FILED

APR 13 2012

DISCIPLINARY BOARD

BEFORE THE
DISCIPLINARY BOARD
OF THE
WASHINGTON STATE BAR ASSOCATION

In re

THOMAS F. MCGRATH, JR.,

Lawyer (Bar No. 1313).

Proceeding No. 10#00055

AMENDED 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 the hearing on October 10 - 12, 2011 and November 8 – 16, 2011. Respondent appeared at the hearing and was represented by Kurt Bulmer. Disciplinary Counsel Kathleen A. T. Dassel appeared for the Washington State Bar Association (the Association).

FORMAL COMPLAINT FILED BY DISCIPLINARY COUNSEL

The Amended Formal Complaint filed by Disciplinary Counsel charged Thomas F. McGrath Jr. with the following counts of misconduct:

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Count I – By drafting, filing, making, and presenting false claims and accounts and/or making false statements about Melinda Maxwell's and CWC's assets, property, and bankruptcy estates to the court, trustee and/or creditors, by receiving, transferring, secreting, and concealing debtors' property from the court, trustee and/or creditors, and/or by disobeying his obligations as an attorney under the bankruptcy rules, Respondent violated RPC 8.4(c) (Conduct Involving Dishonesty), RPC 8.4(d) (Conduct Prejudicial to the Administration of Justice), RPC 4.1 (Truthfulness in Statements to Others), and/or RPC 3.3(a) (Candor Toward the Tribunal).

Count 2 – By intentionally making and using false statements, accounts, and claims against Maxwell's and CWC's debtor estates, and by fraudulently receiving, transferring, and/or concealing property or assets belonging to debtors' estates, and/or by conspiring with Melinda Maxwell and/or unknown others to do so in order to defraud the bankruptcy court, the trustee and/or creditors, Respondent violated RPC 8.4(b) (Criminal Conduct) through violation of 18 U.S.C. §152, subsections (1) through (7) (Concealment of Assets, False Oaths and Claims), 18 U.S.C. §157 (Bankruptcy Fraud), and/or 18 U.S.C. §371 (Conspiracy) and by committing such felonies, and RPC 8.4(d).

Count 3 – By intentionally commingling lawyer funds and funds belonging to his marital community, Maxwell, and/or CWC, with client funds, Respondent violated RPC 1.15(A)(h)(1) and RPC 8.4(d).

Count 4 – By using his trust account to fraudulently conceal funds belonging to his marital community, Maxwell, and/or CWC, Respondent violated RPC 8.4(c).

Count 5 – By falling to maintain complete and/or accurate trust account records, Respondent violated RPC 1.15(A)(h)(2), RPC 1.15B(a)(1), RPC 1.15B(a)(2), and RPC 1.15B(a)(8).

Count 6 – By failing to reconcile his check register balance to his client ledgers, Respondent violated RPC 1.15A(h(6).

Count 7 – By withdrawing funds or allowing funds to be withdrawn from his trust account by writing a check made payable to "cash," Respondent violated RPC 1.15(A)(h)(5).

Count 8 – By allowing a non-lawyer to issue and/or sign checks from his trust account, Respondent violated RPC 1.15A(h)(9).

Count 9 – By communicating or attempting to communicate ex parte on one or more occasions with Bankruptcy Court Judge Karen Overstreet without authorization to do so by law or court order, Respondent violated RPC 3.5(b) (Impartiality and Decorum of the Tribunal), RPC 8.4(a) (Prohibiting Violation or Attempted Violation of the RPC), and RPC 8.4(d).

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

FINDINGS OF FACT REGARDING COUNTS I AND 2

1. Respondent was admitted to the practice of law in the State of Washington on March 6, 1970. Respondent primarily represents clients in debtor bankruptcy and creditor collection through his firm, The McGrath Corporation.

2. Respondent is the sole owner of a mortgage brokerage company, The Wakefield Group, LLC, dba Olympic Mortgage Lending Corporation (Wakefield Group).

3. Respondent and his wife, Melinda Maxwell (Maxwell), are the sole owners of M&T Enterprises, LLC (M&T), which was formed to obtain loans for the purchase of Stevens and Bayliner boats.

4. Beginning in 2005, Respondent represented Maxwell and her business, Chiropractic Wellness Centers (CWC), in a civil suit against a former CWC employee Dr. Katherine Ellison (Ellison). Attorney John Peick (Peick) was Respondent's co-counsel.

5. During all material times, Respondent served as corporate secretary, registered agent, and attorney for CWC, which operated two chiropractic clinics.

6. In October 2007, CWC's suit was dismissed on summary judgment, and Ellison's counterclaims against CWC, Maxwell, and Maxwell and Respondent's marital community proceeded to trial.

7. To avoid Ellison's potential judgment, Respondent began encumbering and disposing of Maxwell's, CWC's, and Maxwell and Respondent's marital assets.

8. In June 2008, M&T sold the Bayliner boat. Respondent deposited the sale proceeds in his trust account, using them to pay marital debt and Maxwell's personal debt, and then redirected the remainder of the proceeds to his office operating account. TR 808, 821, 826, 827 1730 31, 1182 1187, 1801 85; 1202 03, EXS 349, 367, 369, 373, 6007.

9. At a 2010 deposition, Respondent testified that the Bayliner sale proceeds were community property. At the disciplinary hearing, Respondent testified that the proceeds of the sale of the Bayliner boat were not community property. That hearing testimony was not credible. EX 6007, pp. 111 1 12; TR 1730 32.

10. On July 14, 2008, a jury awarded Ellison over $500,000 against Maxwell, CWC, and Maxwell and Respondent's marital community.

Promissory Notes and Deeds of Trust

11. On July 15, 2008, Respondent prepared, and Maxwell executed, three promissory notes (notes) totaling $225,000 in favor of Respondent and the McGrath Corporation. See EXS 600, 602 605. Respondent secured the notes by recording a deed of trust against Maxwell's condo and a UCC Financing Statement against CWC's personal property, including its accounts and receivables. EXS 601 605.

12. The notes prepared by Respondent falsely claim that Maxwell and CWC owed Respondent money for his legal services in the Ellison suit.

13. The notes and securing documents were designed to mislead and discourage Ellison and other creditors from making claims against Maxwell's and CWC's property. TR765 767, 806 07.

14. During all material times, Respondent and Maxwell knew that she and CWC owed no money to Respondent for legal services, and that Maxwell and CWC were not otherwise indebted to him. Respondent's testimony at the hearing that Maxwell and CWC were indebted to him for his legal fees was not credible.

15. In October 2007, Respondent had e-mailed Maxwell that she owed him no money, that he had freely contributed his legal services in the Ellison suit, and that he would not charge Maxwell and CWC for legal services he provided and costs he paid on their behalf. EX 6010; TR 117 18, 1318 22.

16. Respondent prepared false legal billing statements in September 2009, claiming that he had performed legal services between 2005 and 2009. Although the statements were all prepared in September 2009, Respondent dated them between 2005 and 2009. Respondent offered the false statements to creditors and trustees as proof that he had provided legal services.

17. The 2009 billing statements contained time entries that were materially inconsistent with Respondent's 2006 Ellison Federal fee declaration. EXS 345, 349, 702, 3000; TR 687 692. Although Respondent's billing statements were not completely consistent with Peick's billing statements, those inconsistencies were not material.

18. Respondent's testimony that he prepared the invoices beginning in 2005, and that they represent debt supporting the promissory notes, was not credible. TR 1289-1301.

19. Attorney Sarah Atwood (Atwood) testified at the hearing, and swore in her September 2009 declaration filed with the Bankruptcy Court, that she observed Respondent's billing statements being prepared in September 2009 at Respondent's accountant's office. EX 171; TR 194 196, 256-260. Respondent's accountant, Catherine Silva, denied in her hearing testimony having prepared the billing statements. There is insufficient evidence to determine that the billing statements were prepared by Ms. Silva.

20. On July 15, 2008, Respondent prepared, and Maxwell executed, a fourth promissory note for $185,500 in favor of "Olympic Mortgage Lending Corporation" (Olympic Mortgage). EX 606. Respondent secured the note by recording a second Deed of Trust further encumbering Maxwell's condo. EX 607.

21. The $185,500 note falsely claims that Olympic Mortgage loaned Maxwell money. There was no debt incurred by Maxwell underlying Olympic Mortgage's note. TR 1772.

22. During all material times, Respondent and Maxwell knew Olympic Mortgage did not loan money to Maxwell, and that she was not indebted to it. TR 1388.

23. The Olympic Mortgage note and deed of trust were deceptive and designed to mislead and discourage Ellison and other creditors from collecting debt owed to them by Maxwell and CWC. TR806-07.

24. Olympic Mortgage Lending Corporation is not a legal entity itself but rather a "d/b/a" of Respondent's corporation legally known as The Wakefield Group LLC d/b/a Olympic Mortgage Lending Corporation. The business address of the Wakefield Group is Respondent's business address.

25. Respondent intended to conceal the falsity of Olympic Mortgage's claim and to hinder, deceive and discourage Ellison and other creditors in their investigation of Maxwell's financial affairs when he identified "Olympic Mortgage Lending Corporation" as the note's beneficiary and used Terrell McGrath's (his ex-wife) residential address as its business address. EX 100.

26. Respondent's testimony, that the $185,500 note represented actual debt, or that it was a legitimate business practice designed to pre-secure funding of a loan by a future lender, was not credible.

27. During all material times, Respondent knew that the $185,500 note would not be funded by another lender because Maxwell was insolvent. TR 1680, 1692.

28. Respondent made no attempt to finance the loan. He did not contact a lender, or market or broker the note. EX 714.

29. On July 18, 2008, Respondent again encumbered Maxwell's condo by preparing and recording another Deed of Trust in favor of John Peick for $50,000 for legal fees Maxwell and CWC owed to Peick. EX 608A.

30. Maxwell paid all recording fees on every deed of trust. After recording, each deed of trust directed that it be returned to "debtor" Maxwell, not to the alleged beneficiary. EX 608.

Sale of CWC At Capitol Hill

31. On October 17, 2008, Maxwell sold the CWC Capitol Hill clinic, excluding personal property, to Dr. Calvin Mulanax for $50,000. Respondent acted as escrow agent for the transaction. EX 924, Sub-section S.

32. Dr. Mulanax executed two promissory notes in favor of Maxwell for $5,000 and $45,000. Maxwell then assigned the $5,000 note to a business broker for his commission, and the $45,000 note to Peick for legal fees.

Ellison Judgment

33. On October 30, 2008, the King County Superior Court entered final judgment for Ellison nunc pro tunc to July 14, 2008. EX 705; TR 74,1554.

34. In November 2008, Respondent wrote Ellison's counsel, Dan'l Bridges, advising him that any attempt by Ellison to collect the judgment would result in Respondent filing a bankruptcy petition. In February 2009, Ellison hired Atwood to assist in collecting the judgment. TR231, 1555.

35. On June 30, 2009, Atwood garnished the bank accounts of Maxwell, CWC, M&T, The Wakefield Group, The McGrath Corporation, and Respondent. Atwood did not garnish Respondent's trust account because it is a fiduciary account not subject to garnishment. EX 709; TR 232, 937 939, 1593.

Bankruptcy Cases

36. To stay the garnishments, Respondent prepared Maxwell's Chapter 7 bankruptcy and filed it on July 21, 2009. Respondent prepared CWC's Chapter 11 bankruptcy and filed it on July 23, 2009. EXS 100, 208, 710,711 713.

37. On August 20, 2009, the bankruptcy court required Respondent to withdraw as bankruptcy counsel. Respondent, as a multi-level bankruptcy "insider," had substantial conflicts of interest because he was Maxwell's spouse, CWC's registered agent, attorney and secretary; and a purported creditor of the bankruptcy estates. TR 768 , 910, 911, 914.

38. The bankruptcy petitions and schedules (filings) Respondent prepared were false, withheld material information, and concealed assets with the intent to hinder, delay or defraud the court, trustees and creditors.

39. Respondent's actions violated 18 U.S.C. §152, subsections (1) through (7). TR 751, 911 12, 1381.

40. In 2009, the bankruptcy court sanctioned Respondent and Maxwell for bad faith, for withholding discovery, and for obstruction of the bankruptcy process. In 2010, the court denied Maxwell's bankruptcy discharge.

41. At his 2010 deposition, Respondent testified that he prepared and filed every document in the petitions and schedules. Respondent's testimony at the disciplinary hearing that Maxwell prepared the bankruptcy petitions and schedules, that the false information and omissions in the documents were simple mistakes made by Maxwell, and that Respondent did not review the filings before Maxwell filed them, was not credible. EX 6009 p. 34; TR 1214-1215, 1637, 1639, 1649-50, 1772-73.

42. The filings failed to identify Respondent as a multi-level bankruptcy "insider" to the debtors. They did not identify Respondent as Maxwell's spouse. They did not provide his income. They substantially reduced and falsified Maxwell's income to avoid re-designation of her bankruptcy to a Chapter 13 bankruptcy case. These actions violated 18 U.S.C. § 152.

43. On July 21, July 23, July 27, and August 24, 2009, Respondent prepared and filed original and amended filings that were incomplete and that failed to identify the concealed and fraudulently transferred assets. A fraudulent transfer is either a transfer made for less than fair consideration less than two years prior to the date of the debtor's bankruptcy filing or a transfer that was made by the debtor with actual intent to hinder, delay or defraud a creditor within two years prior to the date of filing. TR 754. These actions violated 18 U.S.C. § 152.

44. In the filings and Statement of Financial Affairs (SOFA), Respondent affirmatively misled the court, trustees, and creditors by claiming that no estate assets had been transferred prior to the bankruptcies. These actions violated 18 U.S.C. § 152.

45. In the filings and SOFA, Respondent failed to identify the November 2008 sale and transfer of CWC's Capitol Hill Clinic, and Maxwell's transfer of the sale proceeds through her assignment of the sale proceeds to pay her debts. EX 100, p.36; TR 768-69. These actions violated 18 U.S.C. § 152.

46. In the filings and SOFA, Respondent failed to identify Maxwell's 2008 sale and transfer of her jewelry valued at $30,000, and the fraudulent transfer and concealment of the assets. These actions violated 18 U.S.C. § 152.

47. In the filings and SOFA, Respondent failed to identify M&T' s June 2008 sale and fraudulent transfer of the community's Bayliner boat for a net profit of $5641.76. By so concealing the asset, Respondent violated 18 U.S.C. § 152.

48. Respondent and Maxwell, as co-insureds, filed a claim with The Hartford Insurance Company (Hartford) for damages to Maxwell's condo.

49. In the filings and SOFA, Respondent failed to identify his and Maxwell's June and July 2009 pre-bankruptcy fraudulent transfer and concealment of $7,908 of Hartford insurance policy proceeds, a bankruptcy estate asset, in Respondent's trust account. EXS 1002, 1003, 1005, 1006, 1007. These actions violated 18 U.S.C. § 152.

50. In the filings and SOFA, Respondent failed to identify pre bankruptcy fraudulent transfers and concealment of $61,253.86 of Maxwell's personal funds, a bankruptcy estate asset,

in Respondent's trust account between July 23, 2007 and July 21, 2009. These actions violated 18 U.S.C. § 152.

51. In the filings and SOFA, Respondent failed to identify pre-bankruptcy fraudulent transfers between December 17, 2008 and July 21, 2009 and fraudulent concealment of $14,388.69 of CWC's funds, a bankruptcy estate asset, in Respondent's trust account. These actions violated 18 U.S.C. § 152.

Post-Petition Transfers

52. Respondent affirmatively misled the court, trustees and creditors by falsely claiming in the filings and SOFA that no debtor assets had been transferred after the filing of the bankruptcies. Each post-petition transfer or concealment constituted a separate violation under the bankruptcy code.

53. In the filings and SOFA, Respondent intentionally failed to identify post-petition fraudulent transfers and concealment of CWC's assets between July 24, 2009 and August 20, 2009 in Respondent's trust account. The assets were transferred to avoid creditor garnishment. These actions violated 18 U.S.C. § 152.

54. Respondent's testimony, that it was necessary to deposit CWC's funds in his trust account to pay its employees, was not credible. Maxwell opened a new CWC Homestreet Bank checking account on July 17, 2009, where CWC funds should have been deposited and checks issued to pay CWC's employees. Respondent intentionally failed to identify the Homestreet Bank account on the filings and SOFA.

55. In the filings and SOFA, Respondent intentionally failed to identify his and Maxwell's August 18, 2009 post-petition fraudulent transfer and concealment of $18,625.99 of Hartford insurance policy proceeds, an estate asset, in Respondent's trust account. On September 9, 2009, Respondent transferred $15,000 of the $18,625.99 by writing a check from his trust account to Serv Pro to pay Maxwell's debt for cleaning and repairs to her condo. Respondent concealed and failed to report the transfer of these funds to the court, the trustees, and the creditors. The trustee was required to institute litigation against Serv Pro for the return of the asset. EXS 1011, 1027, 1029, 1030; TR 433. These actions violated 18 U.S.C. § 152.

56. In the filings and SOFA, Respondent intentionally failed to disclose his August 29, 2009 post-petition transfer and concealment of $53,982.99 of Hartford insurance policy proceeds, an estate asset, in Respondent's trust account. On September 9, 2009, Respondent transferred $50,000 of the $53,982.99 by writing a check from his trust account to McBride Construction as down payment for Maxwell's debt for repairs to the condo. The trustee was required to negotiate with McBride for the return of the asset. EXS, 437, 1014, 1027, 1029, 1030. These actions violated 18 U.S.C. § 152.

57. In September 2009 when the trustee discovered the existence of the Hartford asset and demanded its return, Respondent refused. The trustee was required to file a motion for the return of the asset, which Respondent resisted. The court found that the Hartford funds were an asset of the estate and required its return.

Respondent's False Claims and Accounts Against the Estates

58. On July 21, 2009, Respondent filed false claims and accounts in Maxwell's bankruptcy filings to hinder, delay or defraud the court, the trustees and the creditors.

59. On Schedule D of the filings, Respondent falsely claimed that Respondent's 2008 promissory notes and deeds of trust represented secured indebtedness encumbering Maxwell's condo and taking priority over other creditors. These actions violated 18 U.S.C. § 152.

60. On Schedule D of the filings, Respondent falsely claimed that Olympic Mortgage's 2008 promissory note and deed of trust represented secured indebtedness encumbering Maxwell's condo and taking priority over other creditors. These actions violated 18 U.S.C. § 152.

61. On or about September 20, 2009, the trustee filed a complaint to set aside Olympic Mortgage's deed of trust on the condo.

62. On September 22, 2009, after receiving notice of the complaint, Respondent executed and filed a document appointing his ex-wife as successor trustee for Olympic Mortgage.

63. On September 23, 2009, Respondent's ex-wife, at Respondent's behest, reconveyed the deed of trust to Maxwell, fully forgiving all debt alleged under the Olympic Mortgage deed of trust and removing the encumbrance from her condo.

64. On Schedule D of the filings, Respondent falsely claimed that the community-owned Stevens boat was the sole property of Maxwell's "husband," identified only by the letter

"H" on the schedule. This was an intentional attempt by Respondent to remove the Stevens boat from creditor claims. These actions constitute a violation 18 U.S.C. § 152.

False Oath and False Swearing

65. On October 21, 2009, Respondent signed a bankruptcy Proof of Claim under penalty of perjury for $61,807.05 plus interest as a creditor against Maxwell's estate. The Proof of Claim was based on his 2008 promissory note and deed of trust falsely alleging Maxwell's indebtedness for legal services in Ellison case. EX 6010. These actions violated 18 U.S.C. § 152.

FACTS REGARDING COUNTS 3 THROUGH 8

66. At all times from 2007 through mid 2010, Respondent maintained an IOLTA trust account at Bank of America ending in 7218.

Commingling of Personal Funds

67. During all material times between January 2007 through November 2009, Respondent used his trust account as a personal bank account. He deposited or allowed others to deposit his personal funds and those of Maxwell, CWC, M&T, and his marital community to his trust account to conceal the funds.

68. Respondent paid personal and third-party debt from the trust account. This included Maxwell's condo mortgage, M&T's boat mortgages, moorage and insurance fees for the boats, refurbishing costs for Maxwell's condo, private club dues, CWC/Maxwell's storage rental fees, and CWC/Maxwell's employees' wages.

69. Such continuous commingling of client and personal funds in Respondent's trust account jeopardized client funds and exposed them to an invasion of the trust account by a personal creditor satisfying a judgment.

70. Respondent's testimony that he was justified in depositing and commingling Maxwell's and CWC's personal funds in his trust account, when such deposits were unconnected to his legal representation, was not credible. Respondent was entitled to deposit only client funds that were directly connected with a specific and actual representation by him. Respondent admitted at hearing that, after he deposited Maxwell's and CWC's personal funds, he wrote trust account checks to pay his and Maxwell's personal debts unconnected to any specific legal representation by him.

Deposit of Personal Funds to Trust Account

71. In 2007, Respondent concealed his personal funds by depositing them to his trust account as follows: $100 (June 18, 2007), $118 (November 27, 2007), $17,000 (November 30, 2007) and $299 (December 5, 2007). EXS 319, 321, 322, 323. By so doing, Respondent commingled his own funds with client funds in the trust account.

72. In 2007, Respondent and Maxwell concealed Maxwell's personal funds by depositing them to Respondent's trust account as follows: $16,200 (July 23, 2007) and $20, 000 (December 26,2007). EXS 320, 325.

73. By the specific actions set forth in the preceding paragraph, Respondent commingled Maxwell's personal funds with client funds in the trust account.

74. In 2008, Respondent concealed M&T's community funds, representing proceeds from the sale of Respondent and Maxwell's Bayliner boat, by depositing them to Respondent's trust account as follows: $5,641.76 (June 19, 2008). EX 349.

75. By the specific action set forth in the preceding paragraph, Respondent commingled the community funds of M&T with client funds in the trust account.

76. In 2008, Respondent and Maxwell concealed Maxwell's personal funds by depositing them to Respondent's trust account as follows: $1177 (April 23, 2008) and $60 (December 19, 2008). EXS 348, 352, 353.

77. By the specific actions set forth in the preceding paragraph, Respondent commingled Maxwell's personal funds with client funds in the trust account.

78. In 2008, Respondent and Maxwell concealed CWC receivables and money by depositing them to Respondent's trust account as follows: $1,537.76 (December 17, 2008) and $263.58 (December 19, 2008). EXS 351, 354 357.

79. By the specific actions set forth in the preceding paragraph, Respondent commingled CWC's receivables and money with client funds in the trust account.

80. In 2009, Respondent and Maxwell concealed marital funds representing proceeds from claims submitted by them to The Hartford Insurance Company by depositing them to Respondent's trust account as follows: $904 (April 9, 2009), $7,000 (July 13, 2009), $18,625.99 (August 18, 2009), $53, 982.99 (August 29, 2009). EXS 397A, 407, 433, 437.

81. By the specific action set forth in the preceding paragraph, Respondent commingled his and Maxwell's personal marital funds with client funds in the trust account.

82. In 2009, Respondent and Maxwell concealed CWC funds by depositing them to Respondent's trust account as follows: $67.79 (February 2, 2009), $933.08 (March 3, 2009), $617.89 (June 6, 2009), $3,355.82 (July 7, 2009), $899.24 (July 10, 2009), $1,739.92 (July 13, 2009), $2,397.02 (July 15, 2009) $1,819.30 (July 17, 2009), $757.09 (July 20, 2009), $1,562.23 (July 27, 2009), $240.81 (July 128, 2009), $1,228.96 (July 31, 2009), $1120.27 (August 5, 2009), $132.50 (August 18, 2009), EXS 386 - 389, 393, 397B, 397C, 401, 402, 424, 427, 429,433.

83. By the specific actions set forth in the preceding paragraph, Respondent commingled CWC's personal receivables and funds with client funds in the trust account.

84. In 2009, Respondent and Maxwell fraudulently concealed Maxwell's personal funds by depositing them to his trust account as follows: $15,000 (February 25, 2009), $121.44 (March 3, 2009), $79.50 (April 9, 2009), $8615.92 (July 13, 2009). EXS 390, 392, 396, 397, 397A, 406.

85. By the specific actions set forth in the preceding paragraph, Respondent commingled Maxwell's personal funds with client funds in the trust account.

86. In 2009, Respondent concealed his personal funds by depositing them to his trust account as follows: $1000 (transfer from Respondent's operating account to his trust account) (June 24, 2009), $3900 (September 14, 2009), $3418.47 (October 20, 2009), $3418.37 (November 6, 2009). EXH 398,439, 440,441.

87. By the specific actions set forth in the preceding paragraph, Respondent commingled his own funds with client funds in the trust account.

88. Respondent testified at hearing that as part of his practice he collected debt for creditor clients. He deposited debtor payments for clients in his trust account. At the end of each quarter, he would disburse two thirds of the money to the creditor clients. He would leave his remaining one third fee in the trust account. TR 1477 78.

89. By the specific actions set forth in the preceding paragraph, Respondent commingled his own funds with client funds in the trust account.

Respondent's Trust Account Records

90. Between January 2007 and July 2009, Respondent did not maintain complete and accurate trust account records.

91. Between January 2007 and July 2009, Respondent did not maintain any client ledgers for his trust account.

92. Between January 2007 and July 2009, because be failed to maintain client ledgers, client transactions were not recorded.

93. Between January 2007 and July 2009, Respondent did not maintain a complete and accurate check register and did not keep a running balance or accurately state the client's name, the payor or payee of the transaction, the date of the transaction, and/or the amount of the transaction. His records were not adequate to identify and track client funds, especially in light of personal deposits to the trust account.

94. Between January 2007 and July 2009, Respondent's check register was not accurate in that the entries for one or more transactions were not recorded and the running balances were missing or were not accurate.

95. Respondent failed to reconcile his check register balance and bank statements to one another. Although Respondent testified that he would, from time to time, call the bank to determine the balance, such a practice could not identify whether or not there were outstanding checks that would alter the balance. Moreover, such a practice was of little use in guarding against the disbursement of funds of one client for the benefit of another or the detection of the resulting shortages or increases in the account, as identified in the balance error notices Respondent received from the bank.

Other Trust Account Violations

96. On April 9, 2009, Respondent allowed funds to be withdrawn from his trust account by writing a check on the account made payable to "cash." EX 460; TR 1262, 1264.

97. Between January 2007 and November 2009, Respondent gave Maxwell, who is not a lawyer or authorized signatory on Respondent's trust account, unlimited control of the account.

98. While Respondent was aware that Maxwell was using his trust account for personal transactions, he gave her unsupervised and unrestricted access to the account. He knew that she concealed her money and CWC's money in the account, and signed Respondent's name or her own name to checks she disbursed from the account to pay personal debt. These actions jeopardized Respondent's client funds in the trust account and risked subjecting the funds to attachment by Maxwell's creditors.

Ex Parte Contact

99. On September 15, 2009, Respondent sent a letter and compact disc (CD) by United States mail directly to bankruptcy Judge Karen A. Overstreet. The letter stated: "I am enclosing the original CD of the Maxwell 341 hearing on 8/25/09. 1 think it is worth listening to if you have the time." Respondent did not send a copy of the letter to other parties in the case or file it with the clerk.

100. Ex parte contact is always prohibited except as explicitly permitted. There was no law or court order authorizing Respondent to directly contact or attempt to contact Judge Overstreet.

101. Respondent's letter and CD were returned to him by the judge's clerk who advised him that direct ex parte contact was improper. She instructed him that he could only contact the judge during an official court hearing where all parties were present or by filing a pleading with the clerk of the court.

102. After receiving the clerk's letter, Respondent on or about September 24, 2009, communicated a second time with Judge Overstreet by electronically sending her a letter from Respondent and Maxwell's accountant, whom Respondent also represented as a client, that discussed the case. Although he copied all parties on the electronic letter, Respondent should not have directly contacted the judge and sent her materials. However, this communication was not intended as an *ex parte* communication.

103. By the specific actions set forth in the preceding paragraph, Respondent's September 15, 2009 letter constituted an improper *ex parte* contact.

ADDITIONAL FACTS REGARDING SANCTION

104. **Counts 1 and 2: Bankruptcy Statutory Violations and Count 4: Concealment of Funds Deposited in His Trust Account.** Respondent acted intentionally when he, in concert with Maxwell, transferred and concealed bankruptcy assets, filed false claims against the estates, made a false swearing, and when he prepared and filed false and misleading bankruptcy filings. The court, trustees and creditors suffered actual serious injury. They were required to expend time and large sums of money to determine estate assets. There was substantial litigation with Respondent and Maxwell. Respondent's actions caused actual injury by reducing and delaying receipt of assets. Respondent was obstructive and acted in bad faith during the bankruptcy discovery process causing actual injury to the system, the parties, and to the court which was required to expend its resources.

105. **Counts 3: Commingling.** Respondent knew that he was handling client funds improperly and that he was dishonestly sheltering personal funds when he commingled funds belonging to himself, Maxwell, CWC, and their marital community, with client funds. There is always potential injury to client funds when a lawyer commingles funds. A lawyer cannot use a trust account as a personal bank account because it endangers all client funds entrusted to the lawyer. As the Court noted in In re Disciplinary Proceeding Against MeKean, 148 Wn.2d 849, 864, 64 P.3d 1226 (2003), "Lawyers sometimes forget that the dangers of commingling are not merely that the lawyer will squander money 'borrowed' from a trust account and not be able to restore it, but that the commingled funds might be subject to attachment by a lawyer's creditors, thus preempting the lawyer's ability to do so." In In re Disciplinary Proceeding Against Trejo,

163 Wn.2d 701, 725 726, 185 P.3d 1160 (2008), the court explained that the prohibition against commingling also "prevents lawyers from shielding personal assets from their own creditors by hiding funds in client trust accounts ....Thus, there is ample evidence that continued commingling of client and personal funds in the trust account could result in a personal creditor satisfying a judgment against Trejo from the client trust account." Respondent's conduct caused potentially serious injury.

106. **Counts 5 and 6: Inadequate Trust Account Records.** Respondent knew or should have known that he was dealing improperly with client funds by inadequate trust account record keeping. Respondent's conduct caused potential serious injury.

107. **Count 7: Withdrawing Trust Account with Check Payable to "Cash."** Respondent knew or should have known that he was dealing improperly with trust account funds by making a check payable to "Cash" instead of a named payee. Respondent's conduct caused potential serious injury.

108. **Count 8: Unauthorized Access to Trust Account.** Respondent knew or should have known that he should not have relinquished control of his trust account to Maxwell, an unauthorized signatory who was not a lawyer. He allowed her unrestricted access to the account to make deposits and to draft and sign Respondent's name or her own name to trust account checks. Respondent's conduct caused potentially serious injury.

109. **Count 9: Improper Ex Parte Contact.** Respondent knew or should have known that it was improper for him to engage in an improper ex parte contact with Judge Overstreet, and should not have sent a second letter to her after being advised that his first

contact was improper. There was no law or order in this case permitting him to engage in such conduct. There was potential injury to the bankruptcy cases because such contact creates the appearance of unfairness. If the materials had reached the judge, she may have been required to recuse herself from the case causing further delay and additional expense to the court, trustees and creditors. Respondent's conduct caused potentially serious injury.

CONCLUSIONS OF LAW

Violations Analysis

110. All Findings of Fact above that are by nature Conclusions of Law are incorporated herein.

111. In these proceedings, the WSBA has the burden of proving each count by a clear preponderance of the evidence.

112. The Association proved by a clear preponderance of the evidence the charges set forth in Counts 1 and 2 of the Amended Complaint. Between 2007 and November 2009, by drafting and presenting false claims and accounts and making false statements and oaths, by receiving, transferring and concealing Maxwell's and CWC's bankruptcy estate assets, Respondent violated RPC 3.3(a), RPC 4.1, RPC 8.4(b), and RPC 8.4(c). By engaging in such conduct and by disobeying his obligations as an attorney under the bankruptcy code, rules, and statutes, Respondent violated RPC 8.4(d). Counts 1 and 2 are proven by a clear preponderance of the evidence.

113. Between January 2007 and November 2009, by commingling non-client funds with client funds in his trust account, Respondent violated RPC 1.15(A)(h)(l) and RPC 8.4(d). Count 3 is proven by a clear preponderance of the evidence.

114. Between January 2007 and November 2009, by concealing funds belonging to himself, his marital community, Maxwell, and CWC in his trust account, Respondent violated RPC 8.4(c) as alleged in Count 4. Count 4 is proven by a clear preponderance of the evidence.

115. Between January 2007 and November 2009, by failing to keep adequate and accurate books and records regarding his trust account, Respondent violated RPC 1.15(A)(h)(2), RPC 1.15A(h(6), RPC 1.15B(a)(1), RPC 1.15B(a)(2), and/or RPC 1.15B(a)(8). Counts 5 and 6 are proven by a clear preponderance of the evidence.

116. On April 9, 2009, by allowing funds to be withdrawn from his trust account by writing a check on his account made payable to "cash," instead of to a named payee, Respondent violated RPC 1.15(A)(h)(5). Count 7 is proven by a clear preponderance of the evidence.

117. Between at least January 2007 and November 2009, by allowing or relinquishing control of his trust account to an unsupervised non-lawyer to deposit, issue and sign checks from his trust account, Respondent violated RPC 1.15A(h)(9). Count 8 is proven by a clear preponderance of the evidence.

118. On September 15, 2009, by communicating ex parte with Bankruptcy Court Judge Karen Overstreet without authorization to do so by law or court order, Respondent

violated RPC 3.5(b), RPC 8.4(a), and RPC 8.4(d). Count 9 is proven by a clear preponderance of the evidence.

Sanction Analysis

119. A presumptive sanction must be determined for each ethical violation. In re Anschell, 149 Wn.2d 484, 501, 69 P.2d 844 (2003). 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:

120. ABA Standards 5.11, as applied to violations of RPC 8.4(b) and RPC 8.4(c), and ABA Standards 6.11, as applied to violations of RPC 8.4(d), RPC 3.3, and RPC 4.1, are most applicable to Respondent's violations of RPC 8.4(c) (dishonesty), RPC 8.4(d) (prejudice to the administration of justice by violating clear practice norms), RPC 3.3 (candor to the tribunal), and RPC 4.1 (truthfulness to others) charged under Counts 1, 2, 3 and 4.

5.11 Disbarment is generally appropriate when:

(a) a lawyer engages in serious criminal conduct, a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft; or the sale, distribution or importation of controlled substances; or the intentional killing of another; or an attempt or conspiracy or solicitation of another to commit any of these offenses; or

(b) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

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

5.13 Reprimand is generally appropriate when a lawyer knowingly engages in any other conduct that involves dishonesty, fraud, deceit,

or misrepresentation and that adversely reflects on the lawyer's fitness to practice law.

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

6.11 **Disbarment is generally appropriate when a lawyer, with the intent to deceive the court, makes a false statement, submits a false document, or improperly withholds material information, and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding.**

6.12 Suspension is generally appropriate when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld, and takes no remedial action, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding.

6.13 Reprimand is generally appropriate when a lawyer is negligent either in determining whether statements or documents are false or in taking remedial action when material information is being withheld, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding.

6.14 Admonition is generally appropriate when a lawyer engages in an isolated instance of neglect in determining whether submitted statements or documents are false or in failing to disclose material information upon learning of its falsity, and causes little or no actual or potential injury to a party, or causes little or no adverse or potentially adverse effect on the legal proceeding.

121. Respondent was intentionally dishonest and hindered, obstructed, and misled the court, trustees and creditors before and during the bankruptcy process. He made substantial, dishonest misrepresentations about the bankruptcy and assets. Respondent was intentionally dishonest and deceitful in his false swearing under penalty of perjury and in using his trust account to conceal large amounts of non-lawyer personal funds and bankruptcy assets for multiple years. Respondent's deception, dishonesty, and misrepresentations violate clear

practice norms requiring lawyers to be truthful and candid during litigation. Such untruthfulness compromised the fairness of the judicial process, while increasing costs to the parties and the judicial system.

122. The presumptive sanction for Counts 1, 2, 3 and 4 is disbarment for each count under Standards 5.11 and 6.11.

123. ABA Standards 4.12 is most applicable to Respondent's violations of commingling and trust account abuse. ABA Standards 4.11-4.14 provides:

> 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.

124. Respondent knew that he was improperly commingling, knew that he did not maintain complete and accurate trust account records, knew that he withdrew trust account funds by writing a check payable to "cash," and knowingly permitted a non-lawyer to issue and sign checks from his trust account. These actions caused potential injury to all client funds in trust because it exposed them to Respondent and his wife's creditors. ABA Standards Section 4.12, calling for suspension, applies to Counts 5, 6, 7, and 8 of the Amended Complaint.

125. In In re McKean, 148 Wn.2d 849, 64 P.2d 1226 (2002), the Court held that suspension was the presumptive sanction for a lawyer who knowingly commingled his own funds with client funds. The Court held:

> The commentary accompanying ABA Standard 4.12 makes clear that suspension applies when a lawyer mishandles a client's money, even when no ultimate harm comes to the client. "Because lawyers who commingle client's funds with their own, subject the client's funds to the claims of creditors, commingling is a serious violation for which a period of suspension is appropriate even in cases when the client does not suffer *a* loss." ABA Standards 4.12 cmt.

Id. at 870.

126. The presumptive sanction for Counts 5, 6, 7, and 8 is suspension under Standards 4.12.

127. ABA Standards 6.33 is most applicable to Respondent's violation of RPC 3.5(b) prohibiting improper ex parte contact charged under Count 9. ABA Standards 6.31 - 6.33 provide:

> 6.31 Disbarment is generally appropriate when a lawyer:
>
> (a) intentionally tampers with a witness and causes serious or potentially serious injury to a party, or causes significant or potentially significant interference with the outcome of the legal proceeding; or
>
> (b) makes an ex parte communication with a judge or juror with intent to affect the outcome of the proceeding, and causes serious or potentially serious injury to a party, or causes significant or potentially significant interference with the outcome of the legal proceeding; or
>
> (c) improperly communicates with someone in the legal system other than a witness, judge, or juror with the intent to influence or affect the outcome of the proceeding, and causes significant or potentially significant interference with the outcome of the legal proceeding.
>
> 6.32 Suspension is generally appropriate when a lawyer engages in communication with an individual in the legal system when the lawyer knows that such communication is improper, and causes injury or

potential injury to a party or causes interference or potential interference with the outcome of the legal proceeding.

6.33 Reprimand is generally appropriate when a lawyer is negligent in determining whether it is proper to engage in communication with an individual in the legal system, and causes injury or potential injury to a party or interference or potential interference with the outcome of the legal proceeding.

6.34 Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence in improperly communicating with an individual in the legal system, and causes little or no actual or potential injury to a party, or causes little or no actual or potential interference with the outcome of the legal proceeding.

128. Respondent's *ex parte* violation should be sanctioned because he acted negligently when he engaged or attempted to engage in impermissible ex parte communication with the court. Respondent's letter to Judge Overstreet was unauthorized and was made without the knowledge of and outside the presence of opposing counsel. This conduct risked affecting the outcome of the proceeding and there was potential injury to the legal system, the court, the trustee and the creditors.

129. The presumptive sanction for Count 9 is a reprimand.

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

131. Based on the Findings of Fact and Conclusions of Law and application of the ABA Standards the appropriate presumptive sanction is disbarment.

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

Facts Regarding Aggravating and Mitigating Factors

133. Respondent was disbarred in 1982 by the Supreme Court following conviction for second degree assault with a deadly weapon. In re Disciplinary Proceeding Against McGrath, 98 Wn.2d 337, 655 P.2d 232 (1982). Respondent was reinstated in 1993.

134. With regard to Respondent's misrepresentations and deceptive conduct, as set forth above, he acted with both a dishonest and selfish motive.

135. With regard to his actions involving the transfer and concealment of estate property, his commingling and concealment of personal funds, his multi-year inadequate trust account record-keeping to conceal his dishonesty, and his ex parte communications, Respondent engaged in patterns of misconduct.

136. Respondent has committed multiple offenses.

137. Respondent has steadfastly refused to acknowledge the wrongful nature of his misconduct.

138. Respondent has insisted that he had a right to engage in such behavior, and he has blamed others for his dishonest and unethical behavior.

139. Respondent was admitted to practice in 1970 and has substantial experience in the practice of law.

140. I have considered the mitigating factors under Standard 9.32 of the ABA Standards and find that none apply. Based on the number and severity of aggravating factors with no mitigating factors, I recommend disbarment for each count.

Recommendation

141. Based on the ABA Standards and the applicable aggravating factors and no mitigating factors, the Hearing Officer recommends that Respondent Thomas F. McGrath Jr. be disbarred.

Dated this 12th day of April, 2012.

Scott M. Ellerby, Bar No. 16277
Hearing Officer

CERTIFICATE OF SERVICE

I certify that I caused a copy of the Amended FOF, COL & HO's Recommendation to be delivered to the Office of Disciplinary Counsel and to be mailed to Kurt Bulmer, Respondent/~~Respondent's Counsel~~ at 710 Belmont P.A. #3 Seattle, WA 98121, by ~~Certified~~/first class mail, postage prepaid on the 12th day of April, 2012.

~~Clerk/Counsel~~ to the Disciplinary Board