No. 201,001-6

SUPREME COURT OF THE STATE OF WASHINGTON

In re Disciplinary Proceedings Against
Young S. Oh.

Lawyer (Bar No. 29692)

LAWYER'S REPLY BRIEF

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Mr. Oh replies to the Association's Answering Brief as follows:

I. ARGUMENT

A. Conduct Relevant to Count 2 Resulted From Mistaken Belief.

The conduct at issue under Count 2 is Mr. Oh's deposit of client funds into an account ("Account 4714") that was not a client trust account during the early months of his law practice. *See* BF 220 ¶ 53. There is nothing more to the story under Count 2. There was no conversion of client funds for Mr. Oh's own use. There was no refusing disbursement of client funds when asked to do so by a client. There was no other ill-gotten gain by Mr. Oh through such deposits.

Contrary to what the Association would have this Court believe, the evidence can support only the following findings: (1) no client suffered injury as a result of deposit of client funds into Account 4714; (2) Mr. Oh acted under a mistaken belief as to how he was supposed to handle client funds in his possession for immediate disbursement; (3) he acted negligently, without knowledge and intent, and without any selfish or dishonest motive; and (4) after he enrolled himself in the Association's LOMAP, he timely took steps to correct his wrongful practices. The Association's attempt to portray Mr. Oh as a devious, crooked lawyer is simply unsupported by any evidence.

The testimony of the Association's former trust account audit

manager and expert witness, Trina Doty, is right on point. After thorough examination of Mr. Oh's records in this proceeding, she was in the best position to assess Mr. Oh's motives. While highly critical of Mr. Oh's handling of client funds, Ms. Doty frankly testified that she never formed the opinions that Mr. Oh's use of a business checking account for client funds was done with a design to misappropriate funds, TR 212:25-213:3; that Mr. Oh's use of the business checking account was done to serve some dishonest intent, TR 213:4-7; or that Mr. Oh's use of the business checking account was intended to cause harm to a client, TR 213:8-11.

1. Account 4714 was a Business Checking Account, But Not "His" Business Checking Account.

Mr. Oh challenges Finding of Fact ¶ 29 (BF 240) because the Hearing Officer referred to Account 4714 as "his" business checking account and thereby implied that Mr. Oh used the account for his personal and/or business purposes. However, there is no evidence supporting such implication. While Account 4714 was a business checking account, it was not used as "his" business checking account. It was used solely for client funds. *See* Brief of Appellant at pp. 28-29.

Clarity on this use is important not so much to exonerate Mr. Oh under Count 2 as it is to shed light on the absence of any dishonest, selfish or other improper motive. While Account 4714 may not have been a

client trust account, Mr. Oh was doing nothing with it that was dishonest or selfish, or that was otherwise for his own benefit. He simply used the account exclusively for client funds as if it were a trust account, with the mistaken belief that he may use the account given the short duration he held client funds deposited therein. TR 507:24-508:3.

The Association does not contend that Mr. Oh was wrongfully converting or using funds in Account 4714 for his own purposes. It argues that Mr. Oh deposited too much of his earned fees in the account to cover bank charges. Answering Brief at 22. The Association points to Mr. Oh's alleged deposit of $713 in earned fees into the account in March 2001, when the account fees for that month amounted to merely $192, as a violation of RPC 1.14(a). *Id.* However, deposit of such funds to cover account charges is not grounds for holding misconduct on the part of Mr. Oh for several reasons.

First, the Association has never alleged that Mr. Oh should be disciplined for depositing his own funds into a client account.[1] The sole charge under RPC 1.14(a) is Count 2, which alleges that he failed to place and/or keep client funds in a client trust account. BF 220 ¶ 53. It is too late now to raise a new claim of misconduct. *See* ELC 10.7; *In re*

[1] In this proceeding, the Association has filed four complaints – an initial complaint and three amended complaints. BF 2, 21, 171 and 220.

Disciplinary Proceedings Against Bonet, 144 Wn.2d 502, 510, 29 P.3d 1242 (2001).

Second, former RPC 1.14(a)(1) expressly allowed a lawyer to deposit his own funds into a client trust account to cover bank charges.

Third, Mr. Oh cannot be criticized for depositing or leaving a small amount of extra funds in Account 4714 to cover future bank charges. He was not trying to hide personal funds from creditors or engaging in any other improper activity.

2. No Evidence Shows Any Actual Injury to Any Client.

There is no evidence that supports the Hearing Officer's finding in Finding of Fact ¶ 35 (BF 240) that any client suffered actual injury as a result of Mr. Oh's use of Account 4714 for client funds. The Association does not point to any evidence which could support such a finding.

The Association contends that there was substantial evidence to support the Hearing Officer's finding that Mr. Oh's use of Account 4714 caused "potential" injury to a client. Answering Brief at 23-24. It first contends that funds in Account 4714 were subject to attachment by Mr. Oh's creditors, *id.*, but the Association presented no evidence that Mr. Oh had any creditors to which such funds were potentially exposed. With the burden of proving actual or potential injury by a clear preponderance of the evidence. *See* ELC 10.14(b), the Association must do more than make

hypothetical or theoretical suggestions. Its arguments and the Hearing Officer's findings of potential harm from possible attachment by creditors must have some evidentiary basis in fact. *See In Re Disciplinary Proceeding Against Trejo,* 163 Wn.2d 701, 720, 185 P.3d 1160 (2008). But there is no evidence on which to find that Mr. Oh had any creditors to which funds in Account 4714 were exposed.

Second, the Association gives great emphasis to the fact that Account 4714 was overdrawn from time to time. While overdrawing Account 4714 may be inexcusable, such fact does not by itself establish actual or potential injury in this proceeding. No check drawn on Account 4714 was ever rejected for insufficiency of funds, TR 520:9-18, and as a result, no client was injured or exposed to injury by overdrafts.

3. The Hearing Officer's Finding of Mr. Oh's Mental State Should Receive No Deference.

The Association contends that this Court should grant "great weight" to the Hearing Officer's Finding of Fact ¶ 47 (BF 240) concerning Mr. Oh's mental state, Answering Brief at 24, but there has to be substantial evidence supporting such finding. The Association attempts to support this finding of knowledge by stringing together unconnected, irrelevant, circumstantial evidence that, even when put together, does not measure up to "substantial." *Id* at 24-25.

The fact that Mr. Oh was an accountant does not make it more likely that he knew that he was dealing improperly with client funds. The requirement for putting client funds into a trust account is specific to lawyers, and there was no evidence (or authority) that would suggest that accountants are aware of such requirement by virtue of their profession.

The fact that Mr. Oh used a trust account in his escrow practice provides no support for a finding that he knew he was dealing improperly with client funds. To the contrary, this fact highlights Mr. Oh's mistaken belief that escrow funds held for some duration must go into an interest-bearing trust account, while funds held for prompt disbursement did not.

The annual requirement that Mr. Oh report compliance with former RPC 1.14 provides no support for a finding that he knew he was dealing improperly with client funds. While such contention may apply to an experienced lawyer who has made that report for years, it does not apply here for Mr. Oh, who at the time in question was a new, inexperienced lawyer who had filed just one, maybe two, of those annual reports. This is hardly enough to persuade a fair-minded, rational person that Mr. Oh must have known based on such filing(s) that he was dealing improperly with client funds.

4. Mr. Oh Timely Implemented Corrective Measures.

The Association offers no explanation as to why the decisions of

the Hearing Officer and the Disciplinary Board are silent as to the fact that Mr. Oh enrolled in LOMAP and then followed its advice by establishing and using an IOLTA account for client funds.

The Association attempts to deflect attention by asserting that Mr. Oh "continued for months after his LOMAP consultation to deposit client funds in accounts that were not trust accounts." Answering Brief at 26. However, this contention is without support. The evidence is undisputed that while Mr. Oh contacted and initially consulted with LOMAP in April 2002, the consultation was not completed until June 2002 due to the vacation schedule of the person at LOMAP with whom Mr. Oh met. *See* EX R-17; TR 501:1-22. As Ms. Doty confirmed, Mr. Oh phased out his use of Account 4714 for client funds in July 2002. TR 208:6-210:3.

Mr. Oh's enrollment in LOMAP and subsequent correction of his use of Account 4714 should carry great weight. It shows that he was trying to do the right thing and never intended or knew that he was doing anything wrong by putting client funds into that account. This Court should recognize the significance of Mr. Oh's corrective action for purposes of both his mental state and as a mitigating factor.

B. <u>The Focus of Count 3 is the Completeness of Mr. Oh's Records</u>.

The conduct at issue under Count 3 is Mr. Oh's record-keeping for client funds that he deposited into Account 4714. BF 220 ¶ 54. The crux

of Count 3 is whether Mr. Oh's records were enough to constitute "complete records" under the vague standard of former RPC 1.14(b)(3). While it is undisputed that Mr. Oh maintained a check register, bank statements, copies of checks and copies of other back-up documentation, the Association alleges that no running balance on that check register, Mr. Oh's lack of and/or unique way of ledger keeping, lack of documentation memorializing reconciliations of various records, and/or lack of certain detail within the documentation that Mr. Oh kept, constitute deficiencies on which misconduct should be found under former RPC 1.14(b)(3). In this light, the focus under Count 3 is properly framed on the records Mr. Oh created and maintained.

The Association, however, portrays Mr. Oh's record-keeping as something it is not. There is no evidence that suggests that any incomplete record-keeping advanced a scheme to convert client funds or to serve some dishonest or selfish purpose. There was no injury to any client. There was no obstructing the Association's investigation into Mr. Oh's records and trust account practices. While critical of Mr. Oh's record-keeping, Ms. Doty never formed the opinion that Mr. Oh's record-keeping was done with a design to misappropriate client funds. TR 198:4-7.

1. Former RPC 1.14(b)(3) Was So Vague It Was Replaced.

The Association cites *Rogers v. Mississippi Bar*, 731 So.2d 1158,

1164 (Miss. 1999) as authority that would suggest that the "complete records" standard of former RPC 1.14(b)(3) was not vague. Answering Brief at 28. However, neither the term "complete records" nor former RPC 1.14(b)(3) is even mentioned in that decision.

The best authority is the committee of highly regarded practitioners, professors and non-lawyer citizens from around Washington State appointed by the Association's Board of Governors in 2003 to perform a comprehensive review of our Rules of Professional Conduct and recommend changes. Brief of Appellant Appendix E at pp. 4-5. The Special Committee for Evaluation of the Rules of Professional Conduct (the "Ethics 2003 Committee"), and a subcommittee thereof, found former RPC 1.14(b)(3) to be vague enough that it needed replacement with the very specific new RPC 1.15B. *Id.* at p. 169. *See also* Brief of Appellant Appendix F at p. 12 and Appendix G at p. 127.[2]

2. The Association's Pursuit of Count 3 is Disproportionate.

The Association applies a double-standard to the prosecution of Count 3 that is not permitted by the proportionality rule governing sanctions for lawyer misconduct. The proportionality rule requires that a sanction for lawyer misconduct be proportionate to sanctions imposed for

[2] Ms. Doty, who sat on the subcommittee that rewrote former RPC 1.14(b)(3) into RPC 1.15B, TR 111:5-14, testified that the former rule had to be replaced "because it didn't provide specific enough guidance to lawyers." TR 111:15-19; *see also* TR 112:16-18.

similar misconduct. *See, e.g.*, *In re Disciplinary Proceeding Against Gillingham*, 126 Wn.2d 454, 469, 896 P.2d 656 (1995) ("We have previously emphasized our commitment to consistency in attorney discipline cases."). The Association's prosecution of Count 3 for poor record-keeping is disproportionate to what the Association normally does when it finds poor record-keeping.

Ms. Doty testified based on her experience as a trust account auditor and audit manager for the Association from 2001 through 2007, about the Association's response when it finds poor, inaccurate or even non-existent record-keeping by a lawyer in the course of auditing a trust account. TR 189:4-196:15. According to the Association's "protocols," TR 189:24-190:2, in "non-serious matters" the Association's response was typically to educate and counsel the lawyers on what they should do. TR 189:24-190:24. In serious matters, the Association "usually required them to show in six months that they did correct the violation." TR 190:21-24. Ms. Doty went on to explain that in the context of record-keeping, when she found a serious violation in the course of her examinations, she generally gave the lawyer six months to correct violations. TR 191:6-192:8. This is true even with sole practitioners who kept their record-keeping "in their heads." TR 192:9-193:24. When a lawyer corrected those serious violations to the Association's satisfaction, the audit process

was dismissed. TR 192:5-8.

In her years with the Association, Ms. Doty referred poor record-keeping for disciplinary action only once. TR 193:25-196:15. That one matter was referred for disciplinary action because, despite her multiple trips back to the lawyer's office, the lawyer repeatedly failed to follow the Association's instructions. Ms. Doty described that matter as follows:

> A. . . . I remember one in particular where I kept going back and asking him to – it was a recordkeeping issue – a lawyer in Tacoma, I kept going back and trying to get him to give me the client ledgers, client ledger reconciliations. He had little index cards that he would do. Which is fine, it doesn't matter what the ledger is on. But they were incomplete. . . . So I gave him six months to adjust all that, and he didn't, and more time and he still didn't and he still didn't. So that got referred to the Office of Disciplinary Counsel.
>
> Q. Is that the only matter in which you found recordkeeping to be the issue after performing a random audit that you ultimately referred it to Disciplinary Counsel?
>
> A. It's the only one I can think of sitting here.
>
> Q. Okay. It sounds like in that you went back repeatedly and he just kept not doing it?
>
> A. Correct.

TR 195:2-196:2.

Here, Mr. Oh was never counseled on his record-keeping, TR 196:16-197:5; and he was never given an opportunity to correct deficiencies found by the Association. TR 197:6-17. The Association simply proceeded with prosecution on Count 3, which was a disproportionate response in view of its own "protocol" applied in finding

the same misconduct in the audit context.

The only response the Association can give is that Mr. Oh makes "highly selective citation" to Ms. Doty's testimony, Answering Brief at 46, which is the reason for the detailed reference to Ms. Doty's testimony above. To make the point abundantly clear and transparent, and without mere citation, here are Ms. Doty's own words that are directly on point:

> Q. Do you have an opinion as to whether if you had found what you found here in the course of a random audit of Mr. Oh's account that you would have provided him with counsel and advice?
>
> A. Yes, we would have.
>
> Q. You would have provided him with counsel and advice and an opportunity to correct your perceived deficiencies, correct?
>
> A. Yes.
>
> Q. And you would not have turned him over to the Chair of the Disciplinary Board until after repeated failure to follow your advice and counsel; correct?
>
> A. Yes.

TR 213:19-214:6. The testimony of lawyer Cindy Toering, the Association's witness who worked for Mr. Oh during the period at issue, shows that had he received guidance on record-keeping, he would have responded positively. *See, e.g.*, TR 169:4-24 ("found Mr. Oh to be very receptive to [my] suggestions"); TR 132:6-25 (Mr. Oh "did as much as he could" to address suggestions from LOMAP). The Association's prosecution of Mr. Oh for record-keeping deficiencies without opportunity

to correct those deficiencies, is by itself entirely disproportionate.

3. The Association Mischaracterizes Ms. Doty's Testimony Concerning the Nature of Examples That She Prepared for Tracing Client Funds in Mr. Oh's Possession.

The testimony from Ms. Doty quoted extensively on page 15 of the Brief of Appellant does not reflect Ms. Doty's review of "some cases" or the "easiest examples," as the Association contends. Answering Brief at 31. That testimony concerns an exhibit that Ms. Doty prepared for the purpose of the hearing, Exhibit A-27, in which she presented documents from ten transactions in which Mr. Oh deposited client funds into Account 4714. While she did refer to these ten transactions as "examples," TR 67:10, Ms. Doty confirmed that these examples were "a representative sample of the transactions that [she was] trying to track." TR 100:19-22. She said the same about Exhibit A-26, another exhibit that she prepared for the hearing. TR 101:12-23 ("trying to capture a representative sample of those transactions").

For each of the ten representative transactions reflected in Exhibit A-27, and for each of the six representative transactions reflected in Exhibit A-26, Ms. Doty was "able to assemble a line of documents in order based on deposit all the way through disbursement." TR 101:4-7. In other words, in each of those sixteen representative transactions, she was "able to trace the money from the moment it went into Mr. Oh's

hands until the moment it went out." TR 101:8-11; *see also* TR 101:24-102:2. With just "several hours of work," Ms. Doty "would have been able to have completed documentation" "[i]f Mr. Oh dropped dead." TR 102:9-11. For all the faults that may be found with Mr. Oh's record-keeping, the bottom line is that the records Mr. Oh kept enabled successful tracing of client funds in his possession.

4. No Evidence Supports the Finding of Knowledge under Count 3.

Once again the Association makes the illogical jump in trying to defend Finding of Fact ¶ 47 (BF 240) of arguing that the mere fact that Mr. Oh is an accountant means that he must have known that his record-keeping of client funds was incomplete. No inference can reasonably be drawn as to Mr. Oh's knowledge of requirements under the Rules of Professional Conduct based on the fact that he is an accountant. The RPCs have no application to accountants and to suggest that an accountant would or should know what "complete records" means in RPC 1.14(b)(3) stretches logic too thin. If the Ethics 2003 Committee found that the rule provided insufficient guidance to lawyers, it cannot be inferred that an accountant would fully understand what it was intended to mean.

C. A One-Year Suspension Would Be Overly Harsh and Disproportionate.

The Association offers no substantive explanation as to why Mr. Oh should still receive a one-year suspension even though the holding of serious misconduct on the forgery charge, on which that harsh sanction was presumably based, was reversed. We say "presumably" because neither the Hearing Officer nor the Board explained how she or it arrived at the length of suspension recommended. Neither offered an important count-by-count analysis of what the sanction should be on each count on which misconduct was found. The Hearing Officer and Board also omitted any assessment of proportionality, which is the important third step in determining an appropriate sanction.

We are thus left to guess how the Hearing Officer and Board arrived at the length of their recommended suspension. While the Hearing Officer's recommendation of a one-year suspension can be rationalized by considering that she held Mr. Oh guilty on the serious charge of forgery, the Board's affirmation of that sanction recommendation, notwithstanding its reversal of the Hearing Officer's forgery decision, cannot. Without the forgery count, any suspension, let alone one for a full year, would be overly harsh and disproportionate to sanctions in like or more egregious

cases. Given all the circumstances of this proceeding, the appropriate sanction, if any, should be a reprimand.

1. There is No Finding That Mr. Oh Knew the Consequences of Alleged Trust Account Misconduct.

The Association relies entirely on Finding of Fact ¶ 47 (BF 240) as the state-of-mind finding supporting application of the presumptive sanction set forth in ABA *Standards for Imposing Lawyer Sanctions* 4.12. However, even if that finding were supported by substantial evidence, it does not support a conclusion of knowledge for sanction purposes.

Finding of Fact ¶ 47 states that Mr. Oh knew that he was dealing improperly with client funds. However, knowledge of wrongdoing is not the standard when considering a lawyer's state of mind for presumptive sanction purposes. *In re Disciplinary Proceeding Against Eugster*, 166 Wn.2d 293, 318, 209 P.3d 435 (2009). The standard is whether he knew the consequences of his wrongdoing. *See id.* at 319. "Knowledge" is defined as the "conscious awareness of the nature and attendant circumstances of the conduct but without the conscious object or purpose to accomplish a particular result." ABA *Standards*, Definitions.

The Hearing Officer made no findings as to Mr. Oh's state of mind relative to the consequences that could flow from his conduct. As a result, there is no finding on which a conclusion can be based that Mr. Oh was

consciously aware of adverse consequences that could flow from placing client funds in a non-trust account or from incomplete record-keeping. Without a finding of knowledge for sanction purposes, only the negligence standard of ABA *Standards* 4.13 can be applied here. As an inexperienced lawyer, Mr. Oh acted on the mistaken belief that what he was doing was proper, which is negligence for sanction purposes. *In re Disciplinary Proceeding Against Carmick*, 146 Wn.2d 582,604, 48 P.3d 311 (2002).[3] Under ABA *Standards* 4.13, the presumptive sanction is reprimand.

2. Subsequent Disciplinary Proceedings are Irrelevant.

The Association seeks to turn on its head the Hearing Officer's conclusion (affirmed by the Board) that the absence of a prior disciplinary record is a mitigating factor. It argues that subsequent conduct and disciplinary action should be viewed as an aggravating factor. However, the Association misreads the Court's analysis *In re Disciplinary Proceeding Against Anschell*, 149 Wn.2d 484, 69 P.3d 844 (2003) ("*Anschell II*") to hold that regardless of whether a violation is considered "prior" or not, it is an additional violation that constitutes an aggravating factor.

[3] Negligence is defined as "the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in this situation." ABA *Standards*, Definitions.

The lawyer in *Anschell II* contended that the Association was guilty of laches for not filing the charges then at issue in a previous proceeding involving related conduct brought against the lawyer two years earlier. *Id.* at 511.[4] He argued that the Association should have presented the charges together, and therefore there were no true prior offenses for the purposes of the prior-disciplinary-offense aggravating factor. *Id.* The Court disagreed, holding that even if the Association had charged the lawyer with all of the offenses in one proceeding, there would still be an aggravating factor. *Id.* "Whether as prior offenses, or as additional offenses considered with the present charges, the additional violations constitute an aggravating factor either as prior discipline or as additional current multiple offenses." *Id.* The Court refused to simply disregard the additional offenses because either way they would constitute an aggravating factor under the ABA *Standards* – be it as "prior disciplinary offenses" or "multiple offenses."

The Court's analysis in *Anschell II* is inapposite here. First, there are no disciplinary offenses prior to this disciplinary hearing. The conduct at issue in this proceeding occurred in 2001 and 2002; whereas, the

[4] The Association filed a formal complaint against the attorney in 1997 due to the attorney's neglect of multiple immigration matters. *In re Disciplinary Proceeding Against Anschell*, 141 Wn.2d 593, 602, 9 P.3d 193 (2000) ("*Anschell I*"). Two years later, the Association brought additional charges for neglect of other immigration cases that occurred during the same time period. *Anschell II*, 149 Wn.2d at 490.

conduct at issue in the subsequent disciplinary proceedings against Mr. Oh occurred in 2003, 2005 and 2006. Second, the Court is not considering Mr. Oh's additional 2003, 2005 and 2006 offenses alongside the present charges. Mr. Oh was charged with those offenses in separate disciplinary proceedings and he has never suggested that he should have been charged in a single proceeding.

The Association would have the Court hold that additional offenses occurring *at any time* constitute an aggravating factor. Such an interpretation is not supported by the ABA *Standards*, which specifically state the term "prior disciplinary offenses" in its list of aggravating factors. ABA *Standards* 9.22(a) (emphasis supplied). The Court has never applied "additional offenses" as an aggravating factor and it is inappropriate for the Association to argue that subsequent disciplinary actions have any relevance here.

3. The Court is Free to Find Additional Mitigating Factors.

The Association argues that the Court may not find facts that are supported by undisputed evidence when the Hearing Officer is silent on such facts. Answering Brief at 40. It advances this argument to persuade this Court that it may not find the additional mitigating factors of absence of dishonest or selfish motive, timely good faith effort to take corrective action, cooperative attitude toward this proceeding, and remorse. *Id.*

However, while the Hearing Officer's findings are entitled to weight, they "are not conclusive." *In re Disciplinary Proceeding Against Mullen,* 127 Wn.2d 150, 162, 896 P.2d 1281 (1995). The Court is "free to examine the record and determine if additional mitigatory or aggravating factors exist as part of its review." *In Re Disciplinary Proceeding Against Longacre*, 155 Wn.2d 723, 752, 122 P.3d 710 (2005). This Court is most certainly free to accept as fact matters that are supported by undisputed evidence, notwithstanding hearing officer silence on such facts. *See Trejo*, 163 Wn.2d at 732-33 (relying on undisputed testimony to support its finding that the mitigating factor of full and free disclosure to the Board applies despite the fact that there was "no finding of full cooperation by the hearing officer or the Board").

4. Any Suspension Would be Disproportionate.

The Association's attempt to distinguish the misconduct in *Trejo*, *Cramer I*, and *Blanchard*, Answering Brief at 44-45, fails for three reasons. First, the Association argues that the misconduct in those three cases is less egregious than that here because the lawyers there maintained client trust accounts while Mr. Oh did not. Its logic is that the misconduct of one lawyer – like the ones in those cases – who converts client funds or commingles them with his own funds is less egregious than a second lawyer who mistakenly, but in good faith, deposits client funds into a non-

trust account, simply because the first lawyer maintains a client trust account while the second does not. That makes no sense. The commingling and conversion of client funds in *Trejo*, *Cramer I*, and *Blanchard* were far more egregious than the alleged misconduct here, notwithstanding the lawyers there maintaining trust accounts.

Second, the Association argues that the record-keeping in *Trejo*, *Blanchard*, and *Cramer I* was not "as bad" as Mr. Oh's recordkeeping. However, this statement is far from the truth. The lawyers in both *Trejo* and *Blanchard* were charged with incomplete record-keeping under former RPC 1.14(b)(3). *In re Disciplinary Proceeding Against Trejo*, 163 Wn.2d 701, 708, 185 P.3d 1160 (2008); *In re Disciplinary Proceeding Against Blanchard*, 158 Wn.2d 317, 290, 144 P.3d 286 (2006). In *Trejo*, the Court described that the lawyer's "inadequate" trust accounting records consisted "solely of a handwritten journal that listed the number of the checks written out of the trust account, the date on which the check was issued, the payee, and the amount of the check." *Trejo*, 163 Wn.2d at 711. Some checks were not accounted for in the attorney's journal and the journal did not track deposits or reflect a running balance. *Id.* In addition, the lawyer did not reconcile his journal with his bank statements and did not maintain an individual client ledger or "any records that could be used to accurately determine client balances in the trust account. Thus, Trejo

could not identify the funds in the trust account that belonged to each client." *Id.* The lawyer in *Cramer I* did not even produce any records due to an alleged burglary at his office, *In re Disciplinary Proceeding Against Cramer*, 165 Wn.2d 323, 329, 198 P.3d 485 (2008). There is no basis for arguing that the record-keeping here was worse.

Third, the Association attempts to distinguish *Trejo* by arguing that there were significant mitigating factors there that are not present here. In actuality, there were three mitigating factors in *Trejo* – remorse, character and reputation, and full and free disclosure to the Board. That is only one more than that found by the Hearing Officer here. That is less than here if this Court recognizes additional mitigating factors on which the Hearing Officer was silent. *See supra* Section I.C.4.

Despite the Association's attempt to distinguish *Trejo*, *Cramer I*, and *Blanchard* from this proceeding, there can be no question that that misconduct in each of those proceedings was far more egregious than that here. Yet, the sanction recommended for Mr. Oh is far harsher than those meted out in the other proceedings.

5. Unanimity by the Board Does Not Require Blind Acceptance by the Court.

The Association goes so far as to suggest that the Court cannot disturb the Board's recommendation because the Board was unanimous in

rendering it. This is not the law. While the Court normally gives "serious consideration" to the Board's recommendations, the Court retains ultimate responsibility for determining "the proper measure of discipline." *In re Disciplinary Proceeding Against McLeod*, 104 Wn.2d 859, 865, 711 P.2d 310 (1985). *See also In re Disciplinary Proceeding Against Noble*, 100 Wn.2d 88, 95, 667 P.2d 608 (1983) ("the ultimate responsibility for determining the nature of the discipline rests with this court and not with the Disciplinary Board. We do not intend to abdicate this responsibility"). The Court is "not bound by the Board's recommendation," *In re Disciplinary Proceeding Against Marshall*, 160 Wn.2d 317, 343, 157 P.3d 859 (2007), and the Court is free to depart from a recommendation when it can "articulate a specific reason to reject [it]." *In re Disciplinary Proceeding against Poole*, 156 Wn.2d 196, 209-10, 125 P.3d 954 (2006).

Where a unanimous Board recommendation is "too harsh," the Court should reject it. In *In re Disciplinary Proceeding Against Perez-Pena*, 161 Wn.2d 820, 837-38, 168 P.3d 408 (2007) a lawyer appealed the Board's recommendation that he be suspended from the practice of law for six months after he assaulted a client and refused to return the client's money. *Perez-Pena*, 161 Wn.2d at 825. The Board overruled the hearing officer's recommendation of admonishment and made a unanimous recommendation of a three-month suspension for the assault to run

concurrently with a six-month suspension for the attorney's failure to return client money. *Id.* On appeal, the Court acknowledged that it generally adopts the Board's recommended sanction if the decision is unanimous, *id.* at 837, but it held that it would not "defer so readily to [the Board's] ultimate recommendation" when the conclusions were based on the Board's finding of more aggravating factors and fewer mitigating factors than the Court finds. *Id.*

Similar to the Board's recommendation in *Perez-Pena*, the Board's one year recommendation here is too harsh. The Board applied two mitigating factors, absence of prior disciplinary offenses and inexperience in the practice of law, and two aggravating factors, dishonest or selfish motive and multiple offenses. The Board erred in failing to find additional mitigating factors in this proceeding; namely, absence of dishonest or selfish motive; timely good faith effort to take corrective measures; cooperative attitude toward disciplinary proceedings; and remorse. *See* Brief of Appellant at 42-43. The number and magnitude of the mitigating circumstances far outweigh the aggravating circumstances, and the Board's recommended one-year suspension is too harsh, particularly when viewed in light of proportionality which was never addressed by either the Hearing Officer or Board.

II. CONCLUSION

Insofar as any sanction is appropriate in this proceeding, it should be a reprimand.

Respectfully submitted this 21st day of May, 2012.

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