

Supreme Court No. 200,531-4

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE DISCIPLINARY PROCEEDING AGAINST

YOUNG S. OH,

Lawyer (Bar No. 29692).

RECEIVED
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON
07 DEC 21 AM 8:11
BY RONALD R. CAMPBELL

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

Kevin M. Bank
Bar No. 28935
Disciplinary Counsel

WASHINGTON STATE BAR ASSOCIATION
1325 4th Avenue, Suite 600
Seattle, Washington 98101-2539
(206) 733-5909

TABLE OF CONTENTS

I. COUNTERSTATEMENT OF THE ISSUES..... 1

II. COUNTERSTATEMENT OF THE CASE..... 2

 A. PROCEDURAL FACTS 2

 B. SUBSTANTIVE FACTS..... 4

 1. Directing Forgeries on Immigration Documents 4

 2. Failing to Maintain Records and Preserve Identity of Client Funds 7

 3. Soliciting False Notarizations 9

 4. Respondent’s Prior Disciplinary Offense 11

III. SUMMARY OF ARGUMENT 11

IV. ARGUMENT..... 12

 A. STANDARD OF REVIEW 12

 B. THE EVIDENCE AND THE FINDINGS OF FACT SUPPORT THE CONCLUSION THAT RESPONDENT VIOLATED RPC 8.4(a) AND RPC 8.4(c), AS CHARGED IN COUNT ONE 13

 C. THE EVIDENCE AND THE FINDINGS OF FACT SUPPORT THE CONCLUSION THAT RESPONDENT VIOLATED FORMER RPC 1.14(a), 1.14(c) AND 1.14(b)(3) AS CHARGED IN COUNTS FOUR AND FIVE..... 22

 1. Substantial Evidence Supports the Findings Regarding Respondent’s Failure to Deposit Client Funds in a Trust Account..... 22

 2. Substantial Evidence Supports the Findings Regarding Respondent’s Failure to Maintain Complete Records of Client Funds in His Possession 24

 D. THE EVIDENCE AND THE FINDINGS OF FACT SUPPORT THE CONCLUSION THAT RESPONDENT VIOLATED RPC 8.4(a), 8.4(c) AND FORMER RPC 5.3(c)(1) AS CHARGED IN COUNT SEVEN 26

1.	Substantial Evidence Supports the Hearing Officer's Finding that Respondent Requested a Non-lawyer Employee to Notarize the Signature of His Wife "in Absentia"	27
2.	Substantial Evidence Supports the Finding that the False Notarization Exposed the Parties to the Transaction and the Lender to Potentially Serious Injury.....	28
E.	THE HEARING OFFICER DID NOT ABUSE HIS DISCRETION BY DENYING RESPONDENT'S MOTION TO PRECLUDE MS. FISHER FROM TESTIFYING	29
F.	THE HEARING OFFICER DID NOT ABUSE HIS DISCRETION IN DENYING RESPONDENT'S MOTION TO VACATE AND AMEND THE HEARING OFFICER'S DECISION.....	30
G.	THE COURT SHOULD AFFIRM THE DISCIPLINARY BOARD'S TWO-YEAR SUSPENSION RECOMMENDATION, BUT SHOULD ADD THE AGGRAVATING FACTOR OF DISHONEST AND SELFISH MOTIVE	32
1.	Presumptive Sanctions.....	33
2.	Aggravating and Mitigating Factors	37
3.	The Disciplinary Board's Sanction Recommendation Is Appropriate and Proportionate.....	42
V.	CONCLUSION.....	46

TABLE OF AUTHORITIES

Cases

<u>Bjorklund v. Continental Casualty Co.</u> , 161 Wn. 340, 297 P. 155 (1931).....	17
<u>Group Health Cooperative v. Washington Dept. of Revenue</u> , 106 Wn.2d 391, 722 P.2d 787 (1986).....	20
<u>In re Disciplinary Proceeding Against Anschell</u> , 141 Wn.2d 593, 9 P.3d 193 (2000).....	43
<u>In re Disciplinary Proceeding Against Anschell</u> , 149 Wn.2d 484, 69 P.3d 844 (2003).....	41, 43
<u>In re Disciplinary Proceeding Against Carmick</u> , 146 Wn.2d 582, 48 P.3d 311 (2002).....	45
<u>In re Disciplinary Proceeding Against Christopher</u> , 153 Wn.2d 669, 105 P.3d 976 (2005).....	44
<u>In re Disciplinary Proceeding Against Dann</u> , 136 Wn.2d 67, 960 P.2d 416 (1998).....	13, 18, 33, 34, 46
<u>In re Disciplinary Proceeding Against Deruiz</u> , 152 Wn.2d 558, 99 P.3d 881 (2004).....	43
<u>In re Disciplinary Proceeding Against Dornay</u> , 160 Wn.2d 671, 161 P.3d 333 (2007).....	40
<u>In re Disciplinary Proceeding Against Dynan</u> , 152 Wn.2d 601, 98 P.3d 444 (2004).....	44
<u>In re Disciplinary Proceeding Against Guarnero</u> , 152 Wn.2d 51, 93 P.3d 166 (2004).....	17
<u>In re Disciplinary Proceeding Against Halverson</u> , 140 Wn.2d 475, 998 P.2d 833 (2000).....	32, 40
<u>In re Disciplinary Proceeding Against Johnson</u> , 114 Wn.2d 737, 790 P.2d 1227 (1990).....	32
<u>In re Disciplinary Proceeding Against Juarez</u> , 143 Wn.2d 840, 24 P.3d 1040 (2001).....	37
<u>In re Disciplinary Proceeding Against Kagele</u> , 149 Wn. 2d 793, 72 P.3d 1067 (2003).....	16, 43
<u>In re Disciplinary Proceeding Against Marshall</u> , 160 Wn.2d 317, 157 P.3d 859 (2007).....	12, 13, 16, 19, 34, 35, 41, 43

<u>In re Disciplinary Proceeding Against McKean</u> , 148 Wn.2d 849, 64 P.3d 1226 (2003).....	26
<u>In re Disciplinary Proceeding Against Poole</u> , 156 Wn.2d 196, 125 P.3d 954 (2006).....	13, 20, 37, 44
<u>In re Disciplinary Proceeding Against Salverson</u> , 94 Wn.2d 73, 614 P.2d 1284 (1980).....	45
<u>In re Disciplinary Proceeding Against Tasker</u> , 141 Wn.2d 557, 9 P.3d 822 (2000).....	44
<u>In re Disciplinary Proceeding Against VanDerbeek</u> , 153 Wn.2d 64, 101 P.3d 88 (2004).....	13
<u>In re Disciplinary Proceeding Against Vetter</u> , 104 Wn.2d 779, 711 P.2d 284 (1985).....	46
<u>In re Disciplinary Proceeding Against Whitney</u> , 155 Wn.2d 451, 120 P.3d 550 (2005).....	12, 21, 30
<u>In re Disciplinary Proceeding Against Whitt</u> , 149 Wn.2d 707, 72 P.3d 173 (2003).....	40
<u>In re Marriage of Rideout</u> , 150 Wn.2d 337, 77 P.3d 1174 (2003)	13, 15, 32
<u>Nelson v. Placanica</u> , 33 Wn.2d 523, 206 P.2d 296 (1949)	31
<u>State v. Bencivenga</u> , 137 Wn.2d 703, 974 P.2d 832 (1999).....	13
<u>State v. Haislip</u> , 77 Wn.2d 838, 467 P.2d 284 (1970)	21

ABA Standards

<u>American Bar Association Standards for Imposing Lawyer Sanctions</u> (1991 ed. & Feb. 1992 Supp.).....	32
<u>ABA Standards 1.1</u>	40
<u>ABA Standards 3.0</u>	40
<u>ABA Standards 4.12</u>	36
<u>ABA Standards 5.1</u>	33
<u>ABA Standards 5.11- 5.14</u>	35
<u>ABA Standards 5.11(a)</u>	34
<u>ABA Standards 5.11(b)</u>	34
<u>ABA Standards 5.12</u>	34, 35

ABA Standards 9.2(i)..... 38

Rules of Professional Conduct

RPC 1.14..... 12, 25
RPC 1.14(a)..... 4, 22
RPC 1.14(b)(3)..... 4, 22
RPC 1.14(c)..... 4, 22
RPC 1.15B 25
RPC 5.3(c)(1)..... 4, 11, 35
RPC 5.3(c)(2)..... 4
RPC 8.4(a)..... 4, 11, 14, 19, 33, 35
RPC 8.4(b) 35
RPC 8.4(c)..... 2, 4, 11, 14, 19, 33, 35

I. COUNTERSTATEMENT OF THE ISSUES

1. The Hearing Officer concluded, and the Disciplinary Board affirmed, that the Association had established by a clear preponderance of the evidence that Respondent: (a) induced non-lawyer employees to forge documents in an immigration petition prepared for a client, and (b) instructed a non-lawyer employee to falsely notarize real estate documents. Should this Court retry the facts and reweigh the evidence supporting this conclusion?

2. The Disciplinary Board adopted the Hearing Officer's findings that Respondent had failed to deposit certain client funds in a trust account and failed to maintain complete and adequate records of client funds. Are those factual findings supported by substantial evidence?

3. Respondent asks this Court to reverse discretionary evidentiary rulings of the Hearing Officer, including a post-hearing motion to vacate and amend the Hearing Officer's Decision. Should the Court reverse on the basis that no reasonable person would have taken the view the Hearing Officer adopted?

4. Respondent induced non-lawyer employees to forge documents on an immigration application in 2002, solicited violation of the notary statute by instructing another employee to falsely notarize documents in 2005, failed to deposit client funds in a trust account, and

failed to maintain complete and accurate trust account records. Should the Court reverse the Disciplinary Board's recommendation of a two-year suspension?

5. Both the Hearing Officer and the Disciplinary Board found more aggravating factors than mitigating factors. Are the aggravating factors supported by the evidence, and should this Court find additional mitigating factors that were found by neither the Hearing Officer nor the Disciplinary Board?

6. The Disciplinary Board and the Hearing Officer found that Respondent acted at least knowingly by inducing employees to forge documents submitted to the Immigration and Naturalization Service (INS) and to falsely notarize documents provided to a closing agent. Did the Disciplinary Board err in applying the mitigating factor of "absence of dishonest and selfish motive," given its conclusion that Respondent violated Rule 8.4(c) of the Rules of Professional Conduct (RPC) by engaging in conduct involving dishonesty and deceit?

II. COUNTERSTATEMENT OF THE CASE

A. PROCEDURAL FACTS

On January 31, 2006, the Washington State Bar Association ("Association") filed a five-count formal complaint against Respondent. Bar File ("BF") 2. On July 25, 2006, the Association filed an amended

complaint adding two counts. BF 21. A hearing occurred on November 27-30, 2006. At the commencement of the hearing, the Association informed the Hearing Officer that it would not pursue Count Three of the amended complaint. TR 35:23-25, 36:1-2, 27:18-25, 28:1-4.

On December 14, 2006, the Hearing Officer filed Findings of Fact and Conclusions of Law and Hearing Officer's Recommendation ("FFCLR"). After the Association moved to modify and correct the FFCLR, the Hearing Officer filed Amended FFCLR ("AFFCLR") on January 29, 2007.¹ The Hearing Officer concluded that the Association proved Counts One, Two, Four, Five and Seven of the amended complaint. AFFCLR 5.1-5.6. He concluded that the presumptive sanction for Counts One and Two² is a 180-day suspension, for Count Four is a 180-day suspension, for Count Five a 180-day suspension, and for Count Seven is a 180-day suspension. *Id.* After applying four aggravating factors (prior disciplinary offense, pattern of misconduct, vulnerability of clients, and substantial experience) and two mitigating factors (cooperation with the Association and lack of selfish and dishonest motive), the Hearing Officer recommended a two-year suspension. AFFCLR 4.1- 4.7 at 11 (Comprehensive Recommendation).

¹ The AFFCLR are at BF 65.

² The Hearing Officer concluded that the allegations of Count Two were subsumed in the conclusions pertaining to Count One. AFFCLR 5.2.

On August, 27, 2007, the Disciplinary Board, by a vote of 6-3, approved the AFFCLR and adopted the two-year suspension recommendation. BF 120. The dissent recommended a one-year suspension. Id.

All nine Disciplinary Board members agreed that Respondent: (1) solicited violation of the notary statute,³ thereby violating RPC 8.4(a), 8.4(c) and former RPC 5.3(c)(1);⁴ and (2) knew or should have known that he was dealing improperly with client property by failing to deposit client funds in a trust account and by failing to maintain complete and accurate trust account records, thereby violating former RPC 1.14(a), former RPC 1.14(c) and former RPC 1.14(b)(3). Id.

Eight Disciplinary Board members concluded that, in addition, Respondent had personally instructed his non-lawyer employees to affix false signatures to an immigration application, in violation of RPC 8.4(a) and RPC 8.4(c). Id.⁵

B. SUBSTANTIVE FACTS

1. Directing Forgeries on Immigration Documents

During the relevant time period, Respondent was a solo practitioner with

³ See RCW 9A.08.020(3)(a)(i); 42.44.160.

⁴ The RPC were revised effective September 1, 2006.

⁵ One Disciplinary Board member who recommended a one-year suspension stated that she did not believe that the Association had met its burden of proof on Counts 1 and 2. BF 120.

offices in Mountlake Terrace. AFFCLR 3.3; TR 166. Respondent obtained a CPA license in 1990, and then went to law school. AFFCLR 3.2; TR 166. After being admitted to the Bar in 1999, Respondent operated an accounting, escrow and law practice from his Mountlake Terrace offices. AFFCLR 3.1-3.3; TR 166. Respondent had 300-500 active accounting clients, processed 20-40 escrow transactions per month, and had a growing legal practice. AFFCLR 3.3. Respondent's office received enormous amounts of mail relating to his clients, some of which lay unopened in mail bins for long periods. TR 238. Respondent disliked confronting or bothering his clients, and frequently avoided them. TR 252-54. A significant portion of Respondent's law practice involved immigration. AFFCLR 3.3. Almost all of Respondent's law clients were from the Korean community. TR 346:24-5; TR 347. Respondent employed non-lawyer assistants to assist him with his legal, accounting and escrow practices. AFFCLR 3.4; TR 338-40. Because most of Respondent's employees were Korean-speaking, Respondent often spoke to his employees in Korean. TR 294:18-25, TR 347. Some of the employees worked on both accounting and legal matters, including visa applications. TR 233-34.

During 2002 and early 2003, Respondent represented John Yeum, the president of a local company that provides merchant account services

to Korean businesses. AFFCLR 3.5; TR 58, 60-61. Mr. Yeum was seeking an H1-B work visa on behalf of a prospective employee, Ae Sun Moon. TR 61. In about November 2003, Respondent assigned a newer employee, Shannon Koh, to the matter, along with his longtime assistant, Esther Kang.⁶ EX 17 at 11-13; TR 434-37.

When Ms. Koh was hired, there were “a lot of cases” that had to be completed in a hurry. EX 17 at 36-37. The Yeum/Moon matter was one of the first cases Ms. Koh worked on, and Mr. Oh told her what to do on the case. Id. at 11-13. When Ms. Koh had prepared the various H1-B visa application documents, Respondent instructed Ms. Koh to “go to Esther and Esther will forge the signature.” Id. at 12. Ms. Koh followed Respondent’s instructions and took the documents to Ms. Kang. Id. at 16-17. Ms. Koh observed as Ms. Kang forged the signatures of Mr. Yeum and Ms. Moon. Id. at 16-17. A total of eight documents related to the Moon/Yeum INS application were forged by non-lawyer employees at Respondent’s direction, three of which were certifications under penalty of perjury by the signor. AFFCLR 3.7. Respondent instructed his non-lawyer employees to forge the signature of Mr. Yeum on these eight documents. AFFCLR 3.8. Mr. Yeum never signed or approved the

⁶ Ms. Kang married after the events at issue. She then changed her name to Esther Lee. TR 408.

documents prior to their submission to INS. AFFCLR 3.7; TR 69-73.

A few weeks after the documents were submitted to INS, INS rejected the H1-B application. AFFCLR 3.11. After learning of the rejection, Mr. Yeum called to complain about inaccuracies and deficiencies in the application. *Id.*; TR 77:9-15. Mr. Yeum also complained that his signature appeared to have been forged on some of the documents submitted to INS. EX 17 at 20.

Although the application was denied on grounds unrelated to the forged signatures, Respondent exposed his clients to potential injury by submitting unverified and improperly signed immigration applications and related documents. AFFLCR 3.14. Respondent acted out of conscious disregard for legal requirements by instructing his non-lawyer employees to forge signatures. AFFCLR 3.15.

2. Failing to Maintain Records and Preserve Identity of Client Funds

From at least early 2001 through August 2002, Respondent repeatedly placed funds of his law clients (and some funds obtained from escrow clients as well) in a business checking account at Bank of America (“BOA business account”). AFFCLR 3.16, 3.18. Respondent had established a client trust account at Bank of America (“BOA trust account”) but failed to use it for his client funds until a contract attorney

he hired in 2001, Cindy Toering, expressed her concerns to Respondent that he was not using a trust account for funds belonging to his law clients. TR 226:7-10, 249:3-11, 250:19-24. The BOA business account that Respondent used for funds of his law clients and escrow clients was overdrawn on at least seven occasions. AFFCLR 3.19. Respondent commingled his own funds, including earned fees, with his clients' funds in the BOA business account. TR 151; EX 35.

Respondent failed to maintain complete and accurate records of client funds in the BOA business account, and, after mid-2002, in the BOA trust account. AFFCLR 3.20-3.24; TR 115-118, 125. Respondent did not maintain client ledgers, did not reconcile his bank statements with his check register, did not identify all deposited checks by client matter, and did not maintain sufficient records to determine the status of third-party vendors who provided services to Respondent's clients. Id. As a result, during 2002 and 2003, Respondent's records did not readily permit reliable verification of client ownership of funds. AFFCLR 3.22. Respondent was a trained accountant, and his failure to place client funds in a trust account and to maintain complete and accurate records was a result of conscious neglect. AFFCLR 3.29. By failing to maintain a trust account and proper records, Respondent exposed his clients to potentially serious injury. AFFCLR 3.28.

3. Soliciting False Notarizations

In the fall of 2005, Respondent and his wife were in the process of purchasing property in Everett, Washington. AFFCLR 3.31; EX. 30. Completion and presentation of the purchase and sale documents were matters of some urgency, with closing scheduled for September 2005. AFFCLR 3.31; EX 30 at Bates 000005. At the time, Respondent's wife was in Vancouver, B.C., and her notarized signature was required on closing documents. AFFCLR 3.31.

Respondent requested a non-lawyer notary in his office, Victoria Fisher, to notarize the signature of his wife "in absentia;" *i.e.*, to falsely certify that Respondent's wife had signed the real estate documents in the notary's presence. AFFCLR 3.32; EX 30 at Bates 000120, 000141-43; TR 318-21. Ms. Fisher complied with Respondent's request to notarize the documents to keep faith with her employer and to keep her job with him. TR 319:13-15. Ms. Fisher had met Respondent's wife, but was not familiar with her signature. TR 320:2-11.

The falsely notarized real estate documents, which included a quitclaim deed and a deed of trust, were provided to the real estate company for processing. AFFCLR 3.33; TR 321-22. On or about October 4, 2005, after a dispute arose between Ms. Fisher and Respondent, Respondent terminated Ms. Fisher's employment. AFFCLR

3.34; EX 20. In a "Termination Notice" dated October 4, 2005, Respondent listed the alleged employee performance "issues" that had led to Ms. Fisher's termination. EX 20. Her false notarization of Respondent's wife's signature on multiple documents was not listed as one of the performance "issues." Id.

Also on October 4, 2005, Respondent notified the real estate company of the false notarizations, claiming that, contrary to his instructions, Ms. Fisher had not gone to Vancouver, B.C., and had instead notarized his wife's signature "via telephone." He said that he was "letting Victoria go based on a few other irregularities" that had come to his attention, and that while he felt for awhile it was "OK" that Ms. Fisher had verified the signature by telephone, he now thought it was improper. EX 30 at Bates 000014. The real estate company then prepared a new quitclaim deed and a new deed of trust, which were later signed by Respondent's wife and properly notarized. AFFCLR 3.34; EX 30 at Bates 000007, 000009.

By using false notarizations of his wife's signature, Respondent exposed the parties to the real estate transaction to potentially serious injury. AFFCLR 3.35. Respondent caused the false notarizations out of conscious disregard for legal requirements. AFFCLR 3.36.

4. Respondent's Prior Disciplinary Offense

On July 19, 2005, Respondent was admonished for his lack of competence and lack of diligence in representing a client in 2003. EX 49. Respondent had filed an immigration application prematurely, and had neglected to inform the client about her removal hearing. Id.

III. SUMMARY OF ARGUMENT

The Hearing Officer determined that Respondent induced non-lawyer employees to forge documents on an immigration petition, including documents requiring certifications under penalty of perjury, and that Respondent instructed another non-lawyer employee to falsely notarize real estate documents. The Hearing Officer's findings, based in part on his determination of the credibility of witnesses, were adopted in full by eight of the nine members of the Disciplinary Board. Those findings are supported by substantial evidence, and they support the conclusion that Respondent violated RPC 8.4(a), RPC 8.4(c) and former RPC 5.3(c)(1). The Court should not disturb the Hearing Officer's credibility determinations or his factual findings.

The Hearing Officer and the Disciplinary Board found that Respondent repeatedly failed to deposit client funds in a trust account, and that he failed to maintain complete and accurate trust account records, despite the fact that he was a trained accountant. These findings are

supported by substantial evidence, and they support the conclusion that Respondent violated former RPC 1.14.

The Disciplinary Board adopted the Hearing Officer's recommendation of a two-year suspension. The Court should affirm the sanction, which is both appropriate for the conduct and not disproportionate to other cases. However, the Court should reverse the Disciplinary Board's adoption of "absence of a dishonest or selfish motive" as a mitigating factor because the evidence supports the contrary finding that Respondent's conduct was dishonest.

IV. ARGUMENT

A. STANDARD OF REVIEW

Unchallenged factual findings are verities on appeal. In re Disciplinary Proceeding Against Whitney, 155 Wn.2d 451, 461, 120 P.3d 550 (2005). When the hearing officer's findings of fact are challenged, they will be upheld if they are supported by substantial evidence. In re Disciplinary Proceeding Against Marshall, 160 Wn.2d 317, 330, 157 P.3d 859 (2007). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of a declared premise. Marshall, 160 Wn.2d at 330. Conclusions of law are reviewed de novo, and will be upheld if they are supported by the findings of fact. Id.

The Hearing Officer, rather than the Court, evaluates the weight of

evidence and credibility of witnesses, and then makes factual findings. In re Disciplinary Proceeding Against Poole, 156 Wn.2d 196, 212, 125 P.3d 954 (2006). The Court gives considerable weight to the hearing officer's factual findings, especially with regard to the credibility of witnesses. Poole, 156 Wn.2d at 209. The Court does not substitute its evaluation of the credibility of witnesses over that of the hearing officer. See In re Disciplinary Proceeding Against Dann, 136 Wn.2d 67, 77, 960 P.2d 416 (1998). The substantial evidence standard of review is appropriate whenever the finder of fact weighs credibility, even when some or all witnesses testify through documents such as declarations or affidavits. In re Marriage of Rideout, 150 Wn.2d 337, 350-51, 77 P.3d 1174 (2003).

A hearing officer is entitled to draw reasonable inferences from documents and testimony. In re Disciplinary Proceeding Against VanDerbeek, 153 Wn.2d 64, 82, 101 P.3d 88 (2004). It is the role of the fact finder, not the reviewing court, to draw such inferences. State v. Bencivenga, 137 Wn.2d 703, 711, 974 P.2d 832 (1999). When reviewing factual findings, the Court will not disturb findings of fact made upon conflicting evidence. Marshall, 160 Wn.2d at 330.

B. THE EVIDENCE AND THE FINDINGS OF FACT SUPPORT THE CONCLUSION THAT RESPONDENT VIOLATED RPC 8.4(a) AND RPC 8.4(c), AS CHARGED IN COUNT ONE

The Hearing Officer properly found that a non-lawyer employee of

Respondent forged the signature of Mr. Yeum in eight locations in the INS application and related documents, and that Respondent instructed his non-lawyer employees to forge the signature of Mr. Yeum on these documents. AFFCLR 3.7-3.8. These findings are supported by substantial evidence, as described below, and they support the conclusion that Respondent violated RPC 8.4(a) (prohibiting a lawyer from knowingly assisting or inducing another to violate the RPC) and RPC 8.4(c) (prohibiting a lawyer from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation) as charged in Count One.⁷

In making these findings, the Hearing Officer considered the testimony of (1) Respondent's former client Mr. Yeum; (2) Respondent's former legal assistant, Shannon Koh; (3) a former contract lawyer in Respondent's office, Cindy Toering; (4) Respondent's long-time office manager/general assistant, Esther Kang; and (5) Respondent himself. The relevant findings are based in part on the Hearing Officer's determination as to which of these witnesses were credible. The witnesses whose testimony the Hearing Officer credited provided direct evidence showing that the signatures at issue were forgeries and that Respondent instructed his employees to forge signatures:

⁷ Because Count Two was subsumed by Count One, the two counts will jointly be referred to as Count One.

- Mr. Yeum testified that the signatures at issue were forgeries, as he uses his Korean name when he signs rather than his anglicized name “John Yeum.” He unequivocally stated that he never gave permission for anyone at Respondent’s office, or anyone at his office, to sign his name on the immigration documents at issue. TR 68-69, 74.
- Ms. Koh testified specifically that Respondent instructed her “to go to Esther Kang and Esther will forge the signature.” Ms. Koh observed Ms. Kang while Ms. Kang forged the signature of Mr. Yeum on the documents. Ms. Kang was the “go to” person to get a client’s signature forged. EX 17 at 13, 41.⁸
- Ms. Koh further testified that she understood that the Yeum/Moon visa application was “in a hurry” and needed to be submitted to INS quickly. EX 17 at 13, 37. Ms. Koh was new to the office when she handled the Yeum/Moon visa application and took her instructions directly from Respondent. EX 17 at 11:6-10.
- Ms. Toering testified that while working in Respondent’s office as a contract attorney, she had seen Ms. Kang forge a client’s signature on an accounting document, and that when Ms. Toering confronted Ms. Kang, Ms. Kang said that “it doesn’t matter who signs.” She also saw another Korean employee forging a client’s name. This employee told Ms. Toering that Respondent had told him the E-2 visa document at issue was late and “had to get done.” The employee felt bad about the forgery. TR 260, 265-66, 293-94.
- Ms. Kang, while denying that she forged the signatures, provided

⁸ Respondent argues that this Court should reevaluate Ms. Koh’s credibility because she testified by deposition. But this Court held as recently as 2003 that reviewing courts will apply a “substantial evidence” standard of review to findings of fact culled from competing testimony, including testimony submitted in the form of written declarations, where the fact finder has made credibility determinations from such evidence. Rideout, 150 Wn.2d at 350-51. Here, Ms. Koh testified by deposition, without Respondent’s objection and subject to Respondent’s counsel’s lengthy cross-examination. EX 17. In addition, the Hearing Officer heard live testimony from Mr. Yeum, Ms. Toering, Respondent and Ms. Kang. He necessarily determined the credibility of all these witnesses in making his findings. There is no basis for this Court to reevaluate the credibility of any of these witnesses, including Ms. Koh.

no alternative explanation as to how they got to be forged, other than that she called Mr. Yeum's office and left a voice mail notifying them the documents were ready and then left the documents with Respondent's office receptionist. She claimed that when she picked the documents up some hours or days later, they had been signed. TR 417-19.

These facts, as well as others, support the Hearing Officer's findings that an employee of Respondent forged the signature of Mr. Yeum and that Respondent instructed his non-lawyer employees to forge the signature of Mr. Yeum. AFFCLR 3.7-3.8.

In attempting to challenge these findings of fact and argue that the Association did not meet its "clear preponderance" burden, Respondent merely reargues his version of the facts. But a respondent lawyer who challenges factual findings must do more than that. In re Disciplinary Proceeding Against Kagele, 149 Wn. 2d 793, 814, 72 P.3d 1067 (2003). A reviewing court will not overturn factual findings based on an alternative explanation or a version of the facts previously rejected by the trier of fact. Marshall, 160 Wn.2d at 331.

Respondent argues, first, that only Ms. Koh's "isolated" testimony supported the Hearing Officer's findings as to Count One. In fact, as described above, the testimony of John Yeum, the victim of the forgery, and Cindy Toering, the contract attorney employed by Mr. Oh, also supports the Hearing Officer's findings. Those findings are also

supported by Respondent's witness, Ms. Kang, who could provide no explanation as to how the forged signature of Mr. Yeum came to be affixed in eight locations on the H1-B petition and related documents, other than that she left them with Respondent's receptionist and that when she later picked them up from the receptionist they had been signed. TR 418-19. Improbable alternative explanations as to how documents came to be forged provide "further circumstantial evidence of guilt." See In re Disciplinary Proceeding Against Guarnero, 152 Wn.2d 51, 56-57, 60-61, 93 P.3d 166 (2004) (Respondent's claim that forged document was brought by client to his office or planted by client in his file is improbable, and does not need to be disproved by the Association).⁹ Furthermore, it is not the quantity of witnesses who testify for one side or the other, but the weight, quality and credibility of witness testimony that is relevant to whether there is substantial evidence to support a factual finding. Bjorklund v. Continental Casualty Co., 161 Wn. 340, 351-52, 297 P. 155 (1931).

Second, Respondent again attempts to argue, as he did at the

⁹ In support of his argument, Respondent claims that the Association's investigator, Ms. Norman, testified that no one she interviewed corroborated Ms. Koh's testimony. RB 25. This statement, taken out of context, may suggest that Ms. Norman spoke to every employee of Ms. Oh during the relevant period. In fact, Ms. Norman testified that she did not remember which employees she spoke to and that, to the best of her recollection, only one employee (whom she did not name) admitted to being aware of forgeries. TR 55.

disciplinary hearing, that Ms. Koh was less credible than Ms. Kang and Respondent himself. RB 25-27. But, as discussed above, the Hearing Officer found Ms. Koh, as well as Ms. Toering and Mr. Yeum, to be credible on the issue of whether the signatures were forged and whether Respondent had instructed his employees to forge signatures. This Court should not substitute its evaluation of the credibility of witnesses over that of the Hearing Officer. Dann, 136 Wn.2d at 77.

Third, Respondent argues that the Hearing Officer misinterpreted Ms. Koh's testimony because Ms. Koh never heard Mr. Oh use the word "forgery." RB 26. In fact, Ms. Koh testified that Mr. Oh specifically instructed her "to go to Esther and Esther will forge the signature." EX 17 at 13. On cross-examination, she emphasized that she had received a specific instruction from Mr. Oh:

Q: When you spoke with Mr. Oh about getting client's signatures, did he tell you go to Esther to get the client's signatures?

A: That's correct.

Q: Did he tell you go to Esther to have her sign the documents for clients?

A: That's correct.

Id. at 93-94. Ms. Koh also testified that she personally observed Ms. Kang forge the signatures of Mr. Yeum on the documents at issue. Id. at

15-17. Given this testimony, Respondent's claim that the Association presented no evidence that Respondent "had knowledge that there may have been a false signature" on the Yeum application is simply inaccurate.

Respondent also incorrectly argues, citing Marshall, 160 Wn.2d at 330, that to sustain its burden, the Association must establish both: (1) the identity of the person who signed Mr. Yeum's name; and (2) Respondent's "direct involvement" with that person's signing. But Marshall does not require that, in order to prove a violation of RPC 8.4(a) and/or 8.4(c), the Association must establish the identity of the person who performs an act of misconduct at the lawyer's direction.¹⁰ In this case, the Association did not charge, and the Hearing Officer did not find or need to find, that Respondent had directed or induced a specific employee to forge documents, even though there was ample evidence that Ms. Kang forged the documents at issue. BF 21; AFFCLR at 5.1. Moreover, contrary to Respondent's assertion, the Association did in fact present direct evidence in the form of Ms. Koh's testimony that Respondent had "direct involvement" in inducing and/or directing his

¹⁰ In Marshall, the court upheld the Disciplinary Board's finding that Marshall had instructed a non-lawyer with whom he was affiliated to create a fake hourly invoice. Marshall, 160 Wn.2d at 343-44. The Court never held, however, that the Association is always required to prove the identity of the person who actually performs the misconduct.

non-lawyer employees to forge documents.

Respondent also argues that the Hearing Officer should have given special weight to the testimony of his expert, Hannah McFarland, who testified that neither Ms. Kang nor Respondent forged the documents at issue.¹¹ RB 11. But the determination of the credibility of witnesses, as well as the appropriate weight to accord to conflicting testimony, is within the discretion of the finder of fact. Poole, 156 Wn.2d at 208-9. The rule is no different for experts. The trier of fact may reject expert testimony in whole or in part in accordance with his or her views as to the persuasive character of that evidence. Group Health Cooperative v. Washington Dep't of Revenue, 106 Wn.2d 391, 399, 722 P.2d 787 (1986). Here, the Hearing Officer heard the testimony of Ms. McFarland, the testimony of the Association's expert and the various fact witnesses. As the finder of fact, the Hearing Officer was charged with making his own factual findings, based on all the evidence, and he was

¹¹ Respondent incorrectly asserts that Ms. McFarland's testimony was not challenged by the Association. The testimony of Ms. McFarland was rebutted by Timothy Nishimura, an experienced forensic document examiner who testified that Ms. McFarland's qualifications as a "forensic document examiner" were dubious, as she had learned most of her purported skills through correspondence courses, she had never worked in a crime laboratory or received one-on-one apprenticeship training, and she had trained with graphologists (persons who purport to analyze personality from writing). Mr. Nishimura made clear that he did not perform his own analysis of the signatures at issue, and that, without doing so, he could not say whether he agreed or disagreed with Ms. McFarland's conclusions. TR 522-34.

not required to give any special weight to Respondent's "expert." See State v. Haislip, 77 Wn.2d 838, 841, 467 P.2d 284 (1970) (notwithstanding expert's testimony that he was unable to determine whether defendant had forged checks, jury could determine from other evidence before it that defendant was the forger).

Finally, Respondent argues that the Hearing Officer abused his discretion in denying Mr. Oh's motion for handwriting samples from Ms. Koh and Ms. Moon. A Hearing Officer's evidentiary rulings are reviewed for a manifest abuse of discretion, which occurs only when no reasonable person would take the view adopted. Whitney, 155 Wn.2d at 465. Respondent filed his motion for handwriting samples from Mr. Yeum, Ms. Moon, Ms. Koh and Chris Oh, one of Mr. Yeum's employees, less than two weeks before the hearing and two weeks *after* the discovery cutoff. BF 30, BF 42. Even though Respondent's motion was untimely, the Hearing Officer granted it in part and ordered that handwriting samples be given by Mr. Yeum and Mr. Oh, who were coming to Seattle for the hearing. TR 29, 105. Respondent admitted that the additional samples requested would have required another continuance of the hearing, which had already been continued once at Respondent's request. TR 18-19. The Hearing Officer did not abuse his discretion by denying Respondent's motion, given that it was untimely,

that it would have resulted in still more delay, and that it would not likely have definitively resolved the central issues in the case.

C. THE EVIDENCE AND THE FINDINGS OF FACT SUPPORT THE CONCLUSION THAT RESPONDENT VIOLATED FORMER RPC 1.14(a), 1.14(c) AND 1.14(b)(3) AS CHARGED IN COUNTS FOUR AND FIVE

Respondent assigns error to the factual findings and legal conclusions concerning Respondent's violation of former RPC 1.14(a) and former RPC 1.14(c) (requiring that client funds be placed in a trust account) and RPC 1.14(b)(3) (requiring that a lawyer maintain complete records of all client funds in his possession). RB 5-6, 29-33. In disputing these findings and conclusions, Respondent merely reargues his version of the facts. The Association established by a clear preponderance of the evidence that Respondent committed serious trust account violations. This Court should affirm the findings and conclusions of the Hearing Officer and the Disciplinary Board.

1. Substantial Evidence Supports the Findings Regarding Respondent's Failure to Deposit Client Funds in a Trust Account.

The Hearing Officer found: (1) that prior to mid-2002, Respondent did not use a lawyer trust account for client funds, AFFCLR 3.16; and (2) that prior to mid-2002, Respondent deposited client funds from both his escrow and law practices in a business checking account rather than a trust

account, AFFLCR 3.18.¹² These findings are supported by substantial evidence, as follows:

- The Association's auditor, Trina Doty, testified that, prior to mid-2002, Respondent failed to deposit funds received from or on behalf of his legal clients, such as cost advances and proceeds obtained from settlements, in an IOLTA or other trust account. These client funds were deposited in a business checking account, which was overdrawn on more than seven occasions. TR 118, 126-36, 151-52; EX 37.
- Ms. Toering testified that, after she began working with Mr. Oh in August 2001, she became concerned that he was not depositing funds obtained from law clients in a trust account. TR 226, 249. When Ms. Toering asked Ms. Kang about the matter, Ms. Kang told Ms. Toering that the office had no trust account for law clients; a few days later, Ms. Kang told Ms. Toering that "we do have a trust account but it hasn't been used for years." TR 249.

Respondent's argument appears to be that these findings are not supported by the evidence because Respondent had a good faith belief that his BOA business account was operating as a de facto trust account, and because he used it only for short-term deposits of client funds. RB 14. This argument is completely without merit. An account is either a trust account in which client funds are segregated and interest is paid to the Legal Foundation of Washington (or the client), or it is not. The

¹² The Association agrees with Respondent that AFFCLR 3.25 is not accurate to the extent that it states that Respondent's "escrow trust account" at Northwest Bank "did not comply with WSBA IOLTA trust account requirements." In fact, the testimony was that this particular account did comply with WSBA requirements and was an appropriate account for deposit of client funds, although Respondent failed to place certain client escrow funds in that account. TR 137-50. The Disciplinary Board decision did not address this apparent inaccuracy.

account Respondent used to deposit client funds was a checking account that earned no interest, and it was not protected from the lawyer's creditors. EX 34; TR 153. How Respondent treated the account is irrelevant.

Similarly, AFFCLR 3.18 (which states that, both before and after he established an IOLTA account for law client funds, Respondent used the BOA business checking account for both law client and some escrow client funds) is supported by the evidence. Both the evidence underlying AFFCLR 3.17, above, and Ms. Doty's related testimony that Respondent also placed certain funds from escrow clients in his BOA checking account, rather than in an existing escrow IOLTA account at Northwest Bank, supports AFFCLR 3.18. TR 137-50. There was also evidence that Respondent deposited at least one client cost check in his BOA business account even after he reactivated his dormant BOA IOLTA account in July 2002. EX 34 (Bank Statement dated 7/20/2002-8/28/2002); EX. 35; TR 169-70.

2. Substantial Evidence Supports the Findings Regarding Respondent's Failure to Maintain Complete Records of Client Funds in His Possession

There was also ample evidence establishing that Respondent failed to maintain attorney-client ledgers documenting the status of client financial accounts. AFFCLR 3.21. Once again, Respondent reargues

that his recordkeeping should be subject to rules and standards different from anyone else's. Respondent maintains that he combined his client ledgers with his check register, and that to the extent there was a need for the Association to review more detailed client ledgers, these were in his client files, which the Association did not examine. Respondent's arguments fail. The Association's auditor testified that:

- Respondent never provided her with any client ledgers, whether from his client files or elsewhere. TR 114-15.
- Respondent produced a check register of sorts for the BOA business account he claims he treated as a trust account, but a check register and a client ledger are two separate instruments, both of which are required to maintain complete and accurate records. Moreover, the check register was not properly reconciled with Respondent's bank statements, and the check register was often inconsistent with the bank statements. TR 113-15.

There was, therefore, more than sufficient evidence from which the Hearing Officer and Disciplinary Board could find that Respondent did not maintain attorney-client ledgers documenting the status of his accounts.

Respondent also argues that the Hearing Officer and the Board erred by imposing on Respondent the recordkeeping requirements of the amended RPC 1.15B (which became effective on September 1, 2006), because former RPC 1.14 imposed no such requirements. In fact, former 1.14 required that Respondent "maintain complete records of all funds"

coming into the possession of the lawyer. See In re Disciplinary Proceeding Against McKean, 148 Wn.2d 849, 860, 862-64, 64 P.3d 1226 (2003) (former RPC 1.14 encompassed a “duty of care” for handling client property, which included maintaining complete and accurate records and providing full accountings to clients of trust transactions). In sum, Respondent has failed to show that the Association did not meet its burden of proof on Counts Four and Five.

D. THE EVIDENCE AND THE FINDINGS OF FACT SUPPORT THE CONCLUSION THAT RESPONDENT VIOLATED RPC 8.4(a), 8.4(c) AND FORMER RPC 5.3(c)(1) AS CHARGED IN COUNT SEVEN

Respondent’s argument concerning Count Seven (engaging in dishonesty, deceit and misrepresentation through solicitation of the crime of false notarization) is nothing more than a request that this Court disregard the Hearing Officer’s credibility findings. The Hearing Officer’s finding (adopted by the Disciplinary Board) that Respondent requested his legal assistant to falsely notarize documents was based on assessments of credibility, which the Court should not disturb. Although Respondent seeks to impugn the credibility of Ms. Fisher, his former legal assistant, based on her alleged “bad” motives, the Hearing Officer heard both Ms. Fisher’s and Respondent’s testimony, see TR 318-19, 330-31, and in weighing both, found Ms. Fisher, not Respondent, to be

credible.

1. Substantial Evidence Supports the Hearing Officer's Finding that Respondent Requested a Non-lawyer Employee to Notarize the Signature of His Wife "in Absentia"

Respondent challenges AFFLCR 3.32 regarding Respondent's involvement in instructing a non-lawyer employee to falsely notarize real estate documents. Both the employee, Victoria Fisher, and Respondent testified about the disputed events. AFFLCR 3.32 was supported by substantial evidence, as follows:

- Ms. Fisher testified that, while employed as Respondent's legal assistant, Respondent asked her to "do him a favor" by notarizing his wife's signature on closing documents related to the purchase of a house by Respondent and his wife. TR 318-19. Respondent's wife was residing in Vancouver, B.C. at the time. TR 319.
- At Respondent's request, Ms. Fisher falsely notarized eight to ten documents requiring the signature of Respondent's wife, including a quit claim deed and a deed of trust. She agreed to perform the false notarizations to keep faith with her boss, and thus keep her job. TR 318-19.
- Respondent told Ms. Fisher that, after notarizing the documents with his wife's signature, she should take the documents to the closing agent's office and tell the closing agent that Ms. Fisher had personally driven to Canada to observe the signing of the documents. She then delivered the documents to the closing agent's office, as she had been instructed. TR 319.
- Respondent terminated Ms. Fisher on October 4, 2005, two weeks after these events and listed several alleged problems he had with Ms. Fisher's work. However, he did not allege

that Ms. Fisher had falsely notarized documents contrary to his instruction. EX 20.

- Respondent's only basis for challenging the finding that Respondent requested Ms. Fisher to falsely notarize the documents is that Respondent rather than Ms. Fisher should be found credible. The Court should not disturb the credibility determinations of the Hearing Officer. Marshall, 160 Wn.2d at 332.

2. Substantial Evidence Supports the Finding that the False Notarization Exposed the Parties to the Transaction and the Lender to Potentially Serious Injury

Respondent also challenges the Hearing Officer's finding that the false notarization exposed the parties to the real estate transaction and the lender to potentially serious injury. AFFLCR 3.33. Although Respondent is correct insofar as he assigns error to the second sentence of AFFLCR 3.33, which states that the transaction closed on the basis of the delivery of the falsely notarized documents, there was nevertheless sufficient evidence for the Disciplinary Board and the Hearing Officer to infer actual and potential injury from Respondent's misconduct.

Respondent terminated Ms. Fisher on October 4, 2005. EX 20. Perhaps out of a concern that Ms. Fisher would reveal the false notarizations to the closing agent, Respondent sent a letter to the agent dated October 4, 2005 in an apparent attempt to cover his tracks. The

letter stated that Respondent was concerned about the notarizations because Ms. Fisher had not traveled to Canada per Respondent's instructions, and that, even though he had Ms. Fisher call his wife for "telephone verification," he felt that the notarization had not been "proper." EX 30 at Bates 000014. As a result, the lender had to reissue the loan documents, which then had to be signed by Respondent's wife in the presence of a notary in Korea. This delayed the closing for at least five months. *Id.* at Bates 000007. There was both potential harm to the transaction, in that the delay could have caused the deal to fall apart, and actual harm, in that both the closing agent and the lender had to issue new documents and substantially delay the closing.

E. THE HEARING OFFICER DID NOT ABUSE HIS DISCRETION BY DENYING RESPONDENT'S MOTION TO PRECLUDE MS. FISHER FROM TESTIFYING

Less than two weeks prior to the hearing date, Respondent filed a motion to preclude the testimony of Ms. Fisher on the basis that he had not had an opportunity to depose or interview her prior to that date. BF 42. The Hearing Officer properly denied the motion, but stated that Respondent's counsel would need to have an opportunity to interview Ms. Fisher prior to her testimony. TR 14-15. Respondent's counsel did interview Ms. Fisher prior to her testimony. TR 310-11. Respondent now claims that Ms. Fisher "changed her story" between the interview

and her hearing testimony, and that his inability to depose her prejudiced his defense. RB 37.

The Hearing Officer's evidentiary rulings are reviewed for a manifest abuse of discretion. Whitney, 155 Wn.2d at 465. An abuse of discretion occurs only when no reasonable person would take the view adopted by the Hearing Officer. Id. The Hearing Officer properly exercised his discretion in denying the motion because: (1) Respondent had known how to contact Ms. Fisher since July 25, 2006 but did not attempt to subpoena her to a deposition until mid-October 2006 (BF 47, 80); (2) Respondent chose to take the risk of accepting Ms. Fisher's assurance that she would accept service of the subpoena by mail (RB 26, BF 47); (3) after the subpoena was returned to Respondent's counsel by the postal service as unclaimed, Respondent apparently never made any attempts to either find or serve her; and (4) Respondent's counsel interviewed Ms. Fisher prior to her testimony. Considering these facts, the Hearing Officer's ruling was a proper exercise of his discretion, and the Court should not disturb it.

F. THE HEARING OFFICER DID NOT ABUSE HIS DISCRETION IN DENYING RESPONDENT'S MOTION TO VACATE AND AMEND THE HEARING OFFICER'S DECISION

Similarly, the Hearing Officer properly exercised his discretion in

denying Respondent's motion to vacate and amend based on what Respondent attempted to portray as "newly discovered evidence" that Ms. Fisher had testified falsely. RB 38-39. The Hearing Officer considered the briefs of both parties, and heard oral argument on the motion. In a reasoned and careful decision, BF 82, the Hearing Officer, citing Nelson v. Placanica, 33 Wn.2d 523, 526, 206 P.2d 296 (1949), ruled that the allegedly "newly discovered" evidence produced by Respondent, *i.e.*, that a letter Ms. Fisher said she had sent to various entities had not been received by some of those entities, was immaterial, cumulative, and would not change the result if a new hearing were granted. The Hearing Officer stated:

Ultimately, I concluded that Ms. Fisher was credible on the salient points. Considering the evidence offered in support of Respondent's Motion to Vacate does not change that conclusion.

BF 82 at 2. The Hearing Officer's decision on Respondent's motion reaffirms that his findings were based on credibility determinations. The Court should not substitute its credibility determinations for those of the

Hearing Officer.¹³

G. THE COURT SHOULD AFFIRM THE DISCIPLINARY BOARD'S TWO-YEAR SUSPENSION RECOMMENDATION, BUT SHOULD ADD THE AGGRAVATING FACTOR OF DISHONEST AND SELFISH MOTIVE

The Disciplinary Board adopted the Hearing Officer's recommendation of a two-year suspension, which was based on the Hearing Officer's careful application of the American Bar Association Standards for Imposing Lawyer Sanctions (1991 ed. & Feb. 1992 Supp) ("ABA" Standards"), and this Court should affirm. The Disciplinary Board and the Hearing Officer erred, however, in applying "absence of a selfish or dishonest motive" as an aggravating factor.

This Court requires the application of the ABA Standards in all lawyer discipline cases. In re Disciplinary Proceeding Against Halverson, 140 Wn.2d 475, 492, 998 P.2d 833 (2000); In re Disciplinary Proceeding Against Johnson, 114 Wn.2d 737, 745, 790 P.2d 1227 (1990). Applying the ABA Standards is a two-step process. The first is to determine a presumptive sanction by considering (1) the ethical duty violated, (2) the lawyer's mental state, and (3) the extent of the actual or potential injury

¹³ Respondent also argues, incorrectly, that the Disciplinary Board should assess Ms. Fisher's credibility de novo because she testified by telephone. As discussed in reference to Ms. Koh's testimony, appellate courts review credibility determinations for substantial evidence, not de novo, even if the witness is not physically present in the courtroom. See Rideout, 150 Wn.2d at 350-51. Furthermore, Respondent consented to Ms. Fisher's appearance by telephone on the record, TR 29, and thus has waived his right to assert an objection on appeal.

caused by the misconduct. Dann, 136 Wn. 2d at 77. The second is to consider any aggravating or mitigating factors that might alter the presumptive sanction. Id.

1. Presumptive Sanctions

a. Count One

ABA Standards 5.1 applies to Respondent's conduct in inducing his employees to submit forged documents to INS by instructing them to commit the forgeries. As correctly found by the Hearing Officer, this conduct violated RPC 8.4(a) and RPC 8.4(c). ABA Standards 5.1 states in full:

5.1 Failure to Maintain Personal Integrity

5.11 Disbarment is generally appropriate when:

- (a) a lawyer engages in serious criminal conduct, a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft; or the sale, distribution or importation of controlled substances; or the intentional killing of another; or an attempt or conspiracy or solicitation of another to commit any of these offenses; or
- (b) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

5.12 Suspension is generally appropriate when a lawyer knowingly engages in criminal conduct which does not contain the elements listed in Standard 5.11 and that seriously adversely reflects on the lawyer's fitness to practice.

5.13 Reprimand is generally appropriate when a lawyer knowingly engages in any other conduct that

involves dishonesty, fraud, deceit, or misrepresentation and that adversely reflects on the lawyer's fitness to practice law.

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

As discussed above, the Disciplinary Board adopted the Hearing Officer's finding that Respondent "instructed his non-lawyer employees to forge the signature of the client's President" and the finding that Respondent acted with "conscious disregard for legal requirements." AFFCLR 3.8, 3.15. At minimum, the findings that Respondent undertook the volitional act of *instructing* his employees to forge documents with a *conscious* disregard for legal requirements amount to a finding that Respondent acted knowingly, *i.e.*, "with the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result."¹⁴ ABA Standards, Definitions at 17. The Disciplinary Board's application of ABA Standards 5.12, and recommendation of a 180-day suspension for this misconduct,

¹⁴ Arguably, this statement amounts to a finding that Respondent acted intentionally, *i.e.*, with "the conscious objective or purpose to accomplish a particular result." Id.; see also Marshall, 160 Wn.2d at 343-44 (by instructing another to prepare a false invoice, lawyer engaged in an intentional, calculated act of deceit). If the Court believes that Respondent acted intentionally, then it certainly has the authority to increase the sanction to disbarment under ABA Standards 5.11(a) or 5.11(b). See Dann, 136 Wn.2d at 84-85 (Court has authority to increase or decrease a sanction recommended by the Disciplinary Board).

can be affirmed on this basis.¹⁵

Respondent argues that the application of ABA Standards 5.12 requires a finding that Respondent violated RPC 8.4(b) (commission of a criminal act that reflects adversely on lawyer's honesty, trustworthiness or fitness to practice) because the standard refers to engaging in criminal conduct. But this Court has not adopted such a rigid approach to the ABA Standards. In fact, in the recent Marshall case, the Court applied ABA Standards 5.12 where a Respondent intentionally violated RPC 8.4(c) but not RPC 8.4(b). See Marshall, 160 Wn.2d at 344-45 (applying ABA Standards 5.12 where lawyer was found to have committed an intentional act of deceit and misrepresentation).

b. Count Seven

The Disciplinary Board and the Hearing Officer also did not err in applying ABA Standards 5.12 to Count Seven. The Hearing Officer correctly found that Respondent violated RPC 8.4(a), 8.4(c) and former RPC 5.3(c)(1) by soliciting violation of the notary statute (RCW 42.44.160). AFFCLR 5.6. As in Count One, the Disciplinary Board and the Hearing Officer found that Respondent caused the false notarization out of "conscious disregard for legal requirements" through requesting

¹⁵ Although injury is not required under ABA Standards 5.11- 5.14, the Hearing Officer correctly found that the forgeries caused potential injury to the parties.

that his legal assistant notarize his wife's signature in absentia. The analysis for Count Seven should, therefore, be no different than for Count One.

c. Counts 4 and 5:

The Disciplinary Board and the Hearing Officer correctly determined that ABA Standards 4.12¹⁶ applies to Respondent's deposit of client funds in an office general account (Count Four) and his failure to maintain complete and accurate records of client funds (Count Five). In addition, the Disciplinary Board and the Hearing Officer correctly found that his inadequate handling of client property exposed his clients to "serious" potential injury, because the funds in the general account would not have been immune from Respondent's personal creditors. His poor record keeping made it very difficult to trace the ownership of Respondent's clients' funds. Respondent's misconduct in failing to use a trust account for some client funds and his failing to keep adequate records was especially troubling given Respondent's substantial experience as a CPA. AFFCLR 4.5. The Hearing Officer correctly applied a presumptive sanction of no less than 180-day suspension for Respondent's

¹⁶ ABA Standards 4.12 states that 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."

violation of Count Four, and the identical recommendation for Respondent's violation of Count Five.

2. Aggravating and Mitigating Factors

a. Aggravating factors

The Hearing Officer and the Disciplinary Board properly applied the aggravating factors of prior disciplinary offenses, pattern of misconduct and substantial experience. Respondent's arguments concerning the application of these aggravating factors are misplaced.

First, Respondent contends that his prior discipline (admonition received in 2005 for lack of diligence and competence in an immigration matter in 2003) is too "remote." But under settled case law, Respondent's prior disciplinary offenses cannot be considered temporally "remote" from his current offense. See, e.g., In re Disciplinary Proceeding Against Juarez, 143 Wn.2d 840, 880, 24 P.3d 1040 (2001) (nine-year-old admonition considered aggravating factor).¹⁷

Respondent's contention that he did not commit multiple offenses is without merit. Respondent violated multiple RPC over a period of four years. As found by the Hearing Officer, with respect to the trust account

¹⁷ Applying this aggravator is also appropriate because part of the misconduct found in this case, Respondent's solicitation of the false notarizations in September 2005 (AFFCLR 3.31-3.33), occurred after Respondent was being investigated for misconduct in the matter that resulted in the admonition he received in July 2005. See Poole, 156 Wn.2d at 225-26.

violations alone, there were numerous separate instances of Respondent placing client funds from both law and escrow clients in a general business account. AFFCLR 4.3.

Respondent also challenges the application of the aggravating factor of “substantial experience.” Although ABA Standards 9.2(i) refers to “substantial experience in the practice of law,” the Hearing Officer and the Disciplinary Board correctly analogized that substantial experience as a CPA should be an aggravator where the lawyer mismanages client funds and accounts.

The evidence supports the application of an additional aggravating factor, dishonest or selfish motive, that was not applied by the Hearing Officer or the Disciplinary Board. Respondent’s motive in instructing his non-lawyer employees to forge Mr. Yeum’s signature was clearly dishonest because Respondent ordered someone in his employ to “fake” the signature of a client, with the purpose of deceiving the INS that the client himself had signed and sworn under penalty of perjury. His motive was also selfish, in that the evidence showed that Respondent disliked dealing with clients, and would try to avoid dealing with them directly. TR 252-54. Respondent testified that Mr. Yeum and his company were “hostile” clients. TR 434:11-16. Thus, Respondent wanted to avoid dealing with Mr. Yeum, and selfishly avoided dealing with him by

forwarding the H1-B application without having Mr. Yeum review it and without having Mr. Yeum sign it.

Similarly, when Respondent instructed Ms. Fisher to falsely notarize his wife's signature, he acted dishonestly and selfishly. His wife was residing in Canada and could not return to the United States without first returning to her home country, Korea. TR 399-400. Respondent wanted to close the real estate transaction, but did not want to deal with the inconvenience of having his wife sign in the presence of an appropriate notary in Canada. He, therefore, had Ms. Fisher perform the notarization in absentia to meet the closing deadline.¹⁸

b. Mitigating factors

As discussed above, the evidence clearly supports the application of "dishonest or selfish motive" as an aggravating factor. It cannot simultaneously support the application of "absence of a dishonest or selfish motive" as a mitigating factor. Consequently, the Hearing Officer and the Disciplinary Board clearly erred in applying that mitigating

¹⁸ The Hearing Officer and the Disciplinary Board also applied the aggravator of vulnerability of clients but did not explain why. Although there could be some basis for a finding that Respondent's clients were vulnerable because many spoke limited English and were recent immigrants, and thus were more likely to be completely reliant on Respondent, in In re Disciplinary Proceeding Against Anshell, 149 Wn.2d 484, 514, 69 P.3d 844 (2003), the Court held that unfamiliarity with the system and cultural and language differences is generally not sufficient to establish vulnerability.

factor.¹⁹

Respondent contends that his sanction should be mitigated because “no client or other person” suffered *actual* injury as a result of his conduct. RB 46. Respondent’s argument fails because the ABA Standards do not distinguish between actual and potential injury, and there is no basis for mitigating down a sanction merely because the injury to clients and others was “potential” rather than “actual.” The purpose of lawyer discipline is not to compensate injured persons or to punish the lawyer who causes an actual injury; rather, the purpose is to “protect the public and the administration of justice.” In re Disciplinary Proceeding Against Whitt, 149 Wn.2d 707, 723, 72 P.3d 173 (2003); ABA Standards 1.1. The need for protection of the public, the profession and the legal system is the same whether the lawyer who has violated his ethical obligations actually caused harm or would have caused harm “but for some intervening factor or event.” ABA Standards 3.0, commentary. It is precisely for this reason that a disciplinary proceeding, unlike a civil malpractice suit for damages, does not require a showing of actual harm. See Halverson, 140 Wn.2d; In

¹⁹ The Hearing Officer and the Disciplinary Board also applied the mitigator of cooperative attitude towards proceedings. AFFCLR 4.6, BF 120. Although this mitigator was applied recently in In re Disciplinary Proceeding Against Dornay, 160 Wn.2d 671, 685-86, 161 P.3d 333 (2007), there were no facts in the record in this case indicating that Respondent’s level of cooperation was beyond that required of all lawyers in disciplinary proceedings. There was, therefore, an insufficient factual basis for applying it in this case.

re Disciplinary Proceeding Against Anschell, 149 Wn.2d 484, 516, 69 P.3d 844 (2003).

Respondent also claims that he made timely good faith efforts to correct the misconduct in Count Seven by notifying the closing agent of what he claimed was Ms. Fisher's failure to abide by his instructions to drive to Vancouver, B.C. to notarize the real estate documents. RB 46. Respondent is again attempting to reargue his version of the facts, a version that was rejected by the Hearing Officer, and which the Court should not disturb. Marshall, 160 Wn.2d at 331. Under the facts as found by the Hearing Officer, Respondent's letter to the closing agent must have contained false information because it stated that Ms. Fisher had not gone to Canada per Respondent's instructions but had instead verified his wife's signature by phone. EX 30 at Bates 000014. By contrast, the Hearing Officer found that Respondent instructed Ms. Fisher to perform the false notarizations and, in so doing, impliedly rejected Respondent's contention that he instructed her to go to Canada. See AFFCLR 3.31-3.32. Respondent should not receive mitigation for making false statements to protect himself.

Respondent also maintains that timely good faith effort to rectify consequences of his conduct should apply to his efforts to obtain assistance from the Law Office Management Assistance Program

(LOMAP) with his trust account. RB 47. In fact, Respondent did not obtain LOMAP assistance until Ms. Toering noticed that his office procedures, including handling of his trust account, were inadequate and possibly unethical. TR at 243. Even assuming that meeting with LOMAP would qualify as rectifying consequences of misconduct, it was not Respondent who initiated these actions.

Finally, Respondent argues that the mitigating factor of inexperience in the practice of law should apply. As noted above, with respect to Respondent's mismanagement of his trust account, his long experience as a CPA should be an aggravating factor rather than a mitigating factor. With respect to Respondent's dishonest and deceitful conduct, dishonesty and deceit is not a matter of experience, but one of character.

3. The Disciplinary Board's Sanction Recommendation Is Appropriate and Proportionate

The Disciplinary Board properly adopted the Hearing Officer's recommendation of a 180-day suspension for Count One, a 180-day suspension for Count Seven, and a 360-day suspension for Counts 4 and 5. In light of the seriousness of the violations, the significant aggravating factors and the lack of mitigating factors, a two-year suspension is an appropriate sanction and this Court should affirm the recommendation.

Respondent argues that the sanction should be reduced because it is unfairly “stacked” and that the multiple sanctions should be “merged” into the sanction for the most serious offense. RB 45. Respondent’s argument is legally unsupported. Where multiple instances of misconduct have occurred, the overall sanction should be *at least* consistent with the sanction for the most serious offense, not merged into the most serious offense. Marshall, 160 Wn.2d at 346 (emphasis added). Furthermore, separate suspensions for different findings of misconduct may run consecutively. In re Disciplinary Proceeding Against DeRuiz, 152 Wn.2d 558, 582-83, 99 P.3d 881 (2004).

Proportionate sanctions are those which are “roughly proportionate to sanctions imposed in similar situations or for analogous levels of culpability.” In re Disciplinary Proceeding Against Anschell, 141 Wn.2d 593, 615, 9 P.3d 193 (2000). Respondent has the burden of showing disproportionality. Kagele, 149 Wn.2d at 821. Respondent asserts that a two-year suspension would be disproportionately high based on allegedly similar cases. (RB 48-50). Three of the cases, Moore, Karber and McIntosh, were stipulations and therefore irrelevant to proportionality. Anschell, 149 Wn.2d at 517-18. The other cases cited by Respondent are readily distinguishable.

Although Marshall, 160 Wn.2d 317 (eighteen-month suspension),

also involved several counts of misconduct, including instructing a non-lawyer to create a “fake invoice,” it did not involve instructing non-lawyers to sign false certifications under penalty of perjury, and then submitting them to a government agency, nor solicitation of a criminal act. In Poole, the misconduct was limited to one client matter in which Poole backdated an invoice without his client’s knowledge and failed to timely account to the client. Poole, 156 Wn.2d at 196 (six-month suspension). By contrast, Respondent twice induced or solicited forgeries and false notarizations and had multiple trust account violations.

In In re Disciplinary Proceeding Against Dynan, 152 Wn.2d 601, 98 P.3d 444 (2004), the respondent lawyer received a six-month suspension for misrepresenting his fee to the court but was not found to have solicited violation of a criminal statute. In addition, there were no trust account violations. In re Disciplinary Proceeding Against Christopher, 153 Wn.2d 669, 105 P.3d 976 (2005) is distinguishable by the fact that, in Christopher, the Court found eight mitigating factors, which, when weighed against two aggravators, significantly reduced the presumptive sanction. There were also no trust account violations in that case. Although In re Disciplinary Proceeding Against Tasker, 141 Wn.2d 557, 9 P.3d 822 (2000), involved serious trust account violations, there were no allegations of inducing forgeries and false notarizations *in*

addition to the trust account violations. Even so, Tasker received a two-year suspension.

In re Disciplinary Proceeding Against Salversen, 94 Wn.2d 73, 614 P.2d 1284 (1980) (two-year suspension), is likewise distinguishable. It also involved serious trust account violations (conversion of client funds), but there were no additional charges involving inducement or solicitation of forgery and false notarization. Finally, In re Disciplinary Proceeding Against Carmick, 146 Wn.2d 582, 48 P.3d 311 (2002) (60-day suspension), is inapposite because it involved completely different RPC violations (ex-parte communications with the court and contact with an opposing party Carmick knew to be represented).

Respondent violated two of the most basic tenets of the RPC – the duty to be honest and truthful, and to safeguard client property. In perpetrating his acts of dishonesty, he used subordinates who relied on him for their livelihood. His defense has been to try impugn the integrity and credibility of these employees, even though it is extremely improbable that two employees, working at different time periods and without any knowledge of each other, would have manufactured very similar allegations, *i.e.*, that Respondent instructed them to forge or falsely notarize documents. Indeed, Respondent's blaming of his former employees indicates that Respondent is unable to take responsibility for

his own actions, and argues even more strongly for a severe sanction. As the Court noted in Dann:

He [Dann] repeatedly characterizes the former associate as “disgruntled” as if the motives - even assuming the characterization to be true - of the employee in whistleblowing have any bearing upon the wrongs that he brought to light . . . Dann “has not acknowledged that the preponderance of his actions were in any way dishonest or deceitful . . . his continued insistence that he acted properly leaves us quite uncertain that he would not repeat his ethical misconduct”.

136 Wn.2d at 81(quoting In re Disciplinary Proceeding Against Vetter, 104 Wn.2d 779, 792, 711 P.2d 284 (1985)).

V. CONCLUSION

Respondent instructed his non-lawyer employees to forge and falsely notarize documents, and, despite his knowledge and experience as a CPA, he failed to place client funds in a trust account and maintain complete and accurate records. The Court should affirm the Disciplinary Board’s two-year suspension recommendation.

RESPECTFULLY SUBMITTED this 20th day of December, 2007.

WASHINGTON STATE BAR ASSOCIATION



Kevin M. Bank, Bar No. 28935
Disciplinary Counsel