

Supreme Court No. 200,537-3

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE DISCIPLINARY PROCEEDING AGAINST

STEPHEN D. CRAMER,

Lawyer (Bar No. 9085).

**ANSWERING BRIEF OF THE
WASHINGTON STATE BAR ASSOCIATION**

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I. COUNTERSTATEMENT OF THE ISSUES

1. State of mind is a factual finding accorded great deference on appeal. Lawyer Stephen Cramer took three advance fee deposits, put them in his general account instead of into trust, and spent them before earning them. At the time of the last two deposits, he had financial problems and his general account contained insufficient funds to cover outstanding checks he had recently written, which cleared only because of the deposit of the client's funds. The Hearing Officer found that Cramer should have known he was dealing improperly with client property. A unanimous Disciplinary Board affirmed. Should the Court reweigh the evidence and reach a different result?

2. Rule 5.3(e)(1) of the Rules for Enforcement of Lawyer Conduct (ELC) requires lawyers to furnish full and complete responses in connection with disciplinary investigations. During an investigation into his mishandling of client funds, the Washington State Bar Association (Association) asked Cramer to provide trust account records. He provided a bank statement and stated it showed his client's funds had been deposited in trust. His statement was false. The Hearing Officer and Disciplinary Board found Cramer's misstatement was at least negligent. Should the Court reweigh the evidence and reach a different result?

3. A unanimous Disciplinary Board agreed that Cramer should be suspended for eight months. The Board found four aggravating factors and no mitigating factors; Cramer has been disciplined on three prior occasions, twice for similar misconduct. Should the Court affirm the Board's unanimous recommendation of an eight-month suspension?

II. COUNTERSTATEMENT OF THE CASE

A. PROCEDURAL FACTS

The Association filed a formal complaint charging Cramer with misconduct as follows:

Count 1: By using Mr. Garcia's June 1, 2001 (for \$1,000), April 9, 2002 (for \$1,500) and/or April 12, 2002 (for \$1,000) advance fee payments for his personal, business and/or other expenses not related to Mr. Garcia or Select Construction, Respondent violated RPC 8.4(b) (by committing the crime of theft), RPC 8.4(c), and/or RPC 8.4(i).

Count 2: By failing to deposit Mr. Garcia's June 1, 2001 (for \$1,000), April 9, 2002 (for \$1,500) and/or April 12, 2002 (for \$1,000) advance fee payments into a trust account, Respondent violated RPC 1.14(a).

Count 3: By representing to the Office of Disciplinary Counsel that he had deposited Mr. Garcia's April 9, 2002 (for \$1,500) and April 12, 2002 (for \$1,000) advance fee payments into his IOLTA trust account, when he had not, Respondent violated ELC 5.3(e), RPC 8.4(c), RPC 8.4(d), and/or RPC 8.4(l).

Bar File (BF) 2.

Following a disciplinary hearing, Hearing Officer Edward L.

Dunkerly concluded, by a clear preponderance of the evidence, that Cramer violated Rule 8.4(c) of the Rules of Professional Conduct (RPC)¹ as charged in Count 1; RPC 1.14(a) as charged in Count 2; and RPC 8.4(c), RPC 8.3(d), RPC 8.4(l), and ELC 5.3(e) as charged in Count 3. BF 60 at 5-6. After determining the presumptive sanctions and weighing aggravating and mitigating factors, the Hearing Officer recommended that Cramer be suspended for eight months. Id. at 7.

After briefing and oral argument, the Disciplinary Board adopted the Hearing Officer's decision with one amendment – the Board concluded that, in regard to Count 1, the Association proved that Cramer acted with knowledge. BF 69. The Board unanimously recommended that Cramer be suspended for eight months. Id.

B. SUBSTANTIVE FACTS

Cramer was admitted to practice law in the State of Washington in 1979. BF 60, Findings of Fact (FF) 1.

1. Facts related to Counts 1 and 2 (misuse of client funds)

In May 2001, Frank Garcia hired Cramer to defend him against a lawsuit filed by Magnum Enterprises. BF 60, FF 2. Cramer agreed to represent Garcia on an hourly basis. Hearing Transcript (TR) 157. While

¹ The RPC were amended in September 2006. All citations are to the former version of the RPC.

Cramer gave Garcia a form fee agreement, Garcia never signed or returned the fee agreement and the two never agreed that any fee payment Garcia made to Cramer would be nonrefundable. TR 45, 60, 156; BF 60, FF 15.

On June 1, 2001, Garcia paid Cramer a \$1,000 advance fee deposit. BF 60, FF 6. Cramer did not deposit the \$1,000 into his IOLTA trust account; he deposited it into his general business account. BF 60, FF 7; Exhibit (EX) 101. But Cramer did not earn this \$1,000 until October 2001. TR 132-33; EX 106, 217.

Trial in Garcia's case was set for April 15, 2002. BF 60, FF 21. On April 9, Cramer called Garcia and threatened to withdraw from the representation unless Garcia immediately paid him a \$2,500 advance fee for the upcoming trial. BF 60, FF 19; TR 53. Garcia brought a \$1,500 check to Cramer's office that same day. BF 50, FF 8; EX 104 at Bates Stamp 000333. Cramer was experiencing financial difficulties at that time, as evidenced by eight overdrafts in his general account in April 2002. BF 60, FF 18; EX 101 at Bates Stamp 000273-274. He also owed back employment taxes to the Internal Revenue Service (IRS) and had a payment agreement with the IRS in effect during that month. BF 60, FF 16; TR 136-42, 215-18; EX 222. Cramer insisted that Garcia pay the entire \$2,500 by April 12, 2002. TR 54.

On April 12, 2002, Garcia gave Cramer another check for \$1,000.

BF 60, FF 11; EX 104 at Bates Stamp 000334. As of that date, Cramer knew that Garcia's trial was not going to go forward on April 15 because there were no available judges or courtrooms, but he did not communicate this to Garcia. BF 60, FF 22; TR 58-59. Despite knowing that he had not yet earned Garcia's \$2,500 advance fee, Cramer deposited Garcia's \$1,500 and \$1,000 checks into his general account on April 15, not into his trust account. BF 60, FF 9, 12; EX 101; EX 105.

On April 1, 2002, before receiving the \$2,500 from Garcia, Cramer had sent the IRS a \$1,000 installment payment on his past due employment taxes. EX 101 at Bates Stamp 000305 (check no. 6168). But when he deposited Garcia's \$2,500 into his general account on April 15, 2002, the account had a balance of \$77.80 and that IRS check had not yet cleared the account. EX 225; EX 101 at Bates Stamp 000273; TR 22. In fact, the balance in his general account had been insufficient to cover the IRS check since April 5, 2002. EX 225. Cramer admitted that he checked his account's balance by phone at times, but did not say whether he did so prior to depositing Garcia's checks. TR 165.

On the same day that Cramer deposited Garcia's checks into his general account, the bank paid four checks he had drawn on the account, including the \$1,000 IRS check. TR 22; EX 101 at Bates Stamp 000273. The IRS check would not have cleared Cramer's general account but for

his deposit of Garcia's \$2,500 into that account. BF 60, FF 20; TR 141-42. As of April 19, 2002, Cramer's general account was overdrawn and remained that way for the rest of the month. EX 101 at Bates Stamp 000302; EX 225. The Hearing Officer and Disciplinary Board found that Cramer knowingly and dishonestly deposited Garcia's advance fees in his general account and used them to pay business expenses. BF 60, Conclusion of Law (CL) re: Count 1; BF 69; TR 184. In fact, Cramer did not earn the \$2,500 advance fees until November 2002, seven months later. TR 133; EX 106.

2. Facts related to Count 3 (misrepresentation to the Association)

Garcia filed a grievance against Cramer and questioned whether Cramer had deposited his advance fees into trust or spent them. EX 211. Cramer's response did not address this issue, so disciplinary counsel asked him to produce his billing and trust records for Garcia. EX 212, 214. In response, Cramer provided a copy of his Columbia Bank trust account statement dated April, 30, 2002, and said, "Garcia's \$2,500.00 payment was deposited [in my trust account] on April 16, 2002." EX 216. But as can be seen from the above facts, this was not true.

Cramer reviewed Garcia's client file and billing statements prior to responding to the Association. BF 60, FF 24. The Hearing Officer and

Disciplinary Board found that Cramer knew from the billing statements that he received the funds from Garcia on April 9 and 12, 2002, and should have known he had not deposited Garcia's funds in trust when he responded to the Association. BF 60, FF 24-25; BF 69. Cramer's misrepresentation did not come to light until five months later when Garcia's wife faxed copies of the cancelled checks to the Association. TR 108-11; EX 104.

III. ARGUMENT

A. STANDARD OF REVIEW

The Court reviews findings of fact for substantial evidence. In re Disciplinary Proceeding Against Guarnero, 152 Wn.2d 51, 58, 93 P.3d 166 (2004) "Substantial evidence" exists if the record contains "evidence in sufficient quantum to persuade a fair-minded, rational person of the truth of a declared premise." In re Disciplinary Proceeding Against Bonet, 144 Wn.2d 502, 511, 29 P.3d 1242 (2001). A lawyer challenging factual findings on appeal must do more than "argue his version of the facts while ignoring testimony by other witnesses that supports each finding." In re Disciplinary Proceeding Against Kronenberg, 155 Wn.2d 184, 191, 117 P.3d 1134 (2005). Unchallenged findings of fact are verities on appeal. In re Disciplinary Proceeding Against Boelter, 139 Wn.2d 81, 96, 985 P.2d 328 (1999).

The credibility or veracity of a witness is best determined by the hearing officer before whom the witness appeared and testified. In re Disciplinary Proceeding Against Selden, 107 Wn.2d 246, 251, 728 P.2d 1036 (1986). Consequently, the Court will not substitute its evaluation of the credibility of witnesses for that of the hearing officer. See In re Disciplinary Proceeding Against Egger, 152 Wn.2d 393, 406, 98 P.3d 477 (2004). Furthermore, the hearing officer is entitled to draw reasonable inferences from the documents and testimony. See, e.g., In re Disciplinary Proceeding Against VanDerbeek, 153 Wn.2d 64, 82, 101 P.3d 88 (2004). Circumstantial evidence is as good as direct evidence for these purposes. Kronenberg, 155 Wn.2d at 191.

This Court will uphold the hearing officer's conclusions of law if they are supported by the findings of fact. In re Disciplinary Proceeding Against Haley, 157 Wn.2d 398, 406, 138 P.3d 1044 (2006).

The Court gives serious consideration to the Board's recommended sanction and will hesitate to reject a unanimous recommendation in the absence of clear reasons for doing so. In re Disciplinary Proceeding Against Poole, 156 Wn.2d 196, 209-10, 125 P.3d 954 (2006).

B. CRAMER IMPROPERLY ATTEMPTS TO INFLATE THE BURDEN OF PROOF

Cramer cites In re Disciplinary Proceeding Against Marshall, 160 Wn.2d 317, 352, 157 P.3d 859 (2007), for the proposition that the Court presumes any licensed and practicing attorney maintains the high morals of the profession and that this presumption is only rebutted by proof beyond a clear preponderance of the evidence. RB at 15, 17-18 (emphasis added). But this citation is to the dissent in Marshall, which cited In re Disciplinary Proceeding Against Little, 40 Wn.2d 421, 430, 244 P.2d 255 (1952), for the proposition. The cited portion of Little was later overruled because it inflated the Association's burden of proof over that set forth in the ELC. Guarnero, 152 Wn.2d at 61-62. The Association bears only the burden of establishing an act of misconduct "by a clear preponderance of the evidence." ELC 10.14(b) (emphasis added). On appeal, the "substantial evidence" standard requires the reviewing body to view the evidence "in the light most favorable to the party who prevailed in the highest forum that exercised fact-finding authority," Sunderland Family Treatment Services v. City of Pasco, 127 Wn.2d 782, 788, 903 P.2d 986 (1995), not in the light most favorable to a respondent lawyer who has been found to have committed misconduct.

C. THE HEARING OFFICER PROPERLY FOUND THAT CRAMER KNOWINGLY FAILED TO DEPOSIT GARCIA'S INITIAL FEE DEPOSIT INTO TRUST

Cramer argues that the only reasonable conclusion that can be drawn from his failure to deposit Garcia's initial \$1,000 payment into trust is that he and Garcia agreed that payment was a nonrefundable fee, and his deposit of the payment into his general account was therefore not a violation. RB at 14.² In the alternative, he argues that he was merely negligent in not communicating the nonrefundable nature of the fee to his client. *Id.* at 18. But these arguments were rejected by the Hearing Officer and the Disciplinary Board. Cramer is essentially asking the Court to reweigh the evidence. The Court should decline to do so.

While Cramer argues that there must have been a meeting of the minds, or else he would not have deposited Garcia's advance fee deposit into his general account (RB at 14), his client was unaware of any such agreement. Garcia testified that there was no discussion about the nonrefundable nature of the fee and no agreement. TR 45, 60. Cramer had no specific recollection of such an agreement, he simply speculated

² Cramer assigns error to several conclusions of law, but does not assign error to the specific findings of fact that underlie those conclusions. RB at 2-3. In order to challenge findings of fact, it is incumbent on the appellant to present argument about why specific findings of fact are not supported by the evidence and to cite to the relevant portion of the record to support that argument. In re Disciplinary Proceeding Against Whitney, 155 Wn.2d 451, 466-67, 120 P.3d 550 (2005). Unchallenged findings of fact are verities on appeal. Boelter, 139 Wn.2d at 96.

there must have been one. TR 156-57, 172. And he now concedes the absence of a written, signed fee agreement with Garcia. RB at 14. The Hearing Officer was entitled to reject Cramer's speculative explanation and find that there was no agreement that the initial \$1,000 payment was nonrefundable, and that Cramer should have known that he was dealing improperly with client funds when he had no written fee agreement and nevertheless deposited Garcia's funds in his general account. See In re Disciplinary Proceeding Against Whitt, 149 Wn.2d 707, 722, 72 P.3d 173 (2003) (“[A] hearing officer is not bound by various explanations if he or she is not persuaded by them.”); In re Disciplinary Proceeding Against Dann, 136 Wn.2d 67, 78-79, 960 P.2d 416 (1998) (Court will not disturb factual findings made by a hearing officer upon conflicting evidence). The fact that Cramer gave Garcia a blank fee agreement does not alter this analysis. Garcia never signed or returned it and there is no finding that Cramer explained its terms. See BF 60, FF 3.

Without an explicit agreement, the funds paid by Garcia were client property until earned. See In re Disciplinary Proceeding Against DeRuiz, 152 Wn.2d 558, 574, 99 P.3d 881 (2004) (even availability retainers are nonrefundable only when the client so agrees). The conclusion that Cramer knowingly violated RPC 8.4(c) and RPC 1.14(a) when he deposited this payment in his general account before it was

earned is supported by the findings. The definition of “knowledge” in this instance includes the alternative that the lawyer “should have known” he was acting improperly with client property. In re Disciplinary Proceeding Against McKean, 148 Wn.2d 849, 865, 64 P.3d 1226 (2003); accord In re Disciplinary Proceeding Against Holcomb, 162 Wn.2d 563, 585, 173 P.3d 898 (2007) (definition of “knowledge” in conflict of interest cases includes the requirement that the lawyer should have known that a conflict existed). Here, the Hearing Officer reasonably could conclude that Cramer should have known Garcia had not signed the fee agreement and that his use of his client’s funds before they were earned was improper. See In re Disciplinary Proceeding Against Longacre, 155 Wn.2d 725, 744, 122 P.2d 710 (2005) (a hearing officer’s factual finding regarding a lawyer’s state of mind should be given great weight on review). This finding should not be disturbed.

D. THE HEARING OFFICER PROPERLY FOUND THAT CRAMER KNOWINGLY FAILED TO DEPOSIT GARCIA’S ADVANCE TRIAL PAYMENTS INTO TRUST

Cramer argues that the Hearing Officer and Disciplinary Board incorrectly found that he knowingly deposited Garcia’s \$2,500 advance trial payments into his general account before they were earned, and asks the Court to find that his failure to deposit the payments into trust was just a one-time negligent error. RB at 19. But he merely restates his version

of the facts and ignores the other evidence that indicated he should have known he was dealing improperly with Garcia's payments. The Court should decline to reweigh the evidence.

The finding that Cramer should have known he was dealing improperly with Garcia's funds when he deposited them in his general account, and the conclusion that he thereby violated RPC 8.4(c) and RPC 1.14(a), is supported by the evidence regarding his financial dealings at the time. His general account was overdrawn on eight separate occasions during April 2002. BF 60, FF 17-18; TR 21; EX 101, Bates Stamp 274. He owed back employment taxes to the IRS. BF 60, FF 16; EX 222. He had written a \$1,000 check to the IRS on April 1, 2002, despite not having sufficient funds in the account to cover that check due to his having written another \$2,000 check to the IRS on March 22, 2002 that had not yet cleared the account. EX 101, Bates Stamp 000274, 000303 (check no. 6153), 000305 (check no. 6168); EX 225. The \$2,000 IRS check cleared Cramer's general account on April 5, 2002, leaving a balance of only \$581.67, a balance that continued to dwindle until Cramer deposited Garcia's advance trial payment in the account on April 15, 2002. EX 101, Bates Stamp 00274; EX 225. Cramer's \$1,000 IRS check cleared the account on April 15 only because of his deposit of Garcia's funds. BF 60, FF 20. And Cramer continued to insist that Garcia pay him the full \$2,500

advance trial payment for an April 15, 2002 trial even though he had already sent a notice of withdrawal to the court and notified opposing counsel that he would likely not be appearing on Garcia's behalf on the trial date. EX 201; EX R-12. In fact, Cramer gave the notice to the trial judge after receiving Garcia's first advance trial payment on April 9, 2002. TR 54, 175. And he knew that no judges were available for the April 15, 2002 trial prior to receiving Garcia's second advance trial payment on April 12, 2002. BF 60, FF 22; TR 179, 184. Further, Cramer appeared to know the status of his finances on April 12th because on that same day he told former Chief Disciplinary Counsel Anne Seidel that he needed thirty days to pay a \$1,423 settlement to a grievant in an unrelated matter. BF 60, FF 26; TR 202.

On these facts, the Hearing Officer reasonably could conclude that Cramer's deposit of Garcia's advance trial payments into his trust account was a knowing violation of RPC 8.4(c) and RPC 1.14(a). This conclusion should not be disturbed. Haley, 157 Wn.2d at 406 (Court will uphold the hearing officer's conclusions of law if they are supported by the findings of fact); Longacre, 155 Wn.2d at 744 (hearing officer's factual finding regarding a lawyer's state of mind should be given great weight on review).

E. THE HEARING OFFICER PROPERLY FOUND THAT CRAMER RECKLESSLY MISREPRESENTED THE DEPOSIT LOCATION OF GARCIA'S ADVANCE TRIAL PAYMENT

Cramer argues that the Hearing Officer and the Disciplinary Board erred in finding that his act of providing false information to the Association during its investigation was "more than negligent but not knowing." RB at 22; BF 60 at 6.³ He argues, as he did at hearing, that he was merely trying to fulfill his duty to respond by providing the only documents in his possession, and was simply mistaken when he represented that Garcia's funds had been deposited in trust. RB at 23. But his argument was rejected by both the Hearing Officer and the Disciplinary Board. BF 60 at 5-7 (CLs for Counts 1 and 2); BF 69; Whitt, 149 Wn.2d at 722; Longacre, 155 Wn.2d at 744.

The finding regarding Cramer's state of mind is well supported by the facts. At the time Cramer responded to the Association, he knew that Garcia had questioned whether he had deposited the funds in trust. BF 60, FF 24. He had reviewed Garcia's file and billing statements, so he knew he had received Garcia's payments on April 9 and 12, 2002, not on April 16, 2002, the date of the trust account deposit he falsely claimed was

³ "Negligence" is defined in the American Bar Association's Standards for Imposing Lawyer Sanctions (1991 ed. & Feb. 1992 Supp.) (ABA Standards) as failing 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 at 17 (definitions).

Garcia's. BF 60, FF 23-24. Yet, prior to providing the Association with a trust account bank statement for April 2002 and stating, without reservation, that the \$2,500 deposit reflected therein was Garcia's, Cramer did nothing to confirm the truth of his statement. He knew that his account statement did not disclose the source of the funds deposited on April 16, 2002, and so he did not know that the deposit to which he pointed consisted of Garcia's funds. It is undisputed that he could easily have confirmed whether he had deposited Mr. Garcia's advance fees into his trust account or general account. Or he could have indicated that he was unsure of the source of the deposit but believed it was Garcia funds. But instead, and despite the great adverse effect he attempts to ascribe to a burglary of his office (RB at 24), he unequivocally stated the trust account deposit was Garcia's. The misrepresentation was not discovered until Garcia's wife forwarded copies of Garcia's checks to the Association several months later and noted the account numbers contained in the endorsements on the back. TR 108-10. On these facts, The Hearing Officer could reasonably find that Cramer's act was "more than negligent but not knowing." BF 60 at 6 (CL re: Count 3).

Cramer had an obligation, under ELC 5.3(e), to provide a "full and complete response" to the Association. Given the limited resources available to investigate allegations of lawyer misconduct, "such

investigations depend upon the cooperation of attorneys.” In re Disciplinary Proceeding Against McMurray, 99 Wn.2d 920, 931, 665 P.2d 1352 (1983). Cramer disregarded his duty to ensure that the information he gave to the Association was accurate. This conduct was unreasonable. The Court should not disturb the conclusion that his misrepresentation violated RPC 5.3(e), RPC 8.4(c), RPC 8.4(d), and RPC 8.4(l).

F. THE COURT SHOULD AFFIRM AND ADOPT THE RECOMMENDED EIGHT-MONTH SUSPENSION

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. Dann, 136 Wn.2d at 77. Second, the ultimate sanction is arrived at by considering any aggravating or mitigating factors that might alter the presumptive sanction. Id. The Hearing Officer and Disciplinary Board correctly applied the ABA Standards to arrive at a recommendation of an eight-month suspension.

1. The Hearing Officer Properly Applied ABA Standard 4.12 to Cramer’s Misuse of Client Funds (as charged in Counts 1 and 2)

ABA Standards section 4.1 applies when a lawyer converts client funds (Count 1) and when a lawyer fails to deposit client funds into his trust account (Count 2) and provides that:

- 4.11 Disbarment is generally appropriate when a lawyer knowingly converts client property and causes injury or potential injury to a client.
- 4.12 Suspension is generally appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client.
- 4.13 Reprimand is generally appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client.
- 4.14 Admonition is generally appropriate when a lawyer is negligent in dealing with client property and causes little or no actual or potential injury to a client.

The Hearing Officer concluded that ABA Standard 4.12 applied to Cramer's violations charged in Counts 1 and 2, and that the presumptive sanction is suspension. BF 60 at 6.

Cramer argues that if he is found to have committed the misconduct charged in these counts, then either ABA Standard 4.13 or 4.14 should be applied because his conduct was no more than negligent and there was little if any injury because his legal fees ultimately exceeded Mr. Garcia's advance fee deposits. RB at 18. Cramer's argument regarding state of mind is addressed above at pages 9-13 and was rejected by both the Hearing Officer and the Disciplinary Board.

As to injury, he argues that his misconduct caused no actual injury to Garcia. RB at 18. But ABA Standard 4.12 does not require proof of ultimate actual harm; it applies whether there was actual or potential

injury. “[A] lawyer may be disciplined even if the misconduct does not cause any damage. The rationale is the need for protection of the public and the integrity of the profession.” In re Disciplinary Proceeding Against Halverson, 140 Wn.2d 475, 486, 998 P.2d 833 (2000); ABA Standard 1.1.

Yet Cramer’s conduct did cause injury. Garcia’s funds were spent before Cramer earned his fees. TR 132-33. Garcia could potentially have been permanently deprived of his funds if Mr. Cramer had become incapacitated, died, or gone bankrupt before he earned the fees advanced to him. There is also injury to the legal system when a lawyer mishandles trust accounts and client funds. In re Disciplinary Proceeding Against Anshell, 149 Wn.2d 484, 516, 69 P.3d 844 (2003).

When a lawyer knows or should know he is dealing improperly with client property and causes any injury or potential injury, the presumptive sanction is suspension under ABA Standard 4.12. The Hearing Officer so found. The Court should adopt this conclusion.

2. The Hearing Officer Properly Applied ABA Standard 7.3 to Cramer’s Misrepresentation to the Association (as charged in Count 3)

ABA Standards section 7.0 applies when a lawyer provides false information in a disciplinary investigation and provides that:

- 7.1 Disbarment is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit

for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system.

- 7.2 Suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.
- 7.3 Reprimand is generally appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.
- 7.4 Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence that is a violation of a duty owed as a professional, and causes little or no actual or potential injury to a client, the public, or the legal system.

Finding that Cramer acted more than negligently, but less than knowingly, when he provided false information to the Association, the Hearing Officer concluded that the presumptive sanction for Cramer's violations in Count 3 is reprimand under ABA Standard 7.3. BF 60 at 6-7.

Cramer argues that he should receive at most an admonition under ABA Standard 7.4 because his conduct was merely negligent and caused little or no injury to the legal system. RB at 28. His argument regarding state of mind is addressed above at pages 9-13 and was rejected by the Hearing Officer and the Disciplinary Board.

As to injury, the legal profession, the public, and the disciplinary system are injured whenever a lawyer provides a false answer to the Association during a grievance investigation. "Lack of cooperation can

only impede the investigation of complaints and undermine the public's confidence in the profession." McMurray, 99 Wn.2d at 931. Cramer's false answer cast doubt on his client's statements to the Association and might have camouflaged his misuse of client funds. In fact the misuse likely would have remained hidden had not Garcia's wife forwarded the cancelled checks to the Association nine months after the grievance in this matter had been opened. EX 104, 211; TR 109-11. Cramer caused at least potential injury to both his client and the legal system. The Court should adopt the Hearing Officer's conclusion that the presumptive sanction for Cramer's negligent submission of false evidence is reprimand.

3. The Hearing Officer Properly Applied the Aggravating Factors in This Matter

The Hearing Officer found four aggravating factors and no mitigating factors applied to the misconduct charged in Counts 1 and 2. BF 60 at 6-7. The Hearing Officer did not specifically state which aggravating factors applied to Count 3, but it appears that the same aggravating factors would apply to that count too. Cramer challenges the application of all of the aggravating factors. RB at 30.

a. The Hearing Officer Properly Applied the Aggravating Factor of Prior Discipline

In 1991, Cramer received a Reprimand for failing to inform the probate court that the deceased had divorced his client and the deceased's

minor daughter was the sole beneficiary of the estate. Instead, Cramer probated the estate as if the divorced wife were the sole beneficiary. As here, Cramer was found to have violated RPC 8.4(c), among other rules, for his misrepresentations to the court. EX 223, Appendix A.

In 1994, Cramer received a Censure for misusing client funds. His fee agreement entitled him to 33 1/3 percent of any recovery above \$17,000. Although the client only recovered a total of \$13,000, Cramer disbursed the full 33 1/3 percent of the award to himself as fees and ignored the client's concerns about the amount of fees he had taken until six weeks before the disciplinary hearing. EX 223, Appendix B. As here, Cramer was found to have violated RPC 1.14(a), because he failed to maintain his client's funds in trust.

Finally, Cramer was censured in 1994 for failing to ensure that a statutory warranty deed was recorded promptly. EX 223, Appendix B.

Cramer argues that his prior discipline does not constitute an aggravating factor because the offenses are too remote in time and are unrelated to his offenses in this matter. RB at 30.

Cramer cites no authority for the proposition that his prior discipline is too remote. As this argument is not supported by citation to legal authority, it need not be considered on appeal. DeHeer v. Seattle Post-Intelligencer, 60 Wn.2d 122, 126, 372 P.2d 193 (1962) ("Where no

authorities are cited in support of a proposition, the Court is not required to search out authorities, but may assume that counsel, after diligent search, has found none.”).

Even if the Court considers this argument, it should reject it. While the instant violations occurred eight years after he received his censures, the Court has held that prior offenses as old or older can be considered as aggravating factors. Marshall, 160 Wn.2d 346-47 (prior similar discipline was considered an aggravating factor even though it occurred nine and 18 years prior); In re Disciplinary Proceeding Against Greenlee, 158 Wn.2d 259, 276 n.2, 143 P.3d 807 (2006) (prior discipline found to be a substantial aggravating factor despite fact that discipline occurred more than 20 years prior); VanDerbeek, 153 Wn.2d at 94 (lawyer’s 1987 reprimand for similar misconduct considered an aggravating factor); In re Disciplinary Proceeding Against Cohen, 150 Wn.2d 744, 761, 82 P.3d 224 (2004)_ (10-year-old and 30-year old disciplinary offenses involving similar conduct were considered as aggravating factors). Even unrelated prior disciplinary offenses can be considered as aggravating factors. Greenlee, 158 Wn.2d at 266 n.1, 276 (unrelated prior discipline considered a “substantial” aggravating factor). Here, the current violations and two of Cramer’s prior disciplinary violations involve similar misconduct.

This would be Cramer's fourth disciplinary sanction. The Court should conclude that his prior discipline is a significant aggravating factor as to all counts.⁴

b. The Hearing Officer Properly Applied the Aggravating Factor of Substantial Experience in the Practice of Law

Cramer argues that the fact that he has practiced law since 1979 is not a significant aggravating factor. RB at 30. To the contrary, the fact that he has been practicing for so many years suggests that he should have known that he should deposit client funds into a trust account. He should also know that he is required to provide complete and truthful responses to requests for information in disciplinary investigations. Substantial experience in the practice of law should be found to be an aggravating factor as to all counts in this matter where Cramer not only has such experience, but has been disciplined before as well. Cf. Holcomb, 162 Wn.2d at 589 (lawyer's substantial experience found to be an aggravating factor despite fact that he had never been disciplined before).

c. The Hearing Officer Properly Applied the Aggravating Factor of Multiple Offenses

The Hearing Officer concluded that Respondent committed multiple offenses. This was appropriate because three counts of

⁴ ABA Standard 8.2 also appears to apply to Cramer's misconduct as he has previously been reprimanded and censured for similar misconduct and engaged in further acts that caused injury and potential injury to his client and the legal system. The presumptive sanction under that standard is suspension.

misconduct were found, the misconduct was comprised of violations of six different RPC, and the violations occurred at three separate times over a two-year interval. See, e.g., Poole, 156 Wn.2d at 225 (multiple offense aggravator applied when there were two counts of misconduct, one of which was based on over eight months of continued misconduct). This aggravating factor should be applied to all counts.

d. The Hearing Officer Properly Applied the Aggravating Factor of Refusal to Acknowledge Wrongful Nature of the Conduct

The Hearing Officer and unanimous Disciplinary Board applied the aggravating factor of refusal to acknowledge the wrongful nature of the conduct because Cramer misrepresented to the Association that he had deposited Garcia's advance trial payments in his trust account even though he had not. BF 60 at 7. Cramer argues this was incorrect because he was not trying to mislead anyone when he responded to the Association. RB at 30. Cramer's argument is dependent on a finding that his misrepresentation was an innocent mistake. But the Hearing Officer and Disciplinary Board rejected this testimony.

This aggravating factor is properly applied when the lawyer does not deny that he engaged in the activity in question but instead argues that the activity was not wrongful or was immaterial. Kronenberg, 155 Wn.2d at 196 n.8; Poole, 156 Wn.2d at 224. The evidence as found by the

Hearing Officer supports the conclusion that Cramer refused to recognize the wrongful nature of his misconduct. He did not deny that his statement to the Association about the deposit was untrue, but continued to maintain that he acted based on the best information he had and would do nothing different in the future. TR 260. Accordingly, this aggravating factor should apply to his failure to deposit Garcia's advance trial deposits into trust and to the violations charged in Count 3.

e. The Mitigating Factor of Absence of Dishonest or Selfish Motive Does Not Apply

Cramer claims that there was an absence of dishonest or selfish motive. RB at 31. But he had the burden of proof on this issue and no such conclusion was reached by the Hearing Officer or the Disciplinary Board. In re Disciplinary Proceeding Against Carpenter, 160 Wn.2d 16, 30, 155 P.3d 937 (2007) (respondent lawyer bears the burden of proving mitigating factors); Smith v. King, 106 Wn.2d 443, 451, 722 P.2d 796 (1986) (absence of a finding on an issue is presumed to be a finding against the party with the burden of proof). The Hearing Officer found that Cramer knowingly deposited Garcia's money in his general account rather than in trust and spent it to pay outstanding personal financial obligations. BF 60, FF 14, 15, 20. Cramer failed to prove that there was absence of a dishonest or selfish motive.

f. The Mitigating Factor of Delay in Disciplinary Proceedings Does Not Apply

Cramer implies, but does not actually argue, that he was prejudiced by the length of time between the charged misconduct and Garcia's filing of the grievance because it affected his ability to specifically recall events and he became the victim of a burglary. See RB at 3. He did not argue delay before the Hearing Officer or the Disciplinary Board, so it is waived. Rule 2.5(a) of the Rules of Appellate Procedure. Also, the Hearing Officer made no finding of delay. King, 106 Wn.2d at 451 (absence of a finding on an issue is presumed to be a finding against the party that had the burden of proof).

Even if the Court considers this issue, it should not find that delay is a mitigating factor because Cramer has not shown he was prejudiced by any delay. See In re Disciplinary Proceeding Against Juarez, 143 Wn.2d 840, 880-81, 24 P.3d 1040 (2001) (two-year delay in an attorney's disciplinary proceeding was not considered a mitigating factor in ascertaining the proper sanction where the attorney was not prejudiced by the delay; cf. In re Disciplinary Proceeding Against Haley, 156 Wn.2d 324, 341-42, 126 P.3d 1262 (2006) ("substantial" four-year delay between filing of grievance and filing of formal complaint and 15-year delay between violations and final decision was considered in mitigation).

g. The Aggravating Factors Support a Suspension Greater than the Minimum.

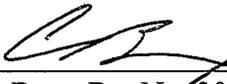
Generally, the minimum suspension is six months. Cohen, 150 Wn.2d at 762. A minimum suspension is warranted “where there are either no aggravating factors and at least some mitigating factors, or where the mitigators clearly outweigh any aggravating factors.” Halverson, 140 Wn.2d at 497. Here, there are four aggravating factors and no mitigating factors. This led the Hearing Officer to conclude that the recommended suspension should be greater than the minimum. The Disciplinary Board unanimously adopted the recommended eight-month suspension. The Court should also adopt that recommendation.

IV. CONCLUSION

The Court should affirm the conclusions of both the Hearing Officer and the unanimous Disciplinary Board that Cramer committed the misconduct charged in Counts 1 through 3 of the formal complaint, and adopt the recommendation that he be suspended for eight months.

RESPECTFULLY SUBMITTED this 27th day of May, 2008.

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