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SUPREME COURT
STATE OF WASHINGTON
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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE:

STEPHEN D. CRAMER,
Lawyer (Bar No. 9085).

CASE NO 2005373
Proceeding No 06#00020
PETITIONER'S BRIEF

COMES NOW Appellant Stephen D. Cramer, by and through his
counsel of record, Hawley Troxell Ennis & Hawley LLP, and files
Petitioner's Brief.

PETITIONER'S BRIEF

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I.

INTRODUCTION

This is an appeal from a decision of the Disciplinary Board of the Washington State Bar Association, which adopted the decision of Hearing Officer Edward Dunkerly, recommending an eight month suspension and a reprimand of attorney Stephen Cramer (“Cramer”). Cramer was accused of intentionally depositing client funds, totaling \$3,500, into his own business account on two occasions. He was also accused of intentionally providing misleading information to the Washington State Bar Office of Disciplinary Counsel (“ODC”).

Cramer admitted to negligently depositing \$2,500 in client trust funds into his separate business account but he provided evidence that the other \$1,000 was placed into the business account pursuant to its status as a non-refundable advance payment that was earned upon receipt. Cramer also denied intentionally misleading the ODC; rather, he provided the information he had and made a logical conclusion based on that information.

The Hearing Officer agreed that Cramer did not act intentionally, either with the incorrect deposits of the client funds or with the response to the ODC’s investigation. Still, the Hearing Officer concluded that Cramer “should have known” that he was dealing improperly with client property

when he made the incorrect deposit, he “should have known” he did not have his client’s signature/concurrence in order to treat the initial retainer as non-refundable, and he acted reckless or negligent when he responded to the ODC’s inquiries. Based on those findings, the Hearing Officer recommended an eight month suspension and a reprimand. The Disciplinary Board accepted those findings and recommendations and Cramer brought this appeal.

II.

ASSIGNMENTS OF ERROR

- A. The Disciplinary Board incorrectly found that Cramer violated the Rules of Professional Conduct when he placed the initial \$1,000 flat fee non-fundable payment into his general business account; that finding is not supported by the clear preponderance of the evidence
- B. Even if the \$1,000 deposit into the business account was a violation of the Rules of Professional Conduct, the clear preponderance of the evidence shows that the violation was at most negligent and should have only resulted in a reprimand or admonition.
- C. The Disciplinary Board incorrectly found that Cramer knowingly dealt improperly with client property when he accidentally placed the \$2,500 retainer into his general business account; the clear preponderance of the evidence shows that Cramer’s negligence in incorrectly depositing the funds should have only resulted in a reprimand or admonition.
- D. The Disciplinary Board improperly found that Cramer violated ELC 5.3(e), RPC 8.4(c), RPC 8.4(d), and 8.4(l) when he represented to the Office of Disciplinary Counsel that he had deposited the \$2,500 retainer into his trust account; that finding is not supported by the clear preponderance of the evidence.

- E. Even if the Disciplinary Board was correct in finding a violation of ELC 5.3(e), RPC 8.4(c), RPC 8.4(d), and/or RPC 8.4(l) based on the incorrect statement to the ODC, the clear preponderance of the evidence shows that the violation was “an isolated instance” of negligent conduct that did not cause actual or potential injury and therefore should result in an admonition, not a reprimand.
- F. The Disciplinary Board improperly weighted the aggravating factors and mitigating factors.
- G. The Disciplinary Board improperly imposed a suspension of eight months for a negligent error, which should only result in a reprimand or admonition.

III.

STATEMENT OF THE CASE

Unfortunately, some of the facts of this case, including the facts that could help clarify Cramer’s intent and his simple negligence, are unavailable to this Court and for two reasons: time lag and a burglary. First, Cramer was not informed of the Grievance filed against him until late February of 2004. Transcript of Hearing on January 29-30, 2007 before Hearing Officer Edward L. Dunkerly (“TR”) 61:2-5. Cramer’s actions that are now the subject of this action occurred in May and/or June of 2001 and in April of 2002. Due to the significant time lag, Cramer was left without the ability to make specific recall as to important facts in this case. In addition, it is undisputed that in January of 2004, prior to any Grievance having been filed or even intimated, a burglary occurred at Cramer’s office that resulted in the loss of the greater majority of his

financial records. TR 233:5-235:9 & 236:16-237:24 This burglary, as explained below, limited the financial evidence that Cramer could present to the ODC and to this Court. However, despite those evidentiary limitations, the facts in the record, as detailed below, do not support the suspension of Cramer.

In April or May of 2001, Cramer met with Garcia for the first time. TR 155:24-156:10. Garcia, who had been referred to Cramer by another attorney, was a subcontractor who was in breach of his contract with the general contractor and was hoping to minimize his liability. TR 81:7-82:15. Cramer and Garcia entered into an attorney client relationship, and Garcia gave Cramer an initial \$1,000 check. Cramer, as would be expected, has no specific memory of what transpired with Garcia regarding the \$1,000 and their fee agreement. TR 156:16. The undisputed facts are that (1) Cramer has a standard fee agreement that he discusses with all new clients (EX R-19), (2) the standard fee agreement contains a blank for a retainer and a blank for the portion of the retainer that is considered earned upon receipt and non-refundable (EX R-19), (3) when Cramer does an hourly fee case, he enters into a written fee agreement that often includes a portion of the retainer as non-refundable (TR 169:23-170:1), (4) the Garcia file does not contain a signed written fee agreement (TR 156:11-14), (5) Garcia paid \$1,000 to Cramer during one of their

initial meetings, (6) on or about June 1, 2001, the \$1,000 was deposited into Cramer's general business account and not into the client trust fund, (7) Cramer eventually earned the entire \$1,000 (EX #217 p.137-141), (8) Cramer subsequently sent Garcia monthly bills based on a \$180.00 hourly fee, and (9) Garcia paid those monthly fee bills.

Cramer testified regarding his modus operandi: he would have provided Garcia with the written fee agreement, he would have written the \$1,000 into the spot for retainer and into the spot for non-fundable retainer, and then he may have sent the fee agreement home with Garcia for his perusal, and possibly consultation with his wife, and then his signature. TR 156:11-25 Because Garcia paid the \$1,000 initial retainer, Cramer is confident Garcia was in agreement as to the language in the fee agreement about the retainer. TR 169:10-172:23 ("I would have told Frank Garcia that this a non-refundable deposit, it's a small amount, I'm going to represent you in the construction case, I'm going to bill you by the hour, let's go"). Because Cramer deposited the \$1,000 initial retainer into the business account, Cramer is confident he explained the non-refundable nature of the fee and received Garcia's consent. *Id* Cramer is unsure why he does not have the signed fee agreement and can only speculate that, as certainly happens, Garcia forgot to return a signed copy and Cramer forgot to follow up. TR 156:11-25. Because of the two-year

time delay, Cramer cannot remember the specifics of what was said and provided to Garcia regarding their fee agreement. *Id*

Garcia testified that Cramer did not follow his modus operandi. Garcia testified that Cramer completely failed to utilize a written fee agreement. TR 60:13-61:1 Instead, Garcia paid the \$1,000 “to cover the immediate work” on his case, with the expectation that more bills would come but without any discussion of how much he would be charged or how it would be calculated. TR 45:7-46:4 & 91:11-20 (Q. Do you recall how much an hour you were being charged? A It was never mentioned.”).

Cramer appeared in the case and proceeded to litigate the matter on behalf of Garcia. All subsequent legal fees were first deducted against the \$1,000 non-refundable payment. Garcia initially secured a very favorable result at a mandatory arbitration. TR 173:1-23. The plaintiff, however, requested trial de novo, which trial was set for April 15, 2002. *Id*; EX R-8, -10, & -11.

Cramer testified that he did not want to go to trial without a retainer to cover those extensive costs, so approximately a month before the trial date he would have started asking Garcia for the \$2,500 retainer. TR 174:2-21. After significant cajoling and just prior to the scheduled date for trial, Cramer received the retainer amount: one check for \$1,000

received on April 9, 2002 and one check for \$1,500 received on April 12, 2002. TR 52:23-55:11 & 176:2-177:5

On April 15, 2002, Cramer deposited the two checks in his business account, rather than the trust account. TR 24:3-22. Though he has no recollection of how the error occurred in April of 2002, Cramer has fully admitted that it was negligent to deposit the retainer in his business account instead of his trust account. TR 259:3-10.

Cramer's business account was low on funds at the time, but Cramer adamantly denies that he purposely deposited the \$2,500 into the business account or that he was even specifically aware of the account having insufficient funds. His April bank statement, showing the business account transactions for March of 2002, did not indicate the account was overdrawn. EX 101 p 271-272. He testified that he does not use on-line banking and does not regularly call the bank to check the account's status. TR 165:7-15 & 147:17-22. He testified that he would not have been aware in April that some checks had initially not cleared his account because of insufficient funds. TR 245:21-246:2; TR 145:4-146:5.

Cramer correctly billed his client regarding the \$2,500 retainer -- all future work was deducted against the retainer. EX #216 p 117. Eventually, however, Garcia became dissatisfied with Cramer because a second, binding, arbitration resulted in a larger liability. EX R-15

Cramer then withdrew from representing Garcia in June of 2003. There is no evidence that Cramer and Garcia had any further communications after Cramer's withdrawal.

In February of 2004, almost two years after Cramer's mistake regarding the \$2,500 retainer, Garcia and his wife filed a grievance with the Washington State Bar Association ("WSBA") EX #211. The grievance mentioned the possibility that Cramer had "likely not put [the \$2,500 retainer] into a trust account." *Id*. Based on that abbreviated accusation, the ODC, in a letter date May 7, 2004, requested that Cramer provide "additional information regarding this grievance" and "billing and trust records (including canceled checks, ledger cards, disbursal statement and monthly billings) for the grievant."

Cramer, unfortunately, could not provide the documents requested by the ODC. In January of 2004, prior to Garcia filing his grievance, Cramer's law office had been burglarized and his billing and other records almost entirely stolen EX R-4 & -22. Cramer did locate a trust account statement from April. EX #216 p 133. The statement listed a deposit in the amount of \$2,500, which was deposited on April 16, 2002. *Id*. There was no other similar April deposit to the trust account. *Id*. Therefore, Cramer assumed that the \$2,500 deposit was the deposit of the Garcia retainer. TR 210:15-212:8

In a letter to the ODC dated August 4, 2004, Cramer indicated that he had been burglarized and lacked most records EX #216. He attached the April trust account statement and stated, "Also attached is a copy of my Columbia Bank trust account statement dated 4/30/02. Mr. Garcia's \$2,500 payment was deposited on 4/16/02." *Id.* Cramer sent that trust account statement to the ODC in order to help resolve the speculation by Garcia. Cramer's assumption regarding the April 16, 2002 deposit, however, proved incorrect.

The ODC gathered the account statements for the business account and the trust fund account. After reviewing the records and locating the checks related to Garcia, the ODC discovered Cramer's error that had occurred on April 15, 2002. The ODC then noted the insufficient funds in the business account and accused Cramer of stealing the funds from Garcia by intending to use them to pay his general business expenses.

The WSBA brought a Complaint on April 3, 2006 alleging three counts of violations of the Rules of Professional Conduct ("RPC"): Count One alleged a violation of RPC 8.4(b), (c), and/or (i) due to the deposit of the \$1,000 on June 1, 2001 and 2,500 on April 15, 2002 into the business account; Count Two alleged a violation of RPC 1.14(a) for those same two deposits to the business account; and Count Three alleged a violation of ELC 5.3(e), RPC 8.4(c), (d), and/or (l) for the incorrect representation

made to the Office of Disciplinary Counsel regarding the deposit to the trust account on April 16, 2002.

A hearing went forward on January 29-30, 2007 before Hearing Officer Edward L. Dunkerly, with testimony received from various persons including Garcia and his wife and Cramer. On February 15, 2007, the Hearing Officer issued his Findings of Fact, Conclusions of Law and Hearing Officer's Recommendation. In his findings of fact, the Hearing Officer found that Cramer "gave Mr. Garcia a form fee agreement similar to the one admitted in this matter [and] Garcia took the fee agreement with him, did not sign it, and did not return it to [Cramer]. The fee agreement contained a provision that the initial funds paid were non-refundable." *See* ¶3. The Hearing Officer concluded, "There was no meeting of the minds or agreement by Mr. Garcia that the initial \$1,000 payment was non-refundable; [Garcia] did not sign and return the fee agreement. [Cramer] should have known that the \$1,000 should have been deposited to his trust account." *See* ¶15.

The Hearing Officer also concluded that Cramer "should have known that the payments by Mr. Garcia [of the \$2,500 retainer] should have been deposited into the trust account." *See* ¶14. With regard to the erroneous statement made to the ODC, the Hearing Officer found, "Respondent should have known when presenting the statement that it was

not Mr. Garcia's funds. He knew from his billing statements that the funds were paid on 12 April 2002 not 16 April 2002, that they were paid before the trial date of 15 April 2002. He reviewed Mr. Garcia's file before producing the bank statement and billing records for the Association " See ¶25.

Based on those findings, the Hearing Officer denied the WSBA's claim for Theft but found a knowing -- "should have known" -- violation of RPC 8.4(i) and 1.14(a) and a "negligent but not knowing" violation of ELC 5 3(e) and RPC 8.4(c), (d), and/or (l). See Conclusion of Law on Counts 1-3. The Hearing Officer found suspension to be the presumptive standard for a knowing violation of RPC 1.14(a) and 8.4(i). See p.7, lines 12-13. He then found four aggravating factors -- 9.22(a) prior disciplinary offenses, 9.22(d) multiple offenses (one when hired and another in April 2002), 9.22(g) refusal to acknowledge wrongful nature of conduct (failing to deposit initial payment to trust account), and 9.22(i) substantial experience in the practice of law -- and found "insufficient basis to depart from the presumptive standard of suspension " See p.7, lines 16-24 Therefore, the Hearing Officer recommended a suspension of eight months. See p.7, line 25. Lastly, the Hearing Officer found that a reprimand is the presumptive sanction for a reckless or negligent violation

of ELC 5.3(e) and RPC 8.4(c), (d), and/or (l), and the Hearing Officer recommended that sanction. *See* p.7, line 27 through p 8 line 2

On or about February 28, 2007, Cramer's counsel filed a Motion to Modify, Amend & Correct the Hearing Officer's Decision. On April 5, 2007, the Hearing Officer issued his Amended Findings of Fact, Conclusions of Law and Hearing Officer's Recommendations ("Amended Order") In his Amended Order the Hearing Officer made minor changes to the factual findings. He also made two changes to his legal conclusions: finding a knowing violation of RPC 8.4(c) instead of to RPC 8.4(i) and concluding that the 9.22(g) factor of refusing to acknowledge nature of conduct was established by "misrepresenting to the Association where he had deposited the Garcia advance fees" and not by "failing to deposit initial payment to trust account."

On October 3, 2007, the Disciplinary Board issued its unanimous Order Adopting Hearing Officer's Decision With Amendment That order accepted all the Hearing Officer's recommendations except it added one sentence to the Conclusion of Law on Count 1: "The Association proved by a clear preponderance of the evidence that the Respondent acted with knowledge " Cramer filed this timely appeal.

IV.

ARGUMENT

A. The \$1,000 Non-Refundable Advance Fee Was No Longer Garcia's Money And Placing Those Funds Into The Business Account Was Not A Violation Of RPC 1.14(a) or RPC 8.4(c); A Clear Preponderance of the Facts Show That, At Worst, Cramer Was Negligent Regarding the \$1,000 Fee.

As set forth in the Statement of the Case, the facts regarding the initial \$1,000 fee are not completely clear. The undisputed facts are (1) Cramer has a standard fee agreement that he discusses with all new clients, (2) the standard fee agreement contains a blank for a retainer and a blank for the portion of the retainer that is considered earned upon receipt and non-refundable, (3) when Cramer does an hourly fee case, he enters into a written fee agreement that normally includes a portion of the retainer as non-refundable, (4) the Garcia file does not contain a signed written fee agreement, (5) Garcia paid \$1,000 to Cramer during one of their initial meetings, (6) on June 1, 2001, the \$1,000 was deposited into Cramer's general business account and not into the client trust fund, and (7) Cramer eventually earned the entire \$1,000.

The dispute is about whether Cramer followed his modus operandi and gave Garcia the written fee agreement and discussed the non-refundable nature of the initial \$1,000 payment. The Hearing Officer, whose findings were adopted by the Disciplinary Board (hereafter

collectively, the “Board”), correctly concluded that Cramer did provide Garcia with a copy of the written fee agreement, per his regular practice. The Board, however, concluded that “there was no meeting of the minds or agreement by Mr. Garcia that the initial \$1,000 payment was non-refundable.” The Board further concluded that Cramer “should have known” that he was violating the trust fund by putting the \$1,000 into his business account.

Both of those conclusions are erroneous. First, the facts do suggest that Garcia never signed the fee agreement otherwise it would likely be in the file. However, the failure to get the fee agreement signed does not mean that there was no meeting of the minds about the non-refundable nature of the \$1,000 payment. Rather, the facts suggest that there was a meeting of the minds: it is not challenged that Cramer’s modus operandi is to discuss fees with his clients at initial meetings, his written fee agreement has a spot for a non-refundable portion of the retainer, the Board found that Cramer gave Garcia the fee agreement, Garcia paid the \$1,000, and Cramer treated the \$1,000 as a non-refundable fee by putting it into the business account. Based on those facts, the reasonable conclusion is that the parties did reach an agreement, but Cramer failed to follow up and get the signed fee agreement back from Garcia, which is not an odd occurrence for a solo practitioner handling an extremely large

number of cases. TR 231:18-232:7. Cramer had no reason to sneak around and hide from his client that the fee was non-refundable. The \$1,000 was a very small amount that would almost certainly be completely earned if Garcia pursued his case. These facts suggest that the parties did have at least an oral agreement and Cramer acted in accordance with that agreement

The only fact to dispute that probably outcome is Garcia's claim that he never even discussed fees with Cramer. The Board rejected Garcia's testimony, apparently finding his testimony less credible, and concluded that Garcia did get a copy of the written fee agreement. Yet the Board still found that there was no agreement. That conclusion is inconsistent and it flies in the face of all the evidence that was undisputed and/or credible. That conclusion also fails to presume Cramer's innocence and fails to require clear and convincing evidence. *See In re Disciplinary Proceeding Against Marshall*, 160 Wn 2d 317, 352, 157 P 3d 859 (2007) ("We presume any licensed and practicing attorney maintains the high morals of the profession. This presumption is only rebutted when facts are proved beyond a clear preponderance of the evidence") (citations omitted).

A non-refundable fee is no longer client money and can and should be deposited into the general business account. Therefore, as a matter of

law, Cramer was not in violation of RPC 1.14(a) (“All funds of clients paid to a lawyer or law firm . . .”) and was not in violation of RPC 8.4(c) (“dishonest acts”). Certainly, the clear preponderance of the evidence did not support a finding that the Garcia and Cramer did not have an agreement regarding the non-fundable fee. See *In re Disciplinary Proceeding Against Allotta*, 109 Wn 2d 787, 792, 748 P.2d 628 (1988) (“In attorney disciplinary proceedings, state bar counsel has the burden of establishing an act of misconduct by a clear preponderance of the evidence. ‘Clear preponderance’ is an intermediate standard of proof in these cases, requiring greater certainty than ‘simple preponderance’ but not to the extent required under ‘beyond reasonable doubt’ This intermediate standard reflects the unique character of disciplinary proceedings. The standard of proof is higher than the simple preponderance normally required in civil actions because the stigma associated with disciplinary action is generally greater than that associated with most tort and contract cases.”) (citations omitted).

Even if the Board correctly found that Garcia and Cramer never reached a final agreement regarding the non-refundable nature of the \$1,000 fee, the clear preponderance of the facts certainly cannot support the argument that Cramer “should have known” that he did not have an agreement. The facts only suggest that Cramer failed to get his client’s

signed fee agreement into the client file. It is a tremendous leap of logic to then conclude that Cramer “should have known” that Garcia had not agreed to the non-refundable nature of the fee. Cramer may have been negligent in failing to follow up on and get the signed fee agreement as proof of their verbal understanding. Or, Cramer may have been negligent if he failed to properly communicate the full meaning of the terms in the written fee agreement; *i.e.* Cramer thought he had an agreement but Garcia failed to fully pay attention or failed to fully appreciate what Cramer was explaining. These are all much more likely scenarios.

The Board completely fails to identify any reason why Cramer would have knowingly acted without Garcia’s consent. All Cramer had to do was point out the provision in the fee agreement to Garcia and have Garcia say okay. Cramer had no reason to knowingly hide the non-refundable nature of the \$1,000 fee. The Board never explains why Cramer would risk his employment in order to hide the non-refundable nature of an initial \$1,000 fee. No client would object to the non-refundable nature of a \$1,000 fee that would be earned within the first six hours of legal work. The Board could not have found by a clear preponderance of the evidence that Cramer “should have known that the \$1,000 should have been deposited to his trust account.” *See Marshall*, 160 Wn.2d at 352 (“We presume any licensed and practicing attorney

maintains the high morals of the profession. This presumption is only rebutted when facts are proved beyond a clear preponderance of the evidence.”) (citations omitted).

Thus, the Board’s conclusions of law regarding the initial \$1,000 payment are incorrect and should be reversed. The Court should find, with regards to the June 1, 2002 deposit of \$1,000, that Cramer was merely depositing his own non-refundable fees into a general business account and he did not violate RPC 1.14(a) or RPC 8.4(c); in the alternative, the Court should conclude that the clear preponderance of the evidence suggests only that Cramer was negligent in communicating the non-refundable nature of the fee and/or in securing Garcia’s signature on the agreement.

The ABA Standards For Imposing Lawyer Sanctions (“ABA Standards”) indicate that “reprimand is generally appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client” and “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.” Certainly, no actual harm was caused since the fees were all earned, and little if any potential injury was caused because \$1,000 is such a small sum and was undoubtedly going to be used in full during the representation.

B. Cramer's One-Time Accidental Deposit Of Trust Funds Into The Business Account Was Admittedly Negligent But Was Not Knowing And, Therefore, Merits Only A Reprimand, Pursuant To ABA Standards 4.13.

Similarly, the Board reached incorrect conclusions, unsupported by the clear preponderance of the facts, regarding the April 15, 2002 deposit of \$2,500. Through the analysis of the trust and general account funds, Cramer has become aware of his error with regards to the deposit of the \$2,500 retainer from Garcia. Cramer has readily admitted that he made an error and that error was a violation of RPC 1.14(a) because he had client funds and he failed to deposit them into his client trust fund. However, Cramer has also steadfastly claimed his innocence of any knowing acts. He did not knowingly commingle the trust funds with his business account. Rather, Cramer has made thousands of trust fund and business account deposits through the years, and it is no surprise that he has made an error in one deposit.

Mistakes happen. Funds are deposited in the wrong bank account because people are sloppy and may get distracted. Cramer has testified, unequivocally, that he merely made a mistake on April 15, 2002 when he deposited the two checks in the wrong bank account. Cramer readily admits that his negligence in erroneously depositing the funds is sanctionable. The proper sanction, under the ABA Standards, would be

reprimand for being negligent in dealing with client property and causing potential injury to the client but no actual injury

The WSBA, however, argues that Cramer knowingly placed the funds into his business account. The WSBA alleges that Cramer was in financial distress and needed the funds to pay his bills. Certainly, the evidence does suggest that the business account was overdrawn at certain points in April. However, the bank account statement for March of 2002 did not indicate that the business account was overdrawn and Cramer was not closely monitoring the account. EX 101 p.271-272.

The WSBA focuses on a check from the IRS that would not have cleared if the retainer had not be deposited in the business account; the WSBA obviously is insinuating that Cramer put the funds into his account in order to make sure that the IRS check cleared. The WSBA is arguing that Cramer risked his entire financial/employment future so that he could pay one IRS check

However, Cramer's actions upon receiving the retainer do not indicate that he was worried about the IRS check, which he had written on April 1, 2002. The facts show that Cramer received the first check from Garcia on April 9 for \$1,000. Cramer, if he was worried about his business account and the IRS check, would have rushed to the bank immediately to make the deposit. He knew the IRS check had been

outstanding for several weeks, but he did not rush to the bank to put additional funds into his account. The facts show that he did not deposit the check on the 9th, 10th, 11th, or 12th. He merely held it, unsure whether he would retain it. His actions are perfectly consistent with his stated reasons for asking for the retainer: he did not want to go to trial on April 15th without a sufficient retainer.

On April 12th, Cramer received the second check from Garcia. Again, he did not rush to the bank. Rather, he waited over the weekend and then deposited both checks. He took some checks to his trust fund and he took some checks to the business account. Unfortunately and accidentally, the Garcia checks were inadvertently included in the wrong deposit. Due to the time lag, Garcia cannot remember the specifics of what was going on that day that may have caused him to make the mistake. Did he have another project he was working on that had him preoccupied? Had he received other funds from a different client that he thought he was depositing? Those facts have long since been forgotten; it was one deposit among thousands and it occurred back in April of 2002.

In sum, the facts suggest that Cramer acted negligently when he deposited the checks in the wrong account. Certainly, a clear preponderance of the evidence does not support the finding that Cramer “should have known” he was depositing the checks in the wrong account.

See Allotta, 109 Wn 2d at 792. That conclusion assumes the worst and ignores the evidence suggesting that Cramer just made an isolated mistake, as we are all prone to do. *See Marshall*, 160 Wn.2d at 352 (“We presume any licensed and practicing attorney maintains the high morals of the profession.”).

The Court should find that Cramer did not violate RPC 8.4(c) (dishonest acts) and only negligently violated RPC 1.14(a). A reprimand is the presumptive sanction for Cramer’s negligence in dealing with client property that caused no actual injury but did create some potential for injury.

C. Cramer’s Reply To The Office of Disciplinary Counsel Did Not Violate Any RPC And Can Not Reasonably Be Considered Negligent; Even if Negligent, It Was Isolated And Caused No Harm So It Did Not Merit More Than an Admonition.

The Board further erred when it found that Cramer was “reckless or negligent” or “more than negligent but not knowing” when he sent a letter to the Office of Disciplinary Counsel, dated June 14, 2004, that stated, “Also attached is a copy of my Columbia Bank trust account statement dated 4/30/02 Mr. Garcia’s \$2,500 payment was deposited on 4/16/02.”

As part of their conspiracy theory, the WSBA alleged that his statement was intentionally misleading. The WSBA argued that Cramer

knew he had misused the funds and was foolish enough to think that if he just denied the misuse, then the Office of Disciplinary Counsel would take him at his word and decline to investigate further. That interpretation of the facts is not reasonable and presumes the worst. The Board correctly rejected that conspiracy theory, finding that the misstatement was not knowing. Thus, the Board agreed that Cramer was not trying to dupe the Office of Disciplinary Counsel into “taking his word for it.” Rather, as discussed below, Cramer was merely trying to fulfill his duty to respond to the investigation and he was drawing conclusions based on the only documents he had in his possession.

The Board, however, still concluded that Cramer’s statement was “reckless or negligent” and therefore violated multiple rules of professional conduct: ELC 5.3(e) - - promptly respond to any inquiry or request made under these rules for information relevant to grievances or matters under investigation . . .”; RPC 8.4(c) - - “engage in conduct involving dishonesty, fraud, deceit or misrepresentation”; RPC 8.4(d) - - “engage in conduct that is prejudicial to the administration of justice”; and RPC 8.4(l) - - “violate a duty . . . imposed by or under the Rules for Enforcement of Lawyer Conduct in connection with a disciplinary matter.” The Board made this factual finding: “Respondent should have known when presenting the statement that it was not Mr. Garcia’s funds.

He knew from his billing statements that the funds were paid on 12 April 2002 not 16 April 2002, that they were paid before the trial date of 15 April 2002. He reviewed Mr. Garcia's file before producing the bank statement and billing records for the Association." That factual finding and the related conclusions of negligence and of rules violations are all in error.

The facts do not support a finding of reckless or negligent action by Cramer. The starting point is the Board's correct conclusion that Cramer was not acting purposely or knowingly to mislead. Rather, Cramer was unaware of his mistake that occurred two years earlier. He knew that Garcia had speculated about a breach of the trust account. He did not believe that he had done anything wrong. He had a duty to respond to questions raised by the Office of Disciplinary Counsel. He went looking for the evidence to support himself and he felt fortunate that he was able to find it, considering most of his financial records had been stolen during the burglary of his office.

He located a bank statement for the period in question and he located a deposit amount that exactly matched the amount of retainer that Garcia had stated he gave to Cramer. The dates were almost identical. Therefore, Cramer made a logical assumption that the \$2,500 deposit represented the Garcia retainer. His actions were actions that anyone with

a clean conscience would take. He had no reason, at that time, to believe that he had made an error regarding his deposit of the Garcia retainer.

The Board incorrectly assumes that Cramer should have known that April 16th was an incorrect date: "He knew from his billing statements that the funds were paid on 12 April 2002 not 16 April 2002, that they were paid before the trial date of 15 April 2002." But that reasoning is lacking logic. A review of his billing statements may have indicated when he got the checks from Garcia but those statements would not have indicated the exact date when Cramer deposited the checks. In fact, the records shows that Cramer waited until April 15th to deposit the checks. It is not unreasonable for him to think he may have waited until April 16th. There was no other \$2,500 deposit for April, so that April 16th would most certainly have appeared to be the Garcia deposit

It is important to note that Cramer did not do anything more than provide the bank statement and state that the April 16th deposit was the Garcia retainer. He was simply providing the documents he had and stating what he believed was obvious. He knew that, no matter what he said, the WSBA could draw its own conclusions from the account statement, and he did not say anything that would have prejudiced the WSBA's ability to do its own evaluation of the documents

The WSBA will argue that Cramer should have done more to verify his statement and therefore he was negligent. The Rules and the WSBA's document request, however, did not require more. The WSBA merely asked for "additional information regarding this grievance" and "billing and trust records (including canceled checks, ledger cards, disbursal statement and monthly billings) for the grievant." Due to the burglary at his office, Cramer could not provide much documentation, but he provided what he could. In addition, he reviewed the documents he had and provided the logical conclusions from that documentation. The Rules for Enforcement of Lawyer Conduct do not require a lawyer to gather the documents from third parties:

Upon inquiry or request, any lawyer must:

- (1) furnish in writing, or orally if requested, a full and complete response to inquiries and questions;
- (2) permit inspection and copying of the lawyer's business records, files, and accounts;
- (3) furnish copies of requested records, files, and accounts;
- (4) furnish written releases or authorizations if needed to obtain documents or information from third parties; and
- (5) comply with discovery conducted under Rule 5.5.

Cramer complied with those rules and he complied with the WSBA's requests for information. Pursuant to the Rules, the WSBA was then able to subpoena the third-party bank records. The bank information, along

with check copies provided by Garcia, allowed the WSBA to discover that the April 16, 2002 deposit, despite its appearance, was not the Garcia retainer.

Therefore, the undisputed facts show that Cramer complied with the WSBA's letters and with the Rules requirements. Most importantly, he did what any logical person with a clean conscience would do: find the documents that support your innocence and provide them to the investigatory body. Therefore, those actions cannot be considered a violation of any rules of professional responsibility. Pursuant to ELC 5.3(e), he "promptly respond[ed]" to the inquires of the WSBA, he provided the "full and complete responses" that were available to him (which unfortunately were severely limited by the burglary), he furnished copies of the records he had, he complied with discovery, and he did not inhibit the WSBA's additional subpoenas to the third-party banks Pursuant to RPC 8.4(c), he did not "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." Pursuant to RPC 8.4(d), he did not "engage in conduct that is prejudicial to the administration of justice" His statement, which turned out to be incorrect, did not prejudice the WSBA's ability to independently evaluate the documents and if there was any prejudice, it was caused by non-negligent conduct and non-negligent conduct cannot be considered a violation of the rules. Finally,

pursuant to RPC 8.4(l), he did not “violate a duty . . . imposed by or under the Rules for Enforcement of Lawyer Conduct [, *i.e.* ELC 5.3(e)] in connection with a disciplinary matter.”

The Court should not find that Cramer acted negligently or recklessly when he sent the April 2002 account statement to the Office of Disciplinary Counsel and stated that the April 16th deposit was for the Garcia retainer. However, if the Court decides to agree with the Board’s conclusions regarding negligence, the Court should still find error in the Board’s decision to adopt the sanction of Reprimand. As the Board found, the duty that would be violated by negligently providing incorrect information to the Office of Investigations is found under ABA Standards 7.0 “Violations of Duties Owed As A Professional.” The facts of this case indicated that admonition, and not reprimand, would be the appropriate sanction: “Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence in determining whether the lawyer’s conduct violates a duty owed as a professional, and causes little or no actual or potential injury to a client, the public, or the legal system.” ABA Standards 7.4.

Here, Cramer is accused of an isolated act of negligence; the WSBA is arguing that he should have done more to make sure that he was not in error when he evaluated the account statement and found a deposit

that mirrored the known facts about the Garcia retainer. Cramer did not believe he needed to do more because he believed he was innocent and he believed the account statement was right on point. If his actions are considered negligent, they were certainly isolated and they did not cause any harm or even any potential harm. He knew that the WSBA would do its own investigation independent of what he stated.

The only way the WSBA can claim any “potential harm” is to argue that there was potential that the WSBA would have abdicated its investigatory responsibility. Cramer knew the ODC would not take his claim on face value; the ODC knew that due to the theft of his financial records, Cramer did not have all the facts and was only offering his opinion based on one account statement. As expected, the ODC did further investigation in order to uncover the truth. The sanction of reprimand is inappropriate in this case because it requires a finding of “injury or potential injury” ABA Standards 7.3. Thus, if the Court concludes that Cramer acted negligently, the act was isolated and caused “little or no actual or potential injury” and therefore Admonition is the generally appropriate sanction.

D. The Aggravating and Mitigating Factors Are Of No Real Significance In This Case.

The Board found too many aggravating factors. Certainly there have been disciplinary actions in the past, but they are remote and unrelated to the allegations in this matter. *See* ABA Standards 9.32(m) (mitigating factor for “remoteness of prior offenses”). Certainly, Cramer has practiced for many years. Neither of those factors is significant and neither should cause the Court to increase any of its presumptive sanctions.

The Board incorrectly included two aggravating factors, 9.22(d) multiple offenses and 9.22(g) refusal to acknowledge wrongful nature of conduct, that are not applicable. As stated repeatedly, Cramer recognizes he was sloppy with his client fund deposits and he needs to be more careful in the future. *See* ABA Standards 9.32(l) (mitigating factor for “remorse”). He was not attempting to mislead anyone when he responded to the Office of Disciplinary Counsel. He is also confident that he only deposited the \$1,000 in his business account because Garcia was in agreement. He has not failed to acknowledge the wrongful nature of his conduct.

Depending on its conclusions regarding the multiple issues raised above, this Court may conclude that Cramer committed multiple negligent

acts. However, the alleged negligent acts are all unrelated and do not indicate a need for increased punishment, particularly since there was an “an absence of a dishonest or selfish motive.” ABA Standards 9.32(b) (another mitigating factor)

Reviewed on the whole, the mitigating and aggravating factors are not particularly relevant to this case. Thus, after an evaluation of the aggravating and mitigating factors, the Court, when imposing sanctions, should impose the minimal sanctions

E. Cramer’s Negligence Merits Reprimand And/or Admonition, Not An Eight Month Suspension.

Without restating the arguments above, the facts do not support the WSBA’s allegations of a grand conspiracy by Cramer. In fact, the Board rejected those accusations. Still, the Board found that Cramer “should have known” he had erred with his trust account. The Board’s findings are not supported by a clear preponderance of the evidence. *See Allotta*, 109 Wn.2d at 792. Rather, the facts support a finding that Cramer made one isolated negligent act, which he readily admits, and that he also, at worst, was potentially negligent in two other unrelated areas. At worst, he was negligent in follow up with a client to get a fee agreement signed and/or in properly explaining the nature of the non-refundable fee. He was admittedly negligent in depositing checks to the correct bank account.

And at worst, he was negligent in his remarks to the ODC because he should have qualified his conclusions .

This is not a case where a client has been actually harmed in any way through the negligent acts. Cramer represented his client's interests and earned his fees and properly billed his fees. The ABA Standards provide that negligent acts should be punished with reprimands and admonitions, with admonitions for those situations where there is little or no harm. This Court should find that a suspension, let alone an eight month suspension, is not the correct sanction.

V.

CONCLUSION

For the reasons stated above, the Petitioner respectfully requests that this Court find that the correct sanction for his negligence is a reprimand or admonition and the Board's sanction of an eight month suspension should be vacated.

RESPECTFULLY SUBMITTED THIS 24th day of April, 2008.

HAWLEY TROXELL ENNIS & HAWLEY LLP

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Attorneys for Appellant

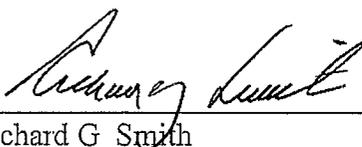
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of April, 2008, I caused to be served a true copy of the foregoing PETITIONER'S BRIEF by the method indicated below, and addressed to each of the following:

Francesca D'Angelo
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U.S. Mail, Postage Prepaid
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Richard G. Smith

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Sent: Thursday, April 24, 2008 3:34 PM
To: 'Tammy Miller'
Cc: Stephen C. Smith; Margo Cadmus; Loren Messerly; francescad@wsba.org
Subject: RE: Stephen D. Cramer / Case No. 2005373 (WSBA Bar No. 9085)

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Subject: Stephen D. Cramer / Case No. 2005373 (WSBA Bar No. 9085)

Dear Court Clerk:

Attached for filing in the above subject matter is the the **Petitioner's Brief** . If you have any questions regarding this matter or need further informatino, please telephone Stephen C. Smith at (208) 344-6000, or his assistant at (208) 388-4281.

COS: Francesca D'Angelo (via e-mail)

* * * * *

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