

No. 200,531-4

SUPREME COURT OF THE STATE OF WASHINGTON

In re Disciplinary Proceedings Against

Young S. Oh,

Lawyer (Bar No. 29692)

BRIEF OF APPELLANT

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TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	ASSIGNMENTS OF ERROR.....	3
III.	ISSUES PERTAINING TO ASSIGNMENTS OF ERROR	6
IV.	STATEMENT OF CASE	8
	A. Statement of Facts.....	8
	1. The Moon Visa Application.....	9
	a. The Falsity of the Moon Application.....	10
	b. Seven Witnesses Refute Count 1	11
	c. Only One Witness for Count 1	12
	2. Mr. Oh’s Trust Account Practices in 2001 and early 2002.....	14
	a. Account 169	14
	b. Mr. Oh Hired LOMAP and corrected Errors.....	15
	c. Mr. Oh’s Record-Keeping.....	15
	3. Mr. Oh’s Personal Real Estate Transaction	16
	a. Mr. Oh Stopped the Transaction	17
	b. Ms. Fisher was a Difficult Witness with an Agenda	17
	c. Ms. Fisher Testified Falsely about a Letter..	19
	B. Procedural History	20
V.	ARGUMENT	23
	A. Standard of Review.....	23

B.	The Association Failed to Prove Count 1 by a <i>Clear</i> Preponderance of Evidence.....	24
1.	Ms. Koh’s Isolated Testimony does not Establish Count 1 by a <i>Clear</i> Preponderance ..	25
2.	The Court may make its own Findings on Ms. Koh’s Deposition Testimony	27
3.	The Association Neglected Its Responsibility for Proving Count 1	28
C.	The Hearing Officer erred in Denying Mr. Oh’s Motion for Handwriting Samples from Ms. Koh and Ms. Moon.....	29
D.	In Finding Misconduct Under Count 5, the Hearing Officer Applied a High Standard of Record-Keeping not in Effect in 2001 and 2002	30
E.	The Association Failed to Prove Count 7 by a <i>Clear</i> Preponderance of the Evidence.....	33
1.	Mr Oh Put a Stop to the Transaction	34
2.	Ms. Fisher’s Testimony Lacked Credibility	34
F.	The Hearing Officer Erred in Denying Mr. Oh’s Motion to Exclude Ms. Fisher’s Testimony	36
G.	The Hearing Officer Erred in Denying Mr. Oh’s Motion to Vacate.....	38
H.	The Hearing Officer’s Recommended Sanction is Overly Harsh and Should be Reduced if not Overturned	40
1.	Presumptive Sanction.....	41
a.	Count 1	41
b.	Counts 4 and 5	42

c. Count 7	44
2. Stacking of Sanctions is Impermissible	45
3. Aggravating and Mitigating Circumstances	45
4. Lack of Unanimity	48
5. Proportionality of Sanction	48
VI. CONCLUSION.....	50
APPENDIX A – Findings of Fact, Conclusions of Law, and Hearing Officer’s Recommendation (Amended January 29, 2007)	
APPENDIX B – Disciplinary Board Order Adopting Hearing Officer’s Decision	
APPENDIX C – Selected Disciplinary Notices published in the Washington State Bar News	

TABLE OF AUTHORITIES

Cases

Atchison T. & S.F. Ry. Co. v. Barrett, 246 F.2d 846, 849 (9 th Cir. 1957)	39
Delle v. Delle, 112 Wash. 512, 517, 192 P. 966 (1920)	23
Estate of Reilly, 78 Wn.2d 623, 654, 479 P.2d 1 (1970)	23, 27, 35
In re Disciplinary Action Against Anschell, 141 Wn.2d 593, 615, 9 P.3d 193 (2000)	49
In re Disciplinary Proceeding Against Carmick, 146 Wn.2d 582, 48 P.3d 311 (2002)	49
In re Disciplinary Proceeding Against Christopher, 153 Wn.2d 669, 979-80, 105 P.3d 976 (2005)	41, 45, 47, 49
In re Disciplinary Proceeding Against Dornay, 160 Wn.2d 671, 679, 161 P.3d. 333 (2007)	23, 46
In re Disciplinary Proceeding Against Dynan, 152 Wn.2d 601, 623, 98 F.3d 444 (2004)	48, 49
In re Disciplinary Proceeding Against Karber, WSBA Bar News (1/07)	49
In re Disciplinary Proceeding Against Kennedy, 80 Wn.2d 222, 230, 492 P.2d 1346 (1972)	27, 35
In re Disciplinary Proceeding Against Little, 40 Wn.2d 421, 430, 244 P.2d 255 (1952)	24, 26
In re Disciplinary Proceeding Against Marshall, 160 Wn.2d 317, 329, 157 P.3d 859 (2007)	23, 24, 28, 38, 40, 41, 45, 49
In re Disciplinary Proceeding Against McIntosh, WSBA Bar News (4/06)	50
In re Disciplinary Proceeding Against Moore, WSBA Bar News (4/07)	49
In re Disciplinary Proceeding Against Noble, 100 Wn.2d 88, 667 P.2d 608 (1983)	51
In re Disciplinary Proceeding Against Poole, 156 Wn.2d 196, 209 n. 2, 122 P.3d 954 (2006)	23, 49
In re Disciplinary Proceeding Against Salvesson, 94 Wn.2d 73, 76, 614 P.2d 1264 (1984)	49
Peacock Records, Inc. v. Checker Records, Inc., 365 F.2d 145, 146 (7 th Cir. 1966)	39
In re Disciplinary Proceedings Against Miller, 149 Wn.2d 262, 285 -86, 66 P.3d 1069 (2003)	48
In re Disciplinary Proceedings Against Tasker, 141 Wn.2d at 577, 572 9 P.3d 822 (2000)	49
Webster v. State Farm Mut. Auto Ins. Co., 54 Wn.App. 492, 495, 774 P.2d 50 (1989)	23, 27, 35

Statutes

RCW 4.72.010	38
RCW 42.44.160	49

Other Authorities

Report and Recommend. p. 12.....	31
Rptr's Explan. Memo. p. 169.....	31

Rules

ABA Standard 4.12	5
ABA Standard 4.13	48
ABA Standard 5.12	5, 6, 46, 49
ABA Standard 5.11	46
ABA Standard 5.13	46, 49
ABA Standard 9.22(i)	53
ABA Standard 9.32(b)	51
ABA Standard 9.32(d)	51, 52
ABA Standard 9.32(e)	51
ABA Standard 9.32(f)	52
ABA Standard 9.32(m)	52
CR 60(b)(4)	42
ELC 10.1(a)	42
ELC 11.12(d)	42
RPC 1.14	34
RPC 1.14(a)	5, 23, 46, 56
RPC 1.14(c)	5, 23, 46
RPC 1.14(b)(3)	passim
RPC 1.15B	34, 36
RPC 1.5	54
RPC 1.5(c)(1)	56
RPC 3.3(a)(1)	54, 55
RPC 3.3(a)(4)	54
RPC 3.3(b)	54, 55
RPC 3.3(f)	55
RPC 3.4(b)	54
RPC 3.5(c)	55
RPC 8.4(d)	54, 55

RPC 4.2.....	55
RPC 5.3(c)(1).....	6, 23, 49
RPC 8.4(a).....	5, 6, 23, 45, 49
RPC 8.4(b).....	45, 54
RPC 8.4(c).....	5, 6, 23, 45, 49, 54, 55, 56
RPC 8.4(d).....	54, 55, 56

I. INTRODUCTION

This is a lawyer disciplinary proceeding brought by the Washington State Bar Association (the Association) against lawyer Young S. Oh charging him with multiple counts of misconduct. A principle issue in this case is the level of investigation and proof expected from the Association when charging a lawyer with professional misconduct. In its investigatory and prosecutorial capacities, the Association should be expected to do more to meet its obligations in lawyer disciplinary proceedings than merely to advocate charges of misconduct.

For instance, the Association's first count accuses Mr. Oh of instructing an employee to forge a client's signature on a visa application. But the only proof the Association can offer to support this count is the transcript of a telephone deposition of a disgruntled, former, four-month employee now living out of state. Six other witnesses, three of whom were the Association's witnesses and a fourth who is a handwriting expert, testified live at the hearing contrary to that witness's deposition transcript.

The Association did even less to get to the bottom of the alleged forgery. The crux of the forgery charge was identifying the forger so as to determine if Mr. Oh had any involvement with that person, but beyond accepting what the one witness had to say, the Association did nothing to make or confirm that determination for itself. Although it had hired a

well-regarded handwriting expert for this case, it never asked him to analyze anyone's handwriting or otherwise attempt to determine who allegedly forged the signatures at issue. By not making that most basic investigation, and by not being able independently to confirm the identity of the forger, the Association was in no position to accuse Mr. Oh of participating in the alleged forgery. This is particularly troubling in this proceeding because the visa application for which the signatures were forged was rife with falsehoods made without any involvement or knowledge by Mr. Oh.

It was with this same lack of effort that the Association investigated and prosecuted six other counts of misconduct. Indeed, the Association's proof on two of these other counts relied entirely on telephone testimony from an out-of-state witness who brought many issues of her own questionable conduct into this hearing. Ultimately, the Association dropped one of its counts before the hearing and, on the remaining counts, the hearing officer found misconduct on four counts, dismissed two counts, and stacked a recommendation for four, six-month suspensions to arrive at a recommended overall sanction of suspension for two years. The Disciplinary Board (the Board) affirmed the hearing officer, although a dissenting group of Board members recommended a reduced suspension of one year.

In reviewing this case, this Court should give the Association's proof – particularly the testimony from absent witnesses – greater scrutiny than it normally would in disciplinary proceedings. When the Court makes that review, it will see that the Association's proof was slight at best; no one suffered injury as a result of anything Mr. Oh did or did not do; Mr. Oh never acted with dishonest or selfish motives; before any disciplinary investigation started, he took affirmative steps to cure any defects in his practice of law; and once that investigation began, he brought a cooperative attitude with him. In the end, Mr. Oh is entitled to an opinion from this Court vacating all or most of the hearing officer's findings of misconduct and/or imposing a much lesser sanction than a two- or even one-year suspension.

II. ASSIGNMENTS OF ERROR

1. The hearing officer erred in making the following findings:
 - a. A non-lawyer employee of Mr. Oh forged the signature of a client's president in a visa application, AFFCLR 3.7¹, on Mr. Oh's instruction. AFFCLR 3.8.
 - b. Prior to mid-2002 Mr. Oh did not use a lawyer trust account for client funds, AFFCLR 3.16; Mr. Oh caused law client and

¹ "AFFCLR" refers to the Findings of Fact, Conclusions of Law, and Hearing Officer's Recommendation (Amended January 27, 2007), a copy of which is attached to this Brief as Appendix A. BF 65 (Decisions Papers (DP) 14-26). The number that follows AFFCLR refers to the paragraph number therein.

escrow client funds to be deposited into his general bank account on multiple occasions. AFFCLR 3.18; and Mr. Oh used a trust account that did not comply with the Association's IOLTA trust account requirements. AFFCLR 3.25.

c. During 2002 and 2003, Mr. Oh maintained no attorney-client ledger documenting the status of client financial accounts. AFFCLR 3.21.

d. Mr. Oh requested a non-lawyer employee to notarize the signature of his wife in absentia, AFFCLR 3.32; that a real estate transaction closed on the basis of the improperly notarized signature, AFFCLR 3.33; and that Mr. Oh's use of the false notarization of his wife's signature exposed the parties to that transaction to potential serious injury. AFFCLR 3.35.

e. The following are aggravating factors in this proceeding: prior disciplinary offense, AFFCLR 4.2; pattern of misconduct, AFFCLR 4.3; vulnerability of clients, AFFCLR 4.4; and substantial experience. AFFCLR 4.5.

2. The hearing officer erred in failing to find the following as mitigating factors in this proceeding: Mr. Oh was inexperienced in the practice of law; he hired the Association's Law Office Management Assistance Program (LOMAP) to assist him with administration of his law

office; he acted on suggestions and information provided to him by LOMAP; in mid-2002, before any audit or investigation by the Association, Mr. Oh opened an IOLTA account and has used it consistently since; Mr. Oh took prompt, corrective action to rectify any consequences of the false notary; and no one suffered any injury from such false notarization.

3. The hearing officer erred in making the following conclusions of law:

a. Mr. Oh violated RPC 8.4(a) and (c) by instructing a non-lawyer employee to forge the signature of a client's president.

AFFCLR 5.1.A. ABA *Standard* 5.12 applies to such violation and the presumptive sanction for such violation is suspension. AFFCLR 5.1.B and C.

b. Mr. Oh violated RPC 1.14(a) and (c) by depositing client funds in a general bank account. AFFCLR 5.3.A. ABA *Standard* 4.12 applies to such violation and the presumptive sanction for such violation is suspension. AFFCLR 5.3.B and C.

c. Mr. Oh was required to maintain "auditable financial records" for client funds in his possession and he violated RPC 1.14(b)(3) by failing to maintain such records. AFFCLR 5.4.A. ABA *Standard* 4.12 applies to such violation and the presumptive sanction for

such violation is suspension. AFFCLR 5.4.B and C.

d. Mr. Oh violated RPC 8.4(a) and (c) and RPC 5.3(c)(1) by causing his wife's signature to be falsely notarized. AFFCLR 5.6.A. ABA *Standard* 5.12 applies to such violation and the presumptive sanction for such violation is suspension. AFFCLR 5.6.B and C.

4. The hearing officer erred in issuing a "Comprehensive Recommendation" calling for the stacking of four, separate six-month suspensions to reach a two-year suspension. AFFCLR p. 11.

5. The hearing officer erred in denying Mr. Oh's Pre-Hearing Motion, BF 42 (CP 55-62), insofar as it requested handwriting samples from Ae Sun Moon and Shannon Koh, TR 29, and the exclusion of testimony from Victoria Fisher. TR 14-15.

6. The hearing officer erred in denying Mr. Oh's Motion to Vacate and Modify the AFFCLR. BF 73 (DP 163-78).

7. The Disciplinary Board erred in approving the foregoing errors by the hearing officer. BF 120 (DP 44-45).

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the Association prove forgery and false notarization charges against Mr. Oh by a clear preponderance of the evidence?

2. Is there substantial evidence to support the findings to which errors are assigned in paragraph 1 of the Assignments of Error?

3. May the Court make its own findings on the deposition testimony of Shannon Koh and on the telephone testimony of Victoria Fisher? If yes, should the Court make findings on the testimony of these two witnesses contrary to those made by the hearing officer?

4. Are there findings of fact supporting the conclusions of law to which errors are assigned in paragraph 3 of the Assignments of Error?

5. Under an abuse of discretion standard, did the hearing officer err in denying Mr. Oh's motion for handwriting samples of Ms. Koh and Ms. Moon for the purpose of investigating the identity of the person(s) responsible making the forgeries at issue in this proceeding?

6. Under an abuse of discretion standard, did the hearing officer err in denying Mr. Oh's motion to exclude Ms. Fisher's testimony on the basis that she evaded service of a deposition subpoena?

7. Under a de novo standard of review, did the hearing officer err in interpreting RPC 1.14(b)(3) to require "auditable financial records" of client funds in a lawyer's possession or otherwise to require a client ledger separate and distinct from a check register although the check register in this case serves the same function as a separate client ledger?

8. Was there substantial evidence sufficient to find the mitigating factors enumerated in paragraph 2 of the Assignments of Error, and, if so, did the hearing officer err by not finding them?

9. Under an abuse of discretion standard of review, did the hearing officer err in denying Mr. Oh's Motion to Vacate and Modify the hearing officer's decision on the basis that false testimony by Ms. Fisher tainted this entire proceeding?

10. Under a de novo standard of review, did the hearing officer err in applying the *ABA Standards* in determining the presumptive sanctions for misconduct found on the part of Mr. Oh?

11. Under a de novo standard of review, did the hearing officer err in issuing a sanction recommendation whereby he stacked four, separate six-month suspensions to reach a "comprehensive recommendation" that Mr. Oh be suspended for two years?

12. Under a de novo standard of review, did the hearing officer err in weighing mitigating factors against the aggravating factors in recommending an appropriate sanction in this proceeding?

13. Under a de novo standard of review, is the sanction recommended by the hearing officer and/or considered by this Court proportionate to sanctions imposed in similar situations or for analogous levels of culpability?

IV. STATEMENT OF CASE

A. Statement of Facts.

Mr. Oh was admitted to practice law in Washington in 1999.

AFFCLR 3.1 (DP 17). He is also a licensed CPA who has maintained an accounting practice since 1993. TR 166-68. In 2000, he started a law practice that included serving as closing agent for business and real estate transactions. His practice grew to 300 to 500 accounting clients, 20 to 40 transactions per month, and an active law practice that focused on immigration matters. AFFCLR 3.3 (DP 17).

1. The Moon Visa Application.

The proceeding involves only one client matter, a visa application for Ae Sun Moon. In the fall of 2002, the president of Card Data Systems (CDS), John Yeum, engaged Mr. Oh to obtain an H-1B visa for Ms. Moon, a Korean citizen. An H-1B visa is a non-immigrant visa that permits an alien in statutorily defined “specialty occupations” to work in the United States for a specific time period. EX 1 p. 2. To obtain an H-1B visa, both the prospective employer and the prospective employee must submit an application and supporting papers to the Immigration and Naturalization Service (now, the Customs and Immigration Service). *Id.*

On November 30, 2002, Mr. Oh submitted the Moon visa application with supporting papers containing signatures purporting to be those of Ms. Moon and Mr. Yeum. EX 1. Among the papers were Ms. Moon’s resume, EX 2 nos. 0092, 0140-41, and letters of employment from two Korean companies that CDS had provided to Mr. Oh. EX 2 nos.

0180-87. Ms. Moon lacked the requisite education to qualify for the visa, so the letters were submitted to show that she had equivalent job experience. EX 1 pp. 1-6. Each letter purported to acknowledge her position, duties and years of employment at that company. *Id.*

The INS denied the Moon application for reasons that had nothing to do with alleged misconduct by Mr. Oh. INS denied the application because Ms. Moon was unqualified for the visa. AFFCLR 3.13 (DP 18).

a. The Falsity of the Moon Application.

In Count 1, the Association alleged that Mr. Oh directed a non-lawyer assistant in his office, Esther Lee (formerly, Kang), to sign Ms. Moon's and Mr. Yeum's signatures in the Moon visa application without their knowledge or permission. However, in the course of this proceeding, Mr. Oh discovered that the information about Ms. Moon's qualifications provided to him by CDS and/or Ms. Moon, including the letters from Korean employers, had been falsified. TR 61-63, 86-89.

After Mr. Oh notified the Association about his discovery, it withdrew its allegations of misconduct as to Ms. Moon's signature. TR 17 and 27. Although the Association's evidence under Count 1 was exactly the same for Mr. Yeum's signatures as it was for Ms. Moon's signatures, it persisted in proceeding on Count 1 on Mr. Yeum's signature.

b. Six Witnesses Refute Count 1.

The Association presented testimony for Count 1 from five witnesses and Mr. Oh presented testimony from three witnesses. Mr. Oh testified that he never forged any client signatures and never directed anyone else to do so. TR 434. Ms. Lee, the former employee accused of making the signatures in question, testified that she never forged anyone's signature and that Mr. Oh never asked her to do so. TR 410-11.²

A handwriting expert, Hannah McFarland, who analyzed the signatures and handwriting samples from Mr. Oh and Ms. Lee, testified that the signatures were made by someone other than Mr. Oh or Ms. Lee. TR 484-91.³ The Association's handwriting expert, Timothy Nishimura, did not contest Ms. McFarland's conclusions or methodology. TR 538.

Mr. Yeum testified for the Association that the signatures at issue were not his. TR 68. He did not offer any testimony as to who made the signatures, although he did admit that he had assigned full responsibility for dealing with the Moon application to a subordinate employee. TR 65.

The Association called an attorney who worked for Mr. Oh when

² Ms. Lee testified that she telephoned Mr. Yeum and left him a message that the application materials were available for his review and signature at Mr. Oh's reception desk. TR 417. She then put the application papers at that desk and they were returned to her the next day fully signed. TR 418.

³ Ms. McFarland also analyzed handwriting samples from Mr. Yeum and one of his assistants and concluded that the signatures in question were not made by them. In an effort to determine who did make the signatures at issue, Mr. Oh requested the hearing officer to permit Ms. McFarland to obtain handwriting samples from Ms. Moon and Ms. Koh, but the hearing officer denied the request. TR 15-29.

the Moon application was submitted, Cindy Toering, but she testified that she never saw or heard Mr. Oh direct or otherwise participate in forgery of a signature. TR 288. It would be surprising in such a small office as Mr. Oh's that an instruction to forge a client signature could be kept secret.

The Association's investigator, Vanessa Norman, testified that she interviewed many of Mr. Oh's former employees, TR 55, but none except one witness (see next section) could support Count 1. TR 55.

c. Only One Witness Tried to Support Count 1.

The Association's case against Mr. Oh on Count 1 consisted entirely of the testimony of one witness, Shannon Koh, who worked for Mr. Oh as a non-lawyer assistant for merely four months. EX 17 pp. 6-7. Ms. Koh did not testify in person at the hearing. The Association presented merely the transcript of her telephone deposition testimony taken outside the presence of the hearing officer. EX 17.

Mr. Oh hired Ms. Koh shortly before the Moon application was submitted to the INS. *Id.* p. 6. She had no prior experience preparing visa applications. *Id.* p. 7. When she started for Mr. Oh, she received training on preparing visa applications but was not allowed to prepare visa paperwork on her own until she established her competency. *Id.* p. 8. Four months after she was hired, Ms. Koh was reassigned to the accounting side of his business due to a slowdown in visa work and an

increase in accounting and tax work, *id.* pp. 23-26, but Ms. Koh refused this move and quit. She was upset and threatened a lawsuit and bar complaint against Mr. Oh on unspecified grounds. *Id.* p. 26.

Ms. Koh had told Ms. Toering that she saw Mr. Oh make the signatures at issue on the Moon application. TR 262. But when she gave her deposition, she changed her story to say that she saw Ms. Lee make the signatures. EX 17 p. 48. When asked about Mr. Oh's involvement, Ms. Koh consistently replied, "every time I asked Mr. Oh for a signature from the client, Mr. Oh told me to go to Esther to get the signature." *Id.* p. 15. She repeated multiple times that these were Mr. Oh's exact words. *Id.* pp. 18, 19, 41, 42, 47 ("that's exactly what he said"), 93. Ms. Koh further admitted that she never heard Mr. Oh use the words "forge" or "forgery." *Id.* p. 47. She simply "assumed that's what he meant." *Id.* pp. 41-42.

Mr. Oh's instruction that Ms. Koh take the visa papers to Ms. Lee must be viewed in the context that Ms. Koh was a new employee with no prior experience with visa applications. *Id.* pp. 7-9. He recognized her lack of experience and was not comfortable having her deal directly with Mr. Yeum, whom he had viewed as a difficult client. TR 439.

The Association presented no evidence that Mr. Oh asked Ms. Lee to sign Mr. Yeum's name or that Mr. Oh even had knowledge that there may have been a false signature.

2. Mr. Oh's Trust Account Practices in 2001 and early 2002.

During 2001 and early 2002, Mr. Oh maintained a business checking account at Bank of America, account 16924714 (Account 169), at a branch near his office in Mountlake Terrace. He also maintained an IOLTA account at Northwest International Bank in Seattle,⁴ and a general business account for his law firm operations. TR 117-18, 137.

a. Account 169.

In 2001 and early 2002, Mr. Oh believed in good faith that he could use Account 169 as a trust account for client funds to be held by him for very short periods of time. AFFCLR 3.29 (DP 20); TR 117-18, 124. He had understood at that time that depositing client funds into an IOLTA account was necessary only when the funds would be held long enough to accrue measurable interest. For funds that would be disbursed promptly upon deposit, such that no interest would accrue, he believed that he was not required to use an IOLTA account. *See* TR 172-74. In hindsight, Mr. Oh is now fully aware that client funds must always be deposited into an IOLTA or other Association-approved trust account, and that client funds should never have been deposited into Account 169.

When in 2001 and early 2002 Mr. Oh did deposit funds that he

⁴ The Association has agreed that the IOLTA account complied with IOLTA requirements and that the hearing officer's finding of no IOLTA account in AFFCLR 3.25 is erroneous. BF 109 p. 17 n.8 (BRIEF 74).

anticipated he would hold for some length of time, such as escrow funds, he properly deposited such funds in his IOLTA account. His IOLTA account practices are not at issue in this proceeding, only his use of Account 169.

b. Mr. Oh Hired LOMAP and Corrected Errors.

In April 2002, Mr. Oh hired the Association's Law Office Management Assistance Program (LOMAP), EX 105, and for a fee, LOMAP provided professional assistance and advice on administering his law office. As one result of hiring LOMAP, Mr. Oh established a second IOLTA account at his local Bank of America branch, account 508591151 (Account 508). TR 201. He has maintained and used an IOLTA account for all client funds ever since. TR 200-01.

Mr. Oh consulted LOMAP and established Account 508 before any audit or investigation by the Association. When the Association did audit and investigate Mr. Oh's trust account practices, Mr. Oh fully cooperated with the Association's auditor. AFFCLR 4.6 (DP 23).

c. Mr. Oh's Record-Keeping.

Mr. Oh always kept sufficient records of client funds to enable him to track them accurately, AFFCLR 3.26 (DP 20), and to avoid any client from suffering any monetary loss. AFFCLR 3.27 (DP 20). He did this by maintaining (a) bank statements, EX 35; (b) a check register and ledger,

EX 34; and (c) back-up and other documents pertaining to particular client transactions within the client's matter file. TR 180, 191. He then reconciled the register against bank statements. *See* EX 34, TR 122-23 (Doty: "tick marks . . . would indicate to me that some sort of reconciliation is going on"), TR 172 (Oh: deposits and disbursements were matched to bank statements). Mr. Oh also maintained detailed client ledgers for escrow transactions. *See, e.g.*, EX 36 1st page.

While the Association's auditor reviewed Mr. Oh's bank statements and check register during her audit, she failed to account for or review records maintained within Mr. Oh's individual client files. Mr. Oh was fully cooperating with the Association's investigation and would have provided information from client files if asked. TR 156-57.

3. Mr. Oh's Personal Real Estate Transaction.

In 2005, Mr. Oh and his wife were involved in a personal real estate transaction for which her notarized signature was required. AFFCLR 3.31 (DP 21). A citizen of Korea, Mr. Oh's wife was in Vancouver, B.C. at the time, *id.*, and was unable under U.S. law to re-enter the U.S. directly without first traveling to Korea. TR 406. Mr. Oh instructed his paralegal, Victoria Fisher, to travel to Vancouver with his wife's friend to obtain and notarize her signature where needed. TR 400. However, Ms. Fisher disregarded Mr. Oh's request and simply notarized

the documents and delivered them to the closing agent. TR 403-04.

It was not unusual for Mr. Oh to ask Ms. Fisher to drive distances in the course of her employment. Mr. Oh routinely made such requests and, for example, he once had her drive to Olympia from their Mountlake Terrace office just to deliver a check. TR 317. Ms. Fisher drove so much for Mr. Oh in her five months of employment that she put over 1,000 miles on her car delivering papers at his directions. *Id.*

a. Mr. Oh Stopped the Transaction.

When Mr. Oh learned that Ms. Fisher falsely notarized his wife's signature, he promptly sent a letter to the closing agent, EX 30 p. 14, stopping the transaction from closing and requesting new documents for his wife to sign. TR 405-06. New documents were issued, re-signed and properly notarized, TR 406, and the transaction closed without harm to any party. TR 406-07.

b. Ms. Fisher was a Difficult Witness with an Agenda.

In Count 7, the Association alleges that Mr. Oh directed Ms. Fisher to notarize his wife's signature without his wife present. The Association relied entirely on Ms. Fisher's testimony, which was presented by telephone testimony from Las Vegas. TR 312.

Ms. Fisher worked for Mr. Oh merely five months in 2005 before he terminated her employment due to misconduct. TR 396, EX 20. She is

still angry about being terminated and has threatened Mr. Oh with “wrongful termination” and bar complaints. TR 330-31 (“yes, I’m very upset about it. I don’t like it.”).

Ms. Fisher was a difficult witness in this case. Prior to the hearing, she evaded service of a deposition subpoena by Mr. Oh’s counsel in the course of discovery. TR 13-14. She consented to accept service of the subpoena by mail and gave counsel a local Seattle address, but she did not tell him that she was moving to Las Vegas the next day and would be gone by the time the subpoena arrived. *Id.* Her whereabouts after that were unknown. *Id.* See also BF 42 (Clerk’s Papers (CP) 55-62).

During the hearing, she proved unreliable as a witness. Initially she failed to answer her phone at the time the Association had scheduled her to testify. See TR 300-01, 305-06. When the Association was able to catch up with her, she did not have exhibits that the Association had pre-arranged for her to use during her testimony. TR 315-16. Instead, she relied on her “photogenic” memory to testify that there were eight to ten documents that she falsely notarized, TR 319, but when asked to identify the documents, she could only name one and then, after prompting from the Association’s counsel, a second. TR 320-22.

Ms. Fisher’s hostility toward Ms. Oh bubbled over on questioning by his counsel: “I damn near lost my ‘job’ behind him and this – this

illegal bullshit he had me going through.” TR 331. *See also* TR 326-27.

c. Ms. Fisher Testified Falsely about a Letter.

In response to the Association’s questions, Ms. Fisher testified that she felt so guilt-stricken by her false notary that she sent a letter to the “Notary Commission,” with copies to the Association and Mr. Oh, to clear her conscience. TR 322-23. This testimony was presented as a central part of her testimony in an effort to corroborate her story and bolster her credibility. Although the letter was in its possession at that time, the Association neither produced the letter to Mr. Oh prior to the hearing nor offered it as an exhibit during the hearing.

When the Association did finally produce a copy of the letter to Mr. Oh on January 19, 2007, BF 74 ¶ 2 (CP 179), several important facts about the letter came to light. First, the letter was not addressed to the “Notary Commission,” but to the closing agent for Mr. Oh’s personal transaction. BF 74 Ex. A (CP 182). Second, neither that agent nor any of the persons to whom the letter was copied – the Association, Mr. Oh, and the “Notary Commission” – received the letter at the time it was allegedly mailed, October 28, 2005. BF 73-77 (CP 163-99). In fact, the only party that did receive the letter was the Association, which received it in July 2006 when it interviewed Ms. Fisher for this proceeding. BF 80 (CP 213-20). Third, there is no such entity known as the “Notary Commission.”

BF 77 ¶ 4 (CP 196).

B. Procedural History.

The Association initially charged Mr. Oh with five counts of misconduct, BF 2 (CP 3-11), and later added two more counts. BF 21 (CP 33-42). Counts 1 and 2 allege misconduct by Mr. Oh in the course of the Moon visa application. AFFCLR 2.1 and 2.2 (DP 16). The Association dismissed Count 3 before the hearing. AFFCLR p. 1 (DP 15). Counts 4 and 5 allege misconduct by Mr. Oh in the course of his handling client funds during 2001 and early 2002. AFFCLR 2.3 and 2.4 (DP 16-17). Count 6 alleges misconduct by Mr. Oh concerning presentation of proposed orders to the King County Superior Court by a paralegal without authorization to do so. AFFCLR 2.5 (DP 16). Count 7 alleges misconduct by Mr. Oh in the course of his personal real estate transaction. AFFCLR 2.6 (DP 16). Although Mr. Oh denies all allegations of misconduct, BF 40 (CP 53-54), he cooperated with the Association's audit of his trust account activities and he otherwise brought a cooperative attitude to the disciplinary proceeding. AFFCLR 4.6 (DP 23).

Timothy Parker served as the hearing officer and the hearing took place from November 27 through November 30, 2006.

Before the hearing, Mr. Oh filed a motion to exclude the testimony of Victoria Fisher and to permit him to obtain handwriting samples from

several key witnesses. BF 42 (CP 55-62). The Association opposed the motion. BF 47 (CP 63-75). The hearing officer denied the motion to exclude Ms. Fisher's testimony with the caveat that Mr. Oh have an opportunity to interview her telephonically before she testifies, TR13-15; and granted in part and denied in part Mr. Oh's request for handwriting samples. TR 15-29, 104-05.

On December 14, 2006, the Hearing Officer filed an initial decision, BF 59 (DP 1-14), but the Association moved to modify and correct it, BF 62 (CP 134-46), and Mr. Oh responded. BF 64 (CP 147-49). The hearing officer granted the motion in part and denied it in part and, on January 29, 2007, issued Findings of Fact, Conclusions of Law and Hearing Officer's Recommendation (Amended January 29, 2007) (the "decision" or AFFCLR). BF 65 (DP 15-26).

The decision concluded that on Count 1, Mr. Oh violated RPC 8.4(a) and (c), AFFCLR 5.1.A (DP 23); Count 2 is subsumed in Count 1, AFFCLR 5.2 (DP 24); on Count 4, Mr. Oh violated RPC 1.14(a) and (c), AFFCLR 5.3.A (DP 24); on Count 5, Mr. Oh violated RPC 1.14(b)(3), AFFCLR 5.4.A (DP 24); the Association failed to prove Count 6, AFFCLR 5.5 (DP 25); and on Count 7, Mr. Oh violated RPC 8.4(a) and (c) and RPC 5.3(c)(1). AFFCLR 5.6.A (DP 25). The hearing officer further found four aggravating factors – prior disciplinary offense, pattern

of misconduct, vulnerability of clients, and substantial experience, AFFCLR 4.2-4.5 (DP 22) – and two mitigating factors – cooperation with the disciplinary process and no dishonest or selfish motive. AFFCLR 4.6 and 4.7 (DP 23). The decision recommended that a 180-day suspension be imposed for each misconduct, AFFCLR 5.1.C, 5.3.C, 5.4.C and 5.6.C (DP 24-25); and recommended that each suspension be imposed consecutively to achieve a two-year suspension. AFFCLR p.11 (DP 25).

Mr. Oh subsequently filed a motion to vacate and modify the decision, BF 73 (CP 163-78), along with four supporting declarations, BF 74-77 (CP 179-99), on the basis that Ms. Fisher gave false testimony that tainted this entire proceeding and the decision on all counts. The Association responded to the motion, BF 78 (CP 200-10), and the hearing officer heard argument on April 6, 2007. TR (4/6/07). The Association and Mr. Oh each submitted two further letters for consideration by the hearing officer, BF 79, 80, 83 and 85 (CP 211-20, 224-25, 227-28), who ultimately denied the motion. BF 81 (CP 221-22).

The Disciplinary Board (the Board) reviewed the hearing officer's decision and, after a hearing, TR (7/20/07), voted 6-3 to affirm the decision. BF 120 (CP 44-45). The three dissenters recommended a decreased sanction of one year. *Id.* n. 1 and 2 (CP 45). The Board's

decision was filed and served on the Association on August 28, 2007. *Id.* p. 2, Certificate of Service.

On September 10, 2007, Mr. Oh timely filed his Notice of Appeal. BF 121 (CP 46-47).

V. ARGUMENT

A. Standard of Review.

The Court has plenary authority to determine the nature of lawyer discipline, *In re Disciplinary Proceeding Against Dornay*, 160 Wn.2d 671, 679, 161 P.3d 333 (2007), and it bears the ultimate responsibility for lawyer discipline in Washington. *In re Disciplinary Proceeding Against Marshall*, 160 Wn.2d 317, 329, 157 P.3d 859 (2007).

Where findings of fact are challenged on appeal, the Court typically upholds the hearing officer's findings if they are supported by substantial evidence. *Marshall*, 160 Wn.2d at 330. Substantial evidence is evidence sufficient "to persuade a fair-minded, rational person of the truth of the declared premise." *Id.* quoting *In re Disciplinary Proceeding Against Poole*, 156 Wn.2d 196, 209 n. 2, 122 P.3d 954 (2006).

However, where challenged factual findings are made on testimony presented by deposition transcript, the Court may disregard those findings to make its own findings de novo based on its review of the transcript. *See Estate of Reilly*, 78 Wn.2d 623, 654, 479 P.2d 1 (1970);

Delle v. Delle, 112 Wash. 512, 517, 192 P. 966 (1920). The Court is in as good a position as the trier of fact to assess the credibility of such witness and the merit of her testimony. *Webster v. State Farm Mut. Auto Ins. Co.*, 54 Wn.App. 492, 495, 774 P.2d 50 (1989).

This Court reviews conclusions of law de novo and will uphold them if supported by the findings of fact. *Marshall*, 160 Wn.2d at 330.

The Association must prove lawyer misconduct by a clear preponderance of the evidence. *Id.* The clear preponderance standard requires more proof than simple preponderance, but less than beyond a reasonable doubt. *Id.* Sanctions may not be imposed against a lawyer on “slight evidence.” *In re Disciplinary Proceeding Against Little*, 40 Wn.2d 421, 430, 244 P.2d 255 (1952).

B. The Association Failed to Prove Count 1 by a Clear Preponderance of the Evidence.

Count 1 alleges that Mr. Oh assisted, induced and/or permitted “his employees to submit documents with forged signatures to the . . . Immigration and Naturalization Service (‘INS’).” AFFCLR 2.1 (DP 16). However, the clear weight of the evidence calls for dismissal of Count 1.

Putting aside the testimony of Mr. Oh and Ms. Lee, who both testified that they had no participation in alleged forgery of Mr. Yeum’s signature, TR 434, 410-11, testimony from four other witnesses

convincingly shows that Mr. Oh had nothing to do with alleged forgery. Not the least of these witnesses is Hannah McFarland, the handwriting expert who testified that the allegedly forged signatures were not in the handwriting of Mr. Oh or Ms. Lee. TR 484-91. This conclusion was tacitly admitted by the Association's handwriting expert, Timothy Nishimura, who challenged neither this conclusion nor the methodology used to reach it. TR 538.

Vanessa Norman, the Association's investigator, found no one among the employees she interviewed to corroborate Shannon Koh's isolated testimony. TR 55. In Mr. Oh's small office, Cindy Toering, the Association's witness, never saw or heard Mr. Oh direct or participate in forgery. TR 288. It is inconceivable that in such a small office something so newsworthy as directing a forgery could be kept secret.

1. Ms. Koh's Isolated Testimony does not Establish Count 1 by a *Clear* Preponderance.

That leaves Shannon Koh as the sole witness to support Count 1, but her testimony is insufficient because it (a) contradicted her contemporaneous statements, (b) does not support Count 1 even if accepted on its face, and (c) is motivated by ill feelings created at the time she left Mr. Oh's employment.

Ms. Koh had previously told Ms. Toering that she observed Mr.

Oh sign Mr. Yeum's name to the application. TR 262. In her deposition, Ms. Koh changed her story to say that Mr. Oh merely instructed her to go to Ms. Lee "to get the signature" and that she observed Ms. Lee sign Mr. Yeum's name. EX 17 pp. 15, 48-49. This significant discrepancy undermines her credibility and testimony.

If accepted at face value, Ms. Koh's testimony does not support Count 1. All she says is that "Mr. Oh told me to go to Esther to get the signature." EX 17 pp. 15, 18, 19, 41, 42, 47 ("that's exactly what he said"). She never heard him say anything about "forgery," EX 17 p. 47; she never saw or heard Mr. Oh ask Ms. Lee (or anyone else) to sign Mr. Yeum's name to the application; and her perception that Mr. Oh was involved in any forgery was her subjective assumption as to what she thought Mr. Oh meant with his words "go to Esther to get the signature." EX 17 pp. 41-42. Ms. Koh's assumption is insufficient to support a finding of misconduct by Mr. Oh. *See Little*, 40 Wn.2d at 430 ("The privilege . . . to practice his profession cannot be lost to the practitioner upon slight evidence.").

Ms. Koh still bears a grudge against Mr. Oh for her transfer to the accounting side of his practice in the middle of the 2003 tax season. EX 17 pp. 23-26. Standing alone against strong, unequivocal testimony of six others to the contrary, her deposition testimony does not, and cannot,

constitute a *clear* preponderance by which Count 7 can be proved.

2. The Court may make its own Findings on Ms. Koh's Deposition Testimony.

The Association presented Ms. Koh's testimony via the transcript of her deposition taken by telephone on September 8, 2006. EX 17. The hearing officer was not present during that telephone deposition, EX 17 p. 2, so he had no opportunity to observe and consider her demeanor. This Court is in as good a position as the hearing officer was in assessing Ms. Koh's credibility and testimony. *See In re Disciplinary Proceeding Against Kennedy*, 80 Wn.2d 222, 230, 492 P.2d 1346 (1972) (deference normally granted to a hearing officer in evaluating the credibility of a witness is based on the hearing officer's ability to observe the witness and her demeanor during the hearing).

This Court is not bound by the hearing officer's findings and it may, and should, review the deposition transcript (EX 17) for itself and make its own findings based on that review, even if such findings are contrary to those of the hearing officer. *See Estate of Reilly*, 78 Wn.2d at 654; *Webster*, 54 Wn.App. at 495. When the Court independently reviews Ms. Koh's testimony, it will agree that she lacks credibility and her testimony, if accepted, does not by itself establish misconduct by a *clear* preponderance of the evidence.

3. The Association Neglected Its Responsibility for Proving Count 1.

Suspicious circumstances surrounding the Moon visa application add context to Mr. Yeum's forged signatures. Unknown to Mr. Oh at the time, Ms. Moon's credentials submitted to him and then to the INS were falsified. Someone went so far as to gin up false resumes for her, EX 2 nos. 0092 and 0140-41, and false employment certifications and affidavits on the letterheads of two Korean companies. EX 2 nos. 0180-87. It should come as no surprise that Mr. Yeum would not want his signature on the Moon application, and may have recognized this when he distanced himself from the Moon application by assigning full responsibility over it to one of his subordinate employees. TR 65.

With the burden of proving Count 1, *see Marshall*, 160 Wn. 2d at 330, the Association had to establish, among other things, (a) the identity of the person(s) who signed Mr. Yeum's name, and (b) Mr. Oh's direct involvement with that person's signing. The Association presented only the questionable testimony of Ms. Koh on the first element, but absolutely no evidence on the second.

The Association chose not to ask its own handwriting expert, Mr. Nishimura, to determine or confirm who made the signatures at issue. TR 538. The identity of the signor is the lynchpin issue under Count 1. The

Association should be held to a higher standard, given its greater responsibility in lawyer disciplinary proceedings, to do something to ferret out the identity of the forger(s) before it accuses a lawyer of forgery and commences disciplinary proceedings.

There is thus insufficient evidence to support the hearing officer's finding in AFFCLR 3.7 that "[a] non-lawyer employee of Mr. Oh forged the signature of [Mr. Yeum] in eight (8) locations in the INS application and related documents . . ." There is absolutely no evidence to support the finding in AFFCLR 3.8 that Mr. Oh "instructed his non-lawyer employees to forge the signatures of [Mr. Yeum]." Count 1 should be dismissed for lack of supporting proof.

C. The Hearing Officer erred in Denying Mr. Oh's Motion for Handwriting Samples from Ms. Koh and Ms. Moon.

In hiring Ms. McFarland, Mr. Oh attempted to identify the forger. Within the realm of suspects are Ms. Moon whose credentials were falsified, TR 61; Ms. Koh, who faced looming deadlines, *see* EX 17 p. 13; and Mr. Yeum or his assistant who have distanced themselves from the falsified information about Ms. Moon's background. While the hearing officer allowed Ms. McFarland to obtain handwriting samples from Mr. Yeum and his assistant, TR 28-29, the hearing officer denied Mr. Oh's request for samples from Ms. Koh and Ms. Moon. TR 28-29.

It was error and an abuse of discretion for the Hearing Officer to deny Mr. Oh these handwriting samples. Mr. Oh should have been given every opportunity to do what the Association should have done; that is, ferret out the forger(s) for the sake of achieving a just and accurate result. The identity of the forger was too important of an issue to not exhaust all reasonable efforts at discovery. Mr. Oh is entitled to remand of this case with the direction that (a) Ms. McFarland be allowed to obtain handwriting samples from Ms. Koh and Ms. Moon (and perhaps others); and (b) the hearing be reopened for additional testimony and argument on the identity of the person(s) who signed Mr. Yeum's name.

D. In Finding Misconduct Under Count 5, the Hearing Officer Applied a High Standard of Record-Keeping not in Effect in 2001 and 2002.

Count 5 alleges that Mr. Oh failed "to maintain adequate records demonstrating ownership of client funds in his possession." AFFCLR 2.4 (DP 16). There is no allegation that Mr. Oh misappropriated client funds or did anything deceptive in his record-keeping. Indeed, none of his clients suffered monetary loss due to any alleged misconduct, AFFCLR 3.27 (DP 20); and at all times he was able to track ownership of client funds in his possession. AFFCLR 3.26 (DP 20).

In 2001 and early 2002, record-keeping for client funds was governed by former RPC 1.14(b)(3), which provided simply in relevant

part: “A lawyer shall . . . (3) Maintain complete records of all funds . . . of a client coming into the possession of the lawyer . . .” The meaning of “complete records” was not addressed in any RPC, opinion from this Court, or Association ethics opinion. Confusion from this lack of clarity led to the replacement of RPC 1.14(b)(3) with the new RPC 1.15B effective September 1, 2006. *See* BF 114, Appendix 1: *Report and Recommend.* p. 12 (BRIEF 107); *Rptr’s Explan. Memo.* p. 169 (BRIEF 113); *App. D* p. 127 (BRIEF 117).

During the period at issue, Mr. Oh maintained bank statements, EX 35, a check register that also served as a ledger, EX 34, detailed ledgers and back-up documents for escrow transactions, EX 36, and numerous back-up and other documents in the client matter file. TR 180, 191. He reconciled the register against the bank statements, EX 34 (tick marks), TR 122-23, 172, and was able to accurately track client funds, AFFCLR 3.26 (DP 20), and ensure that no client funds were improperly used or lost. AFFCLR 3.27 (DP 20).

At the hearing, the Association applied the record-keeping standards set forth in the new RPC 1.15B. The Association’s audit manager, Trina Doty, testified that the Association expected a lawyer to keep the following records: (a) bank statement; (b) checkbook register with dates, deposits and withdrawals, checks with check numbers and

payees, and a running balance; (c) reconciliations of the check register to the bank statements; (d) individual client ledgers; and (e) reconciliations of the client ledgers to the check register. TR 112-14.

In testifying that Mr. Oh did not produce client ledgers, TR 114, Ms. Doty ignored escrow ledgers that Mr. Oh diligently kept, *see, e.g.*, EX 36 1st page, and she failed to recognize that Mr. Oh's check register served also as a ledger for non-escrow transactions. *See* EX 34. Mr. Oh typically received and disbursed non-escrow client funds simultaneously such that an entry showing a deposit of client funds was immediately followed by entries showing disbursement. TR 172, 173. *See, e.g.*, TR 174, EX 37 1st page; TR 185 ("very typical transaction"), EX 37 p.26. Mr. Oh did not receive advance fee deposits or other funds to be held in trust for lengthy periods or that were paid out over time such that records and entries of such disbursements were likewise spread out over time. TR 172-73.

Mr. Oh demonstrated his ability to track client funds when during the hearing, years after the transactions occurred, he was able to explain the transactions that Ms. Doty called into question and how client funds passed through his possession. TR 174-88 (law practice), 188-201 (escrow practice). He reinforced his sound record-keeping when he returned to the hearing the day after Ms. Doty testified with documents from old, long-closed client files that shed additional light on transactions

called into question by Ms. Doty. *See* TR 309-10, EX 106. There can be no doubt that Mr. Oh maintained “complete records.”

The hearing officer erroneously applied the requirements of RPC 1.15B to this case and disregarded Mr. Oh’s maintenance of relevant documents within client files that were not reviewed or considered by Ms. Doty. This error is reflected in AFFCLR 3.28, 3.29 and 5.4 wherein the hearing officer held Mr. Oh to a higher standard than required by old RPC 1.14(b)(3). Whereas RPC 1.14(b)(3) required Mr. Oh simply to “maintain complete records,” the hearing officer required Mr. Oh to “maintain auditable financial records.” AFFCLR 3.28, 3.29 and 5.4.A (DP 20, 24).

E. The Association Failed to Prove Count 7 by a *Clear* Preponderance of the Evidence.

Count 7 alleges that in a personal real estate transaction, Mr. Oh directed Victoria Fisher, “a notary public in his employ to sign a certificate evidencing a notarial act with knowledge that the contents of the certificate were false.” AFFCLR 2.6 (DP 16). The Association relied entirely on the uncorroborated telephone testimony of Ms. Fisher, which lacked so much credibility that this Court should disregard it and dismiss Count 7. Mr. Oh showed his true colors by stopping the transaction when he learned of Ms. Fisher’s false notary.

1. Mr. Oh Put a Stop to the Transaction.

Immediately upon learning that Ms. Fisher falsely notarized his wife's signature, Mr. Oh stopped the real estate transaction and obtained properly notarized documents. EX 30 p. 14; TR 405-06. He thereby delayed the closing of that transaction for over two months, TR 406-07, but ensured that it closed on properly notarized documents and without any harm to any party. This immediate response speaks volumes about his acts and motives. One would not expect Mr. Oh to stop the transaction so abruptly if he had in fact ordered the false notary.

The hearing officer's finding that the transaction closed on the basis of falsely notarized documents, AFFCLR 3.33 (DP 21), is clearly erroneous, and the Association has agreed this was error. BF 109 p. 17 (BRIEF 74). The finding that Mr. Oh exposed the parties to the transaction to "potential serious injury." AFFCLR 3.35 (DP 22) is premised on that erroneous factual finding and is equally erroneous. It is also not supported by any evidence.

2. Ms Fisher's Testimony Lacked Credibility.

The Association presented Ms. Fisher's testimony by telephone from Las Vegas. TR 311-33. Because the hearing officer could not see her, he could not observe her demeanor and this Court is in as good a position as he was to assess her credibility and testimony and make

findings thereon. *See Kennedy*, 80 Wn.2d at 230; *Reilly*, 78 Wn.2d at 654; *Webster*, 54 Wn.App. at 495. Ms. Fisher should not be believed and Count 7, which hinged entirely on her testimony, should be dismissed.

Ms. Fisher worked for Mr. Oh for merely five months in 2005 before he terminated her employment due to misconduct. TR 396, EX 20. Her testimony was affected by her continuing bitterness toward Mr. Oh. TR 330-31 (“Yes, I’m very upset about it. I don’t like it.”).

She testified falsely about a letter relied upon by the Association. Although it neither produced the letter before the hearing nor offered it as an exhibit at the hearing, the Association solicited Ms. Fisher’s testimony about the letter in an effort to corroborate her description of Mr. Oh’s notary instruction. Ms. Fisher testified that not long after she made the false notary, she sent a letter to the “Notary Commission,” with copies to the Association and Mr. Oh, notifying it about the false notary and alleging that she did it only on Mr. Oh’s instruction. TR 322-23. But when the Association finally produced the letter two months later, *see* BF 74 (CP 179), it was plain that Ms. Fisher’s testimony about it was false. The letter was addressed to the closing agent for the transaction, not the “Notary Commission,” BF 74 Ex. A (CP 182); in fact, there is no such entity known as the “Notary Commission,” BF 77 ¶ 4 (CP 196); and no one, including the Association, received the letter at or anywhere near the

time she says she sent it. BF 73-77 (CP 163-99).

An additional reason to disbelieve Ms. Fisher is that the hearing officer, in dismissing Count 6, AFFCLR 3.30 (DP 21), likewise must have disbelieved her testimony offered to support that count. Count 6 alleged that Mr. Oh instructed Ms. Fisher “to personally present orders to the judges of the King County Superior Court when she was not authorized to do so under applicable local rules.” AFFCLR 2.5 (DP 16). The Association attempted to prove Count 6 by presenting only Ms. Fisher’s testimony, but the hearing officer found that the Association failed to meet its burden of proof, AFFCLR 3.30 (DP 21), thereby tacitly finding Ms. Fisher’s testimony not believable. Ms. Fisher’s testimony on Count 7 should be equally rejected.

There is thus insufficient evidence to support the hearing officer’s finding in AFFCLR 3.32 that Mr. Oh “requested a non-lawyer employee of his law office to notarized the signature of his wife in absentia.”

F. The Hearing Officer Erred in Denying Mr. Oh’s Motion to Exclude Ms. Fisher’s Testimony.

Ms. Fisher was such a critical witness in this proceeding that Mr. Oh deserved every opportunity to take her deposition in preparation of his defense. However, she denied him that opportunity by evading service of a deposition subpoena. TR 13-14. Mr. Oh filed a motion to exclude her

testimony or to grant him an opportunity to take her deposition before she testified. BF 42, TR 13-14. The hearing officer denied this motion, TR 14-15, instead permitting only a short telephone interview before she testified. *Id.*

A brief telephone interview was a poor substitute for a deposition in advance of her hearing testimony. The significance of not having a deposition was made clear when Ms. Fisher changed her story between the informal telephone interview by Mr. Oh's counsel and her hearing testimony. *See* TR 326-27. Without a sworn transcript, Mr. Oh's counsel was at a disadvantage in attempting to impeach her testimony on such basis. In addition, Mr. Oh would have been in a position to discover the "Notary Commission" letter and impeach her on this item so central to her testimony.

The hearing officer's denial of Mr. Oh's request for a deposition from Ms. Fisher was an abuse of his discretion and Ms. Fisher's testimony should now be stricken. For the disciplinary process to be meaningful, a lawyer subject to serious charges of misconduct by the Association must be able effectively to defend himself against those charges. Where the circumstances present themselves as they did here, a hearing officer should rule to ensure that the interests of justice are served.

G. The Hearing Officer Erred in Denying Mr. Oh's Motion to Vacate.

After receiving the "Notary Commission" letter on January 19, 2007, Mr. Oh moved to vacate and modify the hearing officer's decision, BF 73 (CP 163-78), and submitted four declarations in support. BF 74-77 (CP 179-99). After hearing on April 6, 2007, TR (4/6/07), the hearing officer denied the motion. BF 81 (CP 221-22).

This denial was error. Ms. Fisher's testimony about the letter, TR 322-23, was false, and that falsity mandates vacating the decision on Count 7 as well as on Counts 1, 4 and 5.

In finding misconduct on Count 7, the hearing officer no doubt relied on the veracity of Ms. Fisher's testimony about the letter as a significant circumstance in and of itself and as one corroborating her entire testimony. Now that it is obvious that the letter and her testimony about it are false, the foundation of the hearing officer's decision on Count 7 is undermined.

This Court has broad plenary powers to modify or reverse the hearing officer's decision to accomplish a just result. *See Marshall*, 160 Wn.2d at 343 ("we are not bound by the Board's recommendation"). This Court should recognize the falsity of the letter and Ms. Fisher's testimony about it and vacate findings and conclusions made thereon. *See also* RCW 4.72.010 (courts have the power to vacate judgments procured by "fraud

by the successful party obtaining the judgment or order”).

The consequences of Ms. Fisher’s false testimony affect much more than Count 7. Credibility was a central issue on all counts and, in accepting Ms. Fisher’s testimony, the hearing officer inherently had to discredit testimony from Mr. Oh and others who testified for him. The taint of Ms. Fisher’s false testimony stained this entire proceeding far beyond the allegations under Count 7 and everyone’s testimony must be reexamined in a new light. That reexamination requires vacating the hearing officer’s decision and the Board’s affirmation thereof.

In *Peacock Records, Inc. v. Checker Records, Inc.*, 365 F.2d 145, 146 (7th Cir. 1966), the court reversed a trial court which refused to vacate a judgment obtained on fraudulent testimony, recognizing that the taint of fraudulent testimony on one count pervades the evidence on all counts:

[W]here it appears the perjured testimony may have played some part in influencing the court to render a judgment, the perjury will not be weighed, on a motion to set aside the judgment. This seems self-evident. The factual question which the district court failed to answer is, “Was the judgment obtained in part by the use of perjury?” *Atchison T. & S.F. Ry. Co. v. Barrett*, 246 F.2d 846, 849 (9th Cir. 1957). If it was, then it was clearly the duty of the district court to set aside the judgment, because poison had permeated the fountain of justice. Thus, . . . this taint had affected the entire proceeding . . .

Peacock Records, 365 F.2d at 147. Likewise, Ms. Fisher’s fraudulent testimony poisoned this entire proceeding and the decision against Mr. Oh

should be vacated. Interests of justice would be best served by not allowing the taint of false testimony to result in the discipline of an attorney who otherwise would not face disciplinary action. Mr. Oh requests that the Court use its broad powers to vacate the decision.

H. The Hearing Officer's Recommended Sanction is Overly Harsh and Should be Reduced if not Overturned.

The Court is not bound by the recommendations of the Board regarding sanctions. *In re Disciplinary Proceeding Against Christopher*, 153 Wn.2d 669, 979-80, 105 P.3d 976 (2005). In Washington, the American Bar Association's *Standards for Imposing Lawyer Sanctions* govern bar discipline cases. *Marshall*, 160 Wn.2d at 342. The ABA *Standards* provide a two-step process to determine the appropriate sanction after finding lawyer misconduct. First, the Court determines the presumptive sanction by considering (1) the ethical duties violated, (2) the lawyer's mental state, and (3) the actual or potential injury caused by the lawyer's misconduct. *Id.* Second, the Court considers aggravating and mitigating factors to determine whether a deviation from the presumptive sanction is warranted. *Christopher*, 153 Wn.2d at 678. Finally, the Court determines whether the degree of unanimity among Board members and the proportionality of the sanction should alter the sanction. *Id.* A recommendation from a divided Board deserves less weight than one from

a unanimous Board. *Marshall*, 160 Wn.2d 348.

1. Presumptive Sanction.

a. Count 1.

On Count 1 the hearing officer concluded that Mr. Oh violated RPC 8.4(a) and 8.4(c) based on his finding that Mr. Oh instructed an employ to affix false signatures on the Moon visa application and related papers. AFFCLR 5.1.A (DP 23). RPC 8.4(a) and 8.4(c) provide:

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the [RPCs], knowingly assist or induce another to do so, or do so through the acts of another.

. . .

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

AFFCLR 5.1.A (DP 23). The hearing officer found that such misconduct “was not the result of desire for personal gain or selfish motive. AFFCLR 3.15 (DP 19).

It is significant that the hearing officer did not find that Mr. Oh engaged in criminal conduct or violated RPC 8.4(b), which makes it professional misconduct for a lawyer to “commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.” However, in determining the presumptive sanction, the hearing officer applied ABA *Standard* 5.12, AFFCLR 5.1.B (DP 23), which provides:

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.

It was error to apply this standard because there was no finding or conclusion that Mr. Oh engaged in criminal conduct.

The applicable ABA *Standard* is *Standard 5.13*, which calls for a reprimand "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." If the Court affirms misconduct under Count 1, reprimand is the presumptive sanction.

b. Counts 4 and 5.

On Count 4, the hearing officer concluded that Mr. Oh violated RPC 1.14(a) and 1.14(c) based on his finding that Mr. Oh deposited client funds in Account 169, a business checking account, and not in an Association-sanctioned trust account. AFFCLR 5.3.A (DP 24). On Count 5, the hearing officer concluded that Mr. Oh violated RPC 1.14(b)(3) based on his finding that Mr. Oh failed to maintain "auditable financial records." AFFCLR 5.4.A (DP 24).

The hearing officer further found that Mr. Oh's mental state under Counts 4 and 5 was one of "conscious neglect" and "not the result of dishonest or selfish motive." AFFCLR 3.29 (DP 20). Mr. Oh was always

“able to accurately track ownership of [client] funds,” AFFCLR 3.26 (DP 20), and that “[n]one of [Mr. Oh’s] clients suffered monetary loss due to [Mr. Oh’s] failure to use a trust account or due to [Mr. Oh’s] failure to maintain auditable financial records.” AFFCLR 3.27 (DP 20).

However, in determining the presumptive sanction under Counts 4 and 5, the hearing officer applied ABA *Standard* 4.12, AFFCLR 5.3.B and 5.4.B (DP 24), which provides:

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.

It was error to apply this standard because there was no finding or conclusion that Mr. Oh’s mental state was one of knowledge and there was no injury to any client. Insofar as the hearing officer found a “potential serious injury,” AFFCLR 3.28 (DP 20), none did occur and the changes he made after hiring LOMAP and April 2002 cured his deficiencies thereafter.

The finding that Mr. Oh’s mental state was one of “conscious neglect” is tantamount to a finding of “negligence.” The ABA *Standards* define “negligence” 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 the situation.” ABA *Standards* Definitions. Mr. Oh’s mental

state most certainly did not rise to the level of “knowledge” which is defined as “the conscious awareness of the nature and attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result.” *Id.*

With a mental state of negligence, the appropriate presumptive sanction is that set forth in ABA *Standard* 4.13: “Reprimand is generally appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client.” If the Court affirms misconduct under Counts 4 and 5, reprimand is the presumptive sanction.

c. Count 7.

On Count 7, the hearing officer concluded that Mr. Oh violated RPC 8.4(a), 8.4(c), and 5.3(c)(1). AFFCLR 5.6.A (DP 25). This conclusion was based on a finding that Mr. Oh caused his wife’s signature to be falsely notarized, *id.*, but the hearing officer found that such misconduct was “not the result of desire for personal gain or selfish motive.” AFFCLR 3.36 (DP 22).

In determining the presumptive sanction, the hearing officer applied ABA *Standard* 5.12, quoted above, AFFCLR 5.6.B (DP 25), but this was error because there was no conclusion that Mr. Oh violated RPC 8.4(c), the criminal conduct prohibition with which the Association did charge Mr. Oh. *See* AFFCLR 2.6 (DP 16). In other words, there is no

finding or conclusion that Mr. Oh engaged in any criminal conduct.

The applicable *Standard* is ABA *Standard* 5.13, under which the presumptive sanction is reprimand.

2. Stacking of Sanctions is Impermissible.

Without citation to any ABA *Standard* or decision of this Court, the hearing officer issued a “Comprehensive Recommendation” whereby he recommended that the six-month suspension recommended for each basis of misconduct found “be imposed consecutively, to wit, suspension for a period of not less than two (2) years.” AFFCLR p. 11 (DP 25). This proposed stacking of sanctions would be unprecedented and against the authority of this Court.

“Where multiple instances of misconduct have occurred, the overall presumptive sanction should at least be consistent with the sanction for the most serious offense.” *Marshall*, 160 Wn.2d at 346. Stacking sanctions end-on-end is not appropriate here; rather, multiple sanctions should be merged into the sanction for the most serious offense. That sanction, if any, should be a stern reprimand.

3. Aggravating and Mitigating Circumstances.

The next step is to consider aggravating and mitigating factors to determine whether a deviation from the presumptive sanction is warranted. *Christopher*, 153 Wn.2d at 678. Mitigating circumstances far outweigh

aggravating circumstances and call for reducing the presumptive sanction.

The hearing officer expressly found two mitigating circumstances. First, Mr. Oh cooperated with the Association's auditor and brought a cooperative attitude to this proceeding, AFFCLR 4.6 (DP 23), which is a proper factor to consider. *Dornay*, 160 Wn. 2d at 685-86; *ABA Standard* 9.32(e). Second, Mr. Oh did not act out of selfish or dishonest motive, AFFCLR 4.7 (DP 23), *see also* AFFCLR 3.15, 3.29, 3.36 (DP 19, 20, 23), which is a proper factor under *ABA Standard* 9.32(b).

There are two additional mitigating factors that the hearing officer found although he did not expressly call them as such. First, no client or any other person suffered actual injury as a result of anything Mr. Oh did or did not do. *See* AFFCLR 3.13, 3.26, 3.27 (DP 18, 20). Second, for purposes of Count 5, Mr. Oh was "able to accurately identify ownership of" client funds in his possession. AFFCLR 3.26 (DP 20).

There are additional mitigating factors that the hearing officer should have found. First, no one suffered any injury as a result of the alleged misconduct under Count 7 because Mr. Oh took immediate corrective action to stop the real estate transaction and thereby prevented any actual or potential injury. The hearing officer should have recognized this corrective action as "timely good faith effort . . . to rectify consequences of misconduct" under *ABA Standard* 9.32(d).

Second, when the alleged misconduct under Counts 4 and 5 occurred, Mr. Oh was inexperienced in the practice of law, as he was when the alleged misconduct under Count 1 occurred. *See ABA Standard 9.32(f)*. Yet he had good enough sense to hire LOMAP for assistance with his office practices and procedures, thereby making a good faith effort to correct past misconduct, which should be a third mitigating factor that should be credited to him. *ABA Standard 9.32(d)*. Fourth, in April 2002 he converted Account 169 to an IOLTA account and has kept client funds in Association-approved trust accounts ever since. *Id.*

The four aggravating circumstances found by the hearing officer should be given little or no weight. First, the admonition Mr. Oh received on July 8, 2005, AFFCLR 4.2 (DP 22), was issued for reasons entirely distinct from the conduct involved here and is too remote to have bearing on Mr. Oh's sanction, if any. *See ABA Standard 9.32(m)*. Second, the "pattern of misconduct" found in AFFCLR 4.3 (DP 22) refers to Mr. Oh's use of Account 169 as a client trust account – he never used it for "general business" purposes as the hearing officer finds, only for client funds. Third, Mr. Yeum and his company, CDS, the only clients involved in conduct at issue in this proceeding are not "vulnerable" as found in AFFCLR 4.4. Nor can the rest of Mr. Oh's clients be considered "vulnerable" under *Christopher*, 153 Wn.2d at 682, on their mere lack of

proficiency with the English language (if that is in fact the case). Fourth, Mr. Oh did not have the “substantial experience” that is found in AFFCLR 4.5 (DP 23) because his lawyer experience, not his CPA experience, is the measure under ABA *Standard* 9.22(i).

The number and magnitude of the mitigating circumstances far outweigh the aggravating circumstances, and the Court should reduce any sanction below the presumptive sanction called for.

4. Lack of Unanimity.

This Court gives recommendations by the Board greater scrutiny when its recommendation is not unanimous. *Miller*, 149 Wn.2d 262, 285-86, 66 P. 3d 1069 (2003). Even where a recommendation is unanimous, the Court may depart from the recommendation if there are clear reasons for doing so. *Id.* Six Board members voted to affirm the hearing officer’s recommendation of a two-year suspension, and three dissenting members voted for a one-year suspension. BF 120 (DP 44-45). The sanction, if any, here should be less than that recommended by the three dissenters.

5. Proportionality of Sanction.

Proportionate sanctions are those which are “roughly proportionate to sanctions imposed in similar situations or for analogous levels of culpability.” *Dynan*, 152 Wn.2d at 623, quoting *In re Disciplinary Action Against Anshell*, 141 Wn.2d 593, 615, 9 P.3d 193 (2000). Suspending

Mr. Oh for two years would be disproportionately high in relation to the following comparable cases:

- *Marshall*, 160 Wn.2d at 350 (18-month suspension);
- *Poole*, 156 Wn.2d at 231-32 (six-month suspension);
- *Christopher*, 153 Wn.2d 687-88 (18-month suspension followed by a three-year probation);
- *Dynan*, 152 Wn.2d at 619-25 (six-month suspension);
- *In re Disciplinary Proceeding Against Carmick*, 146 Wn.2d 582, 607, 48 P.3d 311 (2002) (60-day suspension);
- *In re Disciplinary Proceedings Against Tasker*, 141 Wn.2d at 577, 572, 9 P. 3d 822 (2000) (two-year suspension for misappropriation of \$30,000 of client funds);
- *In re Disciplinary Proceeding Against Salvesson*, 94 Wn.2d 73, 76, 614 P.2d 1264 (1984) (two-year suspension for multiple misuse of client funds);
- *In re Disciplinary Proceeding Against Moore*, WSBA Bar News (4/07) (reprimand for false notary);⁵
- *In re Disciplinary Proceeding Against Karber*, WSBA Bar News (1/07) (reprimand for failing to keep all client funds in a trust

⁵ Copies of the three Disciplinary Notices cited from the *Washington State Bar News* in this brief are attached in Appendix C.

account and to track client funds sufficiently which resulted in an overpayment to himself);

- *In re Disciplinary Proceeding Against McIntosh*, WSBA *Bar News* (4/06) (admonishment for falsely notarizing a signature on a settlement agreement).

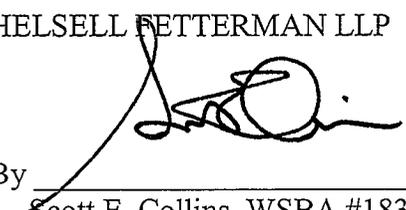
Finally, in *In re Disciplinary Proceeding Against Noble*, 100 Wn.2d 88, 667 P.2d 608 (1983), the Court recognized that “a longer suspension (of 2 years for example) would effectively destroy any reasonable chance for respondent to readily salvage his law practice or maintain his clientele.” *Id.* at 98. A two-year suspension would effectively destroy any reasonable chance for Mr. Oh, whose practice is within a tight-knit Korean-American community, to salvage his practice.

VI. CONCLUSION

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

Respectfully submitted this 2nd day of November, 2007.

HELSELL FETTERMAN LLP

By 

Scott E. Collins, WSBA #18399
Attorneys for Respondent Oh

APPENDIX A

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FILED

JAN 30 2007

DISCIPLINARY BOARD

BEFORE THE DISCIPLINARY BOARD
OF THE
WASHINGTON STATE BAR ASSOCIATION

In re

YOUNG SUK OH,
Lawyer (WSBA No. 29692)

NO. 05-00203

FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND HEARING OFFICER'S
RECOMMENDATION (AMENDED
JANUARY 29, 2007)*

Pursuant to Rule 10.13 of the Rules for Enforcement of Lawyer Conduct ("ELC"), a hearing was held before the undersigned Hearing Officer on November 27, 28, 29, and 30, 2006. Respondent appeared and was represented by Jeffrey C. Grant. The Association was represented by disciplinary counsel Kevin M. Bank.

I. AMENDMENT TO PLEADINGS

During the course of the hearing, the Hearing Officer granted the WSBA's motion to voluntarily dismiss Count 3 of the First Amended Complaint.

* Amendments at ¶¶ 3:16 and 3:18.

FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND HEARING OFFICER'S
RECOMMENDATION (AMENDED
JANUARY 29, 2007) - 1

II. FORMAL COMPLAINT

2 The First Amended Complaint filed by disciplinary counsel charged the following
3 counts of misconduct:

4 2.1 Count No. 1. By assisting and/or inducing and/or permitting his employees to
5 submit documents with forged signatures to the United States Government Immigration and
6 Naturalization Service ("INS"), Respondent violated Rule 8.4(a) and/or Rule 8.4(c) and/or
7 Rule 8.4(d) of the Rules of Professional Conduct ("RPC").

8 2.2 Count No. 2. By failing to properly supervise non-lawyer employees who
9 prepared and/or submitted immigration documents to INS on behalf of his clients,
10 Respondent violated RPC 5.3.

11 2.3 Count No. 4. By failing to keep client funds in a client trust account,
12 Respondent violated RPC 1.14(a) and/or 1.14(c).

13 2.4 Count No. 5. By failing to maintain adequate records demonstrating
14 ownership of client funds in his possession, Respondent violated RPC 1.14(b)(2).

15 2.5 Count No. 6. By instructing his legal assistant to personally present orders to
16 judges of the King County Superior Court when she was not authorized to do so after
17 applicable local rules, Respondent violated RPC 5.3(b) and/or RPC 5.5(b).

18 2.6 Count No. 7. By soliciting, commanding, encouraging and/or requesting a
19 notary public in his employ to sign a certificate evidencing a notarial act with knowledge that
20 the contents of the certificate were false, Respondent violated RPC 8.4(b) (RCW 42.44.160

21
FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND HEARING OFFICER'S
RECOMMENDATION (AMENDED
JANUARY 29, 2007) - 2

1 and RCW 9A.08.020) and/or RPC 8.4(a) and/or RPC 8.4(c) and/or RPC 5.3(b) and/or RPC
2 5.3(c)(1).

3 III. FINDINGS OF FACT

4 After having considered the testimony of the witnesses, the exhibits admitted into
5 evidence, and hearing argument of counsel, the Hearing Officer finds the following facts
6 were proven by a clear preponderance of the evidence (ELC 10.14):

7 3.1 Respondent was admitted to the practice of law in the State of Washington on
8 November 22, 1999.

9 3.2 Prior to attending law school, Respondent obtained a license to practice as a
10 Certified Public Accountant ("CPA"). Respondent maintained a CPA practice in conjunction
11 with his law practice.

12 3.3 Respondent Young S. Oh, during most of the relevant time period, was a sole
13 practitioner. At material times he had 300 to 500 active accounting clients, served as escrow
14 for business closings with respect to 20 to 40 transactions per month, and had an active and
15 growing law practice. A significant portion of the law practice involves immigration.

16 3.4 Respondent utilized non-lawyer employees to assist him with his law practice.

17 Counts 1 and 2:

18 **Assisting, Inducing and Permitting Employees to Submit Forged Documents to INS**

19 3.5 During 2002 and 2003, Respondent represented a business client who was
20 seeking a work visa on behalf of an employee.
21

FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND HEARING OFFICER'S
RECOMMENDATION (AMENDED
JANUARY 29, 2007) - 3

1 3.6 Respondent undertook to prepare the necessary INS application and related
2 documents and directed his employees to assist him. The INS application required that the
3 employer petitioner certify under penalty of perjury that the application and certain
4 information submitted in support be true and correct.

5 3.7 A non-lawyer employee of Respondent forged the signature of the petitioner's
6 president in eight (8) locations in the INS application and related documents, three of which
7 were certifications under penalty of perjury. The forged signatures were made without the
8 permission of the client and without the knowledge of the client.

9 3.8 Respondent instructed his non-lawyer employees to forge the signature of the
10 client's president.

11 3.9 The documents bearing forged signatures were submitted to INS at
12 Respondent's direction.

13 3.10 The use of forged signatures was done to expedite the application process.

14 3.11 The INS received the application and acted on it in due course, resulting in
15 denial of the application on the merits. Thereafter, the president of petitioner reviewed the
16 INS application and related documents and complained of inaccuracies and deficiencies.

17 3.12 The president of petitioner was not afforded the opportunity to review the INS
18 application and related documents prior to submission to INS.

19 3.13 The defects in the INS application and related documents complained of by the
20 petitioner's president were not the reason the visa application was denied.

21
FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND HEARING OFFICER'S
RECOMMENDATION (AMENDED
JANUARY 29, 2007) - 4

1 3.14 By submitting unverified and improperly signed immigration applications and
2 related documents, Respondent exposed his clients and the INS to potential injury.

3 3.15 Respondent caused false signatures out of conscious disregard for legal
4 requirements. This failure was not the result of desire for personal gain or selfish motive.

5 **Count 4 and Count 5:**
6 **Failure to Maintain Client Trust Account**
7 **Failure to Maintain Proper Client Records**

8 3.16 Prior to mid-2002, Respondent did not utilize a lawyer trust account for client
9 funds.

10 3.17 In mid-2002, Respondent opened a lawyer trust account at Bank of America.

11 3.18 Both before and after utilizing a WSBA-compliant lawyer trust account for
12 law clients, Respondent caused law client and escrow client funds to be deposited into his
13 general bank account on multiple occasions.

14 3.19 During the time Respondent's general business account was used to hold client
15 funds, it was overdrawn on at least seven (7) occasions.

16 3.20 During 2002 and 2003, Respondent's business check registers reflected no
17 beginning or periodic balancing and no reproducible reconciliation with bank statements.

18 3.21 During 2002 and 2003, Respondent maintained no attorney-client ledger
19 documenting the status of client financial accounts.

20 3.22 During 2002 and 2003, Respondent's records did not readily permit reliable
21 verification of client ownership of funds.

FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND HEARING OFFICER'S
RECOMMENDATION (AMENDED
JANUARY 29, 2007) – 5

1 3.23 During 2002 and 2003, Respondent's business records did not permit
2 identifying many checks by client or client matter.

3 3.24 During 2002 and 2003, Respondent's business records did not permit a
4 determination of the status of many third-party client obligations, such as vendors that
5 provided services to Respondent's clients.

6 3.25 During 2002, Respondent occasionally used an "escrow trust account" to
7 deposit funds belonging to law clients. The escrow trust account did not comply with WSBA
8 IOLTA trust accountant requirements.

9 3.26 Respondent and his employee charged with bookkeeping responsibilities were
10 able to accurately identify ownership of funds in Respondent's business and "escrow trust"
11 account.

12 3.27 None of Respondent's clients suffered monetary loss due to Respondent's
13 failure to use a trust account or due to Respondent's failure to maintain auditable financial
14 records.

15 3.28 By failing to maintain a trust account and auditable financial records,
16 Respondent exposed his clients to potential serious injury.

17 3.29 Respondent's failure to maintain a trust account and failure to prepare and
18 maintain auditable financial records were not the result of dishonest or selfish motive. These
19 failures were the result of conscious neglect.
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FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND HEARING OFFICER'S
RECOMMENDATION (AMENDED
JANUARY 29, 2007) - 6

1 **Count 6:**

2 **Presentation of Orders to Court by Non-Certified Paralegal**

3 3.30 The Association did not meet its burden of proof, and the Hearing Officer
4 makes no findings with respect to Count 6.

5 **Count 7:**

6 **Falsified Notarization of Signature**

7 3.31 In the fall of 2005, Respondent and his then wife were in the process of
8 purchasing a residential real estate parcel. Completion and presentation of purchase and sale
9 documents was a matter of some urgency with closing scheduled for September 2005. At that
10 time, Respondent's wife was in Vancouver, B.C. Her notarized signature was required for
11 closing.

12 3.32 Respondent requested a non-lawyer employee of his law office to notarize the
13 signature of his wife in absentia. The employee did so. The employee was a notary public.
14 There is no evidence that the signature was not genuine.

15 3.33 The real estate documents with the improperly notarized signature of
16 Respondent's wife were provided to the real estate company for processing. The transaction
17 closed on that basis.

18 3.34 On or about October 4, 2005, after a dispute between Respondent and the
19 notary employee arose, Respondent caused notice of the false notarization to be provided to
20 the lender. New documents, including a quit claim deed and deed of trust, were prepared for
21 Respondent's wife's signature. The signatures were properly notarized and recorded.

FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND HEARING OFFICER'S
RECOMMENDATION (AMENDED
JANUARY 29, 2007) - 7

1 3.35 By utilizing false notarization of his wife's signature, Respondent exposed the
2 real estate transaction parties and lender to potential serious injury.

3 3.36 Respondent caused false notarization out of conscious disregard for legal
4 requirements. This failure was not the result of desire for personal gain or selfish motive.

5 **IV. FINDINGS OF FACT CONCERNING THE PRESENCE OR**
6 **ABSENCE OF AGGRAVATING FACTORS**

7 4.1 Pursuant to *In re Johnson*, 114 Wn.2d 737, 790 P.2d 1227 (1990) and the
8 Standards for Imposing Lawyer Sanctions of the American Bar Association approved
9 February 1996, as amended through 1992, the Hearing Officer makes the following Findings
10 of Fact regarding the presence of aggravating and mitigating factors.

11 A. AGGRAVATING FACTORS

12 4.2 Prior Disciplinary Offenses. On July 8, 2005, Respondent received an
13 Admonition for violation of RPC 1.1 and 1.3. Attached as Exhibit A. ABA Std. § 9.22(a).

14 4.3 Pattern of Misconduct. There were multiple and continuing violations of trust
15 account responsibilities with numerous instances of client funds being commingled with
16 Respondent's funds in a general business bank account. ABA § 9.22(c).

17 4.4 Vulnerability of Clients. Respondent's immigration clients were particularly
18 vulnerable to mishandling of immigration matters due to lack of facility with English and
19 ignorance of Respondent's accounting practices. ABA § 9.22(h).

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FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND HEARING OFFICER'S
RECOMMENDATION (AMENDED
JANUARY 29, 2007) – 8

1 4.5 Substantial Experience. As a licensed CPA, Respondent has substantial
2 experience and knowledge of proper accounting practice and the need for professionals to
3 create and maintain auditable financial records. Cf. ABA § 9.22(i).

4 B. MITIGATING FACTORS

5 4.6 Respondent cooperated with the Bar Association auditor and brought a
6 cooperative attitude to the disciplinary proceedings. ABA § 9.32(e).

7 4.7 Respondent did not act out of selfish or dishonest motive. ABA § 9.32(b).

8 **V. CONCLUSIONS OF LAW, PRESUMPTIVE SANCTIONS
9 AND RECOMMENDATIONS**

10 5.1 Count 1.

11 A. Conclusion. By instructing non-lawyer employees under his
12 supervision to affix false signatures to an immigration application and related
13 documents, Respondent violated RPC 8.4(a) and RPC 8.4(c).

14 B. Presumption Sanction. ABA Standard 5.12 provides:

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

20 C. Recommendation. The Hearing Officer recommends that Respondent
21 be suspended for not less than 180 days .

FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND HEARING OFFICER'S
RECOMMENDATION (AMENDED
JANUARY 29, 2007) – 9

5.2 Count 2. The allegations of Count 2 are subsumed in the conclusions
2 pertaining to Count 1. The Hearing Officer makes no additional conclusions or
3 recommendations.

5.3 Count 4.

5 A. Conclusion. By depositing client funds in a general bank account and
6 not in a WSBA-sanctioned trust account, Respondent violated RPC 1.14(a) and RPC
7 1.14(c).

8 B. Presumptive Sanction. ABA Standard 4.12 provides:

9 Suspension is generally appropriate when a lawyer
10 knows or should know that he is dealing improperly
11 with client property and causes injury or potential
12 injury to a client.

13 C. Recommendation. Suspension for a period not less than 180 days with
14 reinstatement conditioned on demonstrating existence and proper use of a WSBA-
15 compliant IOLTA trust account.

5.4 Count 5.

16 A. Conclusion. By failing to maintain auditable financial records,
17 Respondent violated RPC 1.14(b)(3).

18 B. Presumptive Standard: ABA Standard 4.12 provides:

19 Suspension is generally appropriate when a lawyer
20 knows or should know that he is dealing improperly
21 with client property and causes injury or potential
injury to a client.

FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND HEARING OFFICER'S
RECOMMENDATION (AMENDED
JANUARY 29, 2007) - 10

1 C. Recommendation. Suspension for a period of not less than 180 days
2 with reinstatement conditioned on demonstrating existence and maintenance of
3 auditable financial records.

4 5.5 Count 6. The allegations of Count 6 were not proved.

5 5.6 Count 7:

6 A. Conclusion. By causing his wife's signature to be falsely notarized,
7 Respondent violated RPC 8.4(a), RPC 8.4(c), RPC 5.3(c)(1) and solicited violation of
8 the notary statute, RCW 42.44.160, thereby rendering himself subject to criminal
9 prosecution under RCW 9A.08.020(3)(a)(i).

10 B. Presumptive Sanction. ABA Standard 5.12 provides:

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

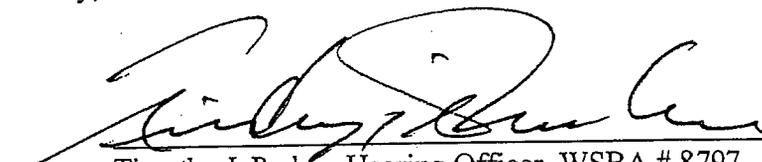
16 C. Recommendation. Suspension for a period of not less than 180 days.

17 VI. COMPREHENSIVE RECOMMENDATION

18 The Hearing Officer recommends that Respondent be suspended and that the
19 discipline recommended for each of the individual counts be imposed consecutively, to wit,
20 suspension for a period of not less than two (2) years.
21

FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND HEARING OFFICER'S
RECOMMENDATION (AMENDED
JANUARY 29, 2007) – 11

1 DATED this 29th day of January, 2007.

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3 
4 Timothy J. Parker, Hearing Officer, WSBA # 8797

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6
7 CERTIFICATE OF SERVICE

8 I certify that I caused a copy of the Amended FF, CL & HO's Recommendation
9 to be delivered to the Office of Disciplinary Counsel and to be mailed
10 to Jeffrey Grant, Respondent/Respondent's Counsel
11 at 701 Pike St, Ste 1125, Seattle, by certified/first class mail,
12 postage prepaid on the 30 day of January, 2007

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Fax:
(206) 442-4394

Bodley Curwley
Clerk/Counsel to the Disciplinary Board

FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND HEARING OFFICER'S
RECOMMENDATION (AMENDED
JANUARY 29, 2007) - 12

APPENDIX B

AUG 2 2007

DISCIPLINARY BOARD

BEFORE THE
DISCIPLINARY BOARD
OF THE
WASHINGTON STATE BAR ASSOCIATION

In re

YOUNG S. OH,

Lawyer (Bar No. 29692).

Proceeding No. 05#00203

DISCIPLINARY BOARD ORDER
ADOPTING HEARING OFFICER'S
DECISION

This matter came before the Disciplinary Board at its July 20, 2007 meeting on automatic review of Hearing Timothy J. Parker's decision recommending a two-year suspension following a hearing.

Having reviewed the documents designated by the parties and hearing oral argument:

IT IS HEREBY ORDERED THAT the Findings of Fact, Conclusions of Law and Hearing Officer's Recommendation are approved.

The vote on this matter was 6-3

Those voting in the majority were: Romas, Madden, Cena, Andrews, Fine and Mosner.

120

1 Those voting in the minority were: Carlson, Kuznetz¹ and Lee².

2
3 Dated this 20th day of August, 2007.

4
5 Lawrence Kuznetz
6 Lawrence Kuznetz, Vice Chair
7 Disciplinary Board

8 CERTIFICATE OF SERVICE

9 I certify that I caused a copy of the order Adopting Hearing Officers received
10 to be delivered to the Office of Disciplinary Counsel and to be mailed
11 to Jeffrey Grant, Respondent/Respondent's Counsel
12 at 701 Pike St SP 1525, Seattle, WA 98101, by Certified/first class mail,
13 postage prepaid on the 28 day of August, 2007

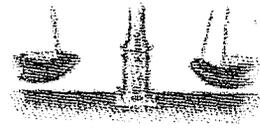
14 Boo Lee
15 Clerk/Counsel to the Disciplinary Board

16
17 ¹ Mr. Carlson and Mr. Kuznetz would have decreased the sanction to a one year suspension based on
18 state of mind and proportionality.

19 ² I respectfully dissent. The Association did not prove by a clear preponderance that Mr. Oh instructed a
20 non-lawyer employee to forge the signature of Mr. Yeum. The Hearing Officer's findings must be based
21 on the transcript of Ms. Koh's deposition, as there is no other evidence to support the conclusion. The
22 other evidence in the record, including live testimony and the handwriting analysis presented by the
23 Respondent, indicates that the signature was not forged by the person Ms. Koh claimed to have seen do
24 the act. Ms. Koh's testimony, standing alone, is far outweighed by the other evidence in the record,
which demonstrates that although Respondent's hands-off attitude towards his law practice may have
encouraged employees to cut corners, he did not direct an employee to forge the signature.

I would hold that Counts 1 and 2 were not proven. As to the remaining counts, I would further hold that
the aggravator of substantial experience was not properly applied by the Hearing Officer. The
substantial experience aggravator looks to the lawyer's experience in the practice of law, not
accounting. The trust account rules are unique to the practice of law, and the Hearing Officer's findings
do not support the conclusion that the Respondent was particularly experienced in the areas that are
related to his violations. With these modifications, I would reduce the sanction to a suspension of
one year.

APPENDIX C



[Lawyer Directory](#)
[Find Legal Help](#)
[Job Opportunities](#)
[Access to Justice](#)
[MCLE Website](#)
[Ethics Opinions](#)

[Bar Leadership](#)
[Board of Governors](#)
[Committees](#)
[Diversity](#)

[Law Students](#)
[Sections](#)
[Young Lawyers](#)

[FAQs](#)
[WSBA Store](#)
[Bar News](#)

[Events Calendar](#)
[Law Links](#)
[Contact Us](#)

[Bar News Archives](#)

[Home](#) > [For the Media](#) > [Publications](#) > [Bar News](#)

April 2006

SEARCH

[SITE INDEX](#)

Disciplinary Notices

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Pursuant to Rule for Enforcement of Lawyer Conduct 3.6(b), file materials relating to a matter concluded with an admonition may be destroyed five years after the admonition was issued. In admonition matters, it is the WSBA's policy to remove the disciplinary notice from the Washington State Bar News website archive five years after the admonition was issued, regardless of whether the WSBA's file materials are destroyed.

For a complete copy of any disciplinary decision, call the Washington State Disciplinary Board at 206-733-5926, leaving the case name, and your name and address.

Note: Approximately 30,000 persons are eligible to practice law in Washington state. Some of them share the same or similar names. Bar News strives to include a clarification whenever an attorney listed in the Disciplinary Notices has the same name as another WSBA member; however, all discipline reports should be read carefully for names, cities, and bar numbers.

Admonished

Mary H. McIntosh (WSBA No. 12744, admitted 1982), of Mount Vernon, was admonished by a review committee of the Disciplinary Board. The admonition was based upon her conduct in 2004 involving improper notarization of a document. Mary H. McIntosh is to be distinguished from Mary Ann McIntosh of Wenatchee.

In 2004, Ms. McIntosh represented a personal representative of a decedent's estate. Following a court hearing concerning disputed creditors' claims, the parties agreed to a settlement; opposing counsel drafted the agreement, which required that all signatures on the agreement be notarized. One of the parties, a creditor of the estate, did not appear in Ms. McIntosh's office to sign the agreement. Ms. McIntosh telephoned the party, who indicated that she would agree to the settlement. Ms. McIntosh then notarized what purported to be the party's signature. Ms. McIntosh's attestation stated that the party personally appeared before her to acknowledge her signature on the agreement, but that had not occurred.

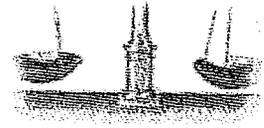
Ms. McIntosh's conduct violated RPC 8.4(c), prohibiting a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation; and RPC 8.4(d), prohibiting a lawyer from engaging in conduct that is prejudicial to the administration of justice.

Scott G. Busby represented the Bar Association. Ms. McIntosh represented herself.



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[Bench Bar Guidelines](#) | [News Releases](#) | [Publications](#) |

[Lawyer Directory](#)
[Find Legal Help](#)
[Job Opportunities](#)
[Access to Justice](#)
[MCLE Website](#)
[Ethics Opinions](#)

[Bar Leadership](#)
[Board of Governors](#)
[Committees](#)
[Diversity](#)

[Law Students](#)
[Sections](#)

[Young Lawyers](#)

[FAQs](#)

[WSBA Store](#)

[Bar News](#)

[Events Calendar](#)

[Law Links](#)

[Contact Us](#)

[Bar News Archives](#)

[Home](#) > [For the Media](#) > [Publications](#) > [Bar News](#)

January 2007

Disciplinary Notices

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Reprimanded

Michael R. Karber (WSBA No. 24044, admitted 1994), of Tempe, Arizona, was ordered to receive two reprimands on May 22, 2006, following a stipulation approved by a hearing officer. This discipline was based on his conduct involving failure to put a contingent-fee agreement in writing and trust-account irregularities.

Mr. Karber represented a client in a lawsuit to recover for damage to the client's pond. The client had been previously represented by another lawyer in the matter. Mr. Karber and the client agreed to a 25 percent contingent fee with a cash advance of \$4,000. Although Mr. Karber was aware of the requirement that agreements for contingent fees be in writing, he neglected to put the contingent-fee agreement in writing. In April 2004, the matter settled at mediation when two insurance carriers agreed to pay \$25,000 each. As part of the mediation, the client agreed to give her previous lawyer a lien of \$1,500 on the settlement proceeds. An environmental expert involved in the matter agreed to limit her charges to \$13,000, provided that the remaining balance of \$9,000 would be paid out of the proceeds of the settlement. Mr. Karber agreed to reduce his fees if necessary to ensure there would be sufficient funds to repair the client's pond. At the time, Mr. Karber believed the repairs could be accomplished for a sum that would allow him to collect the full 25 percent contingency fee of \$12,500.

SEARCH

[SITE INDEX](#)

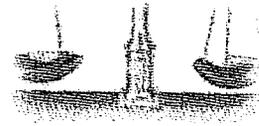
Mr. Karber deposited the first \$25,000 check into his trust account. Mr. Karber paid the environmental expert \$9,000, and, with the client's consent, he withdrew an additional \$1,000 as a fee advance. The second \$25,000 check was sent directly to the client. Out of the \$15,000 remaining in the trust account, Mr. Karber was entitled to the remainder of his fee, which could have been up to \$7,500. However, the exact amount of Mr. Karber's fee was indeterminate until the cost of repairing the client's pond was determined. Mr. Karber intended to assist his client in getting the work contracted. Owing to a medical condition, Mr. Karber's ability to assist his client was impaired at the time. This, coupled with the unavailability of the environmental expert during this period, led to a failure to obtain a contractor to do the work.

Although he was not able to determine the amount of additional fee to which he was entitled, Mr. Karber made a series of disbursements to himself between April and June 2004, totaling \$8,100. Mr. Karber did not maintain individual client ledgers or a check register for his trust account, other than carbon copies of the check stubs. Consequently, Mr. Karber had no running balance of his client's funds apart from periodic bank statements. Due to his medical condition and the inadequacy of his records, Mr. Karber was not aware that he had taken \$600 more than the maximum of fees to which he could have become entitled.

In late June 2004, Mr. Karber left the area to seek medical treatment. In November 2004, he relocated to Arizona. Feeling remorse for his inability to assist his client in arranging for the pond repairs, Mr. Karber decided he would refund the client all of her fees absent the \$5,000 advances. To accomplish this, Mr. Karber deposited \$8,100 of his own funds into his trust account, representing the \$7,500 of his fee that he was forgoing and the \$600 excess fee disbursement he had taken. Mr. Karber subsequently issued a \$13,500 check to the client, retaining \$1,500 in his trust account pending resolution of an apparent dispute between his client and her previous lawyer over a \$1,500 lien.

Mr. Karber's conduct violated RPC 1.5(c)(1), requiring that a contingent-fee agreement be in writing; RPC 1.14(a), requiring that all funds of clients paid to a lawyer or law firm, including advances for costs and expenses, be deposited in one or more identifiable interest-bearing trust accounts and that no funds belonging to the lawyer or law firm be deposited therein; and RPC 1.14(b)(3), requiring a lawyer to maintain complete records of all funds, securities, and other property of a client coming into the possession of a lawyer and render appropriate accounts to his or her client regarding them.

Randy V. Beitel represented the Bar Association. Mr. Karber represented himself. David B. Condon was the hearing officer.



- [Lawyer Directory](#)
- [Find Legal Help](#)
- [Job Opportunities](#)
- [Access to Justice](#)
- [MCLE Website](#)
- [Ethics Opinions](#)

- [Bar Leadership](#)
- [Board of Governors](#)
- [Committees](#)
- [Diversity](#)

- [Law Students](#)
- [Sections](#)
- [Young Lawyers](#)

- [FAQs](#)
- [WSBA Store](#)

- [Bar News](#)
- [Events Calendar](#)
- [Law Links](#)

- [Contact Us](#)
- [Bar News Archives](#)

[Home](#) > [For the Media](#) > [Publications](#) > [Bar News](#)

April 2007

SEARCH

[SITE INDEX](#)

Disciplinary Notices

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Reprimanded

John C. Moore (WSBA No. 21880, admitted 1992), of Lake Oswego, Oregon, received a reprimand, effective October 27, 2006, by order of the Washington State Supreme Court imposing reciprocal discipline in accordance with an order of the Supreme Court of the State of Oregon following a stipulation. This discipline was based on his conduct in 2005 involving use of a notary stamp to attest and verify a signature in violation of the requirements of Oregon's notary statute. For more information, see Oregon State Bar Bulletin, Discipline (July 2006), available at www.osbar.org/publications/bulletin/archive.html. Mr. Moore is to be distinguished from John S. Moore Jr. of Yakima, John A.

Moore Jr. of Yakima, John C. Moore of Seattle, and John D. Moore of Hong Kong.

Mr. Moore's conduct violated Oregon RPC 3.3(a)(5), prohibiting a lawyer from knowingly engaging in illegal conduct or conduct contrary to the Rules of Professional Conduct.

Felice P. Congalton represented the Bar Association. Mr. Moore did not appear either in person or through counsel.

Last Modified: Wednesday, April 04, 2007

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Home | Sitemap | Search | Member Directory | CLE Seminars | Contact Us

Member Login

Public Information

- Member Directory
- Member Login
- Member Fees
- Membership Fees FAQ
- OSB Forms Library
- Judicial Vacancies

Regulatory Functions

- Admissions
- Bar Exam
- Discipline
- MCLE
- Rules Regs & Policies
- Status Changes
- Unlawful Practice of Law

Membership Services

- Affirmative Action
- Bar Publications
- Career Center
- CLE Publications
- BarBooks™
- Bookstore
- CLE Seminars
- Ethics Information
- Ethics Opinions
- Forms Library
- Lawyer Services
- Loan Repayment Assistance Program
- LRS Registration
- Online Resources
- OSB Events
- Oregon Law Foundation
- Performance Standards
- Pro Bono Information
- Professional Liability Fund
- Oregon Attorney Assistance Program
- Practice Management Advisor
- Products & Services
- Surveys, Reports & Research

Bar Leadership

- Board of Governors
- House of Delegates
- Committees
- Judicial Outreach
- Leadership Coliege
- Leadership Group Listings
- Legislative/Public Affairs
- Local Bars/Legal Orgs
- New Lawyers Division
- Law Student Info
- Sections
- Volunteer Opportunities

Client Services

- Client Assistance Office
- Client Security Fund
- Fee Arbitration
- Fees for Public Records
- Lawyer Referral
- Military Assistance Panel

OSB Information

- About the Bar
- Directions to the Bar
- Staff Roster
- Contact Us
- OSB Job Opportunities
- Booking Meeting Rooms

Oregon State Bar Bulletin — JULY 2006

Bulletin Features

Discipline

Note: Nearly 12,750 persons are eligible to practice law in Oregon. Some of them share the same name or similar names. All discipline reports should be read carefully for names, addresses and bar numbers.

JOHN C. MOORE
OSB #92099
Lake Oswego
Public reprimand

On June 7, 2006, the disciplinary board approved a stipulation for discipline reprimanding Lake Oswego lawyer John C. Moore for violation of RPC 3.3(a)(5) (knowingly engaging in illegal conduct).

Moore represented a client living in the vicinity of Mt. Hood in a domestic relations matter that required a Uniform Support Affidavit. Moore mailed the affidavit to his client. The client signed the affidavit and returned it to Moore without the required notarization. Moore, who is a licensed notary public in Oregon, telephoned his client to verify the signature. Upon verifying the signature via telephone, Moore notarized the affidavit even though the client had not appeared personally before Moore. At the time that he notarized the document, Moore inserted the words "by telephone" in the jurat, disclosing that his client had not appeared personally before him. Moore subsequently filed the notarized affidavit in the domestic relations proceeding.

Moore's conduct was illegal since the notary statute mandates that a notary not attest to or verify a signature unless the affiant or signer has appeared personally before the notary for that purpose. Although Moore believed his conduct was consistent with the purposes to be served by the notary law, he knew there was no express exception to the requirement that notarizations be made in person and he was unaware of any Oregon case authority that he believed would permit telephone notarization.

Public Legal Info Main Page

Popular Legal Topics

- Bankruptcy
- Family/Marriage
- Landlord/Tenant
- Traffic

Additional Topics...

Hiring A Lawyer

- Lawyer Referral Service
- Online Referral Request Form
- Unlawful Practice of Law

Problem With Your Lawyer?

- Client Assistance Office
- Client Security Fund
- Fee Arbitration

Foreign Language Legal Information

- Español
- РУССКИЙ
- Tiếng Việt Nam

Publications

- Juror Handbook
- HTML Version
- PDF Version
- Legal Issues for Older Adults
- Voting in Oregon

Legal Info on TV
Legallinks Cable Show

Public Volunteers

- Public Member Application Form