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STATE OF WASHINGTON  
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BY SUSAN L. CARLSON  
CLERK

Supreme Court No. 201,872-6

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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IN RE DISCIPLINARY PROCEEDING AGAINST

John Roling Muenster,

Lawyer (Bar No. 6237).

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**ANSWERING BRIEF OF THE  
OFFICE OF DISCIPLINARY COUNSEL  
OF THE WASHINGTON STATE BAR ASSOCIATION**

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Scott G. Busby  
Bar No. 17522  
Senior Disciplinary Counsel

OFFICE OF DISCIPLINARY COUNSEL  
Washington State Bar Association  
1325 4th Avenue, Suite 600  
Seattle, Washington 98101-2539  
(206) 733-5998

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## I. INTRODUCTION

This Court admitted John Rolfing Muenster to practice law in this jurisdiction in 1975. Muenster actively practiced law in this jurisdiction until he declared his “secession” from the legal profession in late 2018 after his unsuccessful attempt to defend himself at the disciplinary hearing.

In 2012-15, Muenster represented Douglas Myser in a lawsuit against Spokane County, Washington. During the course of the representation, Muenster used his trust account like a cash machine, withdrawing Myser’s funds for his own use without notice to Myser, with the timing and amounts of the withdrawals determined by Muenster’s need for money, not by whether fees had been earned or expenses incurred. Before Myser terminated the representation, Muenster had converted over \$40,000 of Myser’s money.

In addition, an audit of Muenster’s 2013-14 trust account records showed that he failed to safeguard the funds of Myser and his other clients in several respects. Among other things, he failed to maintain a checkbook register, failed to maintain client ledger records, failed to reconcile his trust account records, and disbursed

client funds to himself without giving notice to the client of his intent to do so.

After a disciplinary hearing at which Muenster represented himself, the hearing officer recommended disbarment. Muenster filed a notice of appeal to the Disciplinary Board, but he failed to file a brief, so his appeal was dismissed. Subsequently, the Board unanimously declined to order *sua sponte* review and adopted the hearing officer's decision.

Muenster brings this appeal from the Board decision declining to order *sua sponte* review. He does not challenge any of the hearing officer's findings of fact or conclusions of law, and he does not argue that disbarment is an inappropriate sanction. He completely fails to address the only issue presented for review: whether the Board erred by not finding that *sua sponte* review was required to prevent substantial injustice or to correct a clear error.

Muenster's sole argument on appeal is that this Court has no disciplinary authority over him because he "seceded" from the legal profession after his unsuccessful attempt to defend himself at the disciplinary hearing. Muenster's position is (1) contrary to this court's plenary power over lawyer discipline, (2) contrary to the language and structure of the ELC, (3) contrary to the purposes of

lawyer discipline, and (4) contrary to the prior decisions of this court and every other court that has considered the issue.

## II. COUNTERSTATEMENT OF THE ISSUES

1. According to the hearing officer's unchallenged findings of fact and conclusions of law, Muenster converted over \$40,000 of his client's funds, failed to give notice to his clients before disbursing their funds to himself, and failed to safeguard his clients' funds in several other respects. Based on the presumptive sanction of disbarment, as well as six aggravating factors and only one mitigating factor, the hearing officer recommended disbarment. After dismissing Muenster's appeal because he failed to file a brief, the Disciplinary Board unanimously declined to order *sua sponte* review, and adopted the hearing officer's decision. Did the Disciplinary Board err by not finding that *sua sponte* review was required to prevent substantial injustice or to correct a clear error?

2. This Court admitted Muenster to practice law in this jurisdiction at his request. Muenster offered and provided legal services in this jurisdiction during the period when he committed the serious ethical violations that are the subject of the hearing officer's unchallenged findings of fact and conclusions of law. Can Muenster nullify this Court's disciplinary authority over him by

declaring his “secession” from the legal profession after his unsuccessful defense at the disciplinary hearing?

### **III. COUNTERSTATEMENT OF THE CASE**

#### **A. SUBSTANTIVE FACTS**

##### **1. Basis of Disciplinary Authority (ELC 1.2; RPC 8.5(a))**

Muenster was admitted to the practice of law in Washington in 1975. FFCLR ¶ 1. During all times relevant to this proceeding, he offered and provided legal services in Washington, as described more fully below. *Id.*

##### **2. Muenster’s Conversion of Client Myser’s Funds**

Beginning in 2006, Muenster represented Douglas Myser in two lawsuits against Steven Tangen and Spokane County, Washington. FFCLR ¶¶ 12, 36. The first of these was an excessive force claim under 42 U.S.C. § 1983 that Muenster filed on Myser’s behalf in the United States District Court for the Eastern District of Washington in 2006. *Id.* ¶ 12. After a trial, the court rejected Myser’s claim, and the decision was affirmed on appeal in 2010. *Id.* Myser paid Muenster \$220,000 for representation in that case. *Id.*

In late 2011, Myser approached Muenster about a second lawsuit related to the first one. *Id.* ¶ 13. Despite Muenster’s lack of

success in the first lawsuit, Myser thought he could save money by hiring Muenster again since he was already familiar with the issues. *Id.* ¶ 14. But having already paid Muenster \$220,000 for the first lawsuit, Myser wanted a fee agreement that would limit his financial exposure. *Id.*

At that time, Muenster was having financial problems that would continue during the course of the representation. *Id.* ¶¶ 29-30. Muenster told Myser it was “critical” that he receive \$5,000 “right away” because he had no money to pay his mortgage. *Id.* Myser sent Muenster a check for \$5,000. *Id.* ¶ 29. Later, Muenster told Myser that he needed \$388 to pay his phone bill, and that they would have problems communicating about the case unless Myser provided the funds. *Id.* ¶ 30. Myser provided the funds. *Id.*

In January 2012, Muenster and Myser executed a fee agreement for the second lawsuit. *Id.* ¶ 15. It was a “hybrid” fee agreement that provided for a maximum payment of \$45,000 by Myser and a percentage of any recovery for Muenster. *Id.* ¶¶ 14, 31, 35, 39. Under the fee agreement, Muenster was required to deposit and hold fees and expenses paid in advance in a trust account, to be withdrawn only as fees were earned or expenses incurred, and only after giving Myser reasonable notice of his intent

to withdraw the funds. *Id.* ¶¶ 16-18; see RPC 1.5(f), 1.15A(c), 1.15A(h)(3).

Throughout the representation, Muenster failed to deposit and hold in a trust account the fees and expenses that Myser paid in advance. FFCLR ¶ 19. In some cases, Muenster deposited fees and expenses in his operating/savings account, not his trust account. *Id.* ¶ 20. In other cases, he deposited fees and expenses in his trust account, but withdrew them before they were earned or incurred, without giving Myser any notice of his intent to do so. *Id.* ¶¶ 19, 23. Muenster withdrew Myser's funds from his trust account for his own use in round amounts between \$500 and \$2,000, with the timing and amounts of those withdrawals determined by his need for money, not by whether fees had been earned or expenses incurred. *Id.* ¶¶ 28, 42. Muenster kept no client ledger showing the receipts and disbursements of Myser's funds, in violation of RPC 1.15B(a)(2). *Id.* ¶ 22.

Myser expected that the second lawsuit would require significant expenses for experts, depositions, travel, etc., so he sent Muenster separate checks specifically designated for expenses. *Id.* ¶ 24. By November 30, 2013, Myser had advanced Muenster \$26,000 for expenses. *Id.* ¶ 25. As of that date, Muenster had not

yet incurred any expenses, so the entire amount should have remained in Muenster's trust account. *Id.* ¶ 25; see RPC 1.15A(c)(2). But as of that date, Muenster's trust account had a balance of only \$86.59.

By November 30, 2013, Myser had also advanced Muenster \$33,000 for legal fees, even though Muenster had not yet filed the second lawsuit. *Id.* ¶¶ 25, 36. So of the \$59,000 Myser had advanced to Muenster thus far for fees and expenses, Muenster had appropriated all but \$86.59 to his own use. *Id.* ¶ 27.

By March 2014, Myser had advanced Muenster \$46,000 for legal fees, more than the agreed upon maximum. *Id.* ¶¶ 31, 39. Muenster still had not filed the second lawsuit, and he was not returning Myser's calls. *Id.* ¶¶ 31-32, 36. Myser could not afford to start over with a different lawyer, so he sent more payments to Muenster to "incentivize" him to get the case moving. *Id.* ¶ 33. Myser did not agree to raise the \$45,000 maximum payment that the fee agreement provided for. *Id.* ¶ 35. Finally, after receiving these additional payments over and above the \$45,000 maximum, Muenster filed the second lawsuit against Steven Tangen and Spokane County in the United States District Court for the Western District of Washington in April 2014. *Id.* ¶ 36.

Between December 1, 2013 and November 30, 2014, Myser paid Muenster an additional \$39,000 over and above the \$59,000 he had paid by November 30, 2013. *Id.* ¶ 37. Of that amount, \$37,000 was designated as fees paid in advance, and \$2,000 was designated for expenses. *Id.* This brought the total amount of fees paid by November 30, 2014 to \$70,000, \$25,000 over the maximum, and the total amount for expenses to \$28,000. *Id.* ¶¶ 25, 37, 39.

Of the \$98,000 total that Myser had paid, only \$528.43 remained in Muenster's trust account by November 30, 2014. *Id.* ¶ 38. Muenster had withdrawn the rest, if he had deposited it in trust to begin with, without ever giving Myser any notice of his intent to do so. *Id.* ¶¶ 40-41. He simply withdrew the funds from trust when he needed money, whether or not fees had been earned or expenses incurred. *Id.* ¶¶ 28, 42.

By November 2014, Myser realized that his original estimate of expenses for the second lawsuit was much higher than what would be needed. *Id.* ¶ 48. Myser telephoned Muenster more than once to request a return of some of the \$28,000 he had advanced for expenses, but Muenster did not respond. *Id.* ¶ 49. On December 16, 2014, Myser sent Muenster a written request for an

accounting of the \$28,000 and for the return of \$8,000. Myser needed the \$8,000 for healthcare expenses, and he told Muenster this. *Id.* ¶ 51. On December 24, 2014, Muenster replied, telling Myser that he would return \$28,000 and that he would provide his “ledger.” *Id.* ¶ 52. Muenster knew that he did not have \$28,000, or even \$8,000, to return to Myser. *Id.* ¶ 53.

On January 20, 2014, Myser sent Muenster another written request for the return of the \$8,000 he needed for healthcare expenses. *Id.* ¶ 55. Muenster did not reply. *Id.* Muenster never sent Myser the \$28,000, or the \$8,000, or the “ledger.” *Id.* ¶ 54. During the course of the representation, Muenster incurred and paid only \$1,330.14 in expenses. *Id.* ¶ 43. Of the \$28,000 Myser paid him for expenses, Muenster appropriated the balance to his own use, except for one \$6,000 check that he never deposited. *Id.* ¶¶ 21, 44.

In February 2015, the court dismissed the second lawsuit against Spokane County. *Id.* ¶ 56. Myser’s claims against Steven Tangen were later dismissed, as well. *Id.* Muenster filed a notice of appeal on March 2, 2015. *Id.* ¶ 57.

On March 23, 2015, Myser terminated Muenster’s services and filed a grievance against him. *Id.* ¶ 58. By the time he was

terminated, Muenster had already appropriated over \$90,000 of Myser's funds, even though he was entitled to no more than \$45,000 in fees and no more than \$1,330.14 for expenses. *Id.* ¶¶ 21, 37-39, 43-44, 65.<sup>1</sup>

### **3. Muenster's Failure to Safeguard Other Client Funds**

ODC conducted an audit of Muenster's trust account records for the period between December 1, 2013 and November 30, 2014. *Id.* ¶¶ 11, 37 n. 3. During that period, Muenster himself handled all deposits, withdrawals, and record keeping for his lawyer trust account. *Id.* ¶¶ 2-4, 11. The audit showed that Muenster failed to safeguard client funds in several respects:

- He failed to maintain a checkbook register as required by RPC 1.15B(a)(1). *Id.* ¶ 4. The checkbook register he maintained was not current, it failed to consistently identify the client matter for which trust funds were disbursed, and it failed to show the trust account balance after each transaction. *Id.*
- He failed to maintain individual client ledger records as required by RPC 1.15B(a)(2). *Id.* ¶ 5. The records he belatedly

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<sup>1</sup> Muenster received a total of \$98,000 from Myser. FFCLR ¶ 37. He held \$528.43 in trust, he held a check for \$6,000 that was never cashed, and he incurred \$1,330.14 in expenses. *Id.* ¶¶ 21, 38, 43-44. The balance, which Muenster had appropriated by the time he was terminated, comes to \$90,141.43.

produced were created after the fact, they were inaccurate, and they failed to identify the purpose for which trust funds were received, disbursed, or transferred, the date of the transaction, the check number, the payor or payee, and the balance after each transaction. *Id.*

- He failed to reconcile his trust account records as required by RPC 1.15A(h)(6), and he failed to maintain copies of trust account reconciliations as required by RPC 1.15B(a)(8). *Id.* ¶¶ 6-8. He failed to reconcile his trust account check register balance (which he failed to consistently maintain) to the bank statement balance, and he failed to reconcile the check register balance to the combined total of client ledger records (which also he failed to maintain). *Id.* ¶¶ 7-8.

- He deposited his own funds in his trust account, in violation of RPC 1.15A(h)(1). *Id.* ¶ 10.

- He disbursed client funds from his trust account to himself without giving notice to the client of his intent to do so, in violation of RPC 1.15A(h)(3). *Id.* ¶ 11. Moreover, the timing and amounts of those withdrawals were determined by his need for money, not by whether fees had been earned or expenses incurred, in violation of RPC 1.15A(c)(2). *Id.* Muenster simply

wrote checks to himself in round amounts once or twice per week whenever he needed money. *Id.* The total amount of these checks during the audit period was about \$100,000. *Id.*

## **B. PROCEDURAL FACTS**

### **1. Formal Complaint**

The First Amended Formal Complaint, filed March 24, 2017, alleges 12 counts of ethical misconduct, as follows:

Count 1: By failing to maintain a complete and/or accurate check register, Respondent violated RPC 1.15A(h)(2) and/or RPC 1.15B(a)(1).

Count 2: By failing to maintain individual client ledgers, Respondent violated RPC 1.15A(h)(2) and/or RPC 1.15B(a)(2).

Count 3: By failing to reconcile, on a monthly basis, his check register balance with the balance shown on his trust account bank statement, and his check register balance with the combined total of all client ledgers, Respondent violated RPC 1.15A(h)(6).

Count 4: By failing to maintain copies of reconciliations between his check register and his trust account bank statement, Respondent violated RPC 1.15B(a)(8).

Count 5: By commingling his own funds with client funds in his trust account, Respondent violated RPC 1.15A(h)(1).

Count 6: By failing to give clients reasonable notice of his intent to withdraw fees from his trust account, through a billing statement or other document, before disbursing such funds to himself, Respondent violated RPC 1.4 and/or RPC 1.15A(h)(3).

Count 7: By using and/or converting \$25,000 or more of Mr. Myser's fee payments by November 30, 2014, without entitlement to the funds, Respondent violated RPC 1.5(a) and/or RPC 1.15A(b) and/or RPC 1.15A(c)(1) and/or RPC 1.15A(c)(2).

Count 8: By failing to deposit all funds advanced for costs and expenses into his trust account, Respondent violated RPC 1.15A(c)(1) and (2).

Count 9: By using and/or converting \$21,000 or more of the funds that Mr. Myser had advanced for costs and expenses, when he was entitled to no more than \$967.50 of those funds as of November 30, 2014, Respondent violated RPC 1.15A(b) and/or RPC 1.15A(c)(1) and/or RPC 1.15a(c)(2).

Count 10: By withdrawing fees from his trust account without first advising Mr. Myser in writing of his intent to do so, Respondent violated RPC 1.15A(h)(3).

Count 11: By failing to provide Mr. Myser a written accounting of his funds after distributing funds from trust and/or when requested to provide an accounting and/or an annual basis, Respondent violated RPC 1.4(a) and/or RPC 1.4(b) and/or RPC 1.15A(e).

Count 12: By failing to maintain a complete and/or accurate client ledger, on a contemporaneous basis, for funds received and disbursed in connection with his representation of Mr. Myser in the fraud-on-the-court case, Respondent violated RPC 1.15A(h)(2) and/or RPC 1.15B(a)(2).

FFCLR at 6-7.

## **2. Hearing Officer Decision Recommending Disbarment**

The disciplinary hearing took place over four days in April 2018. FFCLR at 1. On the first three days, Muenster appeared on

his own behalf. *Id.* On the fourth day, he declined to appear, even by telephone, and made his closing argument by email instead. *Id.* at 1 & n. 1.

On December 4, 2018, the hearing officer issued her findings of fact, conclusions of law, and recommendation. The hearing officer concluded that all of the violations alleged in Counts 1-12 of the First Amended Formal Complaint were proven by a clear preponderance of the evidence. FFCLR ¶¶ 70-81. The hearing officer applied the American Bar Association's *Standards for Imposing Lawyer Sanctions* (ABA *Standards*) to determine the following presumptive sanctions for Muenster's ethical misconduct:

- Under ABA *Standards* std. 4.11, disbarment is the presumptive sanction for Muenster's conversion of Myser's funds in violation of RPC 1.5(a), 1.15A(b), and 1.15A(c) (Counts 7, 9). *Id.* ¶¶ 83, 86.

- Under ABA *Standards* std. 4.41(b), disbarment is the presumptive sanction for Muenster's failure to give notice to his clients before disbursing their funds to himself, and his failure to provide an accounting, in violation of RPC 1.4, 1.15A(e), and 1.15A(h)(3) (Counts 6, 10-11). *Id.* ¶ 85.

- Under ABA *Standards* std. 4.12, suspension is the presumptive sanction for Muenster's failure to safeguard client funds in violation of RPC 1.15A and 1.15B (Counts 1-5, 8, 12). *Id.* ¶ 84.

The hearing officer found six aggravating factors under ABA *Standards* std. 9.22: dishonest or selfish motive, a pattern of misconduct, multiple offenses, refusal to acknowledge the wrongful nature of the misconduct, substantial experience in the practice of law, and indifference to making restitution. *Id.* ¶ 89. The hearing officer found only one mitigating factor under ABA *Standards* std. 9.32: absence of a prior disciplinary record. *Id.* ¶ 90. The hearing officer specifically found that remorse was *not* a mitigating factor, inasmuch as Muenster "expressed no regret for his conversion of Myser's funds and remained adamant that he was entitled to them." *Id.* ¶ 91.

Based on the findings of fact, the conclusions of law, the presumptive sanctions, and the aggravating and mitigating factors, the hearing officer recommended that Muenster be disbarred and that he be ordered to pay restitution to Myser in the amount of \$44,111.77 plus interest. *Id.* ¶ 92.

### **3. Disciplinary Board Decision Declining Sua Sponte Review**

On December 28, 2018, Muenster filed a Notice of Appeal from the hearing officer's decision. BF 24. On April 1, 2019, his appeal was dismissed because he failed to file a brief.<sup>2</sup> BF 57. On April 5, 2019, the hearing officer's decision was distributed to the Disciplinary Board for consideration of *sua sponte* review under ELC 11.3(a). BF 59. On May 2, 2019, the Board unanimously declined to order *sua sponte* review and adopted the hearing officer's decision. *Id.* On May 30, Muenster filed a Notice of Appeal from the Board's decision.

### **4. Order Assessing Costs and Expenses**

On June 4, 2019, ODC filed its Statement of Costs and Expenses under ELC 13.9(d). Order Assessing Costs and Expenses, filed July 16, 2019. Muenster filed no exceptions. *Id.* On July 6, 2019, the Chair of the Disciplinary Board entered an Order Assessing Costs and Expenses under ELC 13.9(e) in the amount of \$11,312.13. *Id.* The Order was transmitted to this court on July 16, 2019 under ELC 13.9(g).

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<sup>2</sup> In his brief to this court, Muenster references several documents that he filed with the Disciplinary Board without mentioning that they were filed *after* his appeal was dismissed. Petitioner/Appellant's Opening Brief at 6-7.

#### IV. ARGUMENT

##### A. SCOPE AND STANDARD OF REVIEW

Under ELC 12.3(a), the respondent lawyer or disciplinary counsel has the right to appeal a Board decision recommending suspension or disbarment. There is no other right of appeal. *Id.* Muenster brings this appeal from the Board decision declining to order *sua sponte* review and adopting the hearing officer's decision recommending disbarment. This Court has held that a Board decision declining *sua sponte* review is appealable under ELC 12.3(a). *In re Disciplinary Proceeding Against Conteh*, 187 Wn.2d 793, 799, 389 P.3d 793 (2017); *In re Disciplinary Proceeding Against Osborne*, 187 Wn.2d 188, 203-04, 386 P.3d 288 (2016). But the scope of review is extremely limited, both in terms of the record on review and the issues presented for review. *Conteh*, 187 Wn.2d at 799-800; *Osborne*, 187 Wn.2d at 191, 196, 203-04, 206.

In an appeal from an order declining *sua sponte* review, the record on review "is limited to ONLY the record . . . of the Disciplinary Board's review as required by ELC 11.3(a)." *Osborne*, 187 Wn.2d at 204, 206 (emphasis in original); *Conteh*, 187 Wn.2d at 799-800. It is "therefore limited to the Hearing Officer's Findings of Fact, Conclusions of Law, and Recommendation." *Osborne*, 187

Wn.2d at 204, 206; *Conteh*, 187 Wn.2d at 799-800. Muenster has tried to remake the record in two different ways: First, he has designated documents from the Bar File that were not in the record of the Board's review. Petitioner's Designation of Clerk's Papers for Appeal, filed August 2, 2019. Second, he has transmitted directly to this Court documents that were not in the record of the Board's review and not even in the bar file. Plaintiff-Appellant's Supplemental Clerk's Papers, filed August 28, 2019. Besides being irrelevant to the issue presented for review, these documents are outside the record on review and should not be considered. *Osborne*, 187 Wn.2d at 204, 206; *Conteh*, 187 Wn.2d at 799-800; see *Matter of Warren*, \_\_\_ Wn. App. \_\_\_, 448 P.3d 820, 823 n.1 (2019) (argument in brief appropriate vehicle for pointing out reliance on improper materials). The Court should consider only the record before the Board that was transmitted by the Clerk on July 12, 2019 (BF 1-81).

“The Board should order *sua sponte* review *only in extraordinary circumstances to prevent substantial injustice or to correct a clear error.*” *Conteh*, 187 Wn.2d at 803 (emphasis in original) (quoting ELC 11.3(d)); *Osborne*, 187 Wn.2d at 197. In reviewing a Board decision declining *sua sponte* review, “the issue

is not whether the hearing officer's decision was right or wrong." *Osborne*, 187 Wn.2d at 208 (Wiggins, J., concurring). Instead, the only issue before the Court is "whether the Disciplinary Board erred by not finding that *sua sponte* review was required to 'prevent substantial injustice or to correct a clear error.'" *Conteh*, 187 Wn.2d at 799 (quoting Order, *In re Conteh*, No. 201,448-8, at 1 (Wash. Jan. 22, 2016)); *Osborne*, 187 Wn.2d at 196, 203-04, 206.

The standard of review for a Board order adopting the hearing officer's recommendation is the same one that applies to other Board decisions. *Osborne*, 187 Wn.2d at 204. The Court gives considerable weight to the hearing officer's findings of fact, and treats unchallenged findings as verities on appeal. *Conteh*, 187 Wn.2d at 800; *Osborne*, 187 Wn.2d at 204. Conclusions of law are reviewed de novo, and will be upheld if they are supported by the findings of fact. *Conteh*, 187 Wn.2d at 800; *Osborne*, 187 Wn.2d at 204. The Court also reviews sanction recommendations de novo, but will affirm the Board's recommendation unless it can articulate a specific reason to reject it. *Conteh*, 187 Wn.2d at 800.

**B. THE BOARD DID NOT ERR IN DECLINING *SUA SPONTE* REVIEW**

Muenster does not challenge any of the hearing officer's findings of fact. Just like the respondent lawyer in *Conteh*, 187 Wn.2d at 802, he "makes no specific assignments of error and fails to identify any findings he disagrees with in his briefing." On the record before this Court, he *cannot* challenge any findings of fact, because a challenge would require him to show that specific findings are unsupported by substantial evidence in the record before the hearing officer. *In re Disciplinary Proceeding Against Marshall*, 167 Wn.2d 51, 66-67, 217 P.3d 291 (2009). The hearing officer's findings of fact are therefore verities on appeal. *Conteh*, 187 Wn.2d at 800, 802; *Osborne*, 187 Wn.2d at 204-05. Nor has Muenster shown, or even attempted to show, that the hearing officer's conclusions of law are not supported by the findings of fact.

Just like the respondent lawyer in *Conteh*, Muenster's brief simply fails to address the only issue presented for review: whether the Board erred by not finding that *sua sponte* review was required "to prevent substantial injustice or to correct a clear error." *Conteh*, 187 Wn.2d at 799-800; *Osborne*, 187 Wn.2d at 196, 203-04, 206. He "identifies no extraordinary circumstances, no clear error, and

no substantial injustice.” *Conteh*, 187 Wn.2d at 803. This Court has consistently held that in a case like this where a lawyer converts client funds, only “extraordinary” mitigating factors will justify a departure from the presumptive sanction of disbarment. *In re Disciplinary Proceeding Against Fossedal*, 189 Wn.2d 222, 234, 399 P.3d 1169 (2017); *In re Disciplinary Proceeding Against Schwimmer*, 153 Wn.2d 752, 760, 108 P.3d 761 (2005); *In re Disciplinary Proceeding Against Johnson*, 114 Wn.2d 737, 753, 790 P.2d 1227 (1990); *In re Disciplinary Proceeding Against Rentel*, 107 Wn.2d 276, 286, 729 P.2d 615 (1986). No “substantial injustice” will result from applying that rule to this case, where there are six aggravating factors and only one very ordinary mitigating factor. FFCLR ¶¶ 89-91; see *Schwimmer*, 153 Wn.2d at 763 (no prior discipline not a significant mitigating factor given seriousness of conversion).

**C. THIS COURT’S DISCIPLINARY AUTHORITY IS NOT NULLIFIED BY MUENSTER’S DECLARATION OF SECESSION**

After his unsuccessful defense at the disciplinary hearing, Muenster announced that he would “disavow any membership in the WSBA,” “exit the [legal] profession,” and “secede from [his] position as a lawyer.” BF 39, 41-42, 44, 49, 52. According to his

brief, he also “cancelled” and “terminated” his membership, and “quit.” Petitioner/Appellant’s Opening Brief at 1-4. He has refused, however, to “resign” in accordance with ELC 9.3, the rule this Court specifically adopted for lawyers like Muenster with disciplinary proceedings pending against them. He asserts that this rule and all the other Rules for Enforcement of Lawyer Conduct do not apply to him because he has declared his “secession” from the legal profession. BF 26, 44.

Muenster imagines, or at least hopes, that by announcing his cancellation, termination, disavowal, exit, secession, or whatever he may choose to call it, he can thereby nullify the Court’s disciplinary authority, terminate the proceeding pending against him, avoid any consequences from the serious professional misconduct he no longer disputes, and pass himself off to an unsuspecting public as a retired lawyer with an unblemished record of ethical rectitude. His hopes depend on the assumption—for it is nothing more than an assumption—that this Court’s disciplinary authority depends on his current membership in the Washington State Bar Association (WSBA) or his self-identification as a legal professional. In that assumption, he is mistaken. Muenster’s position is (1) contrary to this Court’s plenary power over lawyer

discipline, (2) contrary to the language and structure of the ELC, (3) contrary to the purposes of lawyer discipline, and (4) contrary to the prior decisions of this Court and every other court that has considered the issue.

### **1. The Court's Power over Lawyer Discipline**

This court has exclusive, inherent, and plenary power to admit, discipline, and disbar lawyers. *In re Disciplinary Proceeding Against Cramer*, 168 Wn.2d 220, 229, 225 P.3d 881 (2010); *Short v. Demopolis*, 103 Wn.2d 52, 62, 691 P.2d 163 (1984); ELC 2.1. The exercise of this power is “necessary for the protection of the court, the proper administration of justice, the dignity and purity of the profession, and for the public good and the protection of clients.” *Short*, 103 Wn.2d at 62 (quoting *Seattle v. Ratliff*, 100 Wn.2d 212, 215, 667 P.2d 630 (1983) and *In re Bruen*, 102 Wash. 472, 475, 172 P. 1152 (1918)).

In the exercise of its plenary power, the Court has delegated certain responsibilities to disciplinary counsel, hearing officers, and the Disciplinary Board under the provisions of the ELC. *Cramer*, 168 Wn.2d at 229; *In re Disciplinary Proceeding Against Kronenberg*, 155 Wn.2d 184, 190, 117 P.3d 1134 (2005); ELC 2.1, 2.3, 2.5, 2.8. Consequently, any limitation on the power to

commence or continue a disciplinary proceeding under the ELC is a limitation on the Court's plenary power over lawyer discipline, and any putative limitation on the Court's plenary power must be narrowly construed. See *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 98-99, 864 P.2d 937 (1994).

## **2. Language and Structure of the ELC**

The Court's disciplinary authority is defined in ELC 1.2 and RPC 8.5(a):

Except as provided in RPC 8.5(c), any lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction and these Rules for Enforcement of Lawyer Conduct, regardless of where the lawyer's conduct occurs. A lawyer not admitted to practice in this jurisdiction is also subject to the disciplinary authority of this jurisdiction and these rules if the lawyer provides or offers to provide any legal services in this jurisdiction. Disciplinary authority exists regardless of the lawyer's residency or authority to practice law in this state. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

ELC 1.2.

A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this

jurisdiction and another jurisdiction for the same conduct.

RPC 8.5(a). These rules must be construed to further, not to frustrate, the purposes of lawyer discipline. *In re Disciplinary Proceeding Against McGlothlen*, 99 Wn.2d 515, 522, 663 P.2d 1330 (1983); *see also Burnside*, 123 Wn.2d at 99.

First, it is undisputed that this Court admitted Muenster to practice law (at his request) in this jurisdiction. FFCLR ¶ 1. He is therefore subject to the Court's disciplinary jurisdiction under ELC 1.2 and RPC 8.5(a). Second, it is undisputed that Muenster offered and provided legal services in this jurisdiction during the period when he committed the serious ethical violations that were proven at the disciplinary hearing. *Id.* So even if Muenster were not admitted to practice law in this jurisdiction, he would still be subject to the court's disciplinary jurisdiction under ELC 1.2 and RPC 8.5(a). Third, under ELC 1.2, the Court has disciplinary authority over Muenster regardless of his current authority to practice law in this state. So "admitted to practice" in ELC 1.2 and RPC 8.5(a) cannot be construed to mean "currently authorized to practice." Fourth, there is simply nothing in ELC 1.2 or RPC 8.5(a) to suggest that the Court's disciplinary authority over Muenster is nullified or in

any way limited by his declaration of secession or his current licensing or bar membership status.

Other provisions of the ELC impose duties on lawyers who have been disbarred or have resigned in lieu of discipline, duties that continue *after* such lawyers have “exited the profession,” to use Muenster’s description of his own situation. BF 44, 47, 53; ELC 9.3(c)(4)(A), 9.3(c)(4)(B), 9.3(c)(5)(A), 9.3(c)(5)(B), 9.3(c)(6), 9.3(c)(6), 14.1(a), 14.1(c), 14.2(a), 14.3, 14.4. So the overall structure of the ELC, as well as the plain language of ELC 1.2 and RPC 8.5(a) are both contrary to Muenster’s claim that he can nullify this court’s disciplinary authority by declaring his “exit” or “secession” from the legal profession or the WSBA.

### **3. Purposes of Lawyer Discipline**

Disciplinary rules must be construed to further, not to frustrate, the purposes for which they are adopted. *McGlothlen*, 99 Wn.2d at 522; *Burnside*, 123 Wn.2d at 99. Among the primary purposes of lawyer discipline are (1) protecting the public from attorney misconduct, (2) maintaining the integrity of the profession and (3) maintaining the public's confidence in the legal system as a whole. *In re Disciplinary Proceeding Against Halverson*, 140 Wn.2d 475, 498, 998 P.2d 833 (2000); *McGlothlen*, 99 Wn.2d at 522.

Consistent with these purposes, this Court has adopted ELC 9.3, a rule specifically directed to lawyers like Muenster who wish to “exit the profession” while disciplinary charges are pending against them. The WSBA Bylaw that Muenster references in his brief is designed to give effect to this rule.<sup>3</sup>

ELC 9.3 contains provisions specifically designed to protect the public, maintain the integrity of the profession, and maintain public confidence in the legal system. For example, the lawyer who desires to “exit the profession” while disciplinary charges are pending must agree to notify other jurisdictions of his resignation in lieu of discipline, resign permanently from the practice of law in other jurisdictions, notify professional licensing agencies in jurisdictions where he has a professional license predicated on admission to practice law, resign permanently from such licenses, disclose his resignation in lieu of discipline in response to questions regarding disciplinary action or the status of his license to practice

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<sup>3</sup> Bylaw III(H) provides, in pertinent part:

If there is a disciplinary investigation or proceeding then pending against the member, or if at the time the member submits the written request the member has knowledge that the filing of a grievance of substance against such member is imminent, resignation is permitted only under the provisions of the ELC . . . .

<https://www.wsba.org/about-wsba/who-we-are/WSBA-bylaws>.

law, and pay restitution, costs, and expenses. ELC 9.3(c)(4)(A), 9.3(c)(4)(B), 9.3(c)(5)(A), 9.3(c)(5)(B), 9.3(c)(6), 9.3(c)(6). Similar provisions designed to further the purposes of lawyer discipline apply when a disciplinary sanction is imposed. See, e.g., ELC 3.5.

The rules this Court has adopted also further the purposes of lawyer discipline by requiring that a lawyer who resigns in lieu of disbarment may never apply for admission or reinstatement, and that a disbarred lawyer may not be reinstated for six years, and then only after a hearing before the Character and Fitness Board. ELC 9.3(e); APR 25.1. On the other hand, a lawyer who has merely “exited the profession,” even one who has been administratively suspended, can change his status to active at any time. APR 17(c). To allow Muenster to terminate the proceeding pending against him by simply declaring his “secession” would be to allow him to circumvent all of these rules and frustrate the purposes for which they were adopted. To allow him to pass himself off as a retired lawyer with an unblemished record of ethical rectitude would be a fraud on the public that the disciplinary rules are meant to protect.

#### **4. Prior Decisions**

This Court has previously disciplined lawyers *after* those

lawyers were disbarred or voluntarily resigned. In *In re Disciplinary Proceeding Against King*, 170 Wn.2d 738, 741, 246 P.3d 1232 (2011), for example, the respondent lawyer moved to dismiss a disciplinary proceeding for mootness after he was disbarred in an unrelated proceeding. This Court denied the motion to dismiss and disbarred the lawyer a second time. *Id.* at 741, 745. If the Court can exercise its disciplinary authority over a lawyer who has already “exited the profession” by being disbarred, then it can surely exercise that authority over a lawyer who merely declares his “secession” in the vain hope of avoiding disbarment after his unsuccessful defense against disciplinary charges.

Courts in other jurisdictions are all in accord:

- In *In re Kraemer*, 411 N.W.2d 71 (N.D. 1987), the Supreme Court of North Dakota held that it had the authority and the obligation to investigate a disbarred lawyer’s pre-disbarment conduct. The court noted that “nothing in the plain language of the rules of disciplinary procedure restricts the timing of the Disciplinary Board’s investigation of a complaint,” and that “to defer resolution of a complaint alleging pre-disbarment misconduct until the initiation of reinstatement proceedings would hamper the availability and

recollections of witnesses, restrict or defeat restitution, and impair fairness to the respondent and the complainant.”

- In *Louisiana State Bar Ass'n v. Krasnoff*, 515 So.2d 780 (La. 1987), the Supreme Court of Louisiana held that it had jurisdiction over a disciplinary proceeding against a disbarred lawyer. The court noted that the lawyer could seek readmission, and also that adjudication of the former lawyer’s misconduct “reinforces the concept that a basic purpose of lawyer discipline is protection of the public.” See also *Louisiana State Bar Ass'n v. Schmidt*, 539 So.2d 622 (La. 1989) (court retained jurisdiction over previously disbarred lawyer, adjudicated additional violations, and ordered him to make restitution).

- In *In re Sloan*, 135 A.D.2d 140, 524 N.Y.S.2d 699 (1988), a former lawyer requested that disciplinary charges against him be dismissed as moot because he had had already been disbarred in a different proceeding. The New York Supreme Court, Appellate Division, denied the request and adjudicated the charges. The court held that the proceeding was not moot “[i]n view of the fact that respondent will, at some future date, be eligible to apply for reinstatement.”

- In *Grievance Administrator v. Attorney Discipline Board*, 447 Mich. 411, 522 N.W.2d 868-69 (1994), the Supreme Court of Michigan held that the Attorney Discipline Board (ADB) retained jurisdiction to consider misconduct committed during the period of licensure by lawyers whose licenses were later revoked. The court found it persuasive that “there may be legal and evidentiary obstacles to proving a stale misconduct charge if, after a number of years, the lawyer’s license is reinstated and the second prosecution is reinstated.”

- In *In re Warren*, 167 Vt. 259, 704 A.2d 789, 791 (1997), the Vermont Supreme Court held that its disciplinary authority extended to a lawyer who had resigned from the Vermont bar. By court rule, the court’s disciplinary authority extended to any lawyer “admitted in the state,” *cf.* ELC 1.2; RPC 8.5(a), which included any “formerly admitted lawyer with respect to acts committed prior to resignation.”

- In *Statewide Grievance Committee v. Burton*, 88 Conn. App. 523, 871 A.2d 380, 383, 385 (2005), the Appellate Court of Connecticut held that disciplinary charges against a disbarred lawyer could be adjudicated “irrespective of the [lawyer’s]

current status,” noting that the adjudication had “future relevance,” and hence was not moot, since the lawyer could apply for readmission to the bar.

- In *Disciplinary Counsel v. Snaider*, 149 Conn. App. 738, 750, 90 A.3d 286, 295 (2014), the Appellate Court of Connecticut exercised its jurisdiction to adjudicate a lawyer’s alleged misconduct and impose discipline even though the lawyer had voluntarily resigned from the bar. The court held that it had jurisdiction over a lawyer who had resigned for the same reasons that it had jurisdiction over a lawyer who had been disbarred.

After an exhaustive search, ODC has found no legal authority anywhere to support the proposition that Muenster can nullify this Court’s disciplinary authority and terminate the proceeding pending against him by resigning or announcing his “secession” from the legal profession. That proposition may be supported by wishful thinking and a desperate desire to avoid the consequences of professional misconduct, but it is not supported by court rule, case law, or the purposes of lawyer discipline.

**D. COSTS AND EXPENSES SHOULD BE ASSESSED AGAINST MUENSTER**

Muenster did not file any exceptions to ODC's Statement of Costs and Expenses. He objects to the Chair's Order Assessing Costs and Expenses solely on the grounds that it is "void due to mootness and lack of jurisdiction." Petitioner/Appellant's Opening Brief at 18.

The Chair's order was entered in accordance with ELC 13.9. For all the reasons set forth above, "mootness and lack of jurisdiction" do not result from Muenster's declaration of secession. It is in the interests of justice that the full amount of costs and expenses ordered by the Disciplinary Board Chair be assessed against Muenster, the party who made those costs and expenses necessary.

**E. MUENSTER'S CLAIMS ABOUT LICENSING FEES AND THE STRUCTURE OF THE WSBA ARE NOT BEFORE THE COURT**

Muenster makes some other perfunctory arguments in his brief about matters that are not the subjects of a disciplinary proceeding and are not before the Court in this appeal. He argues that he should not be "forced" to pay his 2019 licensing fees to the WSBA, that he cannot be administratively suspended for failing to pay his 2019 licensing fees, and that "mandatory bar associations"

are unconstitutional under *Janus v. State, County, and Municipal Employees*, 585 U.S. \_\_\_, 138 S. Ct. 2448, 201 L. Ed. 2d 924 (2018).<sup>4</sup> Petitioner/Appellant’s Opening Brief at 12-18. None of these arguments should be addressed because none of them has any bearing on any issue properly before this court.

The purpose of the disciplinary hearing was to make findings of fact, conclusions of law, and a sanction recommendation based on the misconduct alleged in the formal complaint. ELC 5.7(d)(5), 10.16(a). The purpose of the Board’s review was to determine whether some “extraordinary circumstances” required *sua sponte* review to “prevent substantial injustice or to correct a clear error.” ELC 11.3(d); *Conteh*, 187 Wn.2d at 803; *Osborne*, 187 Wn.2d at

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<sup>4</sup> *Janus* does not hold that “mandatory bar associations” are unconstitutional. Nor does it hold that a court in a jurisdiction with a “mandatory bar association” has no disciplinary authority over a lawyer like Muenster who is admitted to practice in the jurisdiction, practices in the jurisdiction, and then “secedes” after a disciplinary hearing that doesn’t go well for him. In *Janus*, 138 S. Ct. at 2459-60, the United States Supreme Court held that an “agency fee” arrangement whereby public employees were forced to subsidize a union, even if they strongly objected to the union’s positions, violated the free speech rights of employees who chose not to join the union. Muenster also cites *Fleck v. Wetch*, \_\_\_ U.S. \_\_\_, 139 S. Ct. 590, 202 L. Ed. 2d 423 (2018), in which the Supreme Court vacated a decision of the Eighth Circuit Court of Appeals and remanded for further consideration in light of *Janus*. On remand, the Eighth Circuit held that the North Dakota State Bar Association’s procedures for collecting mandatory licensing fees provided members with adequate notice of their First Amendment right to claim a deduction for “nonchargeable” activities of the Bar Association. *Fleck v. Wetch*, 937 F.3d 1112 (8<sup>th</sup> Cir. 2019).

197. And the purpose and scope of this Court's review is solely to determine "whether the Disciplinary Board erred by not finding that *sua sponte* review was required to prevent substantial injustice or to correct a clear error." *Conteh*, 187 Wn.2d at 799 (internal quotations omitted); *Osborne*, 187 Wn.2d at 196, 203-04, 206.

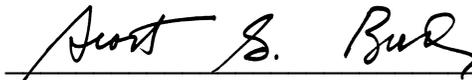
Neither the propriety of the Board's decision nor this Court's disciplinary authority over Muenster depends in any way on whether Muenster has paid or may be required to pay licensing fees to the WSBA. As discussed above, the Court's disciplinary authority is established by the fact that it admitted Muenster to practice law in this jurisdiction, the fact that he practiced law in this jurisdiction from 1975 until he declared his "exit" and "secession" after his unsuccessful defense at the disciplinary hearing, and the fact that he converted client funds and committed other professional misconduct while he was admitted to practice and actively practicing in this jurisdiction. There is no cause for the Court to issue an advisory opinion concerning Muenster's irrelevant arguments about licensing fees or the structure of the WSBA. See, e.g., *Obert v. Env'tl. Research & Dev. Corp.*, 112 Wn.2d 323, 335, 771 P.2d 340, 347 (1989) (court does not give advisory opinions).

## V. CONCLUSION

Muenster's claim to be beyond this Court's disciplinary authority is contrary to the Court's plenary power over lawyer discipline, contrary to the language and structure of the ELC, contrary to the purposes of lawyer discipline, and contrary to the prior decisions of this court and every other court that has considered the issue. According to the hearing officer's unchallenged findings of fact and conclusions of law, Muenster converted over \$40,000 of his client's funds and committed other serious ethical violations, as well. Under the *ABA Standards* and this Court's prior decisions, the only appropriate sanction is disbarment. There is no basis in law or fact for this Court to conclude that the Disciplinary Board erred by not finding that *sua sponte* review was required to prevent substantial injustice or to correct a clear error. Therefore, the Court should (1) affirm the Board's order, (2) disbar Muenster, (3) order that he pay costs and expenses as set forth in the Chair's order, and (4) order that he pay restitution as set forth in the hearing officer's decision unanimously adopted by the Board.

RESPECTFULLY SUBMITTED this 24<sup>th</sup> day of October, 2019.

OFFICE OF DISCIPLINARY COUNSEL

A handwritten signature in black ink, appearing to read "Scott G. Busby". The signature is written in a cursive style with a horizontal line extending from the end of the name.

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Scott G. Busby, Bar No. 17522  
Senior Disciplinary Counsel

**IN THE SUPREME COURT OF THE STATE OF WASHINGTON**

In re

John Roling Muenster,  
  
Lawyer (Bar No. 6237)

Supreme Court No. 201,872-6

DECLARATION OF  
SERVICE BY MAIL

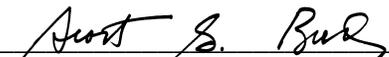
The undersigned Senior Disciplinary Counsel of the Office of Disciplinary Counsel (ODC) of the Washington State Bar Association declares that he caused a copy of the Answering Brief of the Office of Disciplinary Counsel to be mailed by regular first class mail with postage prepaid on October 24, 2019 to:

John Roling Muenster  
P.O. Box 30108  
Seattle, WA 98113

Dated this 24<sup>th</sup> day of October, 2019.

The undersigned declares under penalty of perjury under the laws of the state of Washington that the foregoing declaration is true and correct.

10/24/2019 Seattle, WA  
Date and Place

  
\_\_\_\_\_  
Scott G. Busby, Bar No. 17522  
Senior Disciplinary Counsel  
1325 4th Avenue – Suite 600  
Seattle, WA 98101-2539  
(206) 733-5998

# WASHINGTON STATE BAR ASSOCIATION

October 24, 2019 - 11:02 AM

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