3d 954 (2006) ....	7, 11, 18, 20
<i>In re Disciplinary Proceedings Against Petersen</i> , 120 Wn.2d 833, 846-47, 849, 846 P.2d 1330 (1993).....	11, 12
<i>Marriage of Rideout</i> , 150 Wn.2d 337, 345, 349-51, 350-51, 351, 351-52, 77 P.2d 1174 (2003).....	3, 4
<i>Ortblad v. State</i> , 88 Wn.2d 380, 385, 561 P.2d 201 (1977).....	24
<i>Peacock Records, Inc. v. Checker Records, Inc.</i> , 365, F.2d 145, 146 (7 <sup>th</sup> Cir. 1966).....	17
<i>Simpson Timber Co. v. Aetna Casualty &amp; Surety Co.</i> , 19 Wn. App. 535, 542, 576 P.2d 437 (1978).....	24
<i>Wagner v. Beech Aircraft Corp.</i> , 37 Wn. App. 203, 212-13, 680 P.2d 425 (1984).....	23

<i>Webster v. State Farm Mut. Auto Ins. Co.</i> , 54 Wn.App. 492, 495, 774 P.2d 50 (1989).....	3, 13
---	-------

**RULES**

ABA Standard 4.12.....	19
ABA Standard 4.13.....	19
ABA Standard 5.11.....	18
ABA Standard 5.12.....	18
ABA Standard 5.13.....	18, 19
ABA Standard 9.2(i).....	22
ELC 11.12 (b).....	3
<b>RAP</b> 2.4(a).....	23
<b>RAP</b> 5.1(d).....	23
RPC 1.14(b)(3).....	10, 11
RPC 1.15B.....	10
RPC 8.4(b).....	18, 19
RPC 8.4(c).....	18

A. The Association Failed to Prove Count 1.

1. The Association's Repeated Proffer of Misleading Testimony by Ms. Koh Does not Prove Misconduct.

In arguing that it proved Count 1 by a clear preponderance, the Association places too much emphasis on a quote from deposition testimony by Shannon Koh that Mr. Oh told her to "go to Esther (Lee, ex Kang) and Esther will forge the signature." Answering Brief pp. 6, 15, 18 citing EX 17 p. 13. The Association's repeated proffer of this quote is misleading because later in her testimony Ms. Koh significantly qualifies this testimony. Nevertheless, the Association builds its entire case under Count 1 on the foregoing quote, and that case falls apart as Ms. Koh's quote is peeled back for what it is.

Mr. Oh did instruct Ms. Koh to "go to Esther" when needing client signatures because he would not allow a new, inexperienced employee like Ms. Koh to communicate with clients on visa applications, TR 439; but he never instructed anyone to "forge" a signature, TR 434, a fact that Ms. Koh admits later in her testimony:

Q. Okay. Did you ever hear Mr. Oh use the words "forge" or "forgery"?

A. Forge or forgery? No.

Q. Okay.

A. And I want to tell you that in the Korean language there is no "forge" in speech. When I asked Mr. Oh about the signature

that I have to get from the client, he said you have to go to Ms. Kang to get the client's signature. That's what he said.

Q. So his words were "you have to go to Esther to have her get the client's signature."

A. Right. That's exactly what he said.

EX 17 p. 47. Ms. Koh backs off her initial testimony repeatedly throughout her deposition by making very clear that Mr. Oh's instruction was simply for her to take the visa document to Ms. Lee "to get the signature," as Ms. Koh puts it. For example, on page 18 of her deposition (EX 17), when asked about Mr. Oh's instruction, she testified, "Go to Esther to get the signature." On page 19 she repeats these words: "After Mr. Oh and I get it all together, then I ask Mr. Oh about the signature, but Mr. Oh said to go to Esther to get all the signatures." *See also* EX 17 p. 42 ("He said to go to Esther just like always") and p. 43 ("he always told me to go to Esther to get the signatures").

When asked where she got the notion that Mr. Oh was calling for forgery when he told her to go to Esther for client signatures, Ms. Koh plainly admitted, "I assumed that's what he meant." EX 17 p. 42. Therefore, the Association's entire case of forgery under Count 1 is built on Ms. Koh's subjective, unilateral assumption as to what Mr. Oh meant when he instructed her, a new employee, to go to an experienced employee, Ms. Lee, for obtaining a client's signature.

This Court may, and should, review Ms. Koh's deposition testimony and credibility de novo without deference to any assessment made by the hearing officer. Because the hearing officer did not observe Ms. Koh and her demeanor, this Court is in as good a position to assess her testimony and credibility as he was. *See In re Disciplinary Proceeding Against Kennedy*, 80 Wn.2d 222, 230, 492 P.2d 1346 (1972). In turn, this Court is not bound by any findings made on Ms. Koh's testimony and it is free to make its own findings based on its own review of the testimony, even if its findings are contrary to those of the hearing officer. *See Estate of Reilly*, 78 Wn.2d 623, 654, 479 P.2d 1 (1970); *Webster v. State Farm Mut. Auto Ins. Co.*, 54 Wn.App. 492, 495, 774 P.2d 50 (1989).<sup>1</sup> When making its own findings on Ms. Koh's testimony, this Court should recognize that her entire perception that Mr. Oh was directing forgery was based on misguided assumption.

2. The Association's Reliance on *Rideout*'s Misplaced.

The Association argues that *Marriage of Rideout*, 150 Wn.2d 337,

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<sup>1</sup> It would appear that the Disciplinary Board had great reluctance to make its own review of Ms. Koh's testimony and credibility. At least one Board member expressed that very concern during the Board's hearing in this matter, based on an interpretation of the ELCs governing the Board's review (likely ELC 11.12(b)) as precluding de novo consideration of deposition testimony. Board Hearing Transcript p. 7 (7/20/07). Even if that was the applicable rule for the Board, there is no such limitation imposed on this Court's review of absent testimony presented at the hearing and the hearing officer's findings thereon. This Court's plenary authority over lawyer discipline proceedings, *see In re Disciplinary Proceeding Against Dornay*, 160 Wn.2d 671, 679, 161 P.3d 333 (2007), gives it broad power to give de novo consideration to deposition and other absent testimony, particularly when presented as central proof against a lawyer in a disciplinary proceeding.

350-51, 77 P.2d 1174 (2003) compels the Court to accept all of the hearing officer's findings made on Ms. Koh's testimony, but the "narrow exception" created in that case has no application here. In *Rideout*, this Court addressed the applicable standard for reviewing a family court commissioner's factual finding of bad faith made in a contempt proceeding in a marital dissolution action where the evidence consisted solely of written declarations. *Id.* at 345, 349-51.

In rejecting the appellant's argument that the finding should be reviewed de novo, the court crafted a "narrow exception" to "the general rule" (that appellate courts may review decisions made on documentary evidence de novo) to hold that the finding should be reviewed for substantial evidence. *Id.* at 351. This "narrow exception" was crafted due to the unique, limited circumstances presented: competing documentary evidence necessarily had to be weighed to reach an outcome, *id.*; trial judges and court commissioners, who routinely hear family law matters, are better equipped than appellate courts to make credibility determinations in family law proceedings, *id.* at 351-52; and the appellant had the right to present live testimony in lieu of declarations but chose not to. *Id.* at 352. There is no similar basis in this lawyer disciplinary proceeding to craft any exception to the "general rule" that appellate courts may review decisions made on documentary evidence de novo.

3. There Was No Finding That Ms. Koh Was Credible.

On page 18 of its Answering Brief the Association baldly states, "the Hearing Officer found Ms. Koh . . . to be credible on the issue of whether the signatures were forged and whether Respondent instructed his employees to forge signatures." However, no such finding was made, and the Association can cite to nothing to support its statement.

4. Ms. Koh's Testimony of Observing Ms. Lee Forge Signatures Should be Rejected as Pure Fantasy.

This Court should further reject Ms. Koh's testimony that she allegedly observed Ms. Lee signing Mr. Yeum's signature to visa papers because this testimony lacks all credibility for several reasons. First, Ms. Koh contradicts herself in a very significant way. She initially told a co-worker that she observed Mr. Oh signing Mr. Yeum's name, TR 262; but she later changed her story to say that she observed Ms. Lee make the signatures. EX 17 pp. 15, 48-49.

Second, Ms. Koh is prone to hyperbole. While she would have the Court believe that Ms. Lee signed countless client signatures, EX 17 p. 42, she could not identify a single one of those clients. *Id.* If forgery was as rampant as Ms. Koh would have us believe, the Association would surely have brought charges for misconduct in other client matters as well. The Association's investigator, who interviewed a number of Mr. Oh's

employees, could not find another employee with knowledge of any alleged forgeries, TR 55, which would be a fairly well-known fact in a small office like Mr. Oh's. Even the Association's one witness who worked in Mr. Oh's office for a length of time, attorney Cindy Toering, never saw or heard Mr. Oh direct others to commit or participate in forgery. TR 288.<sup>2</sup>

Third, Mr. Oh's handwriting expert concluded that the signatures that are at issue in this proceeding were not in Ms. Lee's handwriting. TR 484-91. This conclusion, and the methodology used in reaching it, went unchallenged by the Association's handwriting expert. TR 538.

5. Rejection of Ms. Koh's Testimony Eliminates the Association's Proof of Count 1.

Because the Association relies entirely on Ms. Koh's testimony for Count 1, and because that testimony should be given no weight after independent assessment by this Court, the Association is left with no evidence whatsoever to support Count 1, and it should be dismissed.

If any weight can be given to Ms. Koh's testimony, that weight is

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<sup>2</sup> In its Answering Brief at page 15, the Association refers to an accounting matter (completely unrelated to any issue in this action) where Ms. Toering testified that Ms. Lee signed a document without knowing what the document was or the reason Ms. Lee signed it. TR 265-66. Ms. Lee explained that she signed client excise tax returns to certify that she prepared them. TR 410. The Association referred to another incident (completely unrelated to any issue in this action) where Ms. Toering observed another employee signing a client's name to a document. TR 254. Notably, the Association omitted Mr. Oh's reaction when Ms. Toering reported this incident to him. He promptly fired the employee, TR 375-76, demonstrating he does not condone forgery in his office.

"slight" at best, particularly in the face of so much evidence to the contrary, and Ms. Koh's testimony is not enough to establish misconduct by a clear preponderance. *See In re Disciplinary Proceeding Against Little*, 40 Wn.2d 421, 430, 244 P.2d 255 (1952) (sanctions may not be imposed against a lawyer on "slight evidence").

6. The Hearing Officer Abused His Discretion By Denying Mr. Oh Additional Handwriting Samples.

The Association counters the weakness of Ms. Koh's deposition testimony by arguing that Mr. Oh did not explain how the forged signatures came about. In making this argument, however, the Association would impermissibly shift the burden of proof from it to Mr. Oh. *See In re Disciplinary Proceeding Against Marshall*, 160 Wn.2d 317, 330, 157 P.3d 954 (2006).

In defending himself, Mr. Oh sought to do what the Association, as Disciplinary Counsel with the burden of proof, should have done. Mr. Oh hired a handwriting expert and charged her with the task of identifying whose handwriting made the signatures at issue. Although the Association hired its own well-regarded handwriting expert, it inexplicably never charged him with that task. TR 538. When the hearing officer denied Mr. Oh the opportunity to collect handwriting samples from Ms. Koh and Ms. Moon, TR 28-29, the hearing officer abused his

discretion by denying Mr. Oh the opportunity of unmasking the forger, resolving the lynchpin issue presented by Count 1, and clearing his name.

Without the requested handwriting samples, Mr. Oh was forced to defend himself in the face of Ms. Koh's testimony by having to prove a negative; that is, that he had no involvement with forgery. Faced with this difficult burden, Mr. Oh was left to present two overlapping sets of events. First, he presented Ms. Lee's testimony that, after calling Mr. Yeum, she left the visa papers at the reception desk for Mr. Yeum (or his designee) to pick up for signature. TR 417. The papers were then returned to her the next day fully signed. TR 418.

Second, Mr. Oh presented the fact that, unknown to him, the Moon petition was already contaminated with fraud when it was brought to him, which the Association conceded when it withdrew allegations of misconduct as to Ms. Moon's signatures within the visa application. TR 17 and 27. Ms. Moon's qualifications and letters from supposed Korean employers had been falsified in the package of application materials brought to Mr. Oh by Mr. Yeum. TR 61-63, 86-89.

Perhaps because of this fraud, Mr. Yeum did not want to sign the Moon petition and he delegated or demanded someone else to make the signatures for him. Given how the evidence in this case stacks up, that explanation is as, if not more, plausible than the theory on which the

Association brought this proceeding.

The critical question of who made the signatures remains unanswered to this day due to the Association's passive approach in this proceeding and the hearing officer's denial of handwriting samples to Mr. Oh. By taking a passive approach, even after retaining a leading handwriting expert, the Association failed to meet its burden of proof and failed to meet its broader obligation to the Court, the bar and the public of ferreting out the forger's identify with the certainty.

B. On Count 4, Mr. Oh Used a Dedicated Account, not a "General Business Account," for Client Funds in 2001 and Early 2002.

The Association agrees that the hearing officer's finding in the second sentence of AFFCLR 3.25 is erroneous.

Contrary to the Association's arguments, Mr. Oh does not contend that an account he used for client funds in 2001 and early 2002, Account 169, was a proper trust account for client funds. Mr. Oh now recognizes that Account 169 was not a proper trust account, but he nevertheless assigned error to AFFCLR 3.18 and 5.3.A because they characterize Account 169 as a "general bank account" implying that Mr. Oh used that account for general business purposes when he in fact used it only for client funds. He maintained and used a different account for his business's banking needs, TR 117-18, 137, and there is no evidence that

Mr. Oh commingled client funds with his firm's operational funds.

Calling Account 169 a "general bank account" would mischaracterize Mr. Oh's use of the account. Mr. Oh used this account exclusively for client and escrow funds and believed in good faith at the time that he was doing the right thing. He now fully understands that his use of Account 169 was not proper; and, in 2002 after hiring LOMAP, Mr. Oh corrected his trust account practices. The presentation of Mr. Oh's use of Account 169 is not made to escape culpability under Count 4, but to explain his understanding and actions for the Court's context and for mitigating any sanction to be rendered against him.

C. On Count 5, There is No Authority for the Record-Keeping Standard to which the Hearing Officer Held Mr. Oh.

The Association cites no authority in effect at the time of the events involved in this proceeding that enumerates the records required to meet the "complete records" requirement of former RPC 1.14(b)(3). This is because there was no established standard for record-keeping for Mr. Oh to follow, and this is the reason new RPC 1.15B was adopted effective September 1, 2006 (long after the time period at issue here).

Without definitive authority binding Mr. Oh, this Court may not hold that he violated RPC 1.14(b)(3). Rather than focus on the records Mr. Oh did not maintain, this Court should consider what he did maintain:

Mr. Oh kept bank statements, EX 35, a consolidated check register/ledger statement, EX 34, detailed ledgers and back-up documents for escrow transactions, EX 36, and numerous back-up and other documents. TR 180, 191. With these records, he reconciled the bank statements and check register/ledger, EX 34 (tick marks), TR 122-23, 172; tracked client funds accurately, AFFCLR 3.26; and ensured that no client funds were improperly used or lost. AFFCLR 3.27.

The Association's sole criticism of Mr. Oh is that he did not maintain a ledger separate and distinct from his consolidated check register/ledger. During the time period at issue, however, there was no authority requiring the maintenance of a separate and distinct ledger. Although it may have been prudent to keep such a ledger, a lawyer who does not maintain such a ledger, but who does maintain a consolidated register/ledger along with all the other records that Mr. Oh kept, should not have to answer to a count of lawyer misconduct.

Indeed, where lawyers have been held in violation of RPC 1.14(b)(3) for incomplete records, they have completely failed to keep any records of client funds in their possession. *See Marshall*, 160 Wn.2d at 335-36 ("unable to produce complete client registers, check registers, general account files, or appropriate backup documentation" because records were destroyed; no mention about need for ledger statements); *In*

*re Disciplinary Action Against Petersen*, 120 Wn.2d 833, 846-47, 849, 846 P.2d 1330 (1993) (when the Association requested lawyer's trust account records, they were "chaotic or did not exist;" lawyer was later unable to produce them at disciplinary hearing).

The appropriate approach by the Association should have been to proactively counsel Mr. Oh on the records of client funds it would like to see him keep, not charge him with a serious count of lawyer misconduct. This approach would have been particularly appropriate with Mr. Oh because there was no malice, misappropriation or deception in the way he kept and tracked client funds.

D. The Association Failed to Prove Count 7.

1. Ms. Fisher's Testimony Should be Rejected.

The testimony and credibility of the sole witness the Association presented to support Count 7, Victoria Fisher, is reviewable by this Court de novo for the same reasons it may review Ms. Koh's testimony de novo. *See supra* p.3.

Although the Association concedes that Count 7 turns on "assessments of credibility," Ans. Brief p. 26, it elected to present Ms. Fisher's testimony by telephone and thereby deprive the hearing officer of the opportunity to observe her demeanor and assess her credibility. For the same reasons that apply to deposition testimony, this Court is not

bound by findings made by the hearing officer on Ms. Fisher's telephone testimony, and it is free to make its own findings based on an independent review of her testimony, even if those findings are contrary to those of the hearing officer. *See Estate of Riley*, 78 Wn.2d at 654; *Webster*, 54 Wn.App. at 495. As with deposition testimony, this Court is in as good a position as the hearing officer was to assess the testimony and credibility of a witness who testified by telephone and whose demeanor cannot be observed. *See Kennedy*, 80 Wn.2d at 230 (deference normally granted to a hearing officer in evaluating credibility of a witness is based on the hearing officer's ability to observe the witness and her demeanor during the hearing).

When making its own findings on Ms. Fisher's testimony, this Court should find that her entire testimony should be rejected because it was tainted by her open hostility toward Mr. Oh and by her false testimony concerning a letter to the "Notary Commission." Ms. Fisher remains "very upset" about Mr. Oh's termination of her employment for misconduct and her hostility toward him was openly expressed during her testimony. TR 330-31 ("yes, I'm very upset about it. I don't like it."). Her testimony about writing a letter to the "Notary Commission" in response to feeling remorse over falsely notarizing a signature has been definitively proven to be false by the fact that there is no such "Notary

Commission," BF 77 ¶ 4 (CP 196); when finally produced by the Association,<sup>3</sup> the letter was not addressed to the "Notary Commission," BF 74 Ex. A (CP 182); and the actual addressee - an escrow company - and carbon copy recipients never received the letter when it was supposedly sent. BF 73-77 (CP 163-99).

Rejecting the testimony of the only witness presented to support Count 7 results in dismissal of Count 7 for obvious lack of proof.

2. The Association's Choice of Telephone Testimony was Irresponsible.

The Association's choice of presenting Ms. Fisher's testimony by telephone, rather than in person, raises a troubling question that merits review in this proceeding. Conceding that Count 7 turns on "assessments of credibility," Ans. Brief p. 26, the Association elected to present testimony from its only witness on Count 7 in a way that precluded assessment of that witness's credibility.

Where the outcome of a lawyer disciplinary count turns on credibility of conflicting witnesses, and the Association gives the hearing officer no opportunity to observe its witness's demeanor to assess and

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<sup>3</sup> The Association's Answering Brief offers no explanation as to why, with the letter in its possession, it withheld the letter from Mr. Oh prior to the hearing and why it solicited testimony from Ms. Fisher during the hearing about the letter and its contents without producing the letter during the hearing or attempting to make it an exhibit. It was not until after the conclusion of the hearing and the issuance of the hearing officer's decision that the Association finally produced a copy of the letter to Mr. Oh. BF 74 ¶ 2 (CP 179).

compare credibility, how can the Association meet its burden of proving its witness's credibility and that witness's version of events by a clear preponderance sufficient to support a finding of misconduct?

The answer is plain - the Association must give the hearing officer an opportunity to observe witness demeanor, which will in turn allow the hearing officer to assess and compare witness credibility, as a prerequisite to meeting its burden of proving a count of misconduct the outcome of which turns wholly on credibility of competing witnesses. This is particularly so where the Association's proof rests entirely with one witness and the testimony of that witness directly conflicts with the lawyer's testimony.

By failing to bring Ms. Fisher before the hearing officer in person, the Association failed to meet its burden of proving Count 7 by a clear preponderance. It would be inappropriate to sanction a lawyer based on a credibility determination of a witness whose credibility could not be measured, particularly one proven to have testified falsely as to a "Notary Commission" letter.

3. Mr. Oh Took Remedial Steps That Avoided All Actual and Potential Injury from Ms. Fisher's False Notary.

After conceding that the hearing officer erroneously found (AFFCLR 3.33) that the real estate transaction closed on the basis of

falsely notarized documents, Ans. Brief p. 28,<sup>4</sup> the Association overreaches in trying to come up with some "potential injury" that resulted from the delivery of such documents. However, as the Association further concedes, Mr. Oh put a stop to the transaction, fully disclosed the existence of the false notary, and requested and received re-prints of previously prepared documents for notarized signing, EX 30 p. 14; TR 405-06; and the transaction closed as a matter of course. TR 406-07.

The Association's claim that the extra time required to obtain newly signed documents "could have caused the deal to fall apart," Ans. Brief p. 29, is completely without citation and factual support; as is the Association's claim that the mere re-printing of documents for Mrs. Oh to sign caused "actual harm" to the closing agent and lender. *Id.* Ms. Fisher's false notaries were promptly remedied by Mr. Oh such that no actual or potential injury resulted from submission of falsely notarized documents.

E. The Hearing Officer Abused His Discretion by Denying Mr. Oh's Motion to Vacate.

Mr. Oh's motion to vacate the hearing officer's decision was made to eradicate the taint of false testimony on this entire proceeding, App.

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This is the second glaringly obvious error that the hearing officer made in his factual findings (see *supra* p. 9 for the first). Although the Association conceded the error of these two critical factual findings before the Board, BF 109 pp. 14 n.6, 17 n.8 (CP 71, 74), the Board affirmed the hearing officer's decision without any modification for, or even mention of, these glaring errors.

Brief pp. 38-39; not, as the Association characterizes, to bring "newly discovered evidence" to light. Although Ms. Fisher's false testimony about a letter to the "Notary Commission" was exposed by a letter in the possession of the Association at the time such testimony was given, but inexplicably, was not produced until after the hearing officer issued his decision, the premise of the motion to vacate was to undo the effect of Ms. Fisher's false testimony in this proceeding. The only way to undo that false testimony is to vacate the hearing officer's entire decision and remand this proceeding for a new hearing (before a new hearing officer). *See Peacock Records, Inc. v. Checker Records, Inc.*, 365 F.2d 145, 146 (7th Cir. 1966). The hearing officer abused his discretion by allowing his decision to stand despite the taint of Ms. Fisher's false testimony on this entire proceeding.

As the Association points out, the hearing officer denied the motion to vacate on the basis that he somehow "concluded that Ms. Fisher was credible on the salient points," despite her false testimony on the "Notary Commission" letter. However, it was not possible for the hearing officer to reach any conclusion as to Ms. Fisher's credibility because he did not see Ms. Fisher testify. He could not observe her demeanor to assess her credibility, and by making a conclusion that was not possible for him to reach, the hearing officer abused his discretion.

F. The Recommended Sanction, if any, Should be Reduced.

1. The Presumptive Sanction, if any, on Counts 1 and 7 is Reprimand.

That neither the hearing officer nor the Board concluded that Mr. Oh violated RPC 8.4(b) (commission of "a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects") is significant when applying the ABA *Standards* here. Because there is no finding that Mr. Oh engaged in criminal conduct, and there is no conclusion that he violated RPC 8.4(b), ABA *Standard* 5.12 may not be invoked. The presumptive sanction of ABA *Standard* 5.12 applies only "when a lawyer knowingly engages in criminal conduct."

*Marshall* does not support application of ABA *Standard* 5.12 where a lawyer has violated RPC 8.4(c) but not RPC 8.4(b). While that Court applied a suspension sanction like that in *Standard* 5.12, it did so without reference to *Standard* 5.12 and only as an "intermediate consequence" between applying *Standard* 5.11 or *Standard* 5.13:

Because Marshall's state of mind points to disbarment, but the level of harm points to reprimand, we conclude that under standard 5.1, the presumptive sanction for these charges should be the intermediate consequence, suspension.

*Marshall*, 160 Wn.2d at 344-45. Indeed, the *Marshall* Court makes no mention of *Standard* 5.12 in the paragraph announcing the decision to impose a suspension for violation of RPC 8.4(c). *Id.*

The applicable *Standard* for any misconduct under Counts 1 and 7 is *Standard* 5.13 calling for a presumptive sanction of reprimand.

2. The Presumptive Sanction, if any, on Counts 4 and 5 is Reprimand.

In arguing for a suspension under Counts 4 and 5, the Association disregards the hearing officer's finding that Mr. Oh's mental state was one of negligence ("conscious neglect") and "not the result of dishonest or selfish motive." AFFCLR 3.29 (DP 20). Thus, the applicable ABA *Standard is Standard* 4.13 which provides the presumptive sanction "when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client." The presumptive sanction under *Standard* 4.13 is reprimand.

In arguing for application of *Standard* 4.12, the Association cannot, and in fact does not, cite any finding by the hearing officer or Board that Mr. Oh acted knowingly.

3. Stacking Sanctions Against Mr. Oh Would be Unprecedented.

The Association cites *In re Disciplinary Proceeding Against DeRuiz*, 152 Wn.2d 558, 582-83, 99 P.3d 881 (2004) in support of stacking multiple suspensions consecutively, but *DeRuiz* is easily distinguishable. *DeRuiz* involved the consolidation of two separate, multiple-count disciplinary proceedings in each of which the Board had

recommended a six-month suspension. *Id.* That unique circumstance, combined with numerous aggravating factors associated with the lawyer's misconduct at issue in each proceeding, justified this Court's imposition of consecutive six-month suspensions. *Id.*

Multiple independent disciplinary proceedings are not involved here, and there are no overwhelming aggravating circumstances as there were in *DeRuiz* calling for the stacking of multiple suspensions. This Court should follow its normal process of ordering that multiple suspensions, if any, begin to run at the same time:

Normally, a suspension begins when we issue an order, and multiple suspensions begin to run at the same time when the orders are filed at the same time.

*Id.* at 894 (Sanders, J., dissenting).

4. Mitigating Factors Far Outweigh Virtually Non-Existent Aggravating Factors.

The absence of actual injury to any person is an important mitigating factor when considering an appropriate sanction against a lawyer guilty of misconduct. Misconduct that causes actual injury deserves, and normally receives, a stronger sanction than misconduct that merely causes potential injury. In other words, the sanction imposed should be commensurate with the injury caused. *See Marshall*, 160 Wn.2d at 344-45. Here, the Association can point to no actual injury caused by any of the misconduct alleged in this proceeding, and the

absence of such injury should factor in when an appropriate sanction, if any, is considered.

The Association's attempt to fault Mt. Oh's motives in taking remedial action by hiring LOMAP and remedying Ms. Fisher's false notary is not well taken. Mr. Oh took these remedial steps clearly to address shortcomings in his law practice administration and the potential effect of falsely notarized documents. The hearing officer confirms the lack of merit in the Association's attack on Mr. Oh's motives by repeatedly finding that Mr. Oh did not at any time act out of a selfish or dishonest motive. AFFCLR 3.15, 3.29, 3.36, 4.7 (DP 19, 20, 23).

The foregoing mitigating factors, when considered along with Mr. Oh's cooperative attitude toward this proceeding, absence of dishonest and selfish motive, and inexperience in the practice of law at the time, present compelling reasons to mitigate any sanction to be imposed against him.

As for aggravating factors found by the hearing officer, the Association concedes that the hearing officer's finding of vulnerability of clients is erroneous. Ans. Brief p. 39 n. 18. As for the admonition that Mr. Oh received in 2005, while the Association argues it is not temporally remote from the misconduct alleged in this proceeding, it does not attempt to rebut the fact that the misconduct addressed in the admonition was remote in subject matter from the counts at issue herein. The Association

confuses the "pattern of misconduct" found by the hearing officer as an aggravating factor. That "pattern" refers to Mr. Oh's use of Account 169 - a checking account used by Mr. Oh as a dedicated account for client funds - not "multiple offenses" of RPC violations as the Association now argues. And contrary to the Association's argument, the "substantial experience" factor of ABA *Standard* 9.2(i) refers specifically to "substantial experience *in the practice of law*" (emphasis supplied), which Mr. Oh clearly did not have, not "substantial experience as a CPA" as the Association argues without citation. Therefore, the aggravating factors found by the hearing officer are either erroneous or so light as to be clearly outweighed by the foregoing mitigating circumstances.

5. The Association May Not Appeal the Hearing Officer's Finding of Absence of Selfish or Dishonest Motive.

Throughout its Answering Brief, the Association seeks reversal of (a) the hearing officer's finding of absence of selfish or dishonest motive as a mitigating factor; and (b) the hearing officer's refusal to find as an aggravating factor selfish or dishonest motive on the part of Mr. Oh. *See, e.g.,* Ans. Brief pp. 2 ¶ 6, 32, 38-39, 39-40. However, the Association has failed to perfect an appeal or other right of review of these decisions by this Court and the Association is precluded from arguing for such

affirmative relief. The Court should strike those portions of the Answering Brief where the Association attempts to seek such review.

If as the respondent the Association desired affirmative relief in this appeal it was required to seek cross review under RAP 5.1(d). The relief now sought by the Association is separate from the relief sought by Mr. Oh as he is not challenging the finding that he lacked dishonest or selfish motive. RAP 2.4(a) provides in part:

The appellate court will grant a respondent affirmative relief by modifying the decision which is the subject matter of the review *only (1) if the respondent also seeks review of the decision* by the timely filing of a notice of appeal or a notice for discretionary review, or (2) *if demanded by the necessities of the case.*

(Emphasis supplied). To obtain affirmative relief on review, the Association had to file a separate notice of appeal or notice for discretionary review.<sup>5</sup> *See Wagner v. Beech Aircraft Corp.*, 37 Wn. App. 203, 212-13, 680 P.2d 425 (1984) (appellate court refused to consider respondent's arguments to disallow offsets in judgment in appellant's favor where respondent was seeking affirmative relief but failed to properly file notice of appeal). Failing to properly file a separate notice of appeal precludes the Association from raising new issues in its response

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<sup>5</sup> The Association in fact filed a petition for discretionary review in this proceeding under Supreme Court No. 200,525-0, but subsequently withdrew the petition voluntarily. As a result, the Court dismissed the petition as withdrawn, *see* Order (12/3/07), and the Association has no right to cross review.

brief and from seeking affirmative relief. *Simpson Timber Co. v. Aetna Casualty & Surety Co.*, 19 Wn. App. 535, 542, 576 P.2d 437 (1978) (court refused to consider defendant's arguments on the grounds that the defendant failed to file for cross review). *See also Ortblad v. State*, 88 Wn.2d 380, 385, 561 P.2d 201 (1977) (Court would not consider plaintiff's claim that a denial of damages was error where plaintiff did not file a notice of appeal).

6. A Two-Year Suspension Would be Disproportionate.

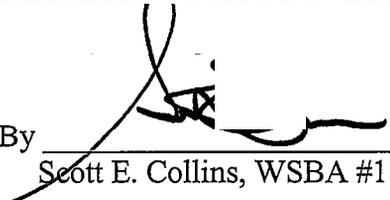
The facts and sanctions in the numerous cases cited previously by Mr. Oh, *see* App. Brief pp. 49-50, do show that a two-year suspension would be disproportionately high. While every disciplinary proceeding is laden with unique facts and circumstances, making it distinguishable at some level from those involved here, the totality of the cases previously cited show that a stern reprimand would be the appropriate, proportionate sanction, if any, in this proceeding.

G. Conclusion

The Court should vacate the hearing officer's decision and dismiss the charges of misconduct against Mr. Oh. Alternatively, the Court should reduce the sanction, if any, imposed on Mr. Oh to a stern reprimand.

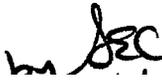
Respectfully submitted this 9th day of January, 2008.

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