Supreme Court No. 201,001-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE DISCIPLINARY PROCEEDING AGAINST

YOUNG S. OH,

Lawyer (Bar No. 29692).

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ANSWERING BRIEF OF THE WASHINGTON STATE BAR ASSOCIATION

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I. COUNTERSTATEMENT OF THE ISSUES

1. Former RPC 1.14(a) and 1.14(c) required Respondent to deposit and maintain client funds in a trust account. According to undisputed findings of fact and conclusions of law, Respondent did not use a trust account for client funds. Instead, he knowingly deposited advance cost payments, settlement proceeds, arbitration awards, and other client funds, as well as earned fees, in a general business checking account. The account had frequent negative balances and numerous overdrafts, but because the account was not a trust account, the Association never received any overdraft notifications from Respondent's bank. Do the evidence and the findings of fact support the Disciplinary Board's unanimous conclusion that Respondent violated former RPC 1.14(a) and 1.14(c)?

2. Former RPC 1.14(b)(3) required Respondent to maintain complete records of all client funds coming into his possession. Although Respondent had over ten years' experience as a certified public accountant (CPA), the records he maintained were among the worst that the Association's Audit Manager had ever seen. Among other deficiencies, Respondent failed to record an opening balance or a running balance in his check register, failed to maintain client ledgers, and failed to adequately reconcile his accounts. Consequently, Respondent's records were

insufficiently complete to determine the ownership of the client funds in his possession. Do the evidence and the findings of fact support the Disciplinary Board's unanimous conclusion that Respondent violated former RPC 1.14(b)(3)?

3. Under ABA Standards std. 4.12, the presumptive sanction is suspension when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client. Respondent knew about trust accounts, and, as an experienced CPA, he knew that his records were inadequate. They were so bad, in fact, that it could not be determined whether any of his clients had lost money. The Disciplinary Board unanimously recommended that Respondent be suspended for one year for his violations of former RPC 1.14(a), 1.14(b)(3), and 1.14(c). Should this court affirm the Board's unanimous sanction recommendation?

II. COUNTERSTATEMENT OF THE CASE

A. SUBSTANTIVE FACTS

In 1990, Respondent received a bachelor's degree in accounting from the University of Washington. FFCLR ¶ 2;[1] TR 463. In the same year, he received his certificate and license as a CPA. FFCLR ¶ 2; TR

[1] "FFCLR" refers to the Finding of Fact, Conclusions of Law, and Hearing Officer's Recommendation, found at BF 240 and Appendix A.

464. In 1993, after working as a CPA for over two years, Respondent established his own accounting firm. FFCLR ¶ 2; TR 463-64. In 1999, Respondent was admitted to the practice of law, and soon thereafter he established a law practice and an escrow practice, as well. FFCLR ¶¶ 1-2; TR 467-68. Respondent practiced immigration law, business law, and some litigation. FFCLR ¶¶ 2, 5; TR 468-69. He also acted as the escrow officer for the purchase and sale of small businesses. FFCLR ¶¶ 2, 5; TR 469-72. In addition, Respondent kept up an accounting practice in which he prepared tax returns and provided other business-related accounting services. FFCLR ¶ 2; TR 472-73, 476-77.

1. Facts Pertaining to Count 2 (Failure to Deposit Client Funds in a Trust Account)

From the beginning of his law practice until at least August 2002, Respondent deposited funds belonging to his clients in a Bank of America (BOA) business checking account ending in 4714. FFCLR ¶¶ 28-29; TR 67-84; EX A27. BOA business checking account #4714 was not a trust account. FFCLR ¶¶ 28-29; TR 47. Nevertheless, Respondent routinely deposited filing fees, TR 67-68, 71; EX A27 at 1-7; incorporation fees, TR 82-83; EX A27 at 34-37; settlement proceeds, TR 71-72, 79-82; EX A27 at 8-10, 21-33; arbitration awards, TR 73-74; EX A27 at 11-13; and other funds belonging to his clients in BOA business checking account #4714.

Additional examples are described at TR 67-84, 581-589.[2] Respondent also deposited earned fees from his accounting practice in the same account. TR 605-6; EX A24B at 3-4, A25 at 2-3.

From the beginning of his law practice, Respondent "knew [the] trust account concept," in his words. TR 480, 484. At least as early as January 2001, Respondent did maintain and use an IOLTA[3] trust account for his escrow practice. FFCLR ¶ 36; TR 86, 484. But even as late as August 2002, Respondent also deposited escrow funds in at least two business checking accounts that were not trust accounts. FFCLR ¶ 37; TR 85-99; EX A26. For example:

- Escrow #1338 (June-July 2002): Respondent received cash escrow funds in the amount of $50,000 that he deposited in his BOA business checking account #4714. TR 90; EX A26 at 14-19. Respondent then wrote a check to himself on this account in the amount of $50,000 that he subsequently deposited in an IOLTA trust account at Northwest International Bank (NWIB) ending in 1448. TR 91-92; EX A26 at 20-21.

- Escrow #1364 (August-September 2002): Respondent received escrow funds in the amount of $42,175.05 that he deposited in NWIB IOLTA trust account #1448. TR 89,

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[2] Because of the use that Respondent tries to make of these examples, it is important to note that they were *not* selected because they were representative of Respondent's record keeping. Rather, they were "just some of the easiest [examples] to pick and point out" of instances where Respondent deposited *identifiable* client funds in BOA business checking account #4714. TR 83-84. In many other cases, as described below, it was difficult or impossible to identify the ownership of funds in that account.

[3] Interest On Lawyer Trust Accounts. See former RPC 1.14(c).

> 505. Respondent then wrote a check to his firm on this account in the amount of $42,175.05 that he deposited in a BOA business checking account ending in 2911. TR 87-88; EX A26 at 4. That account was not a trust account; it was Respondent's "general account," in which he deposited his own business revenues and from which he paid his own business expenses. TR 87-89, 505-06. Respondent then wrote a check to himself on BOA business checking account #2911 in the amount of $42,175.05 and deposited it in NWIB IOLTA trust account #1448. TR 88-89; EX A26 at 5-7.

Other examples are described at TR 85-99; EX A26.

If properly maintained, a lawyer trust account balance never goes below zero. TR 64. Lawyer trust account overdrafts are of serious concern to the Association because they indicate that the lawyer may not be properly safeguarding client funds. TR 49; former RPC 1.14;[4] RLD 13.4.[5] Consequently, whenever an instrument is presented against a lawyer trust account containing insufficient funds, the Association promptly receives an overdraft notification from the lawyer's bank. TR 47-49; RLD 13.4. And, under RLD 13.4(d), every lawyer who received an overdraft notification was obligated to notify the Association, as well. Whenever the Association receives an overdraft notification, either from

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[4] Appendix C. Former RPC 1.14 was in effect until September 1, 2006, when it was superseded by RPC 1.15A and 1.15B.

[5] Appendix D. RLD 13.4 was in effect until October 1, 2002, when it was superseded by ELC 15.4.

the lawyer himself or from his bank, a file is opened in the Office of Disciplinary Counsel, and the overdraft is investigated. TR 48-49.

During the period when Respondent deposited funds belonging to his clients in his BOA business checking accounts #4714 and #2911, these accounts had frequent negative balances and numerous overdrafts. FFCLR ¶¶ 31-33; TR 63-66, 78 (account #4714); TR 80-82 (account #2911); EX A24B at 3-4, 18-20 (account #4714); EX A27 at 30-33 (account #2911). As a result, funds belonging to some of Respondent's clients were used on behalf of others. FFCLR ¶ 35; TR 75-76. But Respondent never notified the Association of these overdrafts, and because the accounts were not trust accounts, the Association never received any overdraft notifications from Respondent's bank, either. FFCLR ¶ 33; TR 62-63. And because the accounts were not trust accounts, they would not have been subject to a random examination under RLD 13.1(a), either. TR 217. Finally, because the accounts were not trust accounts, the client funds deposited therein would not have been protected from attachment by Respondent's creditors. TR 61-63, 69.

2. Facts Pertaining to Count 3 (Failure to Maintain Complete Records of All Client Funds)

Trina Doty, a CPA and the Association's former Audit Manager, examined Respondent's records, along with records obtained by subpoena

from Respondent's bank, to determine whether Respondent maintained "complete" records as required by former RPC 1.14(b)(3). TR 33-37. In spite of Respondent's education, training, and experience in accounting, the records that he maintained of the client funds in his possession were inadequate and incomplete. FFCLR ¶¶ 40-46; TR 37-38, 44, 60, 105, 218, 231; EX A23 at 3. They were, in fact, some of the worst such records that Ms. Doty had ever examined. TR 231. They were not "complete" records because they were not sufficient to account for the client funds in Respondent's possession at a given time. FFCLR ¶¶ 45-46; TR 37-38, 44-45, 60.

A properly maintained check register would have shown, for any given account, how much money was in that account on a given date. TR 52. Respondent did maintain a check register of sorts, but it had no running balance. FFCLR ¶¶ 38, 41; TR 44-46, 51; EX A25. The beginning balance appeared to be zero, but it was not. TR 46, 51-52; EX A25 at 1. In fact, as of January 2, 2001, the date of the first entry in Respondent's check register, the bank statement for BOA business checking account #4714 showed a balance of $718.82. TR 46, 50-51; EX A24B at 1. There was nothing in Respondent's check register or any of his other records to account for the ownership of those funds. TR 53. And because there was no running balance either, it was impossible to

determine from the check register how much money was in the account on a given date "without actually pulling out a calculator and trying to do the math" or, in other words, by adding up all the preceding entries in the check register. TR 46, 52. Even that would not have yielded the correct balance, however, because Respondent failed to note in his check register the many insufficient funds charges, overdraft charges, returned item charges, and other bank fees that appear on his bank statements. EX A24B, A25.

The check register, as well as the checks themselves, was deficient in other respects as well. Many of the entries in the check register had no indication of which client the transaction related to. TR 55, 60. Many of the checks had no such indication, either. FFCLR ¶ 43; TR 38, 54-55; EX A28. Consequently, although the payee could be determined, in many instances it could not be determined which client's funds had been disbursed to that payee. TR 54-57. Records of credit card deposits were similarly deficient. Neither the bank statements nor, in many instances, the check register indicated on which client's behalf a given deposit had been made. TR 45, 57; EX A25 at 2. Respondent himself was unable to identify the clients to which various transactions recorded in his check register related. FFCLR ¶ 46; TR 606-07.

Properly maintained client ledgers would have shown, for each one of Respondent's clients, all the deposits and disbursements related to that client and how much of that client's money Respondent had in his possession on any given date. TR 42-43. But aside from his escrow matters, Respondent did not maintain any client ledgers at all. FFCLR ¶¶ 36, 44; TR 60. Without client ledgers, it was difficult or impossible to determine exactly how much of an individual client's funds were in Respondent's possession at a given time, much less when or for what purposes that client's funds were deposited or disbursed. TR 42-43.

Respondent's bank statements had "tick marks" suggesting that some sort of comparison between bank statements and the check register had been made. TR 44, 117. But no bank reconciliations were among the records that Respondent provided. TR 44, 60. Moreover, reconciling a check register with a bank statement requires reconciling the *account balance* shown in the check register with the account balance on the bank statement. TR 38; EX A32 at 13. This could not be done with Respondent's records because no account balance was shown in the check register. Furthermore, to ensure that all client funds are accounted for, the client ledger balances must be reconciled with the checkbook register balance. TR 38, 66-67; EX A32 at 14. This could not be done with Respondent's records because (a) there were no client ledger balances

(because there were no client ledgers), and (b) there was no account balance shown in the check register. Respondent did not adequately reconcile his records notwithstanding the "tick marks" on his bank statements. FFCLR ¶ 42.

In the opinion of the Association's former Audit Manager, CPA Trina Doty:

> [Respondent's] records were very bad, definitely some of the worst I've seen. I've seen a lot of bad records and these ranked up there just in the sheer level of trying to track the money coming in and going out. Not a lot of documentation on it, so it made it very challenging.

TR 231. Respondent's records were not complete because it could not be determined from those records which funds in his account belonged to which client, or whether any of his clients had lost money. FFCLR ¶¶ 45-46; TR 65-66, 200, 212, 217-18.

B. PROCEDURAL FACTS

This appeal is from the Disciplinary Board decision filed September 29, 2011.[6] BF 264-65. That decision was based on a review of the hearing officer's decision filed March 28, 2011. BF 240, 264. Some additional procedural history is needed, however, in light of Respondent's unsupported assertions that (1) the Association presented perjured testimony in Respondent's first disciplinary hearing and (2) Respondent is

[6] Appendix B.

entitled to a lesser sanction because he has had multiple opportunities to defend against the charges that bring him before this court. Brief of Appellant at 42-43.

1. The First Disciplinary Board Decision

In a decision filed January 30, 2007 after Respondent's first disciplinary hearing, Hearing Officer Timothy J. Parker concluded that (1) Respondent violated RPC 8.4(a) and 8.4(c) by instructing nonlawyer assistants to forge signatures on immigration documents, (2) Respondent violated RPC 1.14(a) and 1.14(c) by depositing client funds in a general bank account instead of a lawyer trust account, (3) Respondent violated RPC 1.14(b)(3) by failing to maintain complete records of client funds in his possession, and (4) Respondent violated RPC 8.4(a), and 5.3(c)(1) by causing a signature to be falsely notarized. BF 65 ¶¶ 5.1, 5.3-5.4, 5.6. The hearing officer recommended a six-month suspension for each of these four violations, with the suspensions to run consecutively for a total of two years. BF 65 ¶¶ 5.1, 5.3-5.4, 5.6, VI.

In a decision filed August 29, 2007, the Disciplinary Board approved the hearing officer's decision by a vote of six to three. BF 120. The three dissenters recommended a one-year suspension. Id.

Respondent appealed to this court from the August 29, 2007 Disciplinary Board decision. BF 121. Just a few days before the appeal

was to be argued, Victoria Fisher, a witness at Respondent's first disciplinary hearing, sent a letter to Respondent, his counsel, and the Association's counsel in which she retracted some of the testimony she had given at the disciplinary hearing some 15 months earlier. BF 144 ¶¶ 1.4, 1.14, Attachment A. That testimony related to the charge that that Respondent violated RPC 8.4(a), 8.4(c), and 5.3(c)(1) by causing a signature to be falsely notarized. Id. ¶¶ 1.2, 1.18. Ms. Fisher claimed it was purely coincidental that she had sent her retraction letter by Federal Express 15 months after her testimony and just a few days before Respondent's appeal was to be argued to this court. Id. ¶¶ 1.13-1.15. Respondent's appeal was stayed. Id. ¶ 1.5.

Ms. Fisher's deposition was taken, and Respondent moved to vacate the hearing officer's January 30, 2007 decision. Id. ¶ 1.6. The hearing officer found:

- that Ms. Fisher's recantation testimony concerning the reasons why her hearing testimony was inaccurate was "not credible." Id. ¶¶ 1.9-1.11;
- that Respondent's hearing testimony was not consistent with Ms. Fisher's hearing testimony or with her recantation testimony. Id. ¶ 1.16; and
- that *none* of Ms. Fisher's testimony was reliable. Id. ¶ 1.17.

Contrary to Respondent's unsupported assertion that the Association presented "perjurious testimony" at Respondent's first disciplinary

hearing, Brief of Appellant at 43, there has never been a finding that Ms. Fisher's hearing testimony was false or that her recantation testimony was true.

In a decision filed January 15, 2009, the hearing officer dismissed the charge that Respondent violated RPC 8.4(a), 8.4(c), and 5.3(c)(1) by causing a signature to be falsely notarized. Id. ¶ 3.1. But because Ms. Fisher "gave no significant disciplinary hearing testimony" with respect to the other charges, the hearing officer concluded that there was no basis to vacate any of the findings, conclusions, or recommendations concerning those charges. Id. ¶¶ 1.18, 2.3. The hearing officer recommended a six-month suspension for each of the remaining three violations, for a total of 18 months. BF 145.

In a decision filed June 23, 2009, the Disciplinary Board vacated the hearing officer's January 15, 2009 decision and remanded the case for a new hearing before a different hearing officer. BF 162 at 2. The Board reasoned that although there was no evidence that the hearing officer considered Ms. Fisher's hearing testimony with respect to any of the other charges, "[t]he Hearing Officer's credibility determinations on other counts may have been affected by Ms. Fisher's testimony." Id.

2. The Decision from Which this Appeal Is Taken

The second disciplinary hearing was based on the three counts of the Third Amended Formal Complaint:[7]

> Count 1: 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).
>
> Count 2: By failing to place and/or keep client funds in a client trust account, Respondent violated former RPC 1.14(a) and/or former RPC 1.14(c).
>
> Count 3: By failing to maintain adequate records to be able to determine ownership of client funds in his possession, Respondent violated former RPC 1.14(b)(3).

BF 220. In a decision filed March 28, 2011, Hearing Officer Susan Amini concluded that all three charges had been proven by a clear preponderance of the evidence. FFCLR ¶¶ 51-53.

As to Count 1, the hearing officer found that Respondent knew that the documents he submitted to the INS contained forged signatures, that the forgeries were "blatant" and "apparent upon cursory review," that Respondent's alternative theories were neither plausible nor credible, and that Respondent's claimed ignorance of the forgeries was not credible, either. Id. ¶¶ 15, 19-20, 24, 51. Based on these findings of fact and

[7] Some of the RPC were revised effective September 1, 2006. The Third Amended Formal Complaint charged Respondent with violating the RPC in effect at the time of the misconduct. BF 220 at 5 n.1.

others, the hearing officer concluded that Respondent violated former RPC 8.4(a), 8.4(c), and 8.4(d) by permitting an employee to forge a client's signature and by submitting forged documents to the INS. Id. ¶ 51.

As to Count 2, the hearing officer found that up through and including August 2002, Respondent deposited client funds in a general business checking account instead of a trust account, that client funds in the account were not protected from Respondent's creditors, that the account had multiple overdrafts and frequent negative balances, that funds from an escrow account were transferred into the general business checking account to "cure" overdrafts, and that the Association was not notified of these overdrafts because the account containing client funds was a general business checking account instead of a trust account. Id. ¶¶ 29-33, 37. Based on these findings of fact and others, the hearing officer concluded that Respondent violated former RPC 1.14(a) and 1.14(c). Id. ¶ 52.

As to Count 3, the hearing officer found that Respondent's record keeping was so inadequate and incomplete that it could not be determined either (a) how much client money was in Respondent's possession at any given time or (b) to whom it belonged. Id. ¶¶ 41, 43, 45-46. Based on these findings of fact and others, the hearing officer concluded that Respondent violated former RPC 1.14(b)(3). Id. ¶ 53.

The hearing officer determined that the presumptive sanction for Respondent's violation of former RPC 8.4(a), 8.4(c), and 8.4(d) as charged in Count 1 was suspension under standard 6.12 of the ABA Standards for Imposing Lawyer Sanctions (1991 ed. & Feb. 1992 Supp.) (ABA Standards). Id. ¶ 55. The hearing officer determined that the presumptive sanction for Respondent's violation of former RPC 1.14(a), 1.14(b)(3), and RPC 1.14(c) as charged in Counts 2-3 was suspension under ABA Standards std. 4.12. Id. ¶ 56. The hearing officer found two aggravating factors: (1) dishonest or selfish motive and (2) multiple offenses, and two mitigating factors: (1) absence of a prior disciplinary record and (2) inexperience in the practice of law. Id. ¶¶ 60-61. The hearing officer noted that Respondent had already received an admonition and a reprimand, but she did not consider these disciplinary actions to establish a "prior" disciplinary record because the acts of misconduct occurred in the years 2003, 2005, and 2006. Id. ¶ 61; EX A29-A31. The hearing officer also noted that Respondent's inexperience in the practice of law was not a mitigating factor with respect to his submission of forged documents to the INS, and that it had little weight with respect to Respondent's trust account violations in light of his training and experience as a CPA. FFCLR ¶ 61. After weighing the aggravating and mitigating factors, and taking into account that the generally accepted

minimum term of suspension is six months, the hearing officer recommended that Respondent be suspended for one year. Id. ¶¶ 59, 62.

In a decision filed September 29, 2011, the Disciplinary Board dismissed Count 1 of the Third Amended Formal Complaint. BF 264 at 1. The Board decided that the Association had not proven by a clear preponderance of the evidence that Respondent *knew* that the forged documents he submitted to the INS were in fact forged. Id. at 4. The Board affirmed the hearing officer's conclusions as to Counts 2 and 3, and adopted the hearing officer's recommendation of a one-year suspension. Id. at 1, 4-5. The Board's decision was unanimous. Id. at 1 n.1.

Respondent's appeal is from the Disciplinary Board's September 29, 2011 decision. BF 265.

III. ARGUMENT

A. STANDARD OF REVIEW

The ultimate responsibility for lawyer discipline rests with this court. In re Disciplinary Proceeding Against Marshall (Marshall II), 167 Wn.2d 51, 66, 217 P.3d 291 (2009). Nevertheless, the court gives great weight to the hearing officer's findings of fact and her evaluation of the credibility of witnesses. Id. at 66-67. Unchallenged findings of fact are treated as verities on appeal. Id. at 66; RAP 10.3(g). Assignments of error must be supported by argument, legal authority, and references to the

record. In re Disciplinary Proceeding Against Behrman, 165 Wn.2d 414, 422, 197 P.3d 1177 (2008).

Challenged findings of fact will be upheld if they are supported by substantial evidence. Marshall II, 167 Wn.2d at 66-67. Substantial evidence is "evidence sufficient to persuade a fair-minded, rational person of the truth of a declared premise." In re Disciplinary Proceeding Against Marshall (Marshall I), 160 Wn.2d 317, 330, 157 P.3d 859 (2007) (internal quotation marks omitted). The hearing officer is entitled to draw reasonable inferences from circumstantial evidence, and a reviewing body must view the evidence and the inferences therefrom in the light most favorable to the party who prevailed in the highest forum that exercised fact-finding authority. In re Disciplinary Proceeding Against Cohen (Cohen I), 149 Wn.2d 323, 332-33, 67 P.3d 1086 (2003); Sunderland Family Treatment Services v. City of Pasco, 127 Wn.2d 782, 788, 903 P.2d 986 (1995).

A lawyer who challenges findings of fact must do more than argue his version of the facts while ignoring adverse evidence. Marshall II, 167 Wn.2d at 67. He must present argument as to why specific findings are unsupported, and he must cite to the record to support his argument. Id.; RAP 10.3(a)(6). Findings of fact will not be overturned based simply on an alternative explanation of the facts or on a version of the facts

previously rejected by the hearing officer and the Disciplinary Board. Marshall II, 167 Wn.2d at 67.

Conclusions of law are reviewed de novo, and will not be disturbed if they are supported by the findings of fact. In re Disciplinary Proceeding Against Hicks, 166 Wn.2d 774, 781, 214 P.3d 897 (2009). The Board's unanimous sanction recommendation should be affirmed unless the court can articulate clear and specific reasons for rejecting it. In re Disciplinary Proceeding Against Guarnero, 152 Wn.2d 51, 59, 93 P.3d 166 (2004).

B. THE EVIDENCE AND THE FINDINGS OF FACT SUPPORT THE DISCIPLINARY BOARD'S UNANIMOUS CONCLUSION THAT RESPONDENT VIOLATED FORMER RPC 1.14(a) AND 1.14(c) AS CHARGED IN COUNT 2.

Former RPC 1.14(a) provides:

> (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.

Former RPC 1.14(c) set forth the requirements that lawyer trust accounts must meet. Under former RPC 1.14(d), escrow funds held by a lawyer were subject to former RPC 1.14.

Under RLD 13.4, compliance with RPC 1.14 would ensure that the Association promptly received an overdraft notification whenever an instrument was presented against a lawyer trust account containing insufficient funds. Under RLD 13.5,[8] each active lawyer was required to file with the Association annually a declaration or questionnaire to determine whether he was complying with RPC 1.14.

The hearing officer and the unanimous Disciplinary Board concluded that Respondent violated former RPC 1.14(a) and 1.14(c) by failing to deposit and maintain client funds in a lawyer trust account. FFCLR ¶ 52; BF 264 at 1, 4. Respondent does not assign error to that conclusion. Brief of Appellant at 2-4. Nor does he assign error to the following related findings of fact, all of which are verities on appeal:

- that before mid 2002, Respondent did not use a lawyer trust account for client funds (FFCLR ¶ 28);
- that the account Respondent used for client funds had "frequent" negative balances and overdrafts (FFCLR ¶¶ 31-32);
- that Respondent transferred client funds from one account to

[8] Appendix D. RLD 13.5 was in effect until October 1, 2002, when it was superseded by ELC 15.5.

another to cover overdrafts (FFCLR ¶ 37);

- that as a result of the frequent negative balances and overdrafts, funds belonging to some clients were used on behalf of others (FFCLR ¶ 35);[9] and

- that all of these problems went undetected because the account that Respondent used for client funds was not a trust account (FFCLR ¶ 33).

Brief of Appellant at 2-4.

Respondent does assign error to the following related findings of fact:

- that Respondent deposited client funds in his "general business checking account" (FFCLR ¶ 29);

- that as a result, client funds were not protected from Respondent's creditors (FFCLR ¶ 30);

- that Respondent's use of funds belonging to some clients on behalf of others caused injury or potential injury. (FFCLR ¶ 35);[10] and

- that Respondent knew he was dealing improperly with client funds when he failed to place those funds in a lawyer trust account (FFCLR ¶ 47).

Brief of Appellant at 2. None of these findings of fact is necessary to support the Board's unanimous conclusion that Respondent violated former RPC 1.14(a) and 1.14(c), but all of them are supported by substantial evidence.

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[9] Respondent assigns error to FFCLR ¶ 35 only insofar as it states or implies that "his placement of client funds caused injuries to clients." Brief of Appellant at 2.

[10] See supra note 9.

1. Substantial Evidence Supports the Finding that Respondent Deposited Client Funds in His General Business Checking Account.

Respondent apparently objects to FFCLR ¶ 29 on the grounds that BOA account #4714 was a "business checking account" but not a "general business checking account." Brief of Appellant at 28-29. The distinction is insignificant—so insignificant, in fact, that even Respondent's counsel referred to the account as a "general business account" at the disciplinary hearing. TR 729. What is significant for purposes of former RPC 1.14(a) and 1.14(c) is that the account was *not a trust account*. FFCLR ¶¶ 28, 52.

Furthermore, the account was not, as Respondent asserts, used exclusively for client funds. Respondent deposited earned fees from his accounting practice in the same account, and those earned fees do *not* correspond to bank charges on the account. TR 605-6, 609-12; EX A24B at 3-4, A25 at 2-3; see former RPC 1.14(a)(1) (funds reasonably sufficient to pay bank charges may be deposited in lawyer trust account). For example, Respondent's check register and his March 2001 bank statement show that he deposited $713 in earned tax return fees between March 5, 2001 and March 26, 2001. EX A24B at 3, A25 at 2. During that statement period, bank charges totaled only $192. EX A24B at 3.

2. Substantial Evidence Supports the Finding that Respondent's Misconduct Caused Injury or Potential Injury.

Substantial evidence supports the findings, FFCLR ¶¶ 30-33, 35, that Respondent's failure to deposit and maintain client funds in a trust account caused injury or potential injury. First, as the Association's former Audit Manager, CPA Trina Doty, testified, client funds that a lawyer fails to deposit and maintain in a trust account may be subject to attachment by the lawyer's creditors. TR 61-63, 69; see also In re Disciplinary Proceeding Against McKean, 148 Wn.2d 849, 864, 64 P.3d 1226 (2003) (commingled funds might be subject to attachment by lawyer's creditors). Whether any particular creditor actually sought to attach the funds held in Respondent's accounts is not dispositive, because in lawyer discipline proceedings, where "the need for protection of the public and the integrity of the profession" is at stake, *potential* harm is enough. In re Disciplinary Proceeding Against Halverson, 140 Wn.2d 475, 486, 998 P.2d 833 (2000).

Second, Respondent's failure to deposit and maintain client funds in a trust account caused his gross mismanagement of the account that he used for client funds to go unreported. As Trina Doty testified, a lawyer trust account "should never go below zero." TR 64. When the account balance does go below zero, clients are harmed because the lawyer does

not have enough money in the account to cover all his obligations to his clients. TR 211, 215. Recognizing that fact, this Court adopted RLD 13.4, requiring an overdraft notification whenever an instrument is presented against a lawyer trust account containing insufficient funds. But the Association never received any overdraft notifications from Respondent or his bank, precisely because Respondent failed to deposit and maintain client funds in a trust account. FFCLR ¶ 33; TR 48-49, 62-63.

3. Substantial Evidence Supports the Finding that Respondent Knew He Was Dealing Improperly with Client Funds.

Substantial evidence supports the finding, FFCLR ¶ 47, that Respondent knew he was dealing improperly with client funds when he failed to place those funds in a lawyer trust account. A lawyer's mental state is usually proven through circumstantial evidence, from which the hearing officer may draw reasonable inferences, and the hearing officer's factual findings concerning a lawyer's mental state are accorded "great weight." In re Disciplinary Proceeding Against Cramer (Cramer I), 165 Wn.2d 323, 332, 198 P.3d 485 (2008); Cohen I, 149 Wn.2d at 332. Despite Respondent's self-serving assertions of ignorance, the hearing officer could infer his knowledge of the facts from (a) his more than ten years' experience as an accountant, (b) the fact that he used a trust account

in his escrow practice, and (c) the fact that he was required to report annually that he was complying with RPC 1.14. See In re Disciplinary Proceeding Against Ferguson, 170 Wn.2d 916, 934, 246 P.3d 1236 (2011) (hearing officer entitled to find lawyer's testimony about intentions not credible and to infer that lawyer did intend what she claimed not to intend).

4. Respondent's "Good Faith" and "Remorse" Are Mere Assertions, Not Facts.

While freely impugning the good faith of the hearing officer and the Office of Disciplinary Counsel,[11] Respondent asks this court to accept as fact his own self-serving assertions of good faith and remorse. Brief of Appellant at 27-28. Respondent contends, in effect, that his claims of good faith and remorse should be treated as factual findings. But it was for the hearing officer to evaluate Respondent's credibility and veracity, and she was not required to accept Respondent's professions of good faith and remorse. See, e.g., Behrman, 165 Wn.2d at 423 (finding of remorse or lack thereof based on respondent lawyer's credibility as witness); Marshall

[11] Respondent asserts, for example, that the hearing officer "stretched" her findings "[i]n her effort to come up with some injury," that she was "willing to disregard important facts" in her desire to "accomplish the harsh sanction that she recommended," and that she "mischaracterized" or "ignored" evidence. Brief of Appellant at 30, 33, 35. Respondent also asserts that the Association presented "perjurious testimony" by Victoria Fisher at the first disciplinary hearing, Brief of Appellant at 43, even though there has never been a finding that Ms. Fisher's hearing testimony was false. See supra pp. 11-13 and infra pp. 41-42.

I, 160 Wn.2d at 330, 332. The hearing officer and the Disciplinary Board made no findings of good faith or remorse, and the findings they did make are inconsistent with Respondent's assertions of good faith. See, e.g., FFCLR ¶¶ 47, 60(b); BF 264 at 4.

5. Respondent's "Corrective Actions" Are Entitled to Little Weight.

Finally, Respondent asks the court to give "significant weight" to the "corrective action" that he took when he finally opened a trust account for client funds after his visit to the Association's Law Office Management Assistance Program (LOMAP) Advisor in April 2002. Brief of Appellant at 31-32. But the court should give equal or greater weight to the fact that Respondent continued for months after his LOMAP consultation to deposit client funds in accounts that were not trust accounts, FFCLR ¶ 29; TR 87-90, 581-89, and the fact that his 2010 reprimand was for subsequent misconduct relating to a trust account that he committed after being specifically warned that the practice in question violated the RPC, EX A31 at 1.

C. THE EVIDENCE AND THE FINDINGS OF FACT SUPPORT THE DISCIPLINARY BOARD'S UNANIMOUS CONCLUSION THAT RESPONDENT VIOLATED FORMER RPC 1.14(b)(3) AS CHARGED IN COUNT 3.

Former RPC 1.14(b)(3) provides:

(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;

The hearing officer and the unanimous Disciplinary Board concluded that Respondent violated former RPC 1.14(b)(3) by failing to maintain records adequate to determine the ownership of all client funds in his possession. FFCLR ¶ 53; BF 264 at 1, 4. Respondent assigns error to that conclusion, but he does not assign error to the following related findings of fact, all of which are verities on appeal:

- that Respondent's check register had no beginning balance or running balance, so that it could not be determined how much client money was in his possession at a given time (FFCLR ¶¶ 40-41);
- that many of the disbursements of client funds Respondent made were not identified by client or matter (FFCLR ¶ 43); and
- that Respondent himself was unable to adequately identify client funds in the check register at the disciplinary hearing (FFCLR ¶ 46).[12]

Brief of Appellant at 2-4.

Respondent does assign error to the following related findings of fact:

- that Respondent did not maintain client ledgers (FFCLR ¶ 44);

[12] Respondent assigns error only to that part of FFCLR ¶ 46 which provides that he did not maintain his records in substantial compliance with former RPC 1.14(b)(3). Brief of Appellant at 2.

- that Respondent did not adequately reconcile his check register with his bank records (FFCLR ¶ 42);
- that Respondent's records were insufficiently complete to determine the ownership of client funds in his possession (FFCLR ¶ 45); and
- that Respondent knew he was dealing improperly with client funds when he failed to keep adequate records of client funds in his possession (FFCLR ¶ 47).

Brief of Appellant at 2. All of these findings are supported by substantial evidence, as discussed below.

1. Former RPC 1.14(b)(3) Was Not Vague.

As a preliminary matter, Respondent complains that former RPC 1.14(b)(3), adopted in 1985, was vague because it was superseded in 2006 by RPC 1.15A(h)(2) and 1.15B(a). Brief of Appellant at 34. RPC 1.15B(a) now describes in detail the "minimum" of what a lawyer's trust account records must include. But a rule or standard is not objectionable merely because it is stated in general terms, or because it could be stated in greater detail. See Rogers v. Mississippi Bar, 731 So.2d 1158, 1164 (Miss. 1999) (rejecting vagueness challenge to Mississippi analogues of RPC 8.4(a), 8.4(b), and 8.4(c)). This is especially true where, as here, the rule at issue applies only to lawyers. Id. According to the testimony of Trina Doty, who conducted about 150 random audits in 2001 and 2002, lawyers were generally *not* confused about what kinds of records they needed to maintain to comply with former RPC 1.14(b)(3). TR 113, 218-

19. Rule 1.15(a) of the American Bar Association's Model Rules of Professional Conduct is still stated in general terms similar to those of former RPC 1.14(b)(3).[13] The mere fact that former RPC 1.14(b)(3) was superseded by later rules does not imply that it was vague or unenforceable.

2. Substantial Evidence Supports the Finding that Respondent Did Not Maintain Client Ledgers.

Substantial evidence supports the finding, FFCLR ¶ 44, that Respondent did not maintain client ledgers. Trina Doty testified that Respondent's records included no client ledgers, no client ledger reconciliations, and no bank account reconciliations. TR 60. Respondent himself concedes that he "did not keep separate client ledgers." Brief of Appellant at 36. Respondent's challenge to the hearing officer's finding of fact is based on his claim that his single check register could be used as a "somewhat unconventional" client ledger for each and every one of his

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[13] Model Rules of Prof'l Conduct R. 1.15(a) (2012) provides:

> A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. *Complete records of such account funds and other property shall be kept by the lawyer* and shall be preserved for a period of [five years] after termination of the representation.

(Emphasis added.)

individual clients by going through the register line-by-line, picking out each transaction relating to an individual client (assuming they could be indentified), and hoping that the deposits and disbursements could be matched and would zero out. TR 31, 100-01, 119-20, 184.

But there was substantial evidence that this procedure, assuming that Respondent had actually used it, was a grossly inadequate substitute for real client ledgers. See, e.g., TR 102-3, 118-19, 180, 184, 220-31. Contrary to Respondent's assertions, Brief of Appellant at 36, not all of the deposits and disbursements of client funds occurred simultaneously, TR 118-19; not all deposits and disbursements of client funds could be easily tracked though Respondent's accounts, TR 223, 226, 228; not all deposits of client funds were matched by disbursements, TR 119, 180, 222-26, 229; and not all the clients to whom deposits and disbursements related could be identified, FFCLR ¶ 46; TR 606-07. As Trina Doty explained:

> A. I mean, what you're talking about doing is not how it's done. You don't go line by line and create one client ledger for two lines. You create one client ledger for every transaction that client does. So that's why I'm struggling a little bit with what you're saying. Yes, those elements are definitely part of the client ledger.
>
> Q. [by Mr. Collins] But, in fact, those are all the elements of a client ledger.
>
> A. Only for those two lines. I mean, I don't know if there's other transactions related to those clients later on in

> this check register. I'd have to go page by page by page by page to find that out. Versus if I looked on an actual ledger, it would all be right there.

TR 184.

Respondent asserts that Ms. Doty "confirmed" that his records were sufficient to track client funds through his accounts. Brief of Appellant at 35. But what Ms. Doty really said was that *in some cases* she was able to track client funds through Respondent's accounts. TR 102-03. Those cases were selected *not* because they were representative of Respondent's record keeping, but because they were the easiest examples to find of clearly identifiable client funds passing through Respondent's business checking accounts. TR 67, 83-84, 120-21. But, taken as a whole, Respondent's records were not sufficiently complete to account for the client funds that came into his possession. As Ms. Doty testified:

> Q. [by Mr. Collins] But you were able to do that in tracing the dollars from entering his office until leaving his office, weren't you?
>
> A. I was able to trace *certain transactions* through the account, but I was not able to look at the account as a whole to determine if there was enough money in that account to cover all of his obligations to his clients.

TR 102-103 (emphasis added).

3. Substantial Evidence Supports the Finding that Respondent Did Not Adequately Reconcile His Accounts.

Substantial evidence supports the finding, FFCLR ¶ 42, that Respondent did not adequately reconcile his accounts. Contrary to Respondent's suggestion, Brief of Appellant at 36, Trina Doty did not "concede" that Respondent's reconciliations, if they occurred, were adequate. On the contrary, she testified that there were no client ledger reconciliations and no bank account reconciliations, just "tick marks" on Respondent's bank statements. TR 44, 60, 65. "Tick marks" show at most that some sort of comparison between bank statements and the check register was made, but not that the balance shown on a bank statement was in accord with the account balance shown on the check register or with the sum of the client ledger balances. TR 117; EX A32 at 13. Respondent, moreover, had no check register *balance* to reconcile, and no client ledgers to reconcile, either. Ms. Doty testified that because of these deficiencies, as well as others, Respondent's records were not complete, and that it was very difficult to determine whether any of Respondent's clients had lost money. TR 60, 65.

4. Substantial Evidence Supports the Finding that Respondent's Records Were Not Adequate to Determine the Ownership of Client Funds in His Possession.

Substantial evidence supports the finding, FFCLR ¶ 45, that Respondent's records were insufficiently complete to determine the

ownership of client funds in his possession. Contrary to Respondent's assertion, Brief of Appellant at 34, the testimony of Trina Doty directly and unequivocally supports this finding. Ms. Doty testified that Respondent did not keep complete records, TR 44, 105; that she was not able to determine from Respondent's records on which clients' behalf certain deposits were made, TR 45, 57, 223; that she was not able to determine from Respondent's records on which clients' behalf certain disbursements were made, TR 54-55, 57; that she was not able to determine from Respondent's records whether Respondent had enough money in his accounts to cover his obligations to his clients, TR 103; and that she was not able to determine from Respondent's records to whom the funds in his possession belonged, TR 45, 53-54, 66, 218.

Respondent asserts that no client was harmed by his bad record keeping. Brief of Appellant at 36. But what the record shows is that Respondent's record keeping was *so* bad that *it could not be determined* whether any of his clients had lost money. TR 65-66, 103, 197, 200. Trina Doty testified that she believed there were client funds left in Respondent's accounts that should have gone to his clients, but she could not determine how much. TR 200. "Complete records," as required by RPC 1.14(b)(3), would do more than merely *fail to show* that clients had lost money; they would affirmatively show that clients had *not* lost money.

5. Substantial Evidence Supports the Finding that Respondent Knew He Was Dealing Improperly with Client Funds.

Substantial evidence supports the finding, FFCLR ¶ 47, that Respondent knew he was dealing improperly with client funds when he failed to keep adequate records of client funds in his possession. Respondent had been a CPA for over ten years. He had run an accounting firm for about eight years. He knew all about maintaining complete financial records, because "that's what CPA's do." TR 214. He knew what client ledgers were, and he knew that he didn't use them outside his escrow practice. He didn't need a degree in accounting to know that an adequate check register must show a balance, and that one can't reconcile a check register balance with a bank statement balance if one's check register doesn't show a balance. And he knew that he (but not the Association) received numerous overdraft notices from his bank, which would suggest to any lawyer, especially a lawyer CPA, that he was not properly managing his accounts.

The hearing officer is entitled to draw reasonable inferences from the evidence, Cohen I, 149 Wn.2d at 332-33, and the only reasonable inference to be drawn from the evidence in this case is that Respondent knew he was dealing improperly with client funds. When pressed by Respondent's counsel for her opinion about Respondent's "motives or

designs in the course of his record-keeping practices," Trina Doty testified as follows:

> A. If you want my opinion, it was -- I felt like in looking through all the records that he just didn't feel like he had to follow the rule.

TR 200. There was substantial evidence from which the hearing officer could draw the same inference.

D. THIS COURT SHOULD AFFIRM THE DISCIPLINARY BOARD'S UNANIMOUS RECOMMENDATION OF A ONE-YEAR SUSPENSION.

The ABA Standards govern sanctions in lawyer discipline cases. Marshall I, 160 Wn.2d at 342. First, the court considers whether the Board determined the correct presumptive sanction, considering the ethical duty violated, the lawyer's mental state, and the actual or potential injury caused by the lawyer's misconduct. Id. Next, the court considers the aggravating or mitigating factors. Id. Finally, the court considers whether the proportionality of the sanction and the degree of unanimity among Board members justify a departure from the Board's recommendation. Id.

1. The Presumptive Sanction Is Suspension.

The hearing officer and the unanimous Disciplinary Board applied ABA Standards std. 4.12[14] to Respondent's violations of former RPC

[14] ABA Standards std. 4.1 is at Appendix E.

1.14(a), 1.14(b)(3), and 1.14(c). FFCLR ¶ 56; BF 264 at 4. ABA Standards std. 4.12 provides:

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

(Emphasis added.) "Knows" in this context means the lawyer has "the conscious awareness of the nature or attendant circumstances of the conduct," not the conscious awareness that the conduct violates the RPC. In re Disciplinary Proceeding Against Egger, 152 Wn.2d 393, 415-16, 98 P.3d 477 (2004) (citing ABA Standards, Definitions at 7). But ABA Standards std. 4.12 is different from all the other ABA Standards in that the requisite mental state for a presumptive suspension is "knows *or should know*," not "knows" (emphasis added). Compare ABA Standards std. 4.12 with ABA Standards stds. 4.22, 4.32, 4.42(a), 4.52, 4.62, 5.12, 5.22, 6.12, 6.22, 6.32, and 7.2.

The hearing officer found that Respondent knew he was dealing improperly with client funds when he failed to place client funds in a trust account and when he failed to keep adequate records of client funds in his possession. FFCLR ¶ 47. The Disciplinary Board unanimously adopted this finding, BF 264 at 1, 4, and, as discussed above, it is supported by substantial evidence in the record. Respondent asks this court to disregard the hearing officer's finding and the supporting evidence, and to find

instead that he was merely negligent. Brief of Appellant at 40-41. But the hearing officer's factual finding concerning a lawyer's mental state is accorded "great weight," and will not be overturned based simply on an alternative explanation of the facts or on a version of the facts previously rejected by the hearing officer and the Disciplinary Board. Cramer I, 165 Wn.2d at 332; Marshall I, 160 Wn.2d at 331; Cohen I, 149 Wn.2d at 332-33. The court should therefore affirm the Board's unanimous determination that the presumptive sanction for Respondent's violation of former RPC 1.14(a), 1.14(b)(3), and 1.14(c) is suspension under ABA Standards std. 4.12.

2. Aggravating and Mitigating Factors Do Not Support a Deviation from the Presumptive Sanction of Suspension.

a. Aggravating Factors

The hearing officer and the Disciplinary Board found two aggravating factors: (1) that Respondent committed multiple offenses; and (2) that 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.[15] FFCLR ¶ 60; BF 264 at 4. Respondent does not contest the first aggravating factor, but he contends there is no

[15] This was the hearing officer's finding as amended by the Disciplinary Board.

evidence that he used any of the client funds in his business checking accounts "for his own purposes." Brief of Appellant at 3, 42.

There is substantial evidence, however, that Respondent used client funds to cover overdrafts in his business checking accounts. FFCLR ¶ 37.[16] For example, in February 2002, Respondent deposited $6,000 in client settlement funds in BOA business checking account #4714, which was not a trust account. TR 80; EX A27 at 26-29. Then he transferred the $6,000 from BOA account #4714 to BOA savings account #2911. TR 80-81; EX A27 at 30. BOA savings account #2911 was not a trust account either; it was the savings account associated with BOA business checking account #2911, the account from which Respondent paid his business expenses. TR 80, 87-89, 505-06, 600; EX A27 at 30-32. At the time of the transfer, BOA business checking account #2911 was in overdraft status. TR 81, 600; EX A27 at 30. Then, a few days later, Respondent transferred the $6,000 from BOA savings account #2911 to BOA business checking account #2911, just two days after that account incurred a "returned item charge." TR 81; EX A27 at 30-31. By using client funds to cover overdrafts, which were not reported to the Association because the overdrawn accounts were not trust accounts,

[16] Respondent does not assign error to this finding of fact. Brief of Appellant at 2-4.

Respondent used those funds "for his own purposes without oversight." FFCLR ¶ 60; BF 264 at 4.

b. Mitigating Factors

The hearing officer and the Disciplinary Board found two mitigating factors: (1) inexperience in the practice of law and (2) absence of a "prior" disciplinary record. FFCLR ¶ 61; BF 264 at 1, 4. The hearing officer noted that Respondent's inexperience in the practice of law had less weight in light of his training and experience as a CPA. FFCLR ¶ 61. The hearing officer also noted that Respondent had already received an admonition, EX A29, and a reprimand, EX A30-A31, but she did not consider those disciplinary actions to establish a "prior" disciplinary record because the acts of misconduct occurred in the years 2003, 2005, and 2006. FFCLR ¶ 61. But whether considered "prior" violations or not, Respondent's additional violations constitute an aggravating factor, and this court will not simply disregard them. See In re Disciplinary Proceeding Against Anschell, 149 Wn.2d 484, 511, 69 P.3d 844 (2003). Respondent's reprimand is particularly relevant, moreover, given that it was for misconduct relating to a trust account that Respondent committed after being specifically warned that the practice in question violated the RPC. EX A31 at 1.

Respondent complains that there is substantial evidence, primarily his own testimony, of other mitigating factors that the hearing officer *did not* find: absence of a dishonest or selfish motive, "corrective action," cooperative attitude, and remorse. Brief of Appellant at 42. In this, Respondent appears to misapprehend the function of appellate review. It is not the function of this court to *make* the findings of fact Respondent desires because there is some evidence from which the hearing officer *could have* made, but *did not* make, such findings. Rather, the court reviews the findings of fact that the hearing officer *did* make to determine whether they are supported by the evidence. See, e.g., Marshall II, 167 Wn.2d at 66-67. It was for the hearing officer, not a reviewing court, to evaluate Respondent's credibility and veracity, as well as his attitude, motives, and professions of remorse. See, e.g., Behrman, 165 Wn.2d at 423 (finding of remorse or lack thereof based on respondent lawyer's credibility as witness); Marshall I, 160 Wn.2d at 330, 332.

Furthermore, the hearing officer had good reasons not to find the mitigating factors that Respondent desires. A finding that Respondent's motives were pure would be inconsistent with the finding that he used client funds "for his own purposes without oversight." FFCLR ¶ 60; BF 264 at 4. A lawyer's cooperation is required, and can only be a mitigating factor when the lawyer goes *above and beyond* the compliance required of

him. In re Disciplinary Proceeding Against Preszler, 169 Wn.2d 1, 31-32, 232 P.3d 1118 (2010). Respondent furnished copies of his records, files, and accounts, but he was required to do so, and the record does not establish that he went above and beyond the compliance required of him. See ELC 1.5, 5.3(e), 5.5(c); RPC 8.4(*l*); Preszler, 169 Wn.2d at 32. Respondent's "corrective action" was not particularly impressive given that (a) he continued for months after his LOMAP consultation to deposit client funds in accounts that were not trust accounts and (b) Respondent's reprimand was for misconduct that he committed after being specifically warned that the practice in question violated the RPC. FFCLR ¶ 29; TR 87-90, 581-89; EX A31 at 1.

Respondent's reckless claim that the sanction should be mitigated because of "perjurious testimony presented by the Association," Brief of Appellant at 43, deserves special mention. As discussed supra pp. 11-13, there has never been a finding that the testimony of Victoria Fisher that the Association presented at Respondent's first disciplinary hearing was false. Likewise, there has never been a finding that the testimony of Victoria Fisher that Respondent presented in his effort to vacate the first hearing officer's decision was true. In fact, the first hearing officer found that Ms. Fisher's recantation testimony was "not credible." BF 144 ¶¶ 1.9-1.11. There is no more support in the record for the factual assertion

that the Association presented perjured testimony at the first disciplinary hearing than there is for the assertion that Respondent presented perjured testimony in his effort to vacate the first hearing officer's decision.

Nor is there support for Respondent's claim that the sanction should be mitigated due to the "protracted nature" of the proceeding, Brief of Appellant at 42. In case after case, this court has held that the "protracted nature" of a disciplinary proceeding is not a mitigating factor unless the lawyer can show unfair prejudice or unjustified prosecutorial delay. Preszler, 169 Wn.2d at 33. The additional expense and burden incident to multiple disciplinary hearings and multiple review proceedings do not justify any mitigation of the sanction to be imposed for a lawyer's misconduct. See id. at 34-35. The "protracted nature" of this proceeding is clearly the result of Respondent's vigorous exercise of his procedural rights, to which the Association does not object. But Respondent has failed to show that the length of the proceeding "resulted in unfair prejudice" or was "caused by unjustified prosecutorial delay." Id. at 33. Respondent is not entitled to mitigation of his sanction any more than the criminal defendant who is convicted a second time after a successful appeal is entitled to a reduced sentence.

3. The Board's Unanimous Sanction Recommendation Is Entitled to Great Deference, and Respondent Has Failed to Show that It Is Disproportionate.

After determining the presumptive sanction and considering the aggravating and mitigating factors, the court considers whether the sanction is appropriate in light of the two remaining Noble[17] factors: (a) the proportionality of the recommended sanction to the misconduct and (b) the Board's degree of unanimity. In re Disciplinary Proceeding Against Stansfield, 164 Wn.2d 108, 130, 187 P.3d 254 (2008); In re Disciplinary Proceeding Against Trejo, 163 Wn.2d 701, 734, 185 P.3d 1160 (2008).

a. Proportionality

In general, this court attempts to impose sanctions that are "roughly proportionate" to sanctions imposed in other similar cases. In re Disciplinary Proceeding Against Blanchard, 158 Wn.2d 317, 334, 144 P.3d 286 (2006). In proportionality review, the court considers whether the recommended sanction is appropriate by comparing the case at hand with other similar cases in which the same sanction was either approved or disapproved. In re Disciplinary Proceeding Against Cohen (Cohen II), 150 Wn.2d 744, 763, 82 P.3d 224 (2004). In determining whether a case is similar to the case at hand, the court considers all the respondent

[17] In re Disciplinary Proceeding Against Noble, 100 Wn.2d 88, 667 P.2d 608 (1983).

lawyer's misconduct, especially any discipline for similar misconduct. In re Disciplinary Proceeding Against Cramer (Cramer II), 168 Wn.2d 220, 240, 225 P.3d 881 (2010). The respondent lawyer bears the burden of proving that the recommended sanction is disproportionate. In re Disciplinary Proceeding Against Kagele, 149 Wn.2d 793, 821, 72 P.3d 1067 (2003).

Respondent asks this court to depart from the Board's unanimous recommendation of a one-year suspension on the basis of three cases: In re Disciplinary Proceeding Against Cramer (Cramer I), 165 Wn.2d 323, 198 P.3d 485 (2008) (eight-month suspension); In re Disciplinary Proceeding Against Trejo, 163 Wn.2d 701, 185 P.3d 1160 (2008) (three-month suspension); and In re Disciplinary Proceeding Against Blanchard, 158 Wn.2d 317, 144 P.3d 286 (2006) (six-month suspension). Brief of Appellant at 44. Each case is dissimilar from Respondent's case in this important respect: in each case, the lawyer actually maintained a trust account, which was subject to random examinations and overdraft notices, but in some instances the lawyer deposited client funds in his business checking account instead of his trust account, or deposited earned fees in his trust account instead of his business checking account. Cramer I, 165 Wn.2d at 327-28; Trejo, 163 Wn.2d at 710-11; Blanchard, 158 Wn.2d at 322. Respondent, on the other hand, did not maintain a trust account for

client funds, so that he could conceal overdrafts and use the funds "for his own purposes without oversight." FFCLR ¶¶ 28-33, 35, 60(b); BF 264 at 4.

There are other dissimilarities as well. Although there were trust account violations in Blanchard, that case "primarily involved a lack of diligence." Blanchard, 158 Wn.2d at 331. In Trejo, there were significant mitigating factors that were not found here, despite Respondent's urging: remorse, character and reputation, and cooperation above and beyond that which was required. Trejo, 163 Wn.2d at 716, 729, 732-33. In Trejo and in Cramer I, the court adopted the Board's sanction recommendation, the opposite of what Respondent asks the court to do here. Cramer I, 165 Wn.2d at 327, 340; Trejo, 163 Wn.2d at 709, 734-35. Only in Blanchard did the court depart from the Board's recommendation, and in that case it did so at least in part because the Board had departed from the hearing officer's recommendation without giving any reasons.[18] Blanchard, 158 Wn.2d at 328, 330. Finally, the court's opinions in Cramer I, Trejo, and Blanchard do not conclusively demonstrate that the record keeping in those cases was as bad as Respondent's.

[18] Four members of the court would nonetheless have adopted the Board's near-unanimous recommendation of a one-year suspension. Blanchard, 158 Wn.2d at 336, 342 (Fairhurst, J., dissenting).

Respondent also cites three disciplinary notices printed in the *Washington State Bar News* concerning lawyers who stipulated to reprimands for violations of RPC 1.14. Brief of Appellant at 49-50. These citations are inapposite for two obvious reasons: (1) stipulations are analogous to plea agreements, and are thus irrelevant in proportionality review, and (2) *Bar News* disciplinary notices do not provide the degree of specificity necessary to permit a meaningful comparison. In re Disciplinary Proceeding Against Lopez, 153 Wn.2d 570, 596, 106 P.3d 221 (2005); In re Disciplinary Proceeding Against DeRuiz, 152 Wn.2d 558, 582 n.5, 99 P.3d 881 (2004); Cohen II, 150 Wn.2d at 763; Anschell, 149 Wn.2d at 518.

Finally, based on a highly selective citation of Trina Doty's testimony, Respondent suggests that he should have received counseling instead of discipline for his violations of former RPC 1.14(a), 1.14(b)(3) and 1.14(c). Brief of Appellant at 48-49. Ms. Doty testified that in some cases where a random examination under RLD 13.1(a) revealed "non-serious" record-keeping deficiencies, she would try to work with the lawyer before referring the matter to the Chair of the Disciplinary Board. TR 189-96. But Respondent's misuse of his business checking accounts for client funds would never have been reveled by a random examination, because those accounts were not trust accounts. TR 217. For the same

reason, the Association never received any overdraft notifications from Respondent's bank, so the many overdrafts on his accounts holding client funds were concealed from the Association. FFCLR ¶¶ 33, 60; BF 264 at 4; TR 48-49, 62-63. Furthermore, Respondent's record-keeping deficiencies were far from "non-serious;" they were, according to Ms. Doty's testimony, some of the worst she had ever seen. TR 231. The only time Ms. Doty saw records that bad in a random examination, the matter was referred to the Office of Disciplinary Counsel. TR 217.

b. Unanimity

The Disciplinary Board is the only body to hear the full range of disciplinary matters, so it has "a unique experience and perspective in the administration of sanctions." In re Disciplinary Proceeding Against Vanderveen, 166 Wn.2d 594, 609, 211 P.3d 1008 (2009). Where the Board's sanction recommendation is unanimous, it is entitled to great deference, and should be affirmed unless this court can articulate a specific reason for rejecting it. In re Disciplinary Proceeding Against Day, 162 Wn.2d 527, 538, 542, 173 P.3d 915 (2007); Guarnero, 152 Wn.2d at 59; see also Vanderveen, 166 Wn.2d at 616. Here, the Board's decision, including its sanction recommendation, was unanimous. BF 264 at 1. The Board's recommendation is entitled to great deference, and Respondent has provided no good reason for the court to reject it.

IV. CONCLUSION

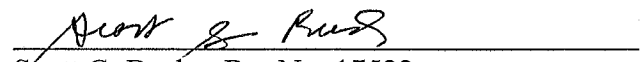
Respondent was an experienced certified public accountant who knew how to use a trust account. In spite of that, he used a general business checking account instead of a trust account for the client funds that came into his possession, he used client funds to cover overdrafts on the account, and he effectively concealed his mismanagement of client funds from the Association's oversight.

As an experienced CPA, Respondent also knew how to maintain complete records of client funds. In spite of that, Respondent's records were so incomplete that it could not be determined how much client money was in his possession at a given time, to whom it belonged, or whether any of his clients had lost money.

The Disciplinary Board's unanimous conclusions that Respondent violated former RPC 1.14(a), 1.14(b)(3), and 1.14(c) are supported by the findings of fact and by substantial evidence in the record. The court should affirm the Board's unanimous conclusions, along with the Board's unanimous recommendation of a one-year suspension.

RESPECTFULLY SUBMITTED this 30th day of March, 2012.

WASHINGTON STATE BAR ASSOCIATION



Scott G. Busby, Bar No. 17522
Disciplinary Counsel

APPENDIX A

FILED

MAR 28 2011

DISCIPLINARY BOARD

BEFORE THE
DISCIPLINARY BOARD
OF THE
WASHINGTON STATE BAR ASSOCIATION

In re Young S. Oh, Lawyer (Bar No. 29692).	Public No. 05#00203 FINDINGS OF FACT, CONCLUSIONS OF LAW AND HEARING OFFICER'S RECOMMENDATION

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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RPC 8.4(c), and/or former RPC 8.4(d).

Count 2 - By failing to place and/or keep client funds in a client trust account, Respondent violated former RPC 1.14(a) and/or former RPC 1.14(b).

Count 3 - By failing to maintain adequate and/or complete records to be able to determine ownership of client funds in his possession, Respondent violated former RPC 1.14(b)(3).

Based on the pleadings in the case, the testimony and exhibits at the hearing, the Hearing Officer makes the following:

FINDINGS OF FACT

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

2. Before his admission to the Bar, Respondent, received an accounting degree from the University of Washington and received a license to practice as a Certified Public Accountant ("CPA"). In 1993, Respondent opened his own accounting practice in Edmonds, Washington where he served primarily Korean-American businesses. In 2000, Respondent opened his law office where he complimented his accounting (CPA) practice with legal and escrow services. Respondent's practice grew to where, during the time period at issue in this proceeding, 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, among other areas, prepared multiple visa applications each month. The accounting services that Mr. Oh provided to his accounting clients included payroll, bookkeeping, and monthly, quarterly and annual federal and state tax returns, including income, excise and B&O tax returns that required client

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

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

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

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

Count 1

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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forged signatures.

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

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

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

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

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

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

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

Counts 2 and 3

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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Respondent violated former RPC 8.4(a), former RPC 8.4(c), and former RPC 8.4(d). Former RPC 8.4 stated in relevant part:

> It is professional misconduct for a lawyer to:
>
> (a) Violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
>
> . . .
>
> (c) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
>
> (d) Engage in conduct that is prejudicial to the administration of justice . .

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

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

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

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Count 2:

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

Count 3:

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

Sanction Analysis

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

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

56. ABA Standard 4.1 applies to Respondent's violations of former RPC 1.14 as charged in Counts 2 and 3. Standard 4.12 provides that "[s]uspension 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."

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

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

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

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

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

(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;

(d) multiple offenses.

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

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

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

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

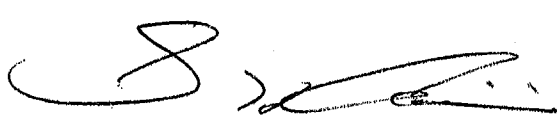
The mitigating factor of "absence of prior disciplinary offenses" applies to the facts and timeline contained in this case.

(f) inexperience in the practice of law: The charges under Counts 2 and 3 stem from Respondent's actions (or inactions) during 2001, 2002 and 2003. Respondent was admitted to the practice of law in the State of Washington in November 1999. The incidents giving rise to the above counts were committed within the early years of the Respondent's law practice. Therefore the mitigating factor of "inexperience in the practice of law" applies to this case. Balancing the inexperience in the practice of law with Respondent being a trained accountant and a practicing CPA, where he maintained a trust account and kept client ledgers for his escrow clients but failed to do so properly for his legal practice, reduces the weight given to this mitigating factor. 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

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

Dated this 22 day of March 2011.



Susan Amini, Bar No. 19808
Hearing Officer

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CERTIFICATE OF SERVICE

I certify that I caused a copy of the PDF, COL & HO's Recommendation to be delivered to the Office of Disciplinary Counsel ~~and to be mailed~~ to Respondent/Respondent's Counsel Scott Collins at 1001 4th Ave Ste 4200 Seattle WA 98154 by Certified/first class mail, postage prepaid on the 28th day of March, 2011

Clerk/Counsel to the Disciplinary Board

APPENDIX B

FILED
SEP 29 2011
DISCIPLINARY BOARD

BEFORE THE
DISCIPLINARY BOARD
OF THE
WASHINGTON STATE BAR ASSOCIATION

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.

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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

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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."

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RECOMMENDATION

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

Dated this 29thday of September, 2011.

H.E. Stiles, II
Disciplinary Board Chair

CERTIFICATE OF SERVICE

I certify that I caused a copy of the PB 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 901 4th Ave, Ste. 4100 Seattle, WA 98154 by Certified/~~first class mail~~, postage prepaid on the 29th day of September, 2011

Clerk/Counsel to the Disciplinary Board

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APPENDIX C

APPENDIX C

RPC 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 13.4 of the Rules of Lawyer Discipline. 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 sub accounting 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.

APPENDIX D

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RLD 13.4 TRUST ACCOUNT OVERDRAFT NOTIFICATION

(a) Overdraft Notification Agreement Required. Every bank, credit union, savings and loan association or qualified public depository referred to in RPC 1.14(c) shall be approved as a depository for lawyer trust accounts if it shall file with the Disciplinary Board an agreement, in a form provided by the Board, to report to the Board in the event any properly payable instrument is presented against a lawyer trust account containing insufficient funds, whether or not the instrument is honored. Any such agreement shall apply to all branches of the financial institution and shall not be canceled except upon 30 days= notice in writing to the Board. The Board shall annually publish a list of approved financial institutions.

(b) Overdraft Reports. The overdraft notification agreement shall provide that all reports made by the financial institution shall contain the following information:

(1) The identity of the financial institution;

(2) The identity of the lawyer or law firm;

(3) The account number;

(4) Either (i) the amount of overdraft and date created; or (ii) the amount of the returned instrument(s) and the date returned.

The information required by the notification agreement shall be provided within 5 banking days of the date the item(s) was paid or returned unpaid.

(c) Costs. Nothing herein shall preclude a financial institution from charging a particular lawyer or law firm for the reasonable cost of producing the reports and records required by this rule, but such charges shall not be a transaction cost to be charged against funds payable to the Legal Foundation of Washington pursuant to RPC 1.14(c)(1).

(d) Notification by Lawyer. Every lawyer who receives notification that any instrument presented against his or her trust account was presented against insufficient funds, whether or not the instrument was honored, shall promptly notify the Office of Disciplinary Counsel of the Association of the same information required by section (b). The lawyer shall include a full explanation of the cause of the overdraft.

RLD 13.5 DECLARATION OR QUESTIONNAIRE

(a) Questionnaire. The Association shall cause to be directed annually to each active lawyer a written declaration or questionnaire designed to determine whether such lawyer is complying with RPC 1.14. Such declaration or questionnaire shall be completed, executed and delivered by such lawyer to the Association on or before the date of delivery specified in such declaration or questionnaire.

(b) Noncompliance. Failure to file the declaration or questionnaire on or before the date specified in section (a) shall be grounds for discipline. Such failure shall also subject the lawyer who has failed to

comply with this rule to a full audit of his or her books and records as provided in rule 13.1(c), upon request of disciplinary counsel to a review committee. A copy of any request made under this section shall be served upon the lawyer involved. The request shall be granted upon a showing that the lawyer has failed to comply with section (a) of this rule. If the lawyer should later comply, disciplinary counsel shall have discretion to determine whether an audit should be conducted, and if so the scope of that audit. A lawyer audited pursuant to this section shall be liable for all actual costs of conducting such audit, and also a charge of $100 per day spent by the auditor in conducting the audit and preparing an audit report. Costs and charges shall be assessed in the same manner as costs under rule 2.8(b)(2).

APPENDIX E

APPENDIX E

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.