

No. 201,001-6

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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I. INTRODUCTION.

This is a lawyer disciplinary proceeding brought by the Washington State Bar Association (the Association) against lawyer Young S. Oh, a sole practitioner. Although this proceeding started in January 2006 with multiple charges of lawyer misconduct leveled at Mr. Oh, it now involves only two counts of alleged misconduct. The Association alleges that in the first years of his practice Mr. Oh (a) deposited client funds into a regular checking account that he used exclusively for client funds, when those funds should have gone into a client trust account; and (b) kept incomplete records of client funds in his possession. There is no allegation that Mr. Oh converted or otherwise misused client funds for his own personal gain.

Mr. Oh concedes that during the time period at issue in this proceeding, he was inexperienced in the practice of law and that his inexperience led to mistakes in administering his law practice. But these mistakes were unintended and unknowing, were committed with an honest and good faith belief that he was meeting his professional responsibilities, and did not cause any harm to any client. More importantly, years before the Association leveled any charge of misconduct at him, Mr. Oh enrolled in the Association's Law Office Management Assistance Program (LOMAP), learned about mistakes he was making, and corrected them.

A principal issue in this proceeding is the sanction appropriate for any mistakes by Mr. Oh that rise to the level of a violation of the Rules of Professional Conduct (RPCs). The one-year suspension recommended to this Court applies the wrong standard for assessing a lawyer's mental state for sanction purposes. As will also be demonstrated below, there are multiple reasons why a suspension of any length in this proceeding would be entirely unwarranted and disproportionate to sanctions ordered for comparable or more egregious lawyer misconduct. The appropriate sanction, if any, should be a reprimand.

II. ASSIGNMENTS OF ERROR.

1. The hearing officer erred in finding: (a) Mr. Oh placed client funds into "his general business checking account," BF 240 ¶ 29 (DP 5); (b) client funds were not protected from his creditors, *id.* ¶ 30 (DP 5); (c) his placement of client funds caused injuries to clients, *id.* ¶ 35 (DP 6); (d) he "did not adequately reconcile" his check register with bank statements, *id.* ¶ 42 (DP 6-7); (e) he did not maintain client ledgers, *id.* ¶ 44 (DP 7); (f) Mr. Oh's record-keeping was not adequate to determine ownership of client funds in his possession, *id.* ¶ 45 (DP 7); (g) he did not maintain his records in substantial compliance with former RPC 1.14(b)(3), *id.* ¶ 46 (DP 7); and (h) he "knew that he was dealing improperly with client funds," *id.* ¶ 47 (DP 7).

2. The hearing officer erred in failing to find the following mitigating factors: (a) absence of actual injury to any client; (b) absence of dishonest or selfish motive; (c) timely good faith effort to take corrective measures; (d) cooperative attitude toward disciplinary proceedings; (e) remorse; and (f) adverse impacts caused by the protracted nature of this proceeding.

3. The hearing officer erred in concluding: (a) Mr. Oh failed to maintain complete and adequate records as required by former RPC 1.14(b)(3); BF 240 ¶ 53 (DP 10); (b) ABA Standard 4.12 applies to his alleged violations of former RPC 1.14 as charged, *id.* ¶ 56 (DP 10); (c) the presumptive sanction is suspension, *id.* ¶ 58 (DP 11); and (d) he failed to use a client trust account for client funds in order to use such funds “for his own purposes.” *Id.* ¶ 60(b) (DP 11).

4. The hearing officer erred in recommending a one year suspension, *id.* ¶ 62 (DP 12); and, in failing to recommend reprimand as the appropriate sanction.

5. The hearing officer erred in failing to consider the proportionality of her sanction recommendation in light of sanctions ordered for comparable misconduct by other lawyers.

6. The Disciplinary Board (Board) erred in approving the foregoing errors by the hearing officer. BF 264 (DP 14-18).

7. The Board erred in not reducing the sanction recommendation after dismissing the count on which the hearing officer relied in issuing her sanction recommendation. *See id.*

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Are each of the findings listed in paragraph 1 of Section II above supported by substantial evidence?

2. Should the hearing officer have made the findings listed in paragraph 2 of Section II above when such matters are supported by substantial, undisputed evidence?

3. Are each of the conclusions listed in paragraph 3 of Section II supported by the findings and by the law?

4. To what extent should a lawyer be held to the vague standard of “complete records” in former RPC 1.14(b)(3) when subsequently it was recognized that the rule needed to be replaced with a more detailed standard in order to provide lawyers with specific guidance as to the records they are expected to keep?

5. Did the hearing officer apply the correct standard in assessing Mr. Oh’s state of mind for sanction determination purposes?

6. Should the protracted nature of this proceeding, the twists that have occurred and the adverse effects they have had on Mr. Oh be a mitigating factor for Mr. Oh’s sanction consideration?

7. Did the hearing officer err in failing to consider whether her sanction recommendation was proportionate to the sanctions issued in comparable proceedings?

8. Is the sanction recommended for Mr. Oh disproportionate to the sanctions issued in comparable proceedings?

IV. STATEMENT OF CASE.

A. Statement of Facts.

1. Lawyer Young Oh.

Mr. Oh is an honest, hard-working, self-made lawyer. He grew up in Korea, emigrated to Washington State as a young man in 1987, and earned an accounting degree from the University of Washington in 1990. TR 461:4-463:21 (Oh). After earning his CPA, he opened an accounting practice in 1993 in Edmonds, serving primarily Korean-American businesses. BF 240 ¶ 2 (DP 2-3).

Mr. Oh enrolled in Seattle University School of Law, at that time in Tacoma, where he attended night school while working full time in his accounting firm. TR 465:4-466:16 (Oh). In 1999, he graduated from law school, passed the bar exam, TR 466:17-467:5 (Oh), and was admitted to the practice of law in Washington State on November 22, 1999. BF 240 ¶ 1 (DP 2).

Mr. Oh continues his law, accounting and escrow practices to this

day as a sole practitioner from his office in Lynnwood, Washington. TR 464:6-8; TR 468:22-469:7 (Oh).

2. The Early Years of Mr. Oh's Law Practice.

This proceeding involves the early years of Mr. Oh's law practice. In 2000, he opened his law office in Mountlake Terrace, Washington as a sole practitioner where he complemented his accounting practice with legal and escrow services. *Id.* ¶¶ 2, 4 (DP 2-3). Through hard work and quality services, Mr. Oh's practice quickly grew to where, during the time period at issue in this proceeding (2001 and 2002), he was providing accounting services to over 300 businesses, serving as escrow for over ten business sales per month, and maintaining an active law practice that prepared multiple visa applications each month. *Id.* ¶ 2 (DP 2-3).

To meet the growing demands of his practice, Mr. Oh employed associate attorneys and accountants from time to time, as well as non-lawyer staff members who assisted with accounting and paralegal functions. *Id.* ¶ 3 (DP 3). He also retained the services of an experienced attorney at another firm in an of counsel status to advise him and his associates in the area of litigation when needed. TR 482:13-483:25 (Oh).

3. Mr. Oh was "Very Receptive" to Suggestions for Improving the Administration of his Law Office.

From August 2001 to January 2003, Mr. Oh employed lawyer

Cindy Toering, BF 240 ¶ 4 (DP 3), who was one of the Association's primary witnesses in this proceeding. Ms. Toering also graduated from Seattle University School of Law in 1999. TR 151:13-18 (Toering). Her first job as an attorney was when she began with Mr. Oh. TR 152:5-13 (Toering). Mr. Oh hired Ms. Toering on a contract basis and paid her hourly. TR 155:15-20 (Toering).

During her 17 months working for Mr. Oh, Ms. Toering requested multiple items that she perceived would improve her practice. TR 155:3-6 (Toering). Even though Mr. Oh employed Ms. Toering on a contract (hourly-pay) basis, he paid for her to attend a week-long trial advocacy course, TR 154:19-155:1 (Toering), and CLEs, TR 155:12-14, and he purchased resource materials for her. TR 155:7-11 (Toering). In fact, to use Ms. Toering's words, "everything I asked was given." *Id.*

Ms. Toering also asked for, and Mr. Oh willingly provided, multiple items she perceived would improve the operations of Mr. Oh's law office. TR 169:19-24 (Toering). For example, she asked for a fax machine dedicated to Mr. Oh's law practice separate from the existing fax machine for the entire office, and Mr. Oh purchased it, installed a new phone line, and put the machine in the escrow and legal area of his office. TR 132:19-24 (Toering). She asked for a bigger desk and for cabinets, which Mr. Oh supplied. TR 490:8-18 (Oh). She even asked for a door for

the entry into her work space, and Mr. Oh hired a contractor to install it and a wall necessary to hang the door. TR 488:8-489:11 (Oh). That work was so extensive that it required a permit. *Id.*

Mr. Oh recognized that he needed help in the administration of his law office and he was glad to have Ms. Toering's suggestions. *See* TR 495:13-23 (Oh). In turn, he was, to use Ms. Toering's words, "very receptive" to her multiple requests and concerns:

Q. You've mentioned that you had some concerns about Mr. Oh's office procedures when you first started there; is that right?

A. Yes.

Q. Did you understand when you started there that he was inexperienced in the practice of law?

A. I most definitely understood that.

. . .

Q. And it was your perception that Mr. Oh could use some help in the administration of his law office; correct?

A. That is correct.

Q. And you made suggestions to him on how to improve his law office administration; is that right?

A. That is correct.

Q. And you found Mr. Oh to be very receptive to your suggestions, didn't you?

A. Yes, I did.

TR 169:4-24 (Toering).

4. Mr. Oh's Deposit of Client Funds into Account 4714.

From 2001 to mid-2002, Mr. Oh maintained a business checking

account at Bank of America with 4714 as the last four digits in the account number (Account 4714).¹ EX A-24B. Although Account 4714 was not a client trust account, Mr. Oh maintained and used it exclusively for client funds. TR 203:21-204:14 (Doty). He never used it as an operating account for his law or accounting practice or for his personal use. *Id.* The only time he put his own funds in the account was for the purpose of covering account expenses and charges that accrued. TR 609:2-18 (Oh).

As he admitted from the stand during the hearing, Mr. Oh now clearly understands it was wrong to put client funds into any account other than a trust account. TR 512:6-8 (Oh). As an inexperienced lawyer when he used Account 4714 for client funds (2001 to mid-2002), Mr. Oh believed at the time that it was proper to use Account 4714 given the short-term nature of his possession of the funds placed in that account. TR 490:22-491:20 (Oh).

The funds that he placed into Account 4714 were advance cost deposits that he immediately disbursed in payment of pre-determined costs. *Id.* For example, if there were filing fees Mr. Oh would have the client issue a check to cover those fees, which he would deposit into Account 4714, and then he would promptly issue a check or checks for that same amount from that account to pay the fee. TR 505:9-18 (Oh),

¹ The Decision erroneously refers to Account 4714 as Account 4717.

507:10-15 (Oh). Mr. Oh did not receive client funds for advance fee deposits or for other reasons that would have him retain or pay out client funds over any real length of time. TR 470:13-17 (Oh); TR 108:16-17 (Doty). His possession of client funds was very short in duration, so short that he typically disbursed client funds to predetermined payees immediately upon his receipt and without accrual of any interest thereon.

Id.

While Mr. Oh was of course wrong in his belief, he nevertheless held it honestly and in good faith. TR 507:24-508:3 (Oh). He used and managed Account 4714 such that no client suffered any monetary loss from his use of that account. *See* TR 212:7-24 (Doty). Mr. Oh essentially maintained and used Account 4714 as if it were a client trust account. TR 203:4-11 (Doty). At no time did he co-mingle funds in that account with general operating funds for his law practice or personal expenditures. TR 202:13-205:13 (Doty).

Mr. Oh's good faith belief as to Account 4714 is confirmed by contrasting his view toward funds that he received into his possession in the course of serving as escrow. TR 507:6-9; 589:18-20 (Oh). For escrow transactions he always maintained and used an IOLTA trust account. BF 240 ¶ 36 (DP 6). Unlike client funds in non-escrow matters, Mr. Oh did not immediately disburse escrow funds in his possession, so he believed

that the longer duration of possession of escrow funds, such that some measurable level of interest would accrue thereon, called for his use of an IOLTA Account for escrow transactions. TR 507:10-18; 509:4-10 (Oh).

5. Mr. Oh's Enrollment in LOMAP and Corrective Measures Taken.

One day Ms. Toering suggested that Mr. Oh contact the Law Office Management Assistance Program (LOMAP). TR 170:9-17 (Toering). LOMAP is a program by the Association that provides professional assistance to lawyers with office and practice administration. *See* <http://www.wsba.org/lawyers/services/lomap.htm>. Mr. Oh "readily agreed to it," TR 170:14 (Toering), and on April 16, 2002, he enrolled in the program to improve his administrative processes and otherwise ensure that he was conforming to ethical requirements for administering his law practice. TR 495:13-496:12 (Oh); EX R-16.

Mr. Oh and Ms. Toering subsequently met with Peter D. Roberts, the head of LOMAP, to review a number of Mr. Oh's practices and processes. TR 171:9-15 (Toering); TR 497:13-500:8 (Oh). Ms. Toering was encouraged by Mr. Oh to speak freely with Mr. Roberts. TR 171:16-21 (Toering); TR 500:9 (Oh). Mr. Oh made a number of changes to the administration of his law practice in the second half of 2002 in response to his discussions with Mr. Roberts, and thereby addressed certain

shortcomings in the administration of his practice. TR 503:25-504:22 (Oh). As Ms. Toering put it, Mr. Oh “did as much as he could” to address the concerns and suggestions that he received from Mr. Roberts. TR 132:6-25 (Toering).

One topic that was discussed was Mr. Oh’s handling of client funds. TR 499:17 (Oh); EXs. R-17, R-18. In the course of these discussions, Mr. Oh learned that all client funds, regardless of the duration they would be in his possession, had to be deposited and held in a trust account. TR 504:5-11 (Oh). After follow up discussions with Mr. Roberts in June 2002, Mr. Oh opened a new IOLTA account at Bank of America. TR 504:12-16 (Oh). Over the next month, he phased out Account 4714 and replaced it with the new IOLTA account. *Id.* TR 208:6-210:13 (Doty). By the end of September 2002, Mr. Oh no longer deposited or kept any client funds in Account 4714. TR 518:22-519:1 (Oh). All such funds from there on went into and were kept in the new IOLTA account. TR 504:2-22; 512:9-19 (Oh).

6. Mr. Oh’s Record-Keeping for Client Funds in his Possession.

During 2001 and 2002, Mr. Oh kept a number of records concerning client funds in his possession. Trina Doty, the Association’s expert witness and former trust account audit manager who audited Mr.

Oh's records for purposes of this proceeding, was highly critical of the sufficiency of these records. TR 44:5-7 (Doty). Even so, Ms. Doty testified to two important facts that were not disputed by any other witness. First, after thoroughly auditing Mr. Oh's records, TR 35:22-25 (Doty), she could not cite a single instance where she found that alleged record-keeping deficiencies caused any loss of client funds or other harm to any client. TR 65:17-20; 212:7-213:11 (Doty).

Second, based on her many years of auditing lawyers' trust account records and her service as the Association's trust account audit manager, Ms. Doty testified that the condition of Mr. Oh's records did not rise to a level where, in her opinion, disciplinary proceedings should have been initiated against him. TR 213:19-214:6 (Doty). Ms. Doty testified that the Association's response should have been to educate and advise Mr. Oh on better record-keeping, and only if he repeatedly ignored requests for improvement should the Association have brought disciplinary charges against him on the basis of record-keeping. *Id.*

Mr. Oh kept a number of different records for client funds in his possession. A principal record that he maintained was a check register that recorded client names, deposits and disbursements of client funds, and the amounts thereof. BF 240 ¶ 35 (DP 6); TR 115:18-25 (Doty); EX A-25. He also kept bank statements that he reconciled against his check

register. TR 117:4-118:1(Doty); EX. A-24B. Mr. Oh further maintained records in his individual client files, TR 526:22-527:17 (Oh).

The Association alleged that Mr. Oh failed to maintain client ledgers for client funds in his possession. However, he believed that he did not need separate ledgers because, in his view, his check register doubled as client ledgers. TR 507:10-21 (Oh). Mr. Oh held this view in good faith. As mentioned above, nearly all of his transactions with client funds were simple deposits followed immediately by disbursements of the same funds. As a result, the register is full of transactions where the deposit appears on one line and the disbursement(s) appears on the immediately following line(s). *Id.* In this format, the check register provides all the same information that a separate ledger would contain, a fact that Ms. Doty conceded. *See* TR 119:20-120:18 (Doty).²

The bottom line is that, although Mr. Oh's records may have been far from perfect, they were sufficient to track client funds from when they came into his possession until they left his possession. Ms. Doty, who examined documents for multiple transactions that she considered to be "representative" of Mr. Oh's handling of client funds, confirms that

² Mr. Oh did create and maintain a ledger for each escrow transaction that he handled. EX. A-25. Again, he drew a distinction based on the nature of his possession of client funds – where he expected to hold escrow funds for some duration, he kept ledgers; where he expected to disburse client funds immediately after deposit, he relied on his register and its successive entries in lieu of separate ledgers.

sufficient documentation existed to track ownership of client funds in Mr.

Oh's possession:

Q. And as I understand [Exhibit] A-27, you took – or basically you tracked ten transactions and provided the paper trail for those ten transactions, correct?

A. Yes.

Q. And I think you called them a representative sample of the transactions that you were trying to track; correct?

A. Yes.

Q. And in each of those transactions you were able to find the deposit documentation; correct?

A. Yes.

Q. And you were able to find the disbursement information; correct?

A. Yes.

Q. And you were able to assemble a line of documents in order based on deposit all the way through disbursement; correct?

A. Sometimes with the bank's help, but yes.

Q. But, in other words, you were able to trace the money from the moment it went into Mr. Oh's hands until the moment it went out; correct?

A. Yes.

Q. And you did the same thing with Exhibit A-26; correct?

A. Yes.

. . .

Q. And, again, you were able to track the money from the moment it went in the door at Mr. Oh's office until it left his office; correct?

A. Yes.

Q. You didn't need Mr. Oh's assistance in doing that; did you?

A. No.

Q. You were able to do it all by yourself?

A. Yes.

TR 100:15-102:11 (Doty).

B. Procedural History.

This proceeding has a long and complicated history through no fault of Mr. Oh.

1. The Association's Charges Against Mr. Oh.

In early 2005, the Association opened an investigation on Mr. Oh. The Association extensively investigated Mr. Oh's conduct by interviewing him and many of his then current and former employees, and it thoroughly reviewed and audited his financial and client records. *See, e.g.,* EX A-23. Mr. Oh fully cooperated with the Association in its investigation. TR 105:14-22 (Doty).

On January 31, 2006, the Association filed its Formal Complaint, BF 2 (CP 39), alleging five counts of misconduct. Counts 1, 2 and 3 arose from a single client engagement in late 2002 when Mr. Oh was engaged to assist a client in applying for a work visa from the Immigration and Naturalization Service (INS). *Id.* ¶¶ 2-53 (CP 2-45). Count 1 alleged that Mr. Oh violated RPC 8.4 “[b]y assisting and/or inducing and/or permitting his employees to submit forged documents to INS.” *Id.* ¶ 54 (CP 45). Count 2 alleged that he violated RPC 5.3 “[b]y failing to properly supervise non-lawyer employees who prepared and/or submitted immigration documents on behalf of his clients.” *Id.* ¶ 55 (CP 45). Count

3 alleged that he violated RPC 1.1 and 1.3 “[b]y failing to timely submit required affidavits from [the client’s] former employers to INS.” *Id.* ¶ 56 (CP 45).

Counts 4 and 5 resulted from the Association’s audit of Mr. Oh’s financial and trust account records in March 2005. *Id.* ¶¶ 57-66 (CP 45-46). Count 4 alleged that Mr. Oh violated RPC 1.14(a) and (c) “[b]y failing to keep client funds in a client trust account.” *Id.* ¶ 67 (CP 46). Count 5 alleged that he violated RPC 1.14(b)(2) “[b]y failing to maintain adequate records to be able to determine ownership of client funds in his possession.” *Id.* ¶ 68 (CP 47).

On July 25, 2006, the Association filed its First Amended Complaint, BF 21 (CP 48), to add two more counts of alleged misconduct. Both counts were based on the Association’s reliance on the testimony of Victoria Fisher, a paralegal who Mr. Oh employed for five months in 2005. *Id.* ¶¶ 69-77 (CP 56-57). Count 6 alleged that Mr. Oh violated RPC 5.3(b) and/or RPC 5.5(b) “[b]y instructing [Ms. Fisher] to personally present orders to Judges of the King County Superior Court when she was not authorized to do so under applicable local rules.” *Id.* ¶ 78 (CP 57). Count 7 alleged that he violated RPC 8.4 and/or RPC 5.3 “[b]y soliciting, commanding, encouraging and/or requiring a notary public in his employ [Ms. Fisher] to sign a certificate evidencing a notarial act with knowledge

that the contents of the certificate were false.” *Id.* ¶ 79 (CP 57).

Mr. Oh subsequently learned and informed the Association that the client involved in Counts 1, 2 and 3 had fabricated the affidavits at issue in Count 3. *See* TR 286:16-288:25 (Yeum). As a result, the Association voluntarily dismissed Count 3. BF 65 p. 1 (CP 103).

2. The First Hearing Decision.

A first evidentiary hearing took place before hearing officer Timothy Parker (the first hearing officer) from November 27 through November 30, 2006. *Id.* The first hearing officer held that the Association met its burdens of proof on Counts 1, 4, 5 and 7; that the allegations of Count 2 were subsumed within Count 1; and that the Association failed to meet its burden of proof on Count 6. *Id.* pp. 9-11 (CP 111-113). The first hearing officer recommended that Mr. Oh be suspended for four consecutive terms of 180 days each, for a total recommended suspension of two years. *Id.* p. 11 (CP 113).

On Counts 4 and 5, the first hearing officer found that Mr. Oh’s mental state was one of “conscious neglect” and “not the result of dishonest or selfish motive.” *Id.* ¶ 3.29 (CP 108). He found that Mr. Oh was always “able to accurately track ownership of [client] funds,” *id.* ¶ 3.26, and that “[n]one of [Mr. Oh’s] clients suffered any monetary loss due to [Mr. Oh’s] failure to use a trust account or due to [Mr. Oh’s] failure

to maintain auditable records.” *Id.* ¶ 3.27.

By a vote of 6-3, the Disciplinary Board (Board) approved the first hearing officer’s decision. BF 120 (CP 462). The three dissenters recommended a one-year suspension. *Id.* fn. 1 and 2 (CP 463).

3. Vacation of the First Hearing Officer’s Decision.

Mr. Oh appealed the first hearing decision to this Court under appeal no. 200,531-4 (the first appeal). BF 121 (CP 464). Less than two weeks before oral argument before this Court on the first appeal, the Association’s witness on whose testimony the holding of false notary under Count 7 was based, Victoria Fisher, recanted her hearing testimony. BF 129, last page (CP 641). In her letter (and in a subsequent deposition), Ms. Fisher candidly admitted that the false notary certificate at issue was completely her own doing and that her prior accusations against Mr. Oh were fabricated out of her anger at his termination of her employment and his refusal to pay monies she wanted from him. *Id.* By Order dated March 7, 2008, this Court struck oral argument and remanded this proceeding to the first hearing officer for further proceedings. BF 140 (CP 716).

On remand, Mr. Oh requested the first hearing officer to vacate the earlier decision on Count 7, dismiss Count 7 for lack of supporting evidence, vacate the decisions on Counts 1, 4 and 5 on the basis that Ms.

Fisher's false testimony tainted the entire hearing, and order that a new hearing take place on those three counts before a new hearing officer. BF 129 (CP 497). *See also* BF 137 (CP 706) and BF 141 (CP 718). In response, the first hearing officer vacated his decision on Count 7 and dismissed Count 7 for lack of evidence, but denied Mr. Oh's request that his decision on Counts 1, 4 and 5 be vacated. BF 144 (CP 728).

Mr. Oh appealed the first hearing officer's refusal to vacate the decisions on Counts 1, 4 and 5 to the Board. BF 151 (CP 740); *see also* BF 158 (CP 874). On June 23, 2009, the Board issued an order that vacated the first hearing officer's decision on Counts 1, 4 and 5 and remanded this proceeding for a new hearing on those counts before a new hearing officer. BF 162 (CP 918). The Board recognized that the testimony of Ms. Fisher so tainted this entire proceeding that a new hearing before a new hearing officer must take place to preserve the fairness of this proceeding against Mr. Oh. *Id.*

4. The Second Hearing Decision.

On December 11, 2009, the Association filed its Second Amended Complaint. BF 171 (CP 923). Former Count 1 carried forward as Count 1 and former Counts 4 and 5 carried forward as new Counts 2 and 3.

The Honorable Charles K. Wiggins, then in private practice, was appointed as hearing officer. BF 169 (CP 921). After the parties

submitted their hearing briefs and after he made certain pre-hearing decisions, Justice Wiggins recused himself shortly before the scheduled evidentiary hearing due to several interactions he had had in the previous months with an individual who, unknown to him at the time, was Mr. Oh's expert witness in this proceeding. BF 215 (CP 1025).

On August 2, 2010, the Association filed its Third Amended Complaint, BF 220 (CP 1029), which was identical to the Second Amended Complaint in all respects except that Count 3 was changed to reflect that it was brought under RPC 1.14(b)(3), not RPC 1.14(b)(2) as previously alleged. *Id.* p. 7 (CP 1035). The Third Amended Complaint alleged three counts of misconduct. Count 1 alleged that Mr. Oh assisted, induced or permitted an employee to forge documents submitted to the INS. *Id.* ¶ 41 (CP 1033). Count 2 alleged that Mr. Oh failed to place and keep client funds in a client trust account. *Id.* ¶ 53 (CP 1034-35). Count 3 alleged that he failed to maintain adequate records of client funds in his possession. *Id.* p. 7 (CP 1035). Mr. Oh denied these allegations.

Susan Amini was appointed as the new hearing officer (the hearing officer), BF 217 (CP 1027), and she presided over the second hearing held in this proceeding from October 12 through 18, 2010. BF 240 (DP 1). On March 28, 2011, the hearing officer issued Findings of Fact, Conclusions of Law and Hearing Officer's Recommendation (the Decision), *id.*, a copy

of which is attached to this brief as Appendix A. The Decision held in favor of the Association on all three counts; applied two mitigating factors (absence of prior disciplinary record and inexperience in the practice law) and two aggravating factors (dishonest or selfish motive and multiple offenses); and recommended a one-year suspension. *Id.*

The hearing officer's conclusion of misconduct under Count 1 was made not on the basis charged by the Association, but on a basis introduced by the hearing officer *sua sponte*. Not making any finding or conclusion that Mr. Oh assisted, induced or permitted one of his employees to forge a signature, as alleged by the Association, the hearing officer instead held that Mr. Oh violated former 8.4(c) and (d) merely by submitting papers that contained signatures that she considered to be "blatantly forged." BF 240 p. 9 lns. 14-17 (DP 9).

On Count 2, the hearing officer concluded that Mr. Oh violated former RPC 1.14(a) and (c) by failing to place and keep client funds in a trust account. *Id.* ¶ 52 (DP 10). In reaching this conclusion, the hearing officer found that "[p]rior to mid-2002, [Mr. Oh] did not utilize a lawyer trust account for client funds." *Id.* ¶ 28 (DP 5). However, the hearing officer found that he "placed client funds into *his* general business checking account," *id.* ¶ 29 (DP 5) (emphasis supplied), implying that Mr. Oh deposited client funds into a checking account that he used for his own

purposes.

The hearing officer further found that such client funds “were not protected from [Mr. Oh’s] creditors,” *id.* ¶ 30 (DP 5), although there was neither evidence nor finding that Mr. Oh had any creditors, let alone creditors to whom client funds were exposed. In other words, there was no evidence or finding that Mr. Oh was in any trouble with any creditor such that client funds in Account 4714 could be exposed to garnishment.

On Count 3, the hearing officer concluded that Mr. Oh violated former RPC 1.14(b)(3) by failing to maintain the records required by that rule. *Id.* ¶ 53 (DP 10). In reaching this conclusion, the hearing officer recognized that Mr. Oh maintained a check register for client funds in his possession, *id.* ¶¶ 38, 40 (DP 6), but she failed to recognize the bank statements that Mr. Oh maintained, EX A-24B, or the documents he maintained in client files. *See* TR 526:22-527:17 (Oh). Although Ms. Doty confirmed that Mr. Oh reconciled his check register with his bank statements, TR 117:4-118:1 (Doty), the hearing officer found that Mr. Oh did not make such reconciliation. BF 240 ¶ 42 (DP 6-7). The hearing officer further found that Mr. Oh did not maintain client ledgers, *id.* ¶ 44 (DP 7), although she did find that he kept individual client ledgers for funds held in his trust account for escrow transactions. *Id.* ¶ 36 (DP 6).

In making her sanction recommendation on Count 1, the hearing

officer applied Standard 6.12 of the American Bar Association's *Standards for Imposing Lawyer Sanctions* (ABA Standard 6.12) to conclude the presumptive sanction to be suspension. *Id.* ¶ 55 (DP 10). On Counts 2 and 3, the hearing officer applied ABA Standard 4.12 to conclude that the presumptive sanction should be suspension. *Id.* ¶ 56 (DP 10). Her application of ABA Standard 4.12 was based on the finding that Mr. Oh "knew that he was dealing improperly with client funds when he failed to place funds in a trust account and when he failed to keep adequate records of client funds in his possession." *Id.* ¶ 47 (DP 7). The hearing officer then balanced two aggravating factors – dishonest or selfish motive and multiple offenses – against two mitigating factors – absence of prior disciplinary record and inexperience in the practice of law – in recommending a one-year suspension. *Id.* ¶¶ 60-62 (DP 11). The hearing officer did not consider whether a one-year suspension is proportionate to sanctions issued in comparable proceedings.

5. The Board's Order Now Before This Court.

On September 29, 2011, the Board issued an Order Modifying the Hearing Officer's Decision, BF 264 (DP 14), a copy of which is attached to this brief as Appendix B. The Board reversed the hearing officer and dismissed Count 1 on the basis that the Association failed to prove misconduct alleged thereunder. The Board further rejected the hearing

officer's *sua sponte* basis for concluding misconduct under Count 1, noting that it "is sympathetic with [Mr. Oh's] basic due process argument that he was not given notice and opportunity to defend that charge." The Board struck all of paragraph 55; the first half of paragraph 60(b); and the last sentence of paragraph 61(f) of the Decision.

The Board adopted the Decision on Counts 2 and 3 and, although it dismissed the serious count of forgery, it adopted the recommendation of a one-year suspension.

On October 14, 2011, Mr. Oh timely filed his Notice of Appeal. BF 265 (DP 19-38).

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).

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.

B. Former RPC 1.14 Governs this Appeal.

Former RPC 1.14 applies to Counts 2 and 3 because they arose before the rule was amended and renumbered in 2006. In Count 2, the Association alleges that Mr. Oh violated former RPC 1.14(a) and (c). BF 220 ¶ 53 (CP 1034-35). In Count 3, it alleges that he violated former RPC 1.14(b)(3). *Id.* p.7, ¶¶ 3-4 (CP1035). Former RPC 1.14 provided in relevant part:

(a) All funds of clients paid to a lawyer or law firm . . . shall be deposited in one or more identifiable interest-bearing trust accounts maintained as set forth in section (c), and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:

(1) Funds reasonably sufficient to pay bank charges may be deposited therein;

(2) Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

(b) A lawyer shall:

...

(3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to his or her client regarding them;

...

(c) Each trust account referred to in section (a) shall be an interest-bearing trust account in any bank, credit union or savings and loan association, selected by the lawyer in the exercise of ordinary prudence, authorized by federal or state law to do business in Washington . . .

The full text of former RPC 1.14 is set forth in Appendix C to this brief.

C. Count 2 Resulted From Inexperience in the Practice of Law

Mr. Oh's inexperience in 2001 and early 2002 played a large part in his mistaken belief that he could use Account 4714 for client funds. He started his legal career as a sole practitioner and he had no one to turn to for guidance on the administration and management of his law office. While he recognizes that inexperience does not excuse him from complying with the RPCs, Mr. Oh does ask the Court to consider his inexperience at the time as context for his trust account practices. The hearing officer concluded that Mr. Oh's inexperience in the practice of law at the time is a mitigating factor. BF 240 ¶ 61(f) (DP 11-12).

The Court should consider five additional facts. First, Mr. Oh used Account 4714 strictly for the purpose of client funds; he did not use the account or funds therein for his own business or personal purposes. Second, no client was harmed by his use of Account 4714 for client funds.

Third, he used Account 4714 with an honest and good faith belief that he was allowed to use such an account for the transactions made. Fourth, long before any ethics investigation was commenced, he voluntarily enrolled in LOMAP and corrected his improper use of Account 4714 for client funds. Fifth, he now clearly sees his error in putting client funds into Account 4714 and he has expressed embarrassment and remorse for his mistake.

1. Account 4714 was Used Exclusively for Client Funds.

Mr. Oh used Account 4714 for client funds only. In that sense, he used the account as if it were a trust account. *See* TR 203:4-11 (Doty). He did not use the account for his own business or personal purposes. TR 203:21-204:14 (Doty). He had other bank accounts that he used for those purposes. *See, e.g.,* EX A-23. When Mr. Oh occasionally put or left small amounts of his own money in Account 4714, he did so solely for the purpose of covering account expenses, TR 609:2-18 (Oh), which was permissible under former RPC 1.14(a)(1).

There is no allegation or evidence that Mr. Oh converted or used client funds for his own personal gain. The sole charge of wrongdoing under Count 2 is that Mr. Oh failed “to keep client funds in a client trust

account” in violation of RPC 1.14(a) and (c). BF 220 ¶ 53 (DP 10).³

The hearing officer’s finding that Mr. Oh “placed client funds into his general business checking account,” BF 240 ¶ 29 (DP5), is not accurate, is not supported by substantial evidence, and unfairly implies that he was putting and using client funds in his law firm operating account. While Account 4714 may be a “business checking account” in terms of the *type* of account that it was, it was by no means “his general business checking account” used for operational purposes. All of the evidence, including Ms. Doty’s testimony, was that Account 4714 was used for client funds only. *See* TR 203:4-11 (Doty).

2. No Client Was Harmed by Mr. Oh’s Use of Account 4714.

There is no evidence that any client lost money or was otherwise harmed by Mr. Oh’s use of Account 4714 for client funds. Not even Ms. Doty, after hours of pouring over Mr. Oh’s records, could point to any actual injury suffered by any client. TR 65:17-20; 212:7-213:11 (Doty).

The hearing officer noted that client funds in Account 4714 were not protected from Mr. Oh’s creditors, BF 240 ¶ 30 (DP 5), but any such exposure was remote or theoretical at most. There was no evidence or

³ In the Decision, the hearing officer makes findings that Mr. Oh made disbursements from Account 4714 before the funds deposited for such disbursement were available. *See* BF 240 ¶¶ 34, 50. However, Mr. Oh was not charged with such alleged misconduct in this proceeding; and such findings are irrelevant to the issues of whether he kept funds in a client trust account for purposes of Count 2, and whether he maintained complete records of client funds in his possession for purposes of Count 3.

finding that Mr. Oh was the subject of any collection action, or that a threat of garnishment of Account 4714 was any more than a theoretical possibility.

In her effort to come up with some injury, the hearing officer stretched to find that Mr. Oh caused overdrafts from Account 4714 by failing to wait until deposits cleared the bank before disbursing funds on behalf of clients. BF 240 ¶ 35(DP 6). This resulted in finding, “As a result, funds belonging to some clients were used on behalf of other clients, causing injury and potential injury.” *Id.* ¶ 36 (DP 6). There are multiple problems with this attempt to find injury. First, the finding of overdrafts has no bearing on the issues presented under Counts 2 and 3. Second, any injury resulting from overdrafts does not translate into injury from the placement of client funds in a checking account. Third, there is no evidence whatsoever that any client was actually injured from any overdrafts on Account 4714.

3. Use of Account 4714 was in Good Faith.

There is no evidence or finding that Mr. Oh’s use of Account 4714 was for a reason other than his inexperience in the practice of law and his good faith belief that he could use such an account for his very short-term holding of client funds. There is no evidence or finding that Mr. Oh used Account 4714 to serve any selfish or dishonest motive. He did not use it

to appropriate client funds for his own purposes. This is not a case where a lawyer is converting client funds for his personal gain.

The finding that Mr. Oh “knew that he was dealing improperly with client funds when he failed to place client funds in a trust account,” BF 240 ¶ 47 (DP 7), is not supported by substantial evidence. There is no evidence of such knowledge. To the contrary, all the evidence establishes that he had no idea prior to enrolling in LOMAP that his deposit of client funds in Account 4714 was not allowed.

The Decision concludes that Mr. Oh failed to use a trust account for client funds “to use the funds for his own purposes without oversight.” *Id.* ¶ 60(b) (DP 11-12).⁴ However, neither substantial evidence nor any finding supports such a conclusion. There was no evidence or finding that Mr. Oh *ever* used client funds “for his own purposes.”

4. Mr. Oh Voluntarily Took Corrective Action.

The fact that Mr. Oh enrolled in LOMAP and corrected his handling of client funds more than two years before the Association opened its investigation here should carry significant weight. Ms. Doty would agree:

Q. Would you consider an attorney’s enrolling in LOMAP to be a significant thing when it comes to improving his or her internal organizational practices?

⁴ The Board’s order struck paragraph 60(b) of the Decision from its beginning through the word “packet.” BF 264 p. 4 (DP 17).

A. I think it's great when attorneys use LOMAP. The point of it is to help them figure out their practice and case management and all those issues that we know sometimes it's hard when you're coming out of law school because now you have to run a business. And they don't necessarily teach you how to do that in law school. So I think LOMAP is a great program.

TR 201:19-202:12 (Doty). However, neither the Decision nor the Board's order makes any reference to Mr. Oh's LOMAP enrollment or the corrective action he took.

Mr. Oh's enrollment in LOMAP shows that he was trying to do the right thing. It shows that he was willing to reach out for assistance on the complex administration of a private law office. It confirms that he was acting in good faith and honestly in handling client funds. If he were acting dishonestly or in bad faith, he would not have opened his practices up for LOMAP's review.

Mr. Oh's corrective action – the opening of a new IOLTA account and utilizing that account for client funds thereafter – shows his willingness to correct shortcomings in his law office administration. It confirms the testimony of Ms. Toering, a witness who was hostile toward Mr. Oh at the hearing, when she says that Mr. Oh was “very receptive” to improving the administration of his law practice. If he were knowingly engaging in misconduct, then he would not have corrected his deficiencies so willingly.

Omission of Mr. Oh's corrective action from the Decision highlights the disposition of the hearing officer toward Mr. Oh. The hearing officer was willing to disregard important facts favorable to Mr. Oh in order to accomplish the harsh sanction that she recommended. Rather than omitting this fact, the hearing officer should have relied on it in concluding that Mr. Oh's corrective action is a significant mitigating factor for sanction consideration in this proceeding. *See ABA Standard 9.32(d)* (timely good faith effort to make restitution or to rectify consequences of misconduct).

5. Mr. Oh is Remorseful about his Use of Account 4714.

Looking back on his use of Account 4714 for client funds now knowing that those funds should have been held in a trust account, Mr. Oh is embarrassed and remorseful about his mistake. TR 509:13; 512:6-13.

D. On Count 3, Mr. Oh Complied With RPC 1.14(b)(3).

In charging Mr. Oh with Count 3, the Association makes no allegation that Mr. Oh misappropriated client funds or did anything deceptive in his record-keeping. *See* BF 220 ¶¶ 45-46, 48-52 (CP 1034). Rather, the Association alleged only that Mr. Oh failed to maintain adequate records to be able to determine ownership of client funds in his possession. *Id.* The hearing officer found that Mr. Oh's record-keeping system "was not adequate to determine ownership of client funds in his

possession.” BF 240 ¶¶ 38-46 (DP 6-7). This finding, however, is directly contrary to Ms. Doty’s testimony that in her review of records of a representative sample of transactions, she was able to track the flow of client funds through his possession. *See* TR 100:15-102:11 (Doty).

1. RPC 1.14(b)(3) was Vague and was Replaced with new RPC 1.15B.

During the period at issue, record-keeping for client funds was governed by former RPC 1.14(b)(3), which simply required that a lawyer shall maintain “complete records.” However, the meaning of “complete records” was unclear. It was not explained in any RPC, comment thereto, opinion of this Court, or an Association ethics opinion.

Indeed, lack of clarity in the meaning of “complete records” led to the replacement of RPC 1.14(b)(3) with RPC 1.15B, which sets forth a specific list of records that a lawyer must now maintain.⁵ *See also* TR 110:5-112:18 (Doty: “The reason the entire rule [former RPC 1.14(b)(3)] was replaced was because it didn’t provide enough guidance to lawyers.”). The Ethics 2003 Committee emphasized this lack of clarity when it recommended replacing former RPC 1.14(b)(3) with RPC 1.15B:

Current RPC 1.14 requires that accurate records be maintained, yet does not specify what records must be maintained . . . To provide lawyers with specific guidelines in this area, the Committee recommends adoption of a separate record-keeping rule.

⁵ RPC 1.15B is set forth in Appendix D to this brief.

Reporter's Explanatory Memorandum to the Ethics 2003 Committee's Proposed Rules of Professional Conduct p. 169, a copy of which is attached to this brief as Appendix E. *See also Report and Recommendation of the Special Committee for Evaluation of the Rules of Professional Conduct (Ethics 2003) to the Board of Governors* p. 12 (March 2004) and *Appendix D (Trust Accounts Subcommittee Final Report* p. 127, copies of excerpts of which are attached to this brief as Appendices F and G, respectively.

With no specification as to the records that a lawyer must maintain, leeway should be granted under RPC 1.14(b)(3) to lawyers like Mr. Oh who in good faith attempt to comply with the rule.

2. Mr. Oh Maintained Multiple Records of Client Funds.

The hearing officer found that Mr. Oh maintained a check register for Account 4714. BF 240 ¶ 38. But in finding deficiencies in Mr. Oh's record-keeping, *id.* ¶¶ 40-44, the hearing officer mischaracterized or ignored other records that Mr. Oh kept. As Ms. Doty confirmed, Mr. Oh's records were sufficient to track client funds from the time Mr. Oh received them until they were disbursed. TR 100:15-102:11 (Doty). The hearing officer's findings omit any mention of bank statements that Mr. Oh kept, EX A-24B, to which there was no deficiency alleged. TR 115:18-25 (Doty). And they omit any mention to multiple back-up records that Mr.

Oh maintained within client files. TR 526:22-527:17 (Oh).

Moreover, the hearing officer's finding that Mr. Oh "did not adequately reconcile [his] check register with the bank statements," BF 240 ¶ 42, is not supported by substantial evidence. Indeed, the Association conceded that Mr. Oh reconciled his bank statements and the check register. TR 117:4-118:1 (Doty).

Much time was spent during the hearing on the question of whether Mr. Oh kept a ledger for client funds in his possession. While Mr. Oh did not keep separate client ledgers for client funds in his possession, he explained how he used his check register for that additional purpose. His receipt and disbursement of client funds typically occurred simultaneously, such that an entry showing a deposit of client funds was frequently followed by entries showing disbursement(s) of those funds. TR 507:10-21 (Oh). *See also* TR 108:16-109:17 (Doty). Mr. Oh did not receive advance fee deposits or other funds that were held by him in trust for lengthy periods or that were paid out over time, such that records and entries of disbursements would likewise be spread out over time. *Id.*⁶

3. No Client Was Harmed by Mr. Oh's Record-Keeping.

There was no evidence or finding that any client lost money or was otherwise harmed by Mr. Oh's record-keeping for client funds in his

⁶ Mr. Oh did keep individual escrow transaction ledgers for every transaction for which he served as escrow. BF 240 ¶ 36 (DP 6); EX A-26.

possession. Ms. Doty could not point to any actual injury suffered by any client. TR 65:17-20; 212:7-213:11 (Doty).

4. Mr. Oh's Record-Keeping was in Good Faith.

There is no evidence or finding that Mr. Oh's record-keeping for client funds in his possession was done with anything less than good faith and honesty. There is certainly no evidence or finding that Mr. Oh's record-keeping was done to serve any selfish or dishonest motive. He did not create or maintain false records in an effort to appropriate client funds for his own purposes or otherwise to cover up any wrongdoing. This is not a case where a lawyer is converting client funds for his own personal gain and hiding it through false records.

The finding that Mr. Oh "knew that he was dealing improperly with client funds . . . when he failed to keep adequate records of client funds in his possession," BF 240 ¶ 47, is not supported by substantial evidence. There is no evidence of such knowledge. To the contrary, all the evidence establishes that he had no idea at the time that his record-keeping was deficient in any way.

E. The Recommended Sanction is Overly Harsh and Should be Reduced if not Overturned.

This 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.⁷ *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. Mitigating factors include (a) the absence of a dishonest or selfish motive; (b) timely good faith effort to make restitution or to rectify consequences of misconduct; (c) a cooperative attitude toward the disciplinary proceedings; (d) inexperience in the practice of law; and (e) remorse. ABA Standard 9.32.

As a third step in Washington, the "proportionality" of a proposed sanction must also be considered. Sanctions imposed for lawyer misconduct are supposed to be "roughly proportionate to sanctions imposed in similar situations or for analogous levels of culpability." *In re Disciplinary Proceeding Against Dynan*, 152 Wn.2d 601, 623, 98 P.3d

⁷ An excerpt of the ABA Standards is attached to this brief as Appendix H.

444 (2004), quoting *In re Disciplinary Proceeding Against Anshell*, 141 Wn.2d 593, 615, 9 P.3d 193 (2000) (internal quotations omitted). The recommended sanction should reflect the nature of the misconduct. *In re Noble*, 100 Wn.2d 88, 98, 667 P.2d 608 (1983).

1. The Presumptive Sanction is Reprimand.

The first step in the sanction process is determination of 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. *Marshall*, 160 Wn.2d at 342. Here, the presumptive sanction should be reprimand under ABA Standard 4.13.

The hearing officer erroneously applied ABA Standard 4.12, which applies when the lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client. BF 240 ¶ 56 (DP 10). The hearing officer's erroneous application of ABA Standard 4.12 is the result of making factual findings not supported by substantial evidence, and of applying the wrong standard for assessing mental state. For reasons stated above, the hearing officer's finding that Mr. Oh acted with knowledge is not supported by substantial evidence.

The hearing officer's application of ABA Standard 4.12 was based on her finding that Mr. Oh "knew that he was dealing improperly with

client funds.” BF 240 ¶ 47 (DP 7). While the “knew or should have known” standard may apply to determine whether a lawyer breached an ethical duty “knowingly,” that standard does not apply when assessing a lawyer’s state of mind for purposes of imposing sanctions. *In re Disciplinary Proceeding Against Eugster*, 166 Wn.2d 293, 318 , 209 P.3d 435 (2009). “To do so would eviscerate the negligence standard by forcing us to assume the lawyer should have known the substantial risk of his actions rather than allowing us the flexibility to conclude that he simply failed to heed that substantial risk.” *Id.* at 318-19. Instead, when assessing a lawyer’s mental state for purposes of imposing sanctions, this Court should look to his state of mind relative to the consequences of his misconduct rather than the duty violated. *Id.* at 319.

When looking at Mr. Oh’s state of mind under this correct standard, it is clear that he simply failed to heed the risks created by any misconduct that he committed. He certainly did not know or intend the consequences of his misconduct, if any. More importantly, the consequences of Mr. Oh’s actions were not the result of knowing, dishonest, selfish or intentional behavior. As a new inexperienced lawyer with a new law office, he believed naively that he did not have to place client funds in a trust account if the funds were to be immediately disbursed. When a lawyer commits misconduct with a mistaken belief

that what he was doing was proper, his mental state for sanction purposes is one of negligence. *In re Disciplinary Proceeding Against Carmick*, 146 Wn.2d 582, 604, 48 P.3d 311 (2002).

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 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.* A lawyer who, as Ms. Toering says, was “very receptive” to improving the administration of his law office and “did as much as he could” to adopt LOMAP’s suggestions, clearly was not acting out of dishonest or selfish, or some other intentional or knowing motive.

With a mental state of negligence and with no actual injury, 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.”

2. Multiple Mitigating Factors Outweigh Aggravating Factors.

The second step in the sanction process is to consider aggravating

and mitigating factors to determine whether a deviation from the presumptive sanction is warranted. *Christopher*, 153 Wn.2d at 678.

Potential aggravating factors are listed in ABA Standard 9.2 and potential mitigating factors are listed in ABA Standard 9.3.

The hearing officer held that multiple offenses and Mr. Oh's use of Account 4714 "for his own purposes" constitute aggravating factors. BF 240 ¶ 60 (DP 11). However, as discussed above, substantial evidence does not support a finding that Mr. Oh engaged in any misconduct "for his own purposes" and that aggravating factor should be stricken.

On the other hand, there are numerous mitigating factors. The hearing officer found two mitigating factors present, absence of prior disciplinary record and inexperience in the practice of law. *Id.* ¶ 61 (DP 11-12). Substantial, undisputed evidence amply supports finding the following additional mitigating factors: the absence of a dishonest or selfish motive; timely good faith effort to make restitution or to rectify consequences of misconduct – namely, the enrollment in LOMAP and the corrective action that followed; a cooperative attitude toward the disciplinary proceedings; and remorse. ABA Standard 9.32(a), (b), (d), (e), (f), and (l).

An additional mitigating factor should be the protracted nature of this proceeding and the twists that have occurred. Through no fault of Mr.

Oh, he has had to endure this proceeding for six long years and incur the burden and expense of defending himself against baseless counts and multiple hearings caused by perjurious testimony presented by the Association. Counts of forgery and false notary are very serious and Mr. Oh has been through a lot to clear his name against the false testimony of Victoria Fisher. If there is ever a case where a lawyer's endurance, expense and burden in defending against baseless charges should be considered a mitigating factor, this is it.

Mitigating factors far outweigh aggravating circumstances and call for a reduction in the presumptive sanction. Whether that presumptive sanction is reprimand under ABA Standard 4.13 or suspension under ABA Standard 4.12, the appropriate sanction after such reduction is a reprimand.

3. The Recommended Sanction is Disproportionate.

The third step in the sanction process is to determine whether the sanction resulting from the first two steps is "roughly proportionate to sanctions imposed in similar situations or for analogous levels of culpability." *Dynan*, 152 Wn.2d at 623. The hearing officer failed to assess proportionality. Suspending Mr. Oh for one year would be disproportionate in relation to comparable cases.

This Court is committed to consistency in lawyer disciplinary

cases, *In re Disciplinary Proceeding Against Johnson*, 118 Wn.2d 693, 704, 826 P.2d 186 (1992), such that this Court attempts to impose sanctions that are roughly proportionate to sanctions imposed in similar situations or for analogous levels of culpability. *In re Disciplinary Proceeding Against Gillingham*, 126 Wn.2d 454, 469, 896 P.2d 656 (1995). If a Board's recommendation of sanction lacks proportionality, this Court will not affirm the recommendation. *In re Disciplinary Proceeding Against Burtch*, 162 Wn.2d 873, 900, 175 P.3d 1070 (2008). When considering whether the recommended sanction is proportionate, the Court considers other cases where it affirmed or rejected the same sanction. *Marshall*, 160 Wn.2d at 348.

a. A One-Year Suspension under Count 2 would be Disproportionate.

The Board's recommended sanction is disproportionately high when compared to the sanctions given to lawyers in similar cases. *See In re Disciplinary Proceeding Against Trejo*, 163 Wn.2d 701, 185 P.3d 1160 (2008); *In re Disciplinary Proceeding Against Blanchard*, 158 Wn.2d 317, 144 P.3d 286 (2006); and *In re Disciplinary Proceeding Against Cramer*, 165 Wn.2d 323, 198 P.3d 485 (2008). In each of these disciplinary proceedings, the attorney was disciplined for mishandling his trust account but received a significantly lighter sanction than that recommended for

Mr. Oh. The disproportionality of Mr. Oh's one year suspension is even more obvious given the fact that the attorneys in these proceedings had prior disciplinary offenses, had substantial experience in the practice of law, and were charged with multiple offenses.

In *Trejo*, lawyer Trejo was suspended for only three months after he grossly mishandled his trust accounts. 163 Wn.2d at 708, 735. Ms. Doty had audited Mr. Trejo's accounts after the Association received notification that his trust account was overdrawn. She discovered that Mr. Trejo had deposited his personal funds in his trust account over sixty-six times. *Id.* at 711-12. In one instance, he even deposited funds into the trust account and then issued a trust account check to pay for a personal debt. *Id.* After giving Mr. Trejo an opportunity to clean up his trust account practices, Ms. Doty conducted a follow-up audit where she discovered Mr. Trejo was still depositing earned fees into the trust account. *Id.* During this second audit period, Ms. Doty found that Mr. Trejo failed to use client ledgers consistently, failed to identify deposits to clients, and failed to reconcile the client ledger to the check register. *Id.*

In addition to Mr. Trejo's own misconduct with the trust account, his legal assistant also mishandled the account. *Id.* at 710. The assistant wrote checks to herself from the trust account and deposited the funds into her personal checking account to cover personal debts. *Id.* Later, when

her personal account was sufficiently funded, she would write a check back to the trust account. *Id.* As a result of her check-floating scheme, on five separate occasions one of Mr. Trejo's clients did not timely receive payment from his Labor and Industries (L&I) checks which were regularly deposited into the trust account. *Id.*

In addition, Mr. Trejo had four aggravating factors: prior disciplinary offenses for inappropriate handling of client funds, a pattern of misconduct, multiple offenses, and substantial experience in the practice of law.

In *Blanchard*, lawyer Blanchard was suspended for merely six months after gross trust account misconduct. 158 Wn.2d at 335-336. He deposited checks for client money into his general account instead of his trust account. *Id.* at 322. He then ignored his client's five requests for an accounting and a refund. *Id.* at 322-23. Not only did Mr. Blanchard refuse to provide the accounting but he also did not have any business records to demonstrate that he had in fact earned the fees. *Id.* at 323.

The Court held him responsible for eight violations of the RPCs. *Id.* at 335. These violations included failure to deposit his client's fees into a trust account, failure to maintain and render complete records and accounts, failure to keep clients reasonably informed, failure to refund money, and failure to cooperate with the grievance sanction. *Id.* His

aggravating factors included prior disciplinary offenses, multiple offenses, substantial experience in the practice of law, and indifference in making restitution. *Id.* at 333-34.

In *Cramer*, lawyer Cramer was suspended for merely eight months for converting client funds and lying about it. He deposited a \$1,000 advance fee deposit into his business account and failed to inform his client that the funds were non-refundable. 165 Wn.2d at 327-28. He then made his client deposit an additional \$2,500 by threatening to withdraw a week before his client's scheduled trial, despite the fact that he was aware that the trial would not occur. *Id.* at 328. Mr. Cramer did not earn the funds until nearly seven months after he received the checks from his client but nevertheless deposited them into his general account. *Id.* It was later discovered that his business account would not have had sufficient funds to clear his April IRS check had he deposited the funds correctly into his trust account. *Id.* at 328-29.

Upon receipt of a complaint from Mr. Cramer's client, the Association requested that Mr. Cramer provide billing and trust records for the client. *Id.* at 329. An alleged burglary at Mr. Cramer's office left him unable to produce relevant documents; however, he was able to produce a bank statement that showed a \$2,500 deposit into his trust account. *Id.* He lied to the Association by asserting that the deposit

consisted of the funds he received from his client when in fact he knew the clients funds were deposited into his general account, not his trust account. *Id.* at 330.

Mr. Oh's proposed one year suspension is disproportionately high when compared to the sanctions imposed in *Trejo*, *Blanchard* and *Cramer*.

b. A One-Year Suspension under Count 3 would be Disproportionate.

A one-year suspension under Count 3 for failure to maintain complete records would also be entirely disproportionate. Mr. Oh has been treated significantly differently from the way the Association treats other lawyers whose trust account record-keeping is found to be deficient. Ms. Doty testified that when she found poor record-keeping she counseled the lawyers on improving their practices. TR 189:15; 190:24 (Doty). She then gave the lawyers time – generally six months – to take corrective action that she would confirm in a follow up visit. TR 191:6-192:8 (Doty). When she found that corrective action was taken, she would close her file. TR 189-24-190:16 (Doty). She referred a lawyer for disciplinary action for poor record-keeping only in the rare occasion when a lawyer repeatedly failed or refused to follow directions on trust account record-keeping. TR 193:25-196.1 (Doty). Such was the case in *Trejo*. *See Trejo*, 163 Wn.2d at 711-12. In contrast, Mr. Oh did not receive any sort of

counseling or grace period in which to fix deficiencies in his trust account record-keeping. He should have been granted the same opportunity to address the Association's record-keeping concerns that it afforded to all other attorneys whose record-keeping is unacceptable.

Moreover, the Board's recommended sanction does not reflect Mr. Oh's self-enrollment in the LOMAP program and the steps he took following the advice and suggestions. This corrective action, together with Ms. Toering's testimony describing how responsive Mr. Oh was to concerns and suggestions with his law office administrator, *see* TR 169:22-24 ("very receptive"), TR 132:6-25 ("did as much as he could") (Toering), demonstrate that had Mr. Oh received Ms. Dody's counseling, rather than disciplinary charges, he most certainly would have corrected his practices and Ms. Dody would have closed her file.

In other proceedings, lawyers with poor record-keeping have not received suspensions. For example, the Association reprimanded Jerry J. Davis (WSBA No. 33294) after he failed to enter all account transactions in his check register, failed to include with each account transaction a reference to the client to whom that transaction applied, failed to keep a running balance in his check register, failed to reconcile his check register with his bank statements, and failed to maintain an individual client transaction summary or ledger for each client whose funds were in his

possession. Washington Bar News, Disciplinary notice of Jerry J. Davis, Vol. 61, No. 10 (October 2007).

The Association reprimanded Howard K. Michaelson (WSBA No. 3928) after he failed to keep a check register with a running balance, failed to reconcile his trust account bank statement to his own records on a regular bases, failed to maintain ledgers for individual client matters, failed to maintain records from which it could be determined on which client's behalf certain deposits and withdrawal were made. Washington Bar News, Disciplinary notice of Howard K. Michaelson, Vol. 62, No. 4 (April 2008). *See also* Washington Bar News, Disciplinary notice of Gary C. Hugill, Vol. 64, No. 2 (February 2010) and Washington Bar News, Disciplinary notice of Michael Joslin Davis, Vol. 64, No. 5 (May 2010) Copies of the foregoing disciplinary notices are attached to this Brief as Appendix I.

VI. CONCLUSION

This court should vacate the conclusion of misconduct under Count 3 and reprimand Mr. Oh under Count 2.

Respectfully submitted this 29th day of December, 2011.

HELSELL FETTERMAN LLP

By 

Scott E. Collins, WSBA #18399

Attorneys for Lawyer Young S. Oh

In Re:

**YOUNG S. OH, Attorney at Law
WSBA No. 29692**

NO. 201,001-6

Appendix A:

**Finding of Fact, Conclusion of Law and Hearing
Officer's Recommendation
Bar file #240**

RECEIVED

MAR 29 2011

HELSELL FETTERMAN

FILED

MAR 28 2011

DISCIPLINARY BOARD

BEFORE THE
DISCIPLINARY BOARD
OF THE
WASHINGTON STATE BAR ASSOCIATION

In re

Public No. 05#00203

Young S. Oh,

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND HEARING OFFICER'S
RECOMMENDATION

Lawyer (Bar No. 29692).

In accordance with Rule 10.13 of the Rules for Enforcement of Lawyer Conduct (ELC), the undersigned Hearing Officer held a hearing on October 12, 13, 14, and 18, 2010 in the above entitled matter. Respondent appeared at the hearing, represented by Scott E. Collins. Disciplinary Counsel Francesca D'Angelo appeared for the Washington State Bar Association (the Association).

FORMAL COMPLAINT FILED BY DISCIPLINARY COUNSEL

The Third Amended Formal Complaint filed by Disciplinary Counsel charged Young S. Oh with the following counts of misconduct:

Count 1 - By assisting and/or inducing and/or permitting one of his employees to forge one or more documents to be submitted to INS, Respondent violated former RPC 8.4(a), former

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1 signatures. Mr. Oh's visa application services included the completion and submission of
2 multiple forms on which client signatures were/are required.

3 3. At times, Respondent employed associate attorneys and non-lawyer staff to assist
4 him in his law practice, including immigration matters.

5 4. From August 2001 to January 2003, Respondent employed lawyer Cindy Toering
6 in his law office.

7 5. During all other times relevant to this proceeding, Respondent was a sole
8 practitioner. The majority of his law practice was immigration and escrow.

9 **Count 1**

10 6. Card Data Systems, Inc. (CDS) was one of Respondent's legal clients. John Yeum
11 is the president of CDS, Inc.

12 7. In 2002, CDS, Inc. hired Respondent to prepare and submit an H-1B visa
13 application for an employee the company wished to sponsor, Ae Sun Moon.

14 8. An H-1B visa is an employment visa that allows the holder to live and work in the
15 United States for the sponsoring employer for a specific period of time. To obtain an H-1B visa,
16 both the proposed employer as "petitioner/sponsor" and the alien as "beneficiary" must submit
17 an application and supporting papers to the United States' immigration agency (at the time, that
18 agency was the Immigration and Naturalization Service "INS"). The form for submitting an H-
19 1B application was INS Form I-129, Petition for Non-Immigrant Worker ("I-129").

20 9. CDS, Inc. had engaged Respondent twice previously to process H-1B visa
21 applications for employees CDS wished to sponsor. Both previous H-1B visa applications had
22 been granted.

23 10. The I-129 form was a several-page application that required the petitioner to
24

1 certify under penalty of perjury that the petition and the supporting documentation submitted
2 with it was true and correct.

3 11. Mr. Yeum's signature, as President and/or representative of CDS, Inc., was forged
4 in eight separate places in the application and in the supporting and related documents that were
5 submitted to the INS. Three of those forged signatures were certifications under the penalty of
6 perjury.

7 12. The forged signatures were traced from other forgeries of Mr. Yeum's signature.

8 13. Respondent exerted control over the work of his non-lawyer employees in all
9 aspects of his law and accounting office.

10 14. The forged signatures were made on documents that were in possession of and/or
11 under the control of the Respondent or his staff.

12 15. Many of these forgeries would have been apparent upon cursory review. Mr.
13 Yeum's name was misspelled and the name used was not Mr. Yeum's legal name with which he
14 signed legal documents.

15 16. The forged signatures were made without Mr. Yeum's permission.

16 17. Neither Mr. Yeum nor anyone at CDS, Inc. was given an opportunity to review the
17 I-129 before it was filed.

18 18. Respondent had signed three separate documents that contained forged signatures
19 which were subsequently submitted to the INS.

20 19. Respondent's testimony that he did not review these documents and that he did not
21 know that the immigration documents were forged before submitting them to the INS was not
22 credible.

23 20. Respondent knew that the documents that he submitted to the INS contained
24

1 | forged signatures.

2 | 21. The purpose of the forgeries was to expedite the application process and to conceal
3 | from Mr. Yeum that Respondent was late in filing the petition.

4 | 22. Lawyer Cindy Toering witnessed employees sign clients' signatures on documents
5 | on multiple occasions.

6 | 23. Toering informed Respondent on at least one occasion that she observed an
7 | employee signing a client's signature on a document. Respondent told Toering that the
8 | employee should have called the client first.

9 | 24. Respondent offered several alternate theories as to how the signatures could have
10 | been forged on the documents. None of those theories was plausible or credible.

11 | 25. Respondent submitted the false signatures with conscious disregard for the
12 | integrity of documents submitted by an attorney to the tribunal.

13 | 26. Respondent's conduct constituted a violation of practice norms.

14 | 27. Respondent's conduct exposed his clients and INS to potential injury and to
15 | potential adverse effect on the legal proceeding.

16 | **Counts 2 and 3**

17 | 28. Prior to mid-2002, Respondent did not utilize a lawyer trust account for client
18 | funds.

19 | 29. Between 2001 up through and including August 2002, Respondent placed client
20 | funds into his general business checking account at Bank of America on multiple occasions
21 | ("BOA account 4717").

22 | 30. During this period of time, the client funds were not protected from Respondent's
23 | creditors.

24 |

1 31. During this time period, Respondent had 12 overdraft or insufficient funds
2 incidents on BOA account 4717.

3 32. During this time period, the account had frequent negative balances.

4 33. Because this account was not an IOLTA account, the Association was not notified
5 of these overdrafts.

6 34. Some of the overdrafts were due to Respondent's failure to wait until deposits
7 cleared the bank before making disbursements on behalf of clients.

8 35. As a result, funds belonging to some clients were used on behalf of other clients,
9 causing injury and potential injury.

10 36. Between January 2001 and the end of 2003, Respondent kept a trust account for
11 his escrow clients. Respondent kept individual client ledgers for funds in his escrow accounts.

12 37. On at least one occasion, Respondent transferred client money from his escrow
13 trust account into his business account in order to cure overdrafts in that account before
14 disbursing the money as directed by the client.

15 38. Between January 1, 2001 and August 2002, Respondent maintained a check
16 register for BOA account 4717.

17 39. In mid-2002, Respondent opened a client trust account at Bank of America ("BOA
18 trust account").

19 40. Between mid-2002 and the end of 2003, Respondent maintained a combined check
20 register for BOA account 4717 and the BOA trust account.

21 41. This register reflected no beginning or periodic balancing and it was not possible
22 to determine how much client money was in the account at any given time.

23 42. Between mid-2002 and the end of 2003, Respondent did not adequately reconcile
24

1 | this check register with the bank statements from either BOA account 4717 or the BOA trust
2 | account.

3 | 43. Between mid-2002 and the end of 2003, Respondent's business records did not
4 | permit identifying many checks by client or client matter.

5 | 44. Between January 2001 and the end of 2003, Respondent did not maintain client
6 | ledgers.

7 | 45. Between January 2001 and the end of 2003, Respondent's record-keeping system
8 | was not adequate to determine ownership of client funds in his possession.

9 | 46. Respondent did not maintain his records in substantial compliance with former
10 | RPC 1.14(c). Respondent was unable to adequately identify client funds in the check register at
11 | the hearing.

12 | 47. Respondent knew that he was dealing improperly with client funds when he failed
13 | to place client funds in a trust account and when he failed to keep adequate records of client
14 | funds in his possession.

15 | 48. Respondent's failure to adequately identify client funds in his possession resulted
16 | in potential injury to his clients.

17 | 49. Respondent's continued failure to adequately identify client funds in his possession
18 | over a period of more than two years constitutes a pattern of misconduct.

19 | 50. Respondent's conduct in making payments on behalf of his clients before funds
20 | were deposited into his trust account was part of a pattern of misconduct in regard to
21 | Respondent's trust account.

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CONCLUSIONS OF LAW

The Association has the burden of proving charges of lawyer misconduct by a clear preponderance of the evidence. ELC 10.14(b); *see also In re Disciplinary Proceeding Against Allotta*, 109 Wn.2d 787, 792, 748 P.2d 628 (1988). “‘Clear preponderance’ is an intermediate standard of proof ... requiring greater certainty than ‘simple preponderance’ but not to the extent required under ‘beyond reasonable doubt.’” *Allotta*, 109 Wn.2d at 792. Accordingly, “a clear preponderance of all the facts proved must support a finding of misconduct.” *In re Disciplinary Proceeding Against Botimer*, 166 Wn.2d 759, 767, 214 P.3d 133 (2009). Sanctions may not be imposed against a lawyer based upon “slight evidence.” *In re Little*, 40 Wn.2d 421, 430, 244 P.2d 255 (1952) (“The privilege ... to practice his profession cannot be lost to the practitioner upon slight evidence.”). Conclusions of law must be supported by the factual findings. *In re Poole*, 156 Wn.2d 196, 209, 125 P.3d 954 (2006) (“*Poole*”).¹

Violations Analysis

The Hearing Officer finds that the Association proved the following by a clear preponderance of the evidence:

Count 1:

51. By permitting one or more of his employees to forge a client’s signature on one or more documents to be submitted to the INS and, by submitting the forged signatures to the INS,

¹ The RPCs were revised effective September 1, 2006. The Association’s Complaint is based upon violations of the RPC in effect as of the date or dates of the acts set forth therein.

1 Respondent violated former RPC 8.4(a), former RPC 8.4(c), and former RPC 8.4(d).

2 Former RPC 8.4 stated in relevant part:

3 It is professional misconduct for a lawyer to:

4 (a) Violate or attempt to violate the Rules of Professional Conduct,
5 knowingly assist or induce another to do so, or do so through the acts of another;

6 (c) Engage in conduct involving dishonesty, fraud, deceit or
7 misrepresentation;

8 (d) Engage in conduct that is prejudicial to the administration of justice . .

9 The ultimate duty for the integrity of the documents submitted to a tribunal rests with the
10 attorney submitting the said documents. Notwithstanding the testimony of Ms. Shannon Koh,
11 the evidence shows that the Respondent signed the documents bearing the forged signatures of
12 the petitioner and subsequently submitted them to the INS. Respondent's theories of pointing
13 fingers to others who may have forged the signatures or who may have had an opportunity or a
14 possible motive to do so would not change the ultimate responsibility of the Respondent with
15 regard to the documents that he submitted to the INS. By submitting the blatantly forged
16 signatures (some had wrong spelling of the name) Respondent engaged in conduct involving
17 dishonesty, fraud, deceit or misrepresentation and engaged in conduct that is prejudicial to the
18 administration of justice. The charges against the Respondent were not solely based on
19 "circumstantial evidence" in this case. The documents admitted into evidence include
20 documents bearing the Respondent's signature as well as the petitioner's forged signatures on
21 the same documents and on the same page.

22 The forged signatures of the petitioner were blatant as even the spelling of the name was
23 wrong.

24 Respondent's claim of "lack of knowledge" as to Petitioner's signatures being forged on
the documents submitted to the INS is not credible.

1 **Count 2:**

2 52. By failing to place and keep client funds in a client trust account, Respondent
3 violated former RPC 1.14(a) and former RPC 1.14(c).

4 **Count 3:**

5 53. By failing to maintain complete and adequate records as required by former RPC
6 1.14(b)(3) in order to be able to determine ownership of client funds, Respondent violated
7 former RPC 1.14(b)(3).

8 **Sanction Analysis**

9 54. The following standards of the American Bar Association's Standards for
10 Imposing Lawyer Sanctions ("ABA Standards") (1991 ed. & Feb. 1992 Supp.) are
11 presumptively applicable in this case:

12 55. ABA Standards 6.1 is the most applicable to Respondent's violations of former
13 RPC 8.4(a), 8.4(b), and 8.4(c) as charged in Count 1. Standard 6.12 provides that "[s]uspension
14 is generally appropriate when a lawyer knows that false statements are being submitted to the
15 court ... and takes no remedial action, and causes . . . a potential adverse effect on the legal
16 proceeding." In immigration matters at the relevant times, the INS was the equivalent of a
17 tribunal and submission of false documents to the INS was the equivalent of submitting false
18 documents to a tribunal. RPC 1.1(m).

19 56. ABA Standard 4.1 applies to Respondent's violations of former RPC 1.14 as
20 charged in Counts 2 and 3. Standard 4.12 provides that "[s]uspension is generally appropriate
21 when a lawyer knows or should know that he is dealing improperly with client property and
22 causes injury or potential injury to a client."

23 57. When multiple ethical violations are found, the "ultimate sanction imposed should
24

1 at least be consistent with the sanction for the most serious instance of misconduct among a
2 number of violations.” In re Petersen, 120 Wn.2d 833, 854, 846 P.2d 1330 (1993).

3 58. Based on the Findings of Fact and Conclusions of Law and application of the ABA
4 Standards, the appropriate presumptive sanction is Suspension.

5 59. Six months is the generally accepted minimum term of suspension. In re Cohen,
6 149 Wn.2d 323, 339, 67 P.3d 1086 (2003).

7 60. The following aggravating factors set forth in Section 9.22 of the ABA Standards
8 are applicable in this case:

9 (b) dishonest or selfish motive: Respondent submitted documents containing
10 forged signatures to a tribunal (INS) without permission or knowledge of the
11 client and to cover his/his office’s delay in submitting the packet; Respondent
failed to use a trust account for client funds in order to conceal overdrafts in
his account and to use the funds for his own purposes without oversight;

12 (d) multiple offenses.

13 61. The following mitigating factors set forth in Section 9.3 of the ABA Standards are
14 applicable in this case:

15 (a) absence of prior disciplinary record. Respondent received an Admonishment in
16 March 2007 with regard to his 2003 representation of a client in an immigration proceedings
17 and he received a Reprimand in October 2010 with regard to 2005-2006 trust account
18 violations. The facts that were the basis of the 2007 and 2010 Disciplinary Rulings stemmed
19 from Respondent’s actions/inactions during a time period that was after the time period for the
20 charges in the present matter.

21 It is improper to use the Disciplinary Rulings retroactively and apply them as an
22 “aggravating factor” i.e. “prior disciplinary record” for actions that predated those rulings. The
23 existence of “prior disciplinary records” is relevant when the Respondent has received a
24

1 disciplinary ruling and continued to violate the RPCs afterward. In this case, prior to the
2 relevant time period of "2001 through 2003" the Respondent had not received any "disciplinary
3 rulings" and had no history of "prior disciplinary offenses".

4 The mitigating factor of "absence of prior disciplinary offenses" applies to the facts and
5 timeline contained in this case.

6 (f) inexperience in the practice of law: The charges under Counts 2 and 3 stem from
7 Respondent's actions (or inactions) during 2001, 2002 and 2003. Respondent was admitted to
8 the practice of law in the State of Washington in November 1999. The incidents giving rise to
9 the above counts were committed within the early years of the Respondent's law practice.
10 Therefore the mitigating factor of "inexperience in the practice of law" applies to this case.
11 Balancing the inexperience in the practice of law with Respondent being a trained accountant
12 and a practicing CPA, where he maintained a trust account and kept client ledgers for his
13 escrow clients but failed to do so properly for his legal practice, reduces the weight given to this
14 mitigating factor. With regard to Count 1, inexperience in the practice of law does not mitigate
15 the submission of documents with forged signatures to the INS.

16 **Recommendation**

17 62. Based on the ABA Standards and the applicable aggravating and mitigating
18 factors, the Hearing Officer recommends that Respondent Young S. Oh be suspended for a
19 period of one year.

20
21 Dated this 22 day of March 2011.

22
23 

24 Susan Amini, Bar No. 19808
Hearing Officer

CERTIFICATE OF SERVICE

I certify that I caused a copy of the PDF, Col by Ho's Recommendation
to be delivered to the Office of Disciplinary Counsel and to be mailed
to Scott Collins Respondent/Respondent's Counsel
at 1001 W. Main Street, Wood State, PA 15214 by Certified/first class mail
postage prepaid on the 26th day of March, 2011

[Signature]
Clerk/Counsel to the Disciplinary Board

In Re:

**YOUNG S. OH, Attorney at Law
WSBA No. 29692**

NO. 201,001-6

Appendix B:

**Disciplinary Board Order Modifying Hearing
Officer's Decision
Bar file #264**

RECEIVED
SEP 30 2011

FILED
SEP 29 2011

HELSELL FETTERMAN

BEFORE THE
DISCIPLINARY BOARD
OF THE
WASHINGTON STATE BAR ASSOCIATION

DISCIPLINARY BOARD

In re

YOUNG SUK OH,

Lawyer (WSBA No. 29692)

Proceeding No. 05#00203

DISCIPLINARY BOARD ORDER
MODIFYING HEARING OFFICER'S
DECISION

This matter came before the Disciplinary Board at its September 16, 2011, meeting, on automatic review of Hearing Officer Susan Amini's March 22, 2011, decision recommending a one-year suspension following a hearing.

Having heard oral argument, reviewed the materials submitted by counsel, and considered the applicable case law and rules,

IT IS HEREBY ORDERED THAT the Hearing Officer's decision is modified as follows:¹

- (1) Count 1 is dismissed.
- (2) The remaining counts (2 and 3), and the recommended sanction are affirmed.

COUNT 1

Count 1 alleged, "By assisting and/or inducing and/or permitting one or more of his employees to forge one or more documents to be submitted to INS, Respondent violated former RPC 8.4(a), former RPC 8.4(c), and/or former RPC 8.4(d)." Paragraph 41, Third

¹ The vote on this matter was unanimous. Those voting were: Barnes, Bray, Butterworth, Handmacher, Ivarinen, Lombardi, Ogura, Stiles, Trippett and Wilson.

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Amended Complaint. Count 1 fails because a clear preponderance of the evidence did not establish, and the Hearing Officer did not find, that Respondent assisted an employee to forge a document, that Respondent induced an employee to forge a document, or that Respondent permitted an employee to forge a document.²

The Hearing Officer concluded, however, "By permitting one or more of his employees to forge a client's signature on one or more documents submitted to the INS, and by submitting the forged signatures to the INS, Respondent violated former RPC 8.4(a), former RPC 8.4(c) and former RPC 8.4(d)." Paragraph 51, Conclusions of Law. The portion of this Conclusion stating that Respondent permitted an employee to forge a signature on a document was in error because it was not supported by any finding of fact to that effect made by the Hearing Officer.³ The Board notes that the Hearing Officer prefaced this and other paragraphs under the Conclusions of Law heading with a recitation that the following were proven by a clear preponderance of evidence, however the Board interprets the quoted portion of Paragraph 51 as a conclusion of law rather than a finding of fact. The findings of fact are set forth specifically in Paragraphs 1 through 50 under the Finding of Facts heading; those findings do not include a finding that Respondent permitted an employee to forge a document.

The Hearing Officer did find that many of the forgeries would have been apparent on cursory review (Paragraph 15, Findings of Fact), that Respondent's denial of knowledge that he was submitting forged documents was not credible (Paragraph 19, Findings of Fact), and

² Paragraph 51 of the Hearing Officer's decision is stricken. The Board reverses this conclusion and finds that Count 1 was not proven.

³ The Hearing Officer found Ms. Koh's testimony that she saw Mr. Lee forge Mr. Yeum's signature not credible. TR 13:16, 15:4 and TR 648-654. The Hearing Officer did not make findings that the Yeum forgery was done by Oh or his employees, that the forgery was done in Respondent's office, or that Respondent recognized Yeum's signature at the time he signed the documents.

that Respondent knew he was submitting forged documents to the INS (Paragraph 20, Findings of Fact), concluding that Respondent violated former RPC 8.4(a), (c) and (d) (Paragraph 51, Conclusions of Law). The Board agrees with the proposition that knowing submission of forged documents to a tribunal constitutes serious misconduct under the above rules, however observes in this case that the Association at no time charged Respondent with knowing submission of forged documents to the INS. The Board also finds it significant that the Association did not charge Respondent with violation of RPC 3.3(a), the rule relating to making a false statement to a tribunal.

The Association in this case had ample opportunity to articulate a knowing submission charge—the hearing that led to the findings and conclusions under review was based on the fourth version of the Association’s complaint (original followed by three amended versions); the Association had the opportunity prior to, or during, the first or second hearing to move to amend its complaint to include a knowing submission charge had the Association believed that the evidence would support that charge. Although the question whether Respondent knew or didn’t know that submitted documents had forged signatures may have been the subject of testimony and argument during the hearing, the Board is sympathetic with Respondent’s basic due process argument that he was not given notice and opportunity to defend that charge. ELC 10.3(a)(3); *In re Poole*, 156 Wn2d 196, 125 P.3d 954 (2006); *In re Romero*, 152 Wn.2d 124, 94 P.3d 939 (2004).

The Board recognizes that it may have the authority under ELC 10.1(a) incorporating Civil Rules including CR 15, *sua sponte* to amend the complaint to conform to the evidence, i.e. to include a charge that Respondent knowingly submitted a forged document to the INS. *In re Bonet*, 144 W.2d 502, 29 P.3d 1242 (2001). The Board, however, will not exercise that

authority considering the due process concern discussed above. Further, the Board determined that the Association at the hearing did not establish by a clear preponderance of evidence that Respondent knowingly submitted forged documents to the INS, i.e. the Hearing Officer's finding on that subject did not satisfy the substantial evidence test.

COUNTS 2 AND 3

Counts 2 and 3 are adopted.

SANCTION

The Board recommends that the Court impose the 1 year suspension, as explained in the Hearing Officer's decision, with the following amendments.

PARAGRAPH 55

This paragraph is stricken.

PARAGRAPH 60(b)

This paragraph is amended as follows:

(b) ~~dishonest or selfish motive: Respondent submitted documents containing forged signatures to a tribunal (INS) without permission or knowledge of the client and to cover his/his office's delay in submitting the packet;~~ Respondent failed to use a trust account for client funds in order to conceal overdrafts in his account and to use the funds for his own purposes without oversight;

PARAGRAPH 61(f)

The last sentence of this paragraph is stricken.⁴

⁴ The stricken language is "With regard to Count 1, inexperience in the practice of law does not mitigate the submission of documents with forged signatures to the INS."

RECOMMENDATION

The Board adopts the Hearing Officer's sanction recommendation of a one year suspension.

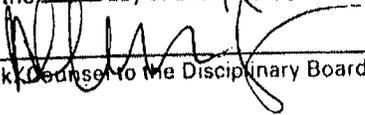
Dated this 29th day of September, 2011.



H.E. Stiles, II
Disciplinary Board Chair

CERTIFICATE OF SERVICE

I certify that I caused a copy of the DB Order Modifying HO's Decision
to be delivered to the Office of Disciplinary Counsel and to be mailed
to Scott Collins Respondent/Respondent's Counsel
at 101 W. Pine St. 400 Seattle WA 98101 by Certified/first class mail,
postage prepaid on the 29th day of September, 2011



Clerk of the Disciplinary Board

In Re:

**YOUNG S. OH, Attorney at Law
WSBA No. 29692**

NO. 201,001-6

**Appendix C:
Former RPC 1.14**

(d) An arbitrator selected as a partisan of a party in a multi-member arbitration panel is not prohibited from subsequently representing that party.
[Amended effective October 29, 1993.]

RULE 1.13 CLIENT UNDER A DISABILITY

(a) When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client cannot adequately act in the client's own interest, a lawyer may seek the appointment of a guardian or take other protective action with respect to a client.

RULE 1.14 PRESERVING IDENTITY OF FUNDS AND PROPERTY OF A CLIENT

(a) All funds of clients paid to a lawyer or law firm, including advances for costs and expenses, shall be deposited in one or more identifiable interest-bearing trust accounts maintained as set forth in section (c), and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:

(1) Funds reasonably sufficient to pay bank charges may be deposited therein;

(2) Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

(b) A lawyer shall:

(1) Promptly notify a client of the receipt of his or her funds, securities, or other properties;

(2) Identify and label securities and properties of a client promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable;

(3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to his or her client regarding them;

(4) Promptly pay or deliver to the client as requested by a client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.

(c) Each trust account referred to in section (a) shall be an interest-bearing trust account in any bank, credit union or savings and loan association, selected by a lawyer in the exercise of ordinary prudence, authorized by federal or state law to do business in Washington and insured by the Federal Deposit Insurance Corporation,

the National Credit Union Share Insurance Fund, the Washington Credit Union Share Guaranty Association, or the Federal Savings and Loan Insurance Corporation, or which is a qualified public depository as defined in RCW 39.58.010(2), which bank, credit union, savings and loan association or qualified public depository has filed an agreement with the Disciplinary Board pursuant to rule 15.4 of the Rules for Enforcement of Lawyer Conduct. Interest-bearing trust funds shall be placed in accounts in which withdrawals or transfers can be made without delay when such funds are required, subject only to any notice period which the depository institution is required to reserve by law or regulation.

(1) A lawyer who receives client funds shall maintain a pooled interest-bearing trust account for deposit of client funds that are nominal in amount or expected to be held for a short period of time. The interest accruing on this account, net of reasonable check and deposit processing charges which shall only include items deposited charge, monthly maintenance fee, per item check charge, and per deposit charge, shall be paid to The Legal Foundation of Washington, as established by the Supreme Court of Washington. All other fees and transaction costs shall be paid by the lawyer. A lawyer may, but shall not be required to, notify the client of the intended use of such funds.

(2) All client funds shall be deposited in the account specified in subsection (1) unless they are deposited in:

(i) a separate interest-bearing trust account for the particular client or client's matter on which the interest will be paid to the client; or

(ii) a pooled interest-bearing trust account with subaccounting that will provide for computation of interest earned by each client's funds and the payment thereof to the client.

(3) In determining whether to use the account specified in subsection (1) or an account specified in subsection (2), a lawyer shall consider only whether the funds to be invested could be utilized to provide a positive net return to the client, as determined by taking into consideration the following factors:

(i) the amount of interest that the funds would earn during the period they are expected to be deposited;

(ii) the cost of establishing and administering the account, including the cost of the lawyer's services and the cost of preparing any tax reports required for interest accruing to a client's benefit; and

(iii) the capability of financial institutions to calculate and pay interest to individual clients.

(4) As to accounts created under subsection (c)(1), lawyers or law firms shall direct the depository institution:

(i) To remit interest or dividends, net of reasonable check and deposit processing charges which shall only include items deposited charge, monthly maintenance fee, per item check charge, and per deposit charge, on the average monthly balance in the

account, or as otherwise computed in accordance with an institution's standard accounting practice, at least quarterly, to The Legal Foundation of Washington. Other fees and transaction costs will be directed to the lawyer;

(ii) To transmit with each remittance to the Foundation a statement showing the name of the lawyer or law firm for whom the remittance is sent, the rate of interest applied, and the amount of service charges deducted, if any, and the account balance(s) of the period in which the report is made, with a copy of such statement to be transmitted to the depositing lawyer or law firm.

(5) The Foundation shall prepare an annual report to the Supreme Court of Washington that summarizes the Foundation's income, grants and operating expenses, implementation of its corporate purposes, and any problems arising in the administration of the program established by section (c) of this rule.

(6) The provisions of section (c) shall not relieve a lawyer or law firm from any obligation imposed by these rules with respect to safekeeping of clients' funds, including the requirements of section (b) that a lawyer shall promptly notify a client of the receipt of his or her funds and shall promptly pay or deliver to the client as requested all funds in the possession of the lawyer which the client is entitled to receive;

(d) Escrow and other funds held by a lawyer incident to the closing of any real estate or personal property transaction are client funds subject to this rule regardless of whether the lawyer, the law firm, or the parties view the funds as belonging to clients or non-clients. [Amended effective July 1, 1988; July 14, 1989; March 1, 1991; October 1, 2002.]

Comment RPC 1.14

Escrow or other funds incident to the closing of real or personal property transactions are subject to this rule regardless of whether the lawyer views the funds as belonging to clients.

[Comment adopted effective December 20, 1988.]

TITLE 2. COUNSELOR

RULE 2.1. ADVISOR

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

RULE 2.2. INTERMEDIARY

(a) A lawyer may act as intermediary between clients if:

(1) The lawyer consults with each client concerning the implications of the common representation, includ-

RULE 1.15. DECLINING OR TERMINATING REPRESENTATION

(a) Except as stated in section (c), a lawyer shall not represent a client or, where representation has commenced, shall, notwithstanding RCW 2.44.040, withdraw from the representation of a client if:

(1) The representation will result in violation of the Rules of Professional Conduct or other law;

(2) The lawyer's physical or mental condition materially impairs his ability to represent the client; or

(3) The lawyer is discharged.

(b) Except as stated in section (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:

(1) The client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(2) The client has used the lawyer's services to perpetrate a crime or fraud;

(3) The client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;

(4) The client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(5) The representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(6) Other good cause for withdrawal exists.

(c) When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) A lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law.

(1) The lawyer reasonably believes that the matter can be resolved on terms compatible with the clients' best interests, that each client will be able to make adequately informed decisions in the matter and that there is little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful; and

(2) The lawyer reasonably believes that the common representation can be undertaken impartially and with-

In Re:

**YOUNG S. OH, Attorney at Law
WSBA No. 29692**

NO. 201,001-6

Appendix D:

**RPC 1.15B
Required Trust Account Records**

West's Revised Code of Washington Annotated Currentness

Part I Rules of General Application

Rules of Professional Conduct (Rpc)

Title 1. Client-Lawyer Relationship

→→ RULE 1.15B REQUIRED TRUST ACCOUNT RECORDS

(a) A lawyer must maintain current trust account records. They may be in electronic or manual form and must be retained for at least seven years after the events they record. At minimum, the records must include the following:

(1) Checkbook register or equivalent for each trust account, including entries for all receipts, disbursements, and transfers, and containing at least:

- (i) identification of the client matter for which trust funds were received, disbursed, or transferred;
- (ii) the date on which trust funds were received, disbursed, or transferred;
- (iii) the check number for each disbursement;
- (iv) the payor or payee for or from which trust funds were received, disbursed, or transferred; and
- (v) the new trust account balance after each receipt, disbursement, or transfer;

(2) Individual client ledger records containing either a separate page for each client or an equivalent electronic record showing all individual receipts, disbursements, or transfers, and also containing:

- (i) identification of the purpose for which trust funds were received, disbursed, or transferred;
- (ii) the date on which trust funds were received, disbursed or transferred;
- (iii) the check number for each disbursement;
- (iv) the payor or payee for or from which trust funds were received, disbursed, or transferred; and
- (v) the new client fund balance after each receipt, disbursement, or transfer;

(3) Copies of any agreements pertaining to fees and costs;

(4) Copies of any statements or accountings to clients or third parties showing the disbursement of funds to them or on their behalf;

(5) Copies of bills for legal fees and expenses rendered to clients;

(6) Copies of invoices, bills or other documents supporting all disbursements or transfers from the trust account;

(7) Bank statements, copies of deposit slips, and cancelled checks or their equivalent;

(8) Copies of all trust account client ledger reconciliations; and

(9) Copies of those portions of clients' files that are reasonably necessary for a complete understanding of the financial transactions pertaining to them.

(b) Upon any change in the lawyer's practice affecting the trust account, including dissolution or sale of a law firm or suspension or other change in membership status, the lawyer must make appropriate arrangements for the maintenance of the records specified in this Rule.

CREDIT(S)

[Adopted effective September 1, 2006.]

WASHINGTON COMMENTS

2012 Electronic Pocket Part Update.

[1] Paragraph (a)(3) is not intended to require that fee agreements be in writing. That issue is governed by Rule 1.5.

[2] If trust records are computerized, a system of regular and frequent (preferably daily) back-up procedures is essential.

[3] Paragraph (a)(9) does not require a lawyer to retain the entire client file for a period of seven years, although many lawyers will choose to do so for other reasons. Rather, under this paragraph, the lawyer must retain only those portions of the file necessary for a complete understanding of the financial transactions. For example, if a lawyer received proceeds of a settlement on a client's behalf, the lawyer would need to retain a copy of the settlement agreement. In many cases, there will be nothing in the client file that needs to be retained other than the specific documents listed in paragraphs (a)(2)-(8).

[Comment adopted effective September 1, 2006.]

RPC 1.15B, WA R RPC 1.15B

Current with amendments received through 11/15/11

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END OF DOCUMENT

In Re:

**YOUNG S. OH, Attorney at Law
WSBA No. 29692**

NO. 201,001-6

Appendix E:

**WSBA Report and Recommendation of the Special
Committee for Evaluation of the Rules of
Professional Conduct (Ethics 2003) to the Board of
Governors
March 2004**

Washington State Bar Association



WSBA

**REPORT AND RECOMMENDATION OF THE
SPECIAL COMMITTEE FOR EVALUATION OF
THE RULES OF PROFESSIONAL CONDUCT (ETHICS 2003)
TO THE BOARD OF GOVERNORS**

March 2004

Ellen Conedera Dial, Chairperson

Douglas J. Ende, Reporter

Washington State Bar Association
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OVERVIEW

Creation and Purpose of the Ethics 2003 Committee

Approximately one year ago, the Board of Governors of the Washington State Bar Association established the Special Committee for the Evaluation of the Rules of Professional Conduct (Ethics 2003 Committee) to review the Washington Rules of Professional Conduct in light of the substantial changes made to the American Bar Association Model Rules of Professional Conduct as a result of the work of the ABA's Ethics 2000 Commission. Established in 1997, the Ethics 2000 Commission undertook a comprehensive evaluation of the Model Rules of Professional Conduct and proposed significant changes in 2001. After considering the Ethics 2000 proposals, the ABA House of Delegates approved a substantially revised version of the Model Rules in February of 2002. Further amendments—sponsored by the ABA Commission on Multijurisdictional Practice and the ABA Task Force on Corporate Responsibility—were adopted by the House of Delegates in August 2002 and August 2003.

The Board of Governors requested that the Ethics 2003 Committee review the ABA's Ethics 2000 revisions, undertake a comprehensive study and evaluation of the current ABA Model Rules as a whole, consider the suitability of adopting the ABA revisions in Washington, consider other appropriate changes to Washington's Rules of Professional Conduct, and submit its recommendations to the Board of Governors.

Reasons for the Ethics 2003 Project

- The Rules of Professional Conduct of forty-four states, including Washington, are based to some degree on the ABA Model Rules. Most or all of those states have undertaken a review of the ABA Ethics 2000 revisions to determine the extent to which their rules should be amended to conform more closely to the Model Rules. Other states, including Oregon and Iowa, are in the process of supplanting code-based structures with Model Rules-based systems. In view of these developments, it became important for the Washington Rules to be reviewed and amended as appropriate.
- Since Washington's adoption of the Rules of Professional Conduct (RPC) in 1985, there has not been a comprehensive evaluation of Washington's rules of lawyer ethics.
- There is value in aspiring to achieve uniformity in rules regulating lawyer conduct. Uniformity in the rules of lawyer ethics will assist Washington lawyers in complying with the rules in force in other jurisdictions when they are practicing elsewhere, and will guide lawyers from other jurisdictions, when practicing here on a limited basis, in conforming their conduct to the standards applicable in Washington. The body of law developed in jurisdictions with uniform rules will also provide Washington lawyers and judges with additional interpretive guidance when applying Washington's Rules of Professional Conduct.

Composition and Conduct of the Committee

The Committee appointed by the Board of Governors reflected a notable degree of diversity,

including diversity in location within (and outside of) the state, size of practice, nature of client/organizational representation, experience in the practice of law, gender, ethnicity, and age. Sixteen lawyer members and one nonlawyer member participated actively in the work of the Committee under the charge of Committee Chair Ellen Conedera Dial. Following Barrie Althoff's relinquishment of the position in February 2003, Douglas Ende served as reporter for the Committee. Members of the Committee were Frank Busichio (citizen member, Marysville), Gail McMonagle (Seattle), Jan Eric Peterson (Seattle), Leland Ripley (Lake Stevens), Mark Fucile (Portland, Oregon), J. Scott Miller (Spokane), Kenneth B. Howard (Coeur D' Alene, Idaho), Peter Ehrlichman (Seattle), Tito Rodriguez (Seattle), Deborah Perluss (Seattle), Dave Boorner (Professor, Seattle University), Ernest Rushing (Olympia), Thomas McBride (Olympia), Anne I. Seidel (Seattle), Christopher Sutton (Seattle), Thomas E. Kelly, Jr. (Seattle), and Peter R. Day (Mercer Island). Justice Mary Fairhurst participated as Supreme Court Liaison, and Joni Kerr (District 3, Vancouver) acted as the Board of Governors Liaison. Nanette Sullins served as the Supreme Court's Staff Liaison to the Committee. The Reporter and the Committee were assisted by University of Washington School of Law student Susan Carroll, who served as the Ethics 2003 Committee's Administrative Assistant.

Over the course of thirteen months, the full Committee met on sixteen occasions for up to six hours per meeting to review the Model Rules and recommend rule revisions. Every member also served on at least one of seventeen subcommittees, each of which spent substantial time and effort evaluating particular rules or segments of the rules and in formulating proposed drafts for consideration by the full Committee. Many additional hours were devoted to individual study and consideration of the proposed drafts, which were circulated in advance of or at each Committee meeting.

In discharging its task, the Committee looked not only to the Model Rules and the proposals of the ABA's Ethics 2000 Commission, but also to the existing Washington Rules of Professional Conduct for distinctive provisions that reflect well-established Washington practices and standards; to Washington Supreme Court decisions that shed light on ethical expectations applicable to lawyers in Washington; to WSBA formal and informal ethics opinions for standards that should be preserved or reinforced; to ethics rules in other states to determine the extent to which those states have adhered to or departed from the Model Rules, as well as to the enforcement experiences in those states; and to the comments and suggestions conveyed to the Committee by members of the Bar and nonlawyer citizens of Washington about how changes to the Rules would affect the profession and the public.

Considering the diversity of the Committee's composition, the complexity and magnitude of the task, and, in many instances, the importance of the competing values at stake, the extent of agreement among Committee members was noteworthy. On occasion, albeit infrequently, the Committee could not reach a consensus or there was a significant division of opinion about the appropriateness or prudence of a particular rule or provision. Such instances notwithstanding, the Committee believes that the Rules of Professional Conduct as proposed herein reflect a reasonable balance of interests, that each individual rule is carefully integrated with the others, and that the proposal as a whole had been conscientiously crafted to ensure broad acceptance by members of the Bar and the public.

Analytic Approach of the Committee

It was the hope of the ABA Ethics 2000 Commission that as state supreme courts considered implementation of the revised Model Rules, uniformity would be the "guiding beacon." The Conference of Chief Justices has also urged cooperation "to ensure consistency among jurisdictions concerning lawyer regulation and professionalism." Recognizing the importance of uniformity in rules regulating lawyer conduct, the Ethics 2003 Committee operated on the general principle that it would recommend adoption of the Model Rules, together with the associated commentary, unless there was a compelling and articulable reason for deviation.

With this in mind, the text of the Model Rules of Professional Conduct is the primary source of the framework for and content of the Rules proposed by the Ethics 2003 Committee in this Report. In some instances, however, the Committee concluded that the Model Rules are silent on a subject that has been traditionally and successfully regulated in Washington, or that an existing Washington rule is clearly more suited to the regulation of Washington lawyers than its Model Rule counterpart. In such cases the Committee has proposed retention of existing provisions in Washington's Rules of Professional Conduct or the addition of new Washington-specific provisions.

As set forth in paragraph [23] of the Scope section of the proposed Rules, the Committee has endeavored to parallel the structure of the Model Rules as closely as possible and to clearly indicate instances of material deviation. Omissions from the Model Rules are signaled by notation in the text of the rule. Other alterations of the Model Rules and Comments are accompanied by explanatory remarks in the form of "Washington Comments" annexed to the general Comment section of each modified rule. (In some cases, Washington-specific interpretive gloss is included among the Washington Comments even if the text of the Model Rule is unaltered.) Additional reasons for proposed deviations from the Model Rules are detailed in this Report.

What the Ethics 2003 Committee Did

- Commencing in February 2003, the Committee examined the Model Rules of Professional Conduct and other proposed revisions to the Washington Rules of Professional Conduct. With uniformity as its touchstone, the Committee sought to assure that twenty years after their adoption, Washington's Rules would integrate with technological and other changes that have affected the way law is being practiced, would harmonize with any pertinent changes in substantive law and legal procedure, and would provide better guidance to lawyers seeking to comply with ethical requirements. The Committee, through its open process, sought, received, and acted upon viewpoints from throughout the legal community and from the public.
- Shortly after it was convened, at the request of the Board of Governors, the Committee acted promptly to address ethical issues raised by the Security and Exchange Commission's adoption of regulations under the Sarbanes-Oxley Act. The Committee recommended that the Board of Governors adopt a formal ethics opinion discussing the effect of the regulations on the obligations of Washington lawyers under Rules of Professional Conduct. The

Committee's efforts culminated in adoption by the Board of Governors, on July 26, 2003, of the "Interim Formal Ethics Opinion Re: The Effect of the SEC's Sarbanes-Oxley Regulations On Washington Attorneys' Obligations Under the RPCs."

- The Committee repeatedly and widely solicited participation by and comments from the profession at large. It also encouraged comments from the public and provided opportunities for those comments. At the outset of the Committee's undertaking, leaders of all the county bar associations, WSBA sections, boards, and committees, and specialty and minority bar associations were contacted directly about the work of the Committee. The Committee invited members of these organizations to attend Ethics 2003 Committee meetings and urged each bar leader to canvass his or her membership about possible changes to the Rules of Professional Conduct and to have members direct comments and inquiries to the Committee. The Committee offered to send Committee members to each county bar association to discuss the Ethics 2003 project.
- As a result of the initial outreach efforts, members of the Committee spoke about the work of the Committee at thirty-three county bar meetings, continuing legal education programs, and other law-related roundtables and programs around the state of Washington. Over 1,985 individuals attended those sessions. Speakers invited the attendees to ask questions about the Ethics 2003 process, attend Committee meetings, and submit comments to the Committee.
- In October 2003, the Committee sponsored a public forum for nonlawyers on the issue of lawyer-client confidentiality. The public forum was an opportunity for members of the Ethics 2003 Committee to exchange views with interested nonlawyers about lawyer-client confidentiality and its significance to clients and to the public. The Committee presented information about significant distinctions between ABA Model Rule 1.6 and Washington's current confidentiality rule, as well as about the Ethics 2003 process in general, and elicited the views and recommendations of the participants about possible changes to Washington's rules.
- The Washington State Bar Association web site, the *Washington State Bar News*, the WSBA Executive Director's "News Flash," and WSBA Section Newsletters were used to publicize information about the meetings, the work of the Ethics 2003 Committee, and the rule changes under consideration. The activities of the Committee were highlighted in the July 2003 Executive's Report in the *Bar News*. The November 2003 Executive's Report, authored by Committee Member J. Scott Miller as guest columnist, was devoted exclusively to the Ethics 2003 process. Meeting agendas were made available on the Ethics 2003 Committee's web page in advance of each Committee meeting, and a summary of the Committee's actions was posted shortly following each meeting. Interested lawyers and nonlawyers were invited to attend the Ethics 2003 Committee meetings and directed to submit their comments via an Ethics 2003 email address or directly to the Committee Chair or Reporter. Over thirty-five individual emails were received via the Ethics 2003 email address and disseminated to Committee members. Comments were also received by direct mail and telephone.
- Meetings were frequently attended by nonmember guests, who were given an opportunity to address comments and proposals to the full Committee. Nonmember attendees included

representatives from the WSBA Board of Governors, WSBA Family Law Section, the WSBA Litigation Section, the WSBA Rules of Professional Conduct Committee, the Legal Foundation of Washington, the Washington Association of Criminal Defense Lawyers, the WSBA Office of Disciplinary Counsel, the WSBA Lawyer Services Department, and the faculty of the University of Washington School of Law, as well as a number of individual unaffiliated lawyers, law students, and nonlawyer citizens.

- In instances where specific organizational stakeholders had a known or apparent interest in the Committee's resolution of an imminent issue, the organizations were contacted directly and asked to participate in the Committee's work and/or to submit comments or recommendations. Organizations that participated in this fashion include the Legal Foundation of Washington, the Washington State Trial Lawyer's Association, the Washington Defense Trial Lawyers, the Washington Defender's Association, the Washington Association of Criminal Defense Lawyers, the WSBA Business Law Section, and the WSBA Family Law Section.
- As a result of Committee members' discussions with individual lawyers around the state, suggestions directed to the full Committee at meetings, comments received at the public forum, and recommendations or comments submitted via mail, telephone and e-mail, the Committee took into account a diverse aggregation of lawyer and nonlawyer viewpoints.
- Each proposed Rule, together with its accompanying Comments, has gone through five layers of consideration and examination by the Committee. First, each of the subcommittees was assigned a discrete Rule or segment of the Rules to evaluate and prepare. Each subcommittee performed initial drafting work, generally with one or more individual members preparing an initial draft of each Rule, and those drafts then being examined, revised, and approved by the subcommittee. Second, the subcommittee draft was presented by the subcommittee chair to the full Committee at one of its meetings, and then considered, debated, revised, and approved (in whole or in part). In some cases, the Committee resubmitted particular issues to a subcommittee to be presented again at a subsequent meeting. Third, the Committee draft was thoroughly reviewed by the Committee's Reporter, with the assistance of several members of the Committee, to ensure structural consistency, identify drafting problems, and resolve any substantive errors or omissions. Following that review, the Reporter proposed further revisions and circulated a revised draft for Committee members to study. Fourth, the Reporter's version of the Committee draft was considered by the full Committee at its March 10, 2004 meeting, and, after further revision, was given tentative approval. Fifth, and finally, the Committee considered a complete draft of all Rules and this Report and gave final approval to the proposed Rules that are submitted herein.
- While the Committee's work was underway, the Chair provided the Board of Governors with interim updates on the progress of the Ethics 2003 Committee at Board meetings in July 2003, October 2003, and February 2004.
- The Committee has endeavored to present its recommendation to the Board of Governors well in advance of the October 15 deadline for submission of suggested rules to the Supreme Court under General Rule 9.

SUMMARY OF THE ETHICS 2003 PROPOSAL AND IMPORTANT INDIVIDUAL RECOMMENDATIONS

Although uniformity has been the “guiding beacon,” the Committee has not sought to adhere blindly to the ABA Model Rules as a whole, but instead has proposed an integrated approach in which Washington-specific concerns and interests, as reflected in the current Rules of Professional Conduct, have been retained and interpolated into a structure that parallels the framework of the ABA Model Rules. To facilitate ease of reference and for consistency and uniformity in comparison of the Washington Rules of Professional Conduct with the ABA Model Rules and with the parallel rules of the great majority of other states, the Committee believes it important to maintain—to the extent possible—the rule-numbering format of the Model Rules.

The most visible change from the current Rules is the inclusion of official Comments in the Committee’s proposal. Although the Supreme Court did not incorporate the ABA Comments to the Model Rules when it adopted Washington’s Rules of Professional Conduct in 1985, it has become well established that Washington courts will look to the ABA Comments when interpreting Washington’s rules. See, e.g., *In re Discipline of McKean*, 148 Wn.2d 849, 864 n.9, 64 P.3d 1226 (2003); *In re Discipline of Carmick*, 146 Wn.2d 582, 595, 48 P.3d 311 (2002); *Teja v. Saran*, 68 Wn. App. 793, 798 n.4, 846 P.2d 1375 (1993), *review denied*, 122 Wn.2d 1008, 859 P.2d 604 (1993); see also R. Aronson, *An Overview of the Law of Professional Responsibility: The Rules of Professional Conduct Annotated and Analyzed*, 61 Wash. L. Rev. 823 (1986) (critiquing non-adoption of published Comments to the Model Rules and noting that Comments provide necessary guidance on the interpretation and application of each Rule). The Committee believes that Comments will provide convenient and beneficial assistance to lawyers by clarifying the manner in which individual rules apply to particular ethical predicaments. The Comments will assist researchers and the judiciary in illuminating the intent and policy behind the promulgation of particular rules and provisions. Cross-references in the Comments will clarify the ways in which many rules relate to each other and to other rules, statutes, and cases. The inclusion of “Washington Comments” will further tailor the set of Rules to Washington’s specific legal landscape and provide guidance in those instances in which Washington’s version of a rule departs from the Model Rule version.

Many of the Committee’s individual rule recommendations entail no material change from the existing Washington version. In a few instances, the Committee has recommended adoption of a Model Rule or Model Rule variant that would substantially change a lawyer’s ethical duties, or a Model Rule that would be entirely new to Washington. In other instances, the Committee has recommended retention of a Washington rule in lieu of a Model Rule counterpart despite substantial support for the Model Rule approach from a minority of the Committee.

For the information of the Board and the Bar in understanding the proposed Rules—but not to be included in the publication of the official text of the Rules and Comments—the Reporter’s Explanatory Memorandum following the Committee’s recommendation explains the source of each proposed Rule and Comment, compares the proposed Rules to the existing Washington Rules and to the Model Rules, and briefly explains the Committee’s reasons for making

particular decisions. Additional detailed information about the Committee's recommendation is found in the Appendices, which include (1) a "redline" version of the current Rules of Professional Conduct reflecting all changes proposed by the Committee; (2) the written reports of the subcommittees; and (3) the minutes of the sixteen Committee meetings. (Note that the text of the draft rules as set forth in the subcommittee reports may vary from the text of the final Committee recommendations.)

Significant Committee proposals include the following:

RULE 1.5: Fees

Proposed Rule 1.5 is essentially a restructured version of existing Washington RPC 1.5, with several clarifying revisions that are consistent with the Model Rule. The changes will strengthen existing obligations, require lawyers to be clear with clients about the nature of both fees and expenses, and better educate lawyers as to their duties. Existing RPC 1.5 requires that a lawyer's fee be reasonable. In the proposed Rule, this language is replaced with clearer prohibitory language: "a lawyer shall not make an agreement for, charge, or collect an *unreasonable fee*." (Emphasis added.) The proposed Rule explicitly extends its coverage to the amount of expenses charged to a client. Existing RPC 1.5(c) requires that contingent fee agreements be in writing. The proposed Rule conforms to the Model Rule's requirement that such a writing be signed by the client. The Committee was divided about two proposals relating to Rule 1.5. First, the Committee considered a provision that would require most or all fee agreements be in writing. Second, the Committee considered a provision that would require a lawyer to communicate to the client in writing the fact that a fee is deemed "nonrefundable," and that would also require a lawyer to reevaluate the reasonableness of a nonrefundable fee at the conclusion of the representation and to refund any portion of the fee not in compliance with the reasonableness requirement of Rule 1.5(a). In divided votes, the Committee declined to recommend either proposal. (For additional information regarding the Committee's recommendation, see the Reporter's Explanatory Memorandum and the Appendices to this Report.)

RULE 1.6: Confidentiality of Information

Among the most controversial issues addressed during the Ethics 2003 process related to confidentiality and Rule 1.6. The Committee's proposed Rule is in most respects similar to the Model Rule. It opts for the Model Rule language "information relating to the representation of a client" in lieu of the current Washington prohibition on disclosure of "confidences and secrets." Proposed Rule 1.6 also incorporates a number of new Model Rule exceptions, including an exception that would permit disclosure "to prevent reasonably certain death or substantial bodily injury" and an exception that would permit disclosure "to prevent the client from committing a fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services." The proposed rule retains existing RPC 1.6(b)(1), Washington's broad exception permitting disclosure of information to prevent the client from committing a crime, as well as RPC 1.6(c), which permits a lawyer to disclose to a tribunal a breach of fiduciary responsibility by a client who is a court-appointed fiduciary. The proposed rule does *not* include two provisions found in the Model Rule. The Committee concluded that these two exceptions were improvident and

incompatible with the duty of confidentiality as established in the state of Washington. First, the Model Rule would permit a lawyer to reveal confidential client information "to comply with other law." The Committee concluded that lawyers should not be placed in the dilemma of having to assess the validity and/or applicability of a provision of "other law" purporting to require disclosure of confidential information; such decisions should be made only after obtaining a client's informed consent to the disclosure or pursuant to court order. The Committee was also wary of the "other law" provision being used as an ideological tool for the regulation of the practice of law by branches of government other than the judiciary. Second, the Model Rule would permit a lawyer to reveal confidential client information to "mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services." The Committee concluded that although the public interest is heightened when a lawyer is in a position to prevent *future* fraud, that urgency is attenuated when the fraud is already complete. At that point, the balance of interests shifts back to the traditional duties of lawyer-client loyalty and confidentiality. The majority was also convinced that the undefined notions of "mitigation" and "rectification" of fraud are imprudently unbounded and could be used to impose a civil duty to third parties when lawyers fail to report client fraud or fail to disclose sufficient information. Because disclosure would still be permitted pursuant to court order, and because Washington lawyers would be permitted to disclose future fraud contemplated by the client, the Committee concluded that omitting the "past-fraud" exception would strike the appropriate balance between the public interest in acquiring significant information and the need for judicial supervision over lawyer decisions about disclosure of traditionally confidential client information. (For additional information regarding the Committee's recommendation, see the Reporter's Explanatory Memorandum and the Appendices to this Report.)

RULES 1.7, 1.8, 1.9 & 1.10: Conflict of Interest

These Rules were substantially reorganized to conform to the structure of the Model Rules. The proposed changes, together with the addition of substantial commentary, will help to clarify a lawyer's duties with regard to conflicts of interest, one of the more complicated areas of legal ethics. A number of important Washington variants relating to conflicts of interest have been retained. For example, the Committee recommends retaining RPC 1.8(k), prohibiting sex with clients, which, unlike the Model Rule, includes specific provision relating to sexual relations with a representative of an organizational client. The Committee recommends retaining RPC 1.10(b), Washington's rule relating to screening to avoid imputation of conflicts created by lawyers moving between private law firms, although such a procedure is not permitted under the Model Rules. And the Committee recommends retaining and expanding RPC 1.8(i), which expressly addresses conflicts arising when lawyers are related as parent, child, sibling, spouse, or—in the proposed version—when the lawyers are in a "close familial or intimate relationship." The Committee has not proposed adoption of that part of Model Rule 1.8(g) requiring that client consent to aggregate settlements be confirmed in a writing "signed by the client," opting instead for client consent that is "confirmed in writing" only. (For additional information regarding the Committee's recommendation, see the Reporter's Explanatory Memorandum and the Appendices to this Report.)

RULE 1.13: Organization as Client

Because Model Rule 1.13 was not adopted in Washington in 1985, proposed Rule 1.13 does not have a counterpart in Washington's current rules. Rule 1.13 is consistent with existing Washington law in clarifying the lawyer's role when representing an organization and when dealing with the organization's directors, officers, employees, members shareholders, and other constituents. The Rule also sets forth the lawyer's obligation to report "up the ladder" if the lawyer learns that an officer, employee, or the like is acting or intends to act in a way that is a violation of the law and is likely to result in substantial injury to the organization. If "up the ladder" reporting fails and the highest authority in the organization refuses to act or fails to address a clear violation of law—and the lawyer reasonably believes that the violation will result in substantial injury to the organization—the Rule authorizes a lawyer to reveal information relating to the representation in order to prevent the injury whether or not such disclosure would otherwise be permitted by Rule 1.6. (For additional information regarding the Committee's recommendation, see the Reporter's Explanatory Memorandum and the Appendices to this Report.)

RULES 1.15A and 1.15B: Trust Accounts

Proposed Rule 1.15A (like the current trust account rule, RPC 1.14) is a departure from the Model Rule. The ABA Model Rules do not address the obligation to pay interest on pooled interest-bearing trust accounts (IOLTA), a Washington requirement that has and continues to necessitate a substantially different trust account rule in Washington. The proposed variations take into account the general obligation of Washington lawyers to deposit client funds in IOLTA accounts, as well as the body of law that has developed to help interpret Washington's trust accounting practices. In addition, the Committee has proposed adoption of a supplemental rule relating to trust account recordkeeping. Proposed Rule 1.15B will provide guidance to lawyers regarding the nature of the trust account records that must be preserved and will help ensure that records are available for an appropriate period of time. The proposed recordkeeping Rule is based on the ABA Model Rules for Client Protection. (For additional information regarding the Committee's recommendation, see the Reporter's Explanatory Memorandum and the Appendices to this Report.)

RULE 1.17: Sale of Law Practice

Model Rule 1.17 was adopted by the ABA in 1990; it does not have a counterpart in Washington's current rules. Rule 1.17 defines the circumstances in which a lawyer or a firm may sell a law practice or area of practice and sets forth the ethical obligations of the seller and purchaser in connection with such a sale. In Washington, issues relating to the sale of a law practice have hitherto been addressed only in Formal Ethics Opinion No. 192. The Committee concluded that the subject was more appropriately governed expressly in the Rules of Professional Conduct. (For additional information regarding the Committee's recommendation, see the Reporter's Explanatory Memorandum and the Appendices to this Report.)

RULE 1.18: Duties to Prospective Clients

Rule 1.18 was incorporated into the Model Rules in 2002 as part of the Ethics 2000 revisions. It addresses the time period during which a lawyer and prospective client are considering whether to form a client-lawyer relationship. Under proposed Rule 1.18, a prospective client is a person who discusses with a lawyer the possibility of forming a client-lawyer relationship. Even if no client-lawyer relationship with the prospective client is formed, a lawyer must not disclose information learned in a consultation with the prospective client, and a lawyer is prohibited from representing a client with interests adverse to those of the prospective client unless certain conditions are met. Rule 1.18 has no counterpart in Washington's rules, but it in part codifies case law that had developed under Rule 1.6. (For additional information regarding the Committee's recommendation, see the Reporter's Explanatory Memorandum and the Appendices to this Report.)

RULE 2.4: Lawyer Serving as Third-Party Neutral

Rule 2.4 was incorporated into the Model Rules in 2002 as part of the Ethics 2000 revisions. It recognizes that alternative dispute resolution has become a substantial part of the civil justice system and that increasingly lawyers are serving as third-party neutrals in mediation, arbitration, conciliation, and the like. Unlike nonlawyers who serve as neutrals, lawyers may experience unique ethical problems, for example, those arising from possible confusion about the nature of the lawyer's role. Rule 2.4 is designed to assist parties to dispute resolution in understanding the lawyer-neutral's role. (For additional information regarding the Committee's recommendation, see the Reporter's Explanatory Memorandum and the Appendices to this Report.)

RULE 3.3: Candor Toward the Tribunal

Proposed Rule 3.3 is identical to the Model Rule. It expands the duty of candor (and narrows the duty of confidentiality) in a number of ways. Most significantly, if a lawyer, the lawyer's client, or a witness called by the lawyer has offered false material evidence and the lawyer comes to know of its falsity, the Rule requires a lawyer to take "reasonable remedial measures including, if necessary, disclosure to the tribunal." Under the proposed Rule, this remedial duty applies *even if* compliance requires disclosure of information that would otherwise be protected by Rule 1.6. Hence, a lawyer may be required to disclose confidential client information in order to rectify a prior offer of false evidence to the tribunal. This represents a substantial change from current RPC 3.3, which precludes a lawyer from disclosing information protected by RPC 1.6 even if the lawyer knows that false evidence has been offered to a tribunal. Under current law, a lawyer is required only to make reasonable efforts to convince the client to consent to disclosure; if the client refuses to consent, RPC 3.3(d) authorizes withdrawal. (For additional information regarding the Committee's recommendation, see the Reporter's Explanatory Memorandum and the Appendices to this Report.)

RULE 5.5: Unauthorized Practice of Law; Multijurisdictional Practice of Law

The multijurisdictional practice aspects of Rule 5.5 were incorporated into the Model Rule as part of the Ethics 2000 revisions. They are designed to recognize the increasingly interstate and international nature of some clients' legal matters, and to provide some latitude to out-of-state lawyers practicing outside of their home jurisdictions. The proposed Rule prohibits lawyers not admitted to practice in Washington from establishing an office or other systematic and continuous presence in Washington for the practice of law, but it also creates several "safe harbors" that preclude disciplinary action against an out-of-state lawyer practicing in Washington on a limited and/or transitory basis. The proposed Rule also recognizes the ability of in-house counsel and lawyers authorized by federal or other law to practice in Washington. (For additional information regarding the Committee's recommendation, see the Reporter's Explanatory Memorandum and the Appendices to this Report.)

RULES 6.1 and 6.5: Pro Bono Publico Service and Nonprofit and Court-Annexed Limited Legal Service Programs

Washington's pro bono rule, RPC 6.1, was amended effective September 1, 2003. Washington's RPC 6.5—which relaxes the strict application of conflicts-of-interest rules for lawyers providing short-term limited legal services under the auspices of a program sponsored by a nonprofit organization or court—was enacted effective October 29, 2002. Each of these Rules is based on the counterpart Model Rule adopted by the ABA in 2002 at the recommendation of the Ethics 2000 Commission, but each departs in a number of ways from the corresponding Model Rules version. For example, RPC 6.1 designates thirty hours of pro bono service as an aspirational minimum rather than fifty. And RPC 6.5 includes a provision permitting lawyers to be screened to address conflicts of interest. These differences notwithstanding, the Committee concluded that it was unnecessary to recommend revisions to rules recently approved and adopted by the Supreme Court. Accordingly, the Committee is recommending retention of both rules, with only minor revisions to Rule 6.5. (For additional information regarding the Committee's recommendation, see the Reporter's Explanatory Memorandum and the Appendices to this Report.)

RULE 8.3: Reporting Professional Misconduct

In a close vote after vigorous debate, the Committee declined to adopt Model Rule 8.3, which imposes a nondiscretionary duty to report to an appropriate disciplinary authority when a lawyer knows that another lawyer or a judge has committed a serious violation of applicable ethical rules. In Washington, RPC 8.3 makes reporting discretionary, and it is therefore not unethical for a lawyer to decline to report known professional misconduct of a lawyer or a judge. The Committee recommends retaining the current discretionary reporting approach. In addition, the Committee voted to recommend a revision to paragraph (c) of the Rule that would expressly prohibit a lawyer from reporting professional misconduct if such reporting would require disclosure of confidential client information. (For additional information regarding the Committee's recommendation, see the Reporter's Explanatory Memorandum and the Appendices to this Report.)

CONCLUSION

In proposing a substantial revision to Washington's Rules of Professional Conduct, this Committee has carefully deliberated and exercised independent judgment about the standards of ethical conduct to which all lawyers practicing in Washington should be held. The Committee believes that the Rules as proposed are in keeping with the expectations of the profession, the judiciary, and the public, and, if adopted, will be among the most current, comprehensive, professional, and progressive set of Rules in the nation.

Accordingly, we submit the accompanying proposed Washington Rules of Professional Conduct for the Board's consideration. The Committee welcomes the opportunity to further present its proposed Rules to the Board at its upcoming meetings and to respond to any comments received or questions from the Governors.

March 23, 2004

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In Re:

**YOUNG S. OH, Attorney at Law
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NO. 201,001-6

Appendix F:

**Reporter's Explanatory Memorandum to the Ethics
2003 Committee's Proposed Rules of Professional
Conduct
EXCERPTED**

**REPORTER'S EXPLANATORY MEMORANDUM
TO THE
ETHICS 2003 COMMITTEE'S
PROPOSED RULES OF PROFESSIONAL CONDUCT**

Introduction

For the information of the Board and the Bar in understanding the proposed Rules—but not to be included in the publication of the official text of the Rules and Comments—this Memorandum endeavors to explain the source of each proposed Rule and Comment. It does so by comparing the proposed Rules to the existing Washington Rules and to the Model Rules and briefly explaining the Committee's reasons for making particular decisions. (Because there are no Comments to the existing Washington Rules, the proposed Comments in all cases will constitute an alteration, even if there is no recommended change to the rule itself.)

Although this Memorandum has been reviewed and approved by the full Committee, it primarily represents the Reporter's distillation of information that will usefully guide readers in understanding the basis for the Ethics 2003 Committee's recommendations. Where the Committee has recommended adoption of the Model Rule, the Reporter has, as appropriate, incorporated portions of the rationale set forth in the ABA Ethics 2000 Commission's Report. See ABA Report to the House of Delegates, No. 401 (Aug. 2001 & Feb. 2002), Reporter's Explanation of Changes. Additional detail about the bases for the Committee's recommendations is available in the full text of the written reports of the Ethics 2003 subcommittees and the minutes of the sixteen Committee meetings, both of which are included in the Appendices.

As used in this Memorandum, "Model Rule" refers to the 2004 Edition of the ABA Model Rules of Professional Conduct, unless otherwise noted. "Rule" and "proposed Rule" refer to the version of the Rule recommended by the Ethics 2003 Committee and set forth in this Report. "RPC," "existing RPC," and "current RPC" refer to Washington's Rules of Professional Conduct in force as of the date of this Report, unless otherwise noted.

Preamble and Scope

Comparison with Model Rule

The source of the proposed Preamble and Scope is the Model Rule text. The proposed version is essentially identical to the Model Rule Preamble and Scope except for minor alterations to Preamble [4] and Scope [17] and the addition of Washington Comments [22] and [23].

Comparison with RPC

The proposed Preamble and Scope wholly replace the existing RPC Preamble and Preliminary Statement.

unions in order to ensure adequate time for those lawyers to deposit trust account funds in compliance with the new Rule.

Paragraph (i)(1) of the proposed Rule requires that the interest accruing on an IOLTA account must be not less than the rate paid by the financial institution on similar non-IOLTA accounts maintained at that institution. The intent of this provision, which does not appear in RPC 1.14, is to ensure that only those institutions offering the designated interest rate will be included in the bank participation list maintained by the Disciplinary Board in accordance with ELC 15.4. The intent of this provision is explained in Washington Comment [15].

Rule 1.15B: Required Trust Account Records

Comparison with Model Rule

There is no counterpart to Rule 1.15B in the Model Rules. It is based on the ABA Model Rule on Financial Recordkeeping, which is a component of the ABA Model Rules for Client Protection. In order to signal that inclusion of the proposed Rule is a departure from the structure of the Model Rules, and to alert lawyers that the Rule must be considered concurrently with the provisions of the general trust account rule, numbered 1.15A, the Committee has proposed that the Rule be numbered 1.15B.

Comparison with RPC

There is no counterpart to Rule 1.15B in the existing RPC.

Explanation of Committee Recommendation

Current RPC 1.14 requires that accurate records be maintained, yet does not specify what records must be maintained or specify a retention period. Adequate retention of financial records is important to lawyers and to the owners of the funds to ensure that information will be available should questions or disputes arise about the handling of client or third-party funds, and to provide a source of accurate information should other records be lost or destroyed. To provide lawyers with specific guidelines in this area, the Committee recommends adoption of a separate recordkeeping rule. The Committee concluded that it would be prudent to promulgate a separate rule that would operate concurrently with the general trust account rule rather than incorporate the recordkeeping provisions into the already intricate and relatively lengthy proposed Rule 1.15A. The source of many of the provisions in the proposed Rule is the ABA Model Rule on Financial Recordkeeping, which is a component of the ABA Model Rules for Client Protection. Certain portions of the ABA Model Rule pertain more closely to handling the trust account than to recordkeeping per se. Those portions have been included in proposed Rule 1.15A.

Currently, there is no rule in Washington that instructs lawyers on how long they must retain trust account records. The Model Rule on Financial Recordkeeping suggests that records be retained for five years after termination of representation. The Committee concluded that having the destruction date based on the events the records document rather than the termination of representation would simplify the process of determining when destruction is permissible, since

certain records, such as bank statements, combine information for a number of client matters. Because the destruction date under this system will generally arise on a date earlier than five years after termination of representation, the Committee concluded that a longer retention period is warranted. Accordingly, Paragraph (a) of the proposed rule requires that records be kept for seven years after the events they record.

A section-by-section description of each paragraph of the proposed rule and accompanying comments can be found in the Report of the Trust Accounts Subcommittee, which accompanies this Report in the Appendix.

The Committee's recommendation to adopt proposed Rule 1.15B, together with the Comment, was uncontroversial.

Rule 1.16: Declining or Terminating Representation

Comparison with Model Rule

Proposed Rule 1.16 is identical to the Model Rule, except for the insertion of the phrase "notwithstanding RCW 2.44.040" in paragraph (a).

Comparison with RPC

Proposed Rule 1.16 is substantially similar to RPC 1.15 (with renumbering of the Rule necessitated by the interpolation of Rule 1.13).

Paragraph (a) is essentially identical to RPC 1.15(a).

Paragraph (b) restructures the provision on permissive withdrawal when withdrawal can be accomplished without material adverse effect on the client into new paragraph (b)(1), and the remaining paragraphs are renumbered accordingly. No substantive change is intended.

In paragraph (b)(4), the terms "pursuing an objective" and "imprudent" (appearing in current paragraph (b)(3)) are changed to "taking action" and "with which the lawyer has a fundamental disagreement," respectively.

Paragraph (c) adds the sentence "A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating representation."

Paragraph (d) is essentially identical to RPC 1.15(d), but includes a requirement that an advance payment of "expense" must be refunded upon termination of representation, and adds the phrase "or incurred."

Explanation of Committee Recommendation

The Committee recommends retaining the reference to RCW 2.44.040 in paragraph (a). The statute is a peculiarity that, unless expressly mentioned, might incorrectly be interpreted—in

In Re:

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NO. 201,001-6

Appendix G:

**Appendix D: Ethics 2003 Committee Subcommittee
Reports
EXCERPTED**

APPENDIX D

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* Reporter's Note: The text of drafts prepared by subcommittees may vary from the text of the final rules and comments recommended by the Committee.

Trust Accounts Subcommittee Final Report

This memo describes the Subcommittee's approach to the rules and what we believe are the most important proposed changes.

The Subcommittee met eight times. Because of the technical nature of the rule, the bar's auditors (initially Julie Mass who has since left the bar and subsequently Trina Doty), Senior Disciplinary Counsel Randy Beitel (who due to his degree in accounting coordinates the trust account overdraft notification program and handles many of the grievances requiring trust account audits) and Barbara Clark (the Executive Director of the Legal Foundation of Washington, which administers IOLTA funds), each attended several meetings. The Subcommittee gratefully acknowledges their contributions.

Overall Approach

Model Rule 1.15 is vague and not entirely consistent with our current RPC 1.14. It does not contain any provision for IOLTA, yet contains some requirements not in RPC 1.14, which the Subcommittee felt served no real purpose, such as requiring trust accounts to be in the state where the lawyer's office is situated. Because of the importance of the proper handling of client property and the reliance of practitioners on the current rule, the Subcommittee felt it was important to be as clear as possible while retaining as much as possible from our current rule. A look at trust account rules from other states confirmed that few have adopted MRPC 1.15.

The Subcommittee reviewed the comments to MRPC 1.15, but found they were not helpful. Many of the issues covered under those comments are instead addressed in the text of our proposed rule. Instead, the Subcommittee drafted its own set of comments.

In addition to MRPC 1.15, the Subcommittee considered a draft rule initially prepared by the RPC Committee and later revised to incorporate some changes suggested by the WSBA auditor and Office of Disciplinary Counsel. The RPC Committee reviewed and discussed this draft, and ultimately decided to forward it to Ethics 2003. This draft is referred to as the RPC Committee's draft and is included as Attachment D.

We used the term "must" instead of "shall" because the subcommittee felt "must" is clearer. Since this rule is not based on the model rule, we saw no advantage in keeping the model rule terminology. We use 1.15 to refer to the replacement for current RPC 1.14 in accordance with the Model Rules' numbering system.

Specific Provisions

(a) Recordkeeping

RPC 1.14 requires that accurate records be maintained, yet does not specify what records must be maintained. The Subcommittee believes lawyers should be given specific guidance in this area. The ABA has a model rule on Model Rule on Financial Recordkeeping ("MRFR") which is part of its Model Rules for Client Protection. Rather than incorporate the lengthy recordkeeping provisions in RPC 1.15, the Subcommittee decided to follow the ABA's approach and create a separate rule, which we have provisionally titled RPC 1.15.1. The MRFR is included as Attachment F.

The ABA's model rule applies to both trust accounts and general accounts. Some states have taken this even further and have required lawyers to have a general account. See, e.g., NJ Court Rule 1:21-6. While the Subcommittee believes it is by far the better practice for a lawyer both to have a general account and to maintain records for that account, it felt it was too much of a change from current requirements to adopt that part of the model rule. We therefore modified the MRFR to eliminate the references to general accounts and the distinctions made between general and trust accounts.

Certain portions of the MRFR actually pertain to handling the trust account rather than to recordkeeping per se. We moved those portions to RPC 1.15.

Currently, there is no rule that instructs lawyers on how long they must retain trust account records. The Subcommittee believes this is an area where lawyers should have more guidance. The MRFR suggests that records to be retained for five years after termination of representation. The Subcommittee concluded that having the destruction date based on the events the records record rather than termination of representation would make it easier for law firms to destroy records, since certain records, such as bank statements, combine information for many client matters. Because the destruction date is based on an earlier event, the retention period must be longer, and the Subcommittee believes seven years is the appropriate length of time. Our proposed language is identical to that in Rhode Island's and New Jersey's rules.

(b) Inclusion of third persons in rule

RPC 1.14 applies only to clients and funds held when a lawyer is acting as an escrow. Model Rule 1.15 applies to funds of third persons as well as client funds. Because lawyers often are required to hold funds of third persons in connection with a representation, the subcommittee felt RPC 1.14 should be expanded consistent with model rule 1.15. We have proposed Comment [4] to address concerns that this may increase a lawyer's liability to third persons.

(c) Only a lawyer may be an authorized signatory on a trust account

MRFR B(1) only permits a lawyer admitted to practice law in this jurisdiction to be an authorized signatory on a trust account. The subcommittee relaxed this requirement slightly by permitting any lawyer admitted to practice to be an authorized signatory on the account. Those in other states that have this restriction report that it protects lawyers from theft from the trust account by nonlawyers in their employ. The subcommittee believes that a lawyer could still authorize a nonlawyer assistant to sign the lawyer's name on specific trust account checks or use a signature stamp, but if the nonlawyer did so without the lawyer's authorization, the bank would be liable for the nonlawyer's theft of client funds.

(d) Lawyers must account to clients at least annually for funds held in trust

RPC 1.14(b)(3) currently requires lawyers to "render appropriate accounts" to clients, but is not specific as to what is an appropriate accounting. Between MRPC 1.15(d) and MRFR A(4), it appears the model rules require accountings after distribution of property or upon request. However, after much discussion, the Subcommittee agreed that if a year goes by and there has been no distribution of property or request for an accounting, the lawyer should send a statement so the client or third person is reminded that the lawyer is still holding the property.

(e) Lawyers will no longer be allowed to have trust accounts at credit unions

The National Credit Union Share Guaranty Fund insures funds on deposit at credit unions. However, insurance is provided only to members of the credit union or those eligible for membership. If the client is not in that group, the client's funds would not be insured. The Subcommittee decided that lawyers should not be permitted to keep trust accounts at a credit union because of the risk that those funds would not be insured. According to the Washington Legal Foundation, at the end of June, only 73 out of 6702 total IOLTA accounts are currently at credit unions. If this change is in the final rule, the Subcommittee recommends advance notice to firms with IOLTA accounts at credit unions, as well as in the Bar News and/or accompanying the annual trust account declaration, so firms will have plenty of time to move their accounts.

List of Attachments:

- A. Subcommittee's Proposed RPC 1.15 and 1.15.1
- B. Section-by-section explanation of Proposed 1.15
- C. Section-by-section explanation of Proposed 1.15.1
- D. RPC Committee's Draft Revision of RPC 1.14
- E. ABA's Model Rule on Financial Recordkeeping

In Re:

**YOUNG S. OH, Attorney at Law
WSBA No. 29692**

NO. 201,001-6

Appendix H:

**Standards for Imposing Lawyer Sanctions, as
Approved, February 1986, and as Amended, ABA,
February 1992
EXCERPTED**

STANDARDS FOR IMPOSING LAWYER SANCTIONS

AS APPROVED, FEBRUARY 1986

AND AS AMENDED, FEBRUARY 1992

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I. PREFACE

A. Background

In 1979, the American Bar Association published the Standards for Lawyer Discipline and Disability Proceedings.¹ That book was a result of work by the Joint Committee on Professional Discipline of the American Bar Association. The Joint Committee was composed of members of the Judicial Administration Division and the Standing Committee on Professional Discipline of the American Bar Association. The task of the Joint Committee was to prepare standards for enforcement of discipline in the legal community.

The 1979 standards have been most helpful, and have been used by numerous jurisdictions as a frame of reference against which to compare their own disciplinary systems. Many jurisdictions have modified their procedures to comport with these suggested standards, and the Standing Committee on Professional Discipline of the American Bar Association has assisted state disciplinary systems in evaluating their programs in light of the approved standards.

It became evident that additional analysis was necessary in one important area -- that of appropriate sanctions for lawyer misconduct. The American Bar Association Standards for Lawyer Discipline and Disability Proceedings (hereinafter "Standards for Lawyer Discipline") do not attempt to recommend the type of discipline to be imposed in any particular case. The Standards merely state that the discipline to be imposed "should depend upon the facts and circumstances of the case, should be fashioned in light of the purpose of lawyer discipline, and may take into account aggravating or mitigating circumstances" (Standard 7.1).

For lawyer discipline to be truly effective, sanctions must be based on clearly developed standards. Inappropriate sanctions can undermine the goals of lawyer discipline: sanctions which are too lenient fail to adequately deter misconduct and thus lower public confidence in the profession; sanctions which are too onerous may impair confidence in the system and deter lawyers from reporting ethical violations on the part of other lawyers. Inconsistent sanctions, either within a jurisdiction or among jurisdictions, cast doubt on the efficiency and the basic fairness of all disciplinary systems.

As an example of this problem of inconsistent sanctions, consider the range in levels of sanctions imposed for a conviction for failure to file federal income taxes. In one jurisdiction, in 1979, a lawyer who failed to file income tax returns for one year was suspended for one year,² while, in 1980, a lawyer who failed to file income tax returns for two years was merely censured.³ Within a two-year period, the sanctions imposed on lawyers who converted their clients' funds included disbarment,⁴ suspension,⁵ and censure.⁶ The inconsistency of sanctions imposed by different jurisdictions for the same misconduct is even greater.

An examination of these cases illustrates the need for a comprehensive system of sanctions. In many cases, different sanctions are imposed for the same acts of misconduct, and the courts rarely provide any explanation for the selection of sanctions. In other cases, the courts may give reasons for their decisions, but their statements are too general to be useful. In still other cases, the courts may list specific factors to support a certain result, but they do not state whether these factors must be considered in every discipline case, nor do they explain whether these factors are entitled to equal weight.

The Joint Committee on Professional Sanctions (hereinafter "Sanctions Committee") was formed to address these problems by formulating standards to be used in imposing sanctions for lawyer misconduct. The Sanctions Committee was composed of members from the Judicial Administration Division and the Standing Committee on Professional Discipline. The mandate given was ambitious: the Committee was to examine the current range of sanctions imposed and to formulate standards for the imposition of appropriate sanctions.

In addressing this task, the Sanctions Committee recognized that any proposed standards should serve as a model which sets forth a comprehensive system of sanctions, but which leaves room for flexibility and creativity in assigning sanctions in particular cases of lawyer misconduct. These standards are designed to promote thorough, rational consideration of all factors relevant to imposing a sanction in an individual case. The standards attempt to ensure that such factors are given appropriate weight in light of the stated goals of lawyer discipline, and that only relevant aggravating and mitigating circumstances are considered at the appropriate time. Finally, the standards should help achieve the degree of consistency in the imposition of lawyer discipline necessary for fairness to the public and the bar.

While these standards will improve the operation of lawyer discipline systems, there is an additional factor which, though not the focus of this report, cannot be overlooked. In discussing sanctions for lawyer misconduct, this report assumes that all instances of unethical conduct will be brought to the attention of the disciplinary system. Experience indicates that such is not the case. In 1970, the ABA Special Committee on Evaluation of Disciplinary Enforcement (the Clark Committee), was charged with the responsibility for evaluating the effectiveness of disciplinary enforcement systems. The Clark Committee concluded that one of the most significant problems in lawyer discipline was the reluctance of lawyers and judges to report misconduct.⁷ That same problem exists today. It cannot be emphasized strongly enough that lawyers and judges must report unethical conduct to the appropriate disciplinary agency.⁸ Failure to render such reports is a disservice to the public and the legal profession.

Judges in particular should be reminded of their obligation to report unethical conduct to the disciplinary agencies. Under the ABA Code of Judicial Conduct, a judge is obligated to "take or initiate appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge may become aware."⁹ Frequently, judges take the position that there is no such need and that errant behavior of lawyers can be remedied solely by use of contempt proceedings and other alternative means. It must be emphasized that the goals of lawyer discipline are not properly and fully served if the judge who observes unethical conduct simply deals with it on an

ad hoc basis. It may be proper and wise for a judge to use contempt powers in order to assure that the court maintains control of the proceeding and punishes a lawyer for abusive or obstreperous conduct in the court's presence. However, the lawyer discipline system is in addition to and serves purposes different from contempt powers and other mechanisms available to the judge. Only if all lawyer misconduct is in fact reported to the appropriate disciplinary agency can the legal profession have confidence that consistent sanctions are imposed for similar misconduct.

Consistency of sanctions depends on reporting of other types as well. The American Bar Association Center for Professional Responsibility has established a "National Lawyer Regulatory Data Bank" which collects statistics on the nature of ethical violations and sanctions imposed in lawyer discipline cases in all jurisdictions. The information available from the Data Bank is only as good as the reports which reach it. It is vital that the Data Bank promptly receive complete, accurate and detailed information with regard to all discipline cases.

Finally, the purposes of lawyer sanctions can best be served, and the consistency of those sanctions enhanced, if courts and disciplinary agencies throughout the country articulate the reasons for sanctions imposed. Courts of record that impose lawyer discipline do a valuable service to the legal profession and the public when they issue opinions in lawyer discipline cases that explain the imposition of a specific sanction. The effort of the Sanctions Committee was made easier by the well-reasoned judicial opinions that were available. At the same time, the Sanctions Committee was frustrated by the fact that many jurisdictions do not publish lawyer discipline decisions, and that even published decisions are often summary in nature, failing to articulate the justification for the sanctions imposed.

B. Methodology

The Standards for Lawyer Sanctions have been developed after an examination of all reported lawyer discipline cases from 1980 to June, 1984, where public discipline was imposed.¹⁰ In addition, eight jurisdictions, which represent a variety of disciplinary systems as well as diversity in geography and population size, were examined in depth. In these jurisdictions - Arizona, California, the District of Columbia, Florida, Illinois, New Jersey, North Dakota, and Utah - all published disciplinary cases from January, 1974 through June, 1984, were analyzed. In each case, data were collected concerning the type of offense, the sanction imposed, the policy considerations identified, and aggravating or mitigating circumstances noted by the court.¹¹

These data were examined to identify the patterns that currently exist among courts imposing sanctions and the policy considerations that guide the courts. In general, the courts were consistent in identifying the following policy considerations: protecting the public, ensuring the administration of justice, and maintaining the integrity of the profession. In the words of the California Supreme Court: "The purpose of a disciplinary proceeding is not punitive but to inquire into the fitness of the lawyer to continue in that capacity for the protection of the public, the courts, and the legal profession."¹² However, the courts failed to articulate any theoretical framework for use in imposing sanctions.

In attempting to develop such a framework, the Sanctions Committee considered a number of options. The Committee considered the obvious possibility of identifying each and every type of misconduct in which a lawyer could engage, then suggesting either a recommended sanction or a range of recommended sanctions to deal with that particular misconduct. The Sanctions Committee unanimously rejected that option as being both theoretically simplistic and administratively cumbersome.¹³

The Sanctions Committee next considered an approach that dealt with general categories of lawyer misconduct and applied recommended sanctions to those types of misconduct depending on whether or not -- and to what extent -- the misconduct resulted from intentional or malicious acts of the lawyer. There is some merit in that approach; certainly, the intentional or unintentional conduct of the lawyer is a relevant factor. Nonetheless, that approach was also abandoned after the Sanctions Committee carefully reviewed the purposes of lawyer sanctions. Solely focusing on the intent of the lawyer is not sufficient, and proposed standards must also consider the damage which the lawyer's misconduct causes to the client, the public, the legal system, and the profession. An approach which looked only at the extent of injury was also rejected as being too narrow.

The Committee adopted a model that looks first at the ethical duty and to whom it is owed, and then at the lawyer's mental state and the amount of injury caused by the lawyer's misconduct. (See Theoretical Framework, p. 5, for a detailed discussion of this approach.) Thus, one will look in vain for a section of this report which recommends a specific sanction for, say, improper contact with opposing parties who are represented by counsel [Rule 4.2/DR 7-104(A)(1)],¹⁴ or for any other specific misconduct. What one will find, however, is an organizational framework that provides recommendations as to the type of sanction that should be imposed based on violations of duties owed to clients, the public, the legal system, and the profession.

To provide support for this approach, the Sanctions Committee has offered as much specific data and guidance as possible from reported cases.¹⁵ Thus, with regard to each category of misconduct, the report provides the following:

- discussion of what types of sanctions have been imposed for similar misconduct in reported cases;

-discussion of policy reasons which are articulated in reported cases to support such sanctions; and,

-finally, a recommendation as to the level of sanction imposed for the given misconduct, absent aggravating or mitigating circumstances.

While it is recognized that any individual case may present aggravating or mitigating factors which would lead to the imposition of a sanction different from that recommended, these standards present a model which can be used initially to categorize misconduct and to identify the appropriate sanction. The decision as to the effect of any aggravating or mitigating factors should come only after this initial determination of the sanction.

The Sanctions Committee also recognized that the imposition of a sanction of suspension or disbarment does not conclude the matter. Typically, disciplined lawyers will request reinstatement or readmission. While this report does not include an in-depth study of reinstatement and readmission cases, a general recommendation concerning standards for reinstatement and readmission appears as Standard 2.10.

II. THEORETICAL FRAMEWORK

These standards are based on an analysis of the nature of the professional relationship. Historically, being a member of a profession has meant that an individual is some type of expert, possessing knowledge of high instrumental value such that the members of the community give the professional the power to make decisions for them. In the legal profession, the community has allowed the profession the right of self-regulation. As stated in the Preamble to the ABA Model Rules of Professional Conduct (hereinafter "Model Rules"), "[t]he legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar."¹⁶

This view of the professional relationship requires lawyers to observe the ethical requirements that are set out in the Model Rules (or applicable standard in the jurisdiction where the lawyer is licensed). While the Model Rules define the ethical guidelines for lawyers, they do not provide any method for assigning sanctions for ethical violations. The Committee developed a model which requires a court imposing sanctions to answer each of the following questions:

- (1) What ethical duty did the lawyer violate? (A duty to a client, the public, the legal system, or the profession?)
- (2) What was the lawyer's mental state? (Did the lawyer act intentionally, knowingly, or negligently?)
- (3) What was the extent of the actual or potential injury caused by the lawyer's misconduct? (Was there a serious or potentially serious injury?) and
- (4) Are there any aggravating or mitigating circumstances?

In determining the nature of the ethical duty violated, the standards assume that the most important ethical duties are those obligations which a lawyer owes to clients. These include:

- (a) the duty of loyalty which (in the terms of the Model Rules and Code of Professional Responsibility) includes the duties to:
 - (i) preserve the property of a client [Rule 1.15/DR9-102],
 - (ii) maintain client confidences [Rule 1.6/DR4-101], and
 - (iii) avoid conflicts of interest [Rules 1.7 through 1.13, 2.2, 3.7, 5.4(c) and 6.3/DR5-101 through DR 5-105, DR9-101];
- (b) the duty of diligence [Rules 1.2, 1.3, 1.4/DR6-101(A)(3)];

- (c) the duty of competence [Rule 1.1/DR6-101(A)(1) & (2)]; and
- (d) the duty of candor [Rule 8.4(c)/DR 1-102(A)(4) & DR7-101(A)(3)].

In addition to duties owed to clients, the lawyer also owes duties to the general public. Members of the public are entitled to be able to trust lawyers to protect their property, liberty, and their lives. The community expects lawyers to exhibit the highest standards of honesty and integrity, and lawyers have a duty not to engage in conduct involving dishonesty, fraud, or interference with the administration of justice [Rules 8.2, 8.4(b)&(c)/DR 1-102(A)(3)(4)&(5), DR 8-101 through DR 8-103, DR 9-101(c)].

Lawyers also owe duties to the legal system. Lawyers are officers of the court, and must abide by the rules of substance and procedure which shape the administration of justice. Lawyers must always operate within the bounds of the law, and cannot create or use false evidence, or engage in any other illegal or improper conduct [Rules 3.1 through 3.6, 3.9, 4.1 through 4.4, 8.2, 8.4(d)(e)&(f)/DR7-102 through DR7-110].

Finally, lawyers owe duties to the legal profession. Unlike the obligations mentioned above, these duties are not inherent in the relationship between the professional and the community. These duties do not concern the lawyer's basic responsibilities in representing clients, serving as an officer of the court, or maintaining the public trust, but include other duties relating to the profession. These ethical rules concern:

- (a) restrictions on advertising and recommending employment [Rules 7.1 through 7.5/DR2-101 through 2-104];
- (b) fees [Rules 1.5, 5.4 and 5.6/DR2-106, DR2-107, and DR3-102];
- (c) assisting unauthorized practice [Rule 5.5/DR3-101 through DR3-103];
- (d) accepting, declining, or terminating representation [Rules 1.2, 1.14, 1.16/DR2-110]; and
- (e) maintaining the integrity of the profession [Rules 8.1&8.3/DR1-101 and DR 1-103].

The mental states used in this model are defined as follows. The most culpable mental state is that of intent, when the lawyer acts with the conscious objective or purpose to accomplish a particular result. The next most culpable mental state is that of knowledge, when the lawyer acts with conscious awareness of the nature or attendant circumstances of his or her conduct both without the conscious objective or purpose to accomplish a particular result. The least culpable mental state is negligence, when a lawyer fails to be aware of 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.

The extent of the injury is defined by the type of duty violated and the extent of actual or potential harm. For example, in a conversion case, the injury is determined by examining the extent of the client's actual or potential loss. In a case where a lawyer tampers with a witness, the injury is measured by evaluating the level of interference or potential interference with the legal proceeding. In this model, the standards refer to various levels of injury: "serious injury," "injury," and "little or no injury." A reference to "injury" alone indicates any level of injury greater than "little or no" injury.

As an example of how this model works, consider two cases of conversion of a client's property. After concluding that the lawyers engaged in ethical misconduct, it is necessary to determine what duties were breached. In these cases, each lawyer breached the duty of loyalty owed to clients. To assign a sanction, however, it is necessary to go further, and to examine each lawyer's mental state and the extent of the injuries caused by the lawyers' actions.

In the first case, assume that the client gave the lawyer \$100 as an advance against the costs of investigation. The lawyer took the money, deposited it in a personal checking account, and used it for personal expenses. In this case, where the lawyer acted intentionally and the client actually suffered an injury, the most severe sanction - disbarment - would be appropriate.

Contrast this with the case of a second lawyer, whose client delivered \$100 to be held in a trust account. The lawyer, in a hurry to get to court, neglected to inform the secretary what to do with these funds and they were erroneously deposited into the lawyer's general office account. When the lawyer needed additional funds he drew against the general account. The lawyer discovered the mistake, and immediately replaced the money. In this case, where there was no actual injury and a potential for only minor injury, and where the lawyer was merely negligent, a less serious sanction should be imposed. The appropriate sanction would be either reprimand or admonition.

In each case, after making the initial determination as to the appropriate sanction, the court would then consider any relevant aggravating or mitigating factors (Standard 9). For example, the presence of aggravating factors, such as vulnerability of the victim or refusal to comply with an order to appear before the disciplinary agency, could increase the appropriate sanction. The presence of mitigating factors, such as absence of prior discipline or inexperience in the practice of law, could make a lesser sanction appropriate.

While there may be particular cases of lawyer misconduct that are not easily categorized, the standards are not designed to propose a specific sanction for each of the myriad of fact patterns in cases of lawyer misconduct. Rather, the standards provide a theoretical framework to guide the courts in imposing sanctions. The ultimate sanction imposed will depend on the presence of any aggravating or mitigating factors in that particular situation. The standards thus are not analogous to criminal determinate sentences, but are guidelines which give courts the flexibility to select the appropriate sanction in each particular case of lawyer misconduct.

The standards do not account for multiple charges of misconduct. The ultimate sanction imposed should at least be consistent with the sanction for the most serious instance of misconduct among a number of violations; it might well be and generally should be greater than the sanction for the most serious misconduct. Either a pattern of misconduct or multiple instances of misconduct should be considered as aggravating factors (see Standard 9.22).

III. STANDARDS FOR IMPOSING LAWYER SANCTIONS: BLACK LETTER RULES

For reference purposes, a list of the black letter rules is set out below. The entire report, with commentary on each rule, begins on p. 23.

DEFINITIONS

"Injury" is harm to a client, the public, the legal system, or the profession which results from a lawyer's misconduct. The level of injury can range from "serious" injury to "little or no" injury; a reference to "injury" alone indicates any level of injury greater than "little or no" injury.

"Intent" is the conscious objective or purpose to accomplish a particular result.

"Knowledge" is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result.

"Negligence" is 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.

"Potential injury" is the harm to a client, the public, the legal system or the profession that is reasonably foreseeable at the time of the lawyer's misconduct, and which, but for some intervening factor or event, would probably have resulted from the lawyer's misconduct.

A. PURPOSE AND NATURE OF SANCTIONS

- 1.1 Purpose of Lawyer Discipline Proceedings. The purpose of lawyer discipline proceedings is to protect the public and the administration of justice from lawyers who have not discharged, will not discharge, or are unlikely properly to discharge their professional duties to clients, the public, the legal system, and the legal profession.
- 1.2 Public Nature of Lawyer Discipline. Ultimate disposition of lawyer discipline should be public in cases of disbarment, suspension, and reprimand. Only in cases of minor misconduct, when there is little or no injury to a client, the public, the legal system, or the profession, and when there is little likelihood of repetition by the lawyer, should private discipline be imposed.
- 1.3 Purpose of These Standards. These standards are designed for use in imposing a sanction or sanctions following a determination by clear and convincing evidence that a member of the legal profession has violated a provision of the

Model Rules of Professional Conduct (or applicable standard under the laws of the jurisdiction where the proceeding is brought). Descriptions in these standards of substantive disciplinary offenses are not intended to create grounds for determining culpability independent of the Model Rules. The Standards constitute a model, setting forth a comprehensive system for determining sanctions, permitting flexibility and creativity in assigning sanctions in particular cases of lawyer misconduct. They are designed to promote: (1) consideration of all factors relevant to imposing the appropriate level of sanction in an individual case; (2) consideration of the appropriate weight of such factors in light of the stated goals of lawyer discipline; (3) consistency in the imposition of disciplinary sanctions for the same or similar offenses within and among jurisdictions.

B. SANCTIONS

2.1 Scope

A disciplinary sanction is imposed on a lawyer upon a finding or acknowledgement that the lawyer has engaged in professional misconduct.

2.2 Disbarment

Disbarment terminates the individual's status as a lawyer. Where disbarment is not permanent, procedures should be established for a lawyer who has been disbarred to apply for readmission, provided that:

- (1) no application should be considered for five years from the effective date of disbarment; and**
- (2) the petitioner must show by clear and convincing evidence:**
 - (a) successful completion of the bar examination, and**
 - (b) rehabilitation and fitness to practice law.**

2.3 Suspension

Suspension is the removal of a lawyer from the practice of law for a specified minimum period of time. Generally, suspension should be for a period of time equal to or greater than six months, but in no event should the time period prior to application for reinstatement be more than three years. Procedures should be established to allow a suspended lawyer to apply for reinstatement, but a lawyer who has been suspended should not be permitted to return to practice until he has completed a reinstatement process demonstrating rehabilitation and fitness to practice law.

2.4 Interim Suspension

Interim suspension is the temporary suspension of a lawyer from the practice of law pending imposition of final discipline. Interim suspension includes:

- (a) suspension upon conviction of a "serious crime" or,
- (b) suspension when the lawyer's continuing conduct is or is likely to cause immediate and serious injury to a client or the public.

2.5 Reprimand

Reprimand, also known as censure or public censure, is a form of public discipline which declares the conduct of the lawyer improper, but does not limit the lawyer's right to practice.

2.6 Admonition

Admonition, also known as private reprimand, is a form of non-public discipline which declares the conduct of the lawyer improper, but does not limit the lawyer's right to practice.

2.7 Probation

Probation is a sanction that allows a lawyer to practice law under specified conditions. Probation can be imposed alone or in conjunction with a reprimand, an admonition or immediately following a suspension. Probation can also be imposed as a condition of readmission or reinstatement.

2.8 Other Sanctions and Remedies

Other sanctions and remedies which may be imposed include:

- (a) restitution,
- (b) assessment of costs,
- (c) limitation upon practice,
- (d) appointment of a receiver,
- (e) requirement that the lawyer take the bar examination or professional responsibility examination,
- (f) requirement that the lawyer attend continuing education courses, and

- (g) other requirements that the state's highest court or disciplinary board deems consistent with the purposes of lawyer sanctions.

2.9 Reciprocal Discipline

Reciprocal discipline is the imposition of a disciplinary sanction on a lawyer who has been disciplined in another jurisdiction.

2.10 Readmission and Reinstatement

In jurisdictions where disbarment is not permanent, procedures should be established to allow a disbarred lawyer to apply for readmission. Procedures should be established to allow a suspended lawyer to apply for reinstatement.

C. FACTORS TO BE CONSIDERED IN IMPOSING SANCTIONS

3.0 GENERALLY

In imposing a sanction after a finding of lawyer misconduct, a court should consider the following factors:

- (a) the duty violated;
- (b) the lawyer's mental state;
- (c) the potential or actual injury caused by the lawyer's misconduct; and
- (d) the existence of aggravating or mitigating factors.

4.0 VIOLATIONS OF DUTIES OWED TO CLIENTS

4.1 FAILURE TO PRESERVE THE CLIENT'S PROPERTY

Absent aggravating or mitigating circumstances, upon application of the factors set out in 3.0, the following sanctions are generally appropriate in cases involving the failure to preserve client property:

- 4.11 Disbarment is generally appropriate when a lawyer knowingly converts client property and causes injury or potential injury to a client.
- 4.12 Suspension is generally appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client.

- 4.13 Reprimand is generally appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client.
- 4.14 Admonition is generally appropriate when a lawyer is negligent in dealing with client property and causes little or no actual or potential injury to a client.

4.2 FAILURE TO PRESERVE THE CLIENT'S CONFIDENCES

Absent aggravating or mitigating circumstances, upon application of the factors set out in 3.0, the following sanctions are generally appropriate in cases involving improper revelation of information relating to representation of a client:

- 4.21 Disbarment is generally appropriate when a lawyer, with the intent to benefit the lawyer or another, knowingly reveals information relating to representation of a client not otherwise lawfully permitted to be disclosed, and this disclosure causes injury or potential injury to a client.
- 4.22 Suspension is generally appropriate when a lawyer knowingly reveals information relating to the representation of a client not otherwise lawfully permitted to be disclosed, and this disclosure causes injury or potential injury to a client.
- 4.23 Reprimand is generally appropriate when a lawyer negligently reveals information relating to representation of a client not otherwise lawfully permitted to be disclosed and this disclosure causes injury or potential injury to a client.
- 4.24 Admonition is generally appropriate when a lawyer negligently reveals information relating to representation of a client not otherwise lawfully permitted to be disclosed and this disclosure causes little or no actual or potential injury to a client.

4.3 FAILURE TO AVOID CONFLICTS OF INTEREST

Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving conflicts of interest:

- 4.31 Disbarment is generally appropriate when a lawyer, without the informed consent of client(s):
 - (a) engages in representation of a client knowing that the lawyer's interests are adverse to the client's with the intent to benefit the

in Standard 3.0, the following sanctions are generally appropriate in cases involving prior discipline.

- 8.1 Disbarment is generally appropriate when a lawyer:
- (a) intentionally or knowingly violates the terms of a prior disciplinary order and such violation causes injury or potential injury to a client, the public, the legal system, or the profession; or
 - (b) has been suspended for the same or similar misconduct, and intentionally or knowingly engages in further similar acts of misconduct that cause injury or potential injury to a client, the public, the legal system, or the profession.
- 8.2 Suspension is generally appropriate when a lawyer has been reprimanded for the same or similar misconduct and engages in further similar acts of misconduct that cause injury or potential injury to a client, the public, the legal system, or the profession.
- 8.3 Reprimand is generally appropriate when a lawyer:
- (a) negligently violates the terms of a prior disciplinary order and such violation causes injury or potential injury to a client, the public, the legal system, or the profession; or
 - (b) has received an admonition for the same or similar misconduct and engages in further similar acts of misconduct that cause injury or potential injury to a client, the public, the legal system, or the profession.
- 8.4 An admonition is generally not an appropriate sanction when a lawyer violates the terms of a prior disciplinary order or when a lawyer has engaged in the same or similar misconduct in the past.

9.0 AGGRAVATION AND MITIGATION

9.1 Generally

After misconduct has been established, aggravating and mitigating circumstances may be considered in deciding what sanction to impose.

9.2 Aggravation

9.21 Definition. Aggravation or aggravating circumstances are any

considerations or factors that may justify an increase in the degree of discipline to be imposed.

9.22 Factors which may be considered in aggravation.

Aggravating factors include:

- (a) prior disciplinary offenses;**
- (b) dishonest or selfish motive;**

- (c) a pattern of misconduct;
- (d) multiple offenses;
- (e) bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency;
- (f) submission of false evidence, false statements, or other deceptive practices during the disciplinary process;
- (g) refusal to acknowledge wrongful nature of conduct;
- (h) vulnerability of victim;
- (i) substantial experience in the practice of law;
- (j) indifference to making restitution
- (k) illegal conduct, including that involving the use of controlled substances..

9.3 Mitigation

9.31 Definition. Mitigation or mitigating circumstances are any considerations or factors that may justify a reduction in the degree of discipline to be imposed.

9.32 Factors which may be considered in mitigation.

Mitigating factors include:

- (a) absence of a prior disciplinary record;
- (b) absence of a dishonest or selfish motive;
- (c) personal or emotional problems;
- (d) timely good faith effort to make restitution or to rectify consequences of misconduct;
- (e) full and free disclosure to disciplinary board or cooperative attitude toward proceedings;
- (f) inexperience in the practice of law;

- (g) character or reputation;
- (h) physical disability;
- (i) mental disability or chemical dependency including alcoholism or drug abuse when:
 - (1) there is medical evidence that the respondent is affected by a chemical dependency or mental disability;
 - (2) the chemical dependency or mental disability caused the misconduct;
 - (3) the respondent's recovery from the chemical dependency or mental disability is demonstrated by a meaningful and sustained period of successful rehabilitation; and
 - (4) the recovery arrested the misconduct and recurrence of that misconduct is unlikely;
- (j) delay in disciplinary proceedings;
- (k) imposition of other penalties or sanctions;
- (l) remorse;
- (m) remoteness of prior offenses.

9.4 Factors which are neither aggravating nor mitigating.

The following factors should not be considered as either aggravating or mitigating:

- (a) forced or compelled restitution;
- (b) agreeing to the client's demand for certain improper behavior or result;
- (c) withdrawal of complaint against the lawyer;
- (d) resignation prior to completion of disciplinary proceedings;
- (e) complainant's recommendation as to sanction;
- (f) failure of injured client to complain.

In Re:

**YOUNG S. OH, Attorney at Law
WSBA No. 29692**

NO. 201,001-6

Appendix I:

**Select Disciplinary Notices from the Washington
State Bar News**

BarNews

THE OFFICIAL PUBLICATION OF THE WASHINGTON STATE BAR

OCTOBER 2007

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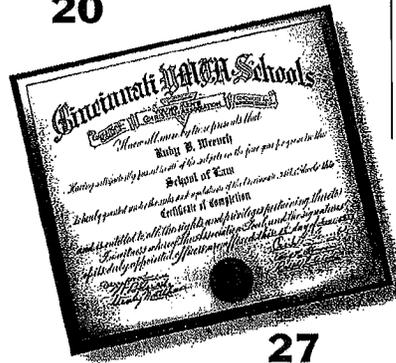
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On the cover: WSBA President Stan Bastian stands on a hill overlooking the city of Wenatchee.
Photo by John Marshall — www.johnmarshallphoto.com.

The mission of the Washington State Bar Association is to promote justice and serve its members and the public.

a stipulation approved by a hearing officer. This discipline was based on his conduct between 2003 and 2005 involving trust-account irregularities.

On September 4, 2003, Mr. Davis's bank notified the Bar Association that a check drawn on Mr. Davis's client trust account had been presented for payment against insufficient funds. On September 18, 2003, Mr. Davis's bank notified the Bar Association that a second check drawn on his client trust account had been presented for payment against insufficient funds. The Bar Association's audit manager conducted an audit of Mr. Davis's client trust account covering the period between June 2003 and March 2005. Mr. Davis cooperated in the audit of his client trust account. The audit revealed a number of deficiencies in the records that Mr. Davis kept of the client funds in his possession. Mr. Davis failed to enter all his account transactions in his check register, failed to include with each account transaction a reference to the client to whom that transaction applied, failed to keep a running balance in his check register, failed to reconcile his check register with his bank statements, and failed to maintain an individual client transaction summary or ledger for each client whose funds were in his possession.

Due to these deficiencies, as well as others, neither Mr. Davis nor the Bar Association's audit manager could determine the ownership of all of the funds in Mr. Davis's client trust account. Based on a reconstruction, the audit manager concluded that there was a \$532.60 shortage in Mr. Davis's client trust account and that an additional \$827.79 related to client matters that were no longer active. These funds should have been disbursed to clients and/or former clients. The audit manager recommended that, after restoring \$532.60 to his client trust account, Mr. Davis disburse the additional \$827.79 to his clients and/or former clients after determining the ownership of those funds. Mr. Davis agreed to comply with the recommendations.

Mr. Davis's conduct violated former RPC 1.14(b)(3), requiring that a lawyer maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to his or her client regarding them.

Scott G. Busby represented the Bar Association. Mr. Davis represented himself. Joseph Nappi Jr. was the hearing officer.

Reprimanded

Jerry J. Davis (WSBA No. 33294, admitted 2002), of Spokane, was ordered to receive a reprimand on September 5, 2006, following

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Reprimanded

Howard K. Michaelsen (WSBA No. 3928, admitted 1959), of Spokane, received a reprimand on December 4, 2007, following approval of a stipulation by the hearing officer. This discipline was based on conduct involving failure to maintain complete trust account records, disbursement of funds in excess of funds clients had on deposit in his trust account, and disbursement of funds from the trust account before corresponding deposits had cleared the bank.

Between July 2002 and July 2005, Mr. Michaelsen maintained an IOLTA client trust account, for which he failed to keep a check register with a running balance. During this time period, Mr. Michaelsen also failed to reconcile his trust account bank statements to his own records on a regular basis, failed to maintain ledgers for individual client matters,

made deposits totaling \$4,770.44 without identifying the client, and made withdrawals totaling \$5,784.89 without identifying the client. During this time period, Mr. Michaelsen disbursed funds in excess of funds that the clients had on deposit in his trust account and before corresponding deposits had cleared the bank, resulting in a \$5,559.28 shortage in his trust account. Upon being notified of the shortage by the Bar Association in November 2005, Mr. Michaelsen reimbursed his trust account; however, in some instances, he was unable to identify clients who had positive balances in his trust account. After Mr. Michaelsen and the Bar Association auditor were able to identify the clients who had positive balances in the trust account, Mr. Michaelsen refunded the positive balances to these clients in October and November 2007.

Mr. Michaelsen's conduct violated former RPC 1.14(a), requiring all funds of clients paid to a lawyer or law firm be deposited in one or more identifiable interest-bearing trust accounts maintained as set forth in the rules; and former RPC 1.14(b)(3), requiring a lawyer to maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and to render appropriate accountings to his or her clients regarding those funds.

Kevin M. Bank represented the Bar Association. Mr. Michaelsen represented himself. Richard B. Geissler was the hearing officer.

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Admonished and Reprimanded

Gary C. Hugill (WSBA No. 4713, admitted 1972), of Kennewick, was ordered to receive an admonition, a reprimand, and probation on August 19, 2009, following approval of a stipulation. This discipline is based on conduct involving disclosure of client information without consent, trust account irregularities, and failure to maintain complete records of client funds.

On March 7, 2007, Mr. Hugill was appointed to represent a client who had been charged in Superior Court with two counts of assault in the first degree and one count of burglary in the first degree. Mr. Hugill represented the client at the trial that began on June 4, 2007. The client failed to appear in court for the second day of trial and the judge asked Mr. Hugill if he knew where the client was. In response to the question, Mr. Hugill revealed the contents and circumstances of communications he had with the client the day before. Among other things, Mr. Hugill revealed that the client had asked him what would happen if he did not "show up" for trial. The disclosure in the preceding sentences was of information relating to the representation of a client, was not impliedly authorized in order to carry out the representation, and the client did not give his informed consent to reveal that information.

On April 4, 2005, the Association received notice from Mr. Hugill's bank that a check drawn on his client trust account had been presented for payment against insufficient funds. The Association's audit manager conducted an audit of Mr. Hugill's client trust account covering the period between January 1, 2005, and February 28, 2006. During the audit period, Mr. Hugill failed to maintain a check register for his client trust account with a running balance, failed to maintain client ledgers, and failed to maintain records from which it could be determined on which client's behalf certain deposits were made. During the audit period, Mr. Hugill also failed to reconcile his client trust account bank statements, failed to deposit some client funds into his client trust

account, and deposited funds belonging to him in his client trust account. Mr. Hugill disbursed more funds on behalf of some clients than he held in trust for those clients.

Mr. Hugill's conduct violated RPC 1.6, prohibiting a lawyer from revealing information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted under the rules; former RPC 1.14(a), requiring that all client funds paid to a lawyer or law firm be deposited into one or more identifiable interest-bearing trust accounts and no funds of the lawyer be deposited therein; and former RPC 1.14(b)(3), requiring a lawyer to maintain complete records of all funds, securities, and other properties of a client coming into possession of the lawyer and render appropriate accounts to his or her client regarding them.

Scott G. Busby represented the Bar Association. Mr. Hugill represented himself. Linda D. O'Dell was the hearing officer.

TERRELL MARSHALL & DAUDT PLLC

is pleased to announce that

Marc C. Cote

has joined the firm as an associate.

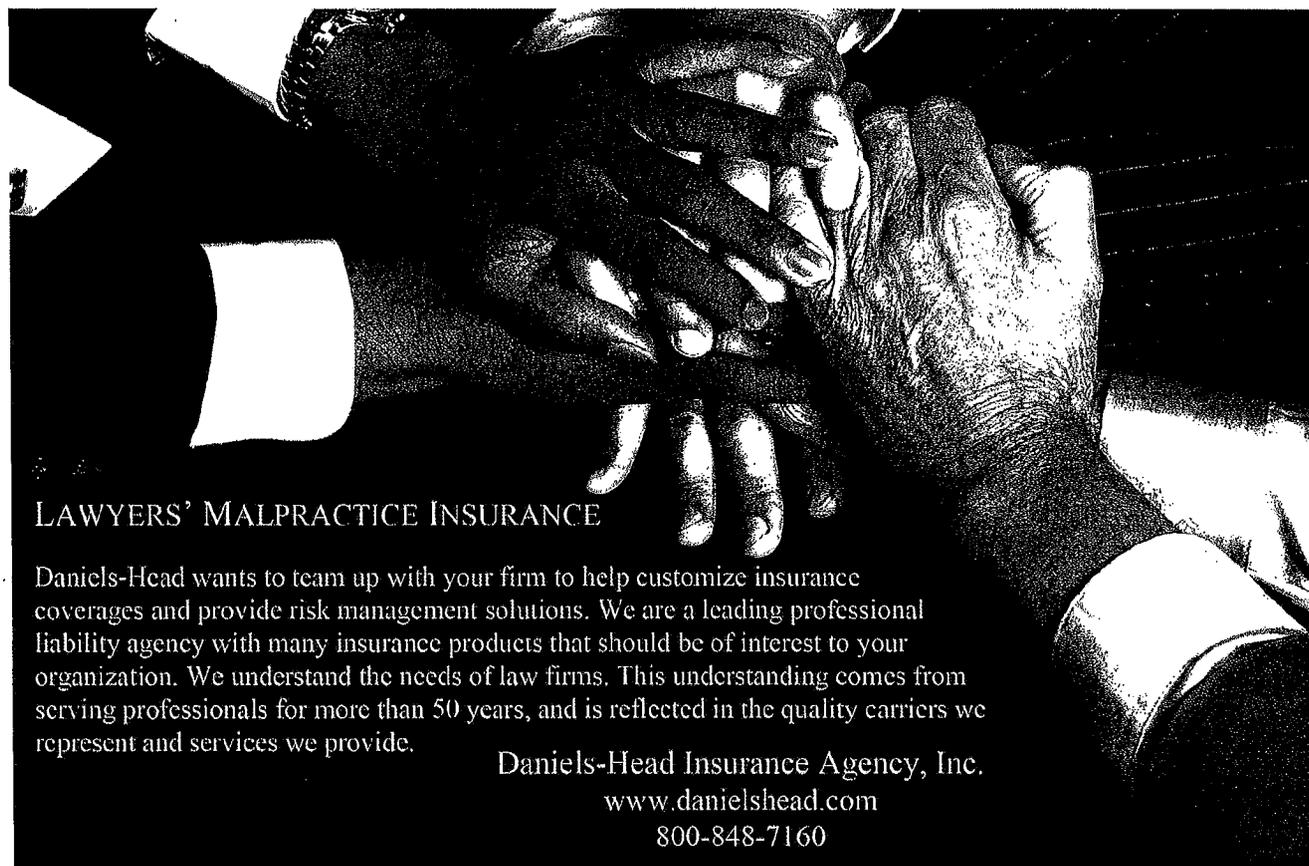
Marc concentrates his practice on employment law and consumer class actions. He was recently selected to the Washington Rising Stars list after his first year of practice. Marc graduated with high honors from the University of Washington School of Law and served as a law clerk for Justice Walter L. Carpeneti of the Alaska Supreme Court.

TERRELL MARSHALL & DAUDT PLLC

3600 Fremont Ave. N., Seattle, WA 98103

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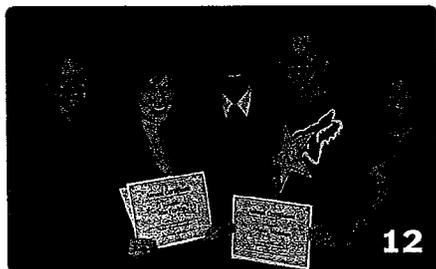


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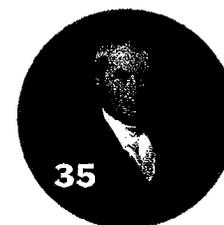
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Cover photo: Spokane's Rogers High School students and essay contest winners strike a pose with members of the WSBA Committee for Diversity. Photo by Tony Iszler.

The Washington State Bar Association's mission is to serve the public and the members of the Bar, ensure the integrity of the legal profession, and to champion justice.

Reprimanded

Michael Joslin Davis (WSBA No. 25846, admitted 1996), of Tacoma, received two reprimands on November 9, 2009, by order of the Disciplinary Board following approval of a stipulation. This discipline is based on conduct involving trust account irregularities, inadequate trust account records, and non-cooperation in a Bar Association investigation. *Michael Joslin Davis is to be distinguished from Michael T. Davis, of Bellevue, and Michael A. Davis, of Scottsdale (resigned).*

During a random investigation of Mr. Davis's trust account, a Bar Association auditor found Mr. Davis's trust account records were incomplete. By not keeping accurate client records, deposit records, or check records, it was not possible for him to determine the ownership of all client funds in his trust account. The auditor also found that Mr. Davis was not removing his own funds from the trust account once ownership of those funds was established, and thereby commingled his funds with the client funds.

In the course of investigating the issues related to his trust account, disciplinary counsel requested that Mr. Davis produce his trust account records for review. Mr. Davis did not make the records available to disciplinary counsel when requested, and only produced records after a subpoena was issued for Mr. Davis to appear with the records.

Mr. Davis's conduct violated former RPC 1.14(a) and current RPC 1.15A(h)(1), requiring that all funds of a client paid to a lawyer be deposited into an identifiable interest-bearing trust account and that no funds belonging to the lawyer be deposited therein except as expressly permitted by rule; former RPC 1.14(b)(3) and current RPC 1.15A(h)(2) and RPC 1.15B, requiring a lawyer to maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to his or her client regarding them; and RPC 8.4(1), prohibiting a lawyer from violating a duty or sanction imposed by or under the Rules for Enforcement of Lawyer Conduct in connection with a disciplinary matter.

Randy V. Beitel represented the Bar Association. Mr. Davis represented himself.

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SUPREME COURT OF THE STATE OF WASHINGTON

In re

YOUNG S. OH, an Attorney at
Law

WSBA No. 29692

NO. 201,001-6

DECLARATION OF SERVICE

I, Katherine M. Stewart, declare as follows:

1. I am over the age of 18 years, not a party to the within action, and am competent to testify hereto.

2. On December 29, 2011, I caused COPIES of the following documents:

BRIEF OF APPELLANT ; and This DECLARATION OF SERVICE.

to be served by the method indicated below and addressed to the following:

Scott G. Busby	Via:
<i>Disciplinary Counsel</i>	<input type="checkbox"/> E-mail
Washington State Bar Association	<input type="checkbox"/> United States Mail
1325 4 th Avenue, Suite #600	<input type="checkbox"/> Overnight Mail
Seattle, WA 98101-2539	<input type="checkbox"/> Facsimile
	<input checked="" type="checkbox"/> Messenger

1 Allison Sato [] E-mail
2 Clerk of the Disciplinary Board [] United States Mail
3 Washington State Bar Association [] Overnight Mail
1325 4th Avenue, Suite #600 [] Facsimile
Seattle, WA 98101-2539 [X] Messenger

4 3. On December 29, 2011, I caused ORIGINALS of the following
5 documents:

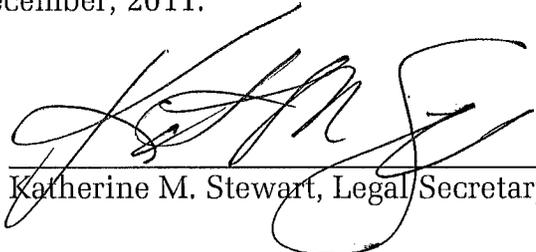
6 **BRIEF OF APPELLANT ; and This DECLARATION OF SERVICE.**

7 to be served by the method indicated below and addressed to the following:

8 Via:
9 Ronald R. Carpenter, Clerk [] E-mail
10 Supreme Court of the State of [X] United States Mail
Washington [] Overnight Mail
11 415 - 12th Avenue SW [] Facsimile
P.O. Box 40929 [] Messenger
12 Olympia, WA 98504-0929

13 I declare under penalty of perjury under the laws of the State of
14 Washington that the foregoing is true and correct.

15 DATED this 29th day of December, 2011.

16
17
18 
19 Katherine M. Stewart, Legal Secretary