BEFORE THE
DISCIPLINARY BOARD
OF THE
WASHINGTON STATE BAR ASSOCIATION

In re **PAUL E. SIMMERLY**, Lawyer (Bar No. 10719).	Public No. 09#00016 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 4 through 8, 2010, October 20, 2010, and November 2, 2010. Respondent Paul E. Simmerly appeared at the hearing and was represented by lawyer Kurt M. Bulmer. Senior Disciplinary Counsel Christine Gray represented the Washington State Bar Association (the Association).

FORMAL COMPLAINT FILED BY DISCIPLINARY COUNSEL

The Second Amended Formal Complaint filed by Disciplinary Counsel charged Paul E. Simmerly with the following counts of misconduct:

Count 1 – On or about February 15, 2007, by taking $4,500 from his trust account without entitlement, Respondent violated current RPC 1.15A(c)(1).

Count 2 – On or about February 21, 2007, by taking $200 from his trust account without entitlement, Respondent violated current RPC 1.15A(c)(1).

Count 3 – Between January and August 2006, by failing to hold all client funds in his trust, Respondent violated former RPC 1.14(a).

Count 4 – Between September 2006 and March 2008, by failing to hold all client funds in his trust account, Respondent violated current RPC 1.15A(c)(1).

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Count 5 – In early 2006, by commingling non-client funds with client funds in his trust account, Respondent violated former RPC 1.14(a).

Count 6 – Between January and August 2006, by failing to keep adequate and/or accurate books and records regarding his trust account, Respondent violated former RPC 1.14(b)(3).

Count 7 – Between September 2006 and March 2008, by failing to keep adequate and/or accurate books and records regarding his trust account, Respondent violated current RPC 1.15A(h) and/or current RPC 1.15B(a).

Count 8 – For one or more months between September 2006 and March 2008, by failing to reconcile, on a timely basis, his check register balance to the bank statement balance and/or reconcile the check register balance to the combined total of all client ledger records, Respondent violated current RPC 1.15A(h)(6).

Count 9 – On one or more occasions between September 2006 and March 2008, by failing to identify, on his trust-account check register, the client matter for each disbursement and/or the check number for each disbursement, Respondent violated current RPC 1.15B(a)(1).

Count 10 – On one or more occasions between September 2006 and March 2008, by failing to identify, on his trust-account client ledgers, the purpose for which trust funds were received or disbursed, the date on which funds were disbursed, the client matter for each disbursement and/or the check number for each disbursement, Respondent violated current RPC 1.15B(a)(2).

Count 11 was withdrawn by the Association during the course of the hearing.

Count 12 - By failing to place all or part of Jaquez's October 2005 advance payment of $2,500 in his trust account, Respondent violated former RPC 1.14(a).

Count 13 - After receiving the $4,020 payment by ARAG and depositing it into his trust account, by failing to keep at least $2,500 of the ARAG payment in his trust account, Respondent violated former RPC 1.14(a).

Count 14 - Between November 2005 and August 2007, by failing to return to Jaquez the $2,500 overpayment on the November 2005 bill, Respondent violated former RPC 1.14(b)(4) and/or current RPC 1.15A(f).

Count 15 - In 2005, by failing to properly account to Jaquez regarding his receipt and/or disbursement of the $2,500 payment in October 2005, the $2,680 payment in November 2005 and/or the $4,020 payment in November 2005, Respondent violated former RPC 1.4 and/or former RPC 1.14(b)(1)&(3).

Count 16 - In one or more e-mails in October 2007, by misrepresenting to Jaquez the payments he had received on Jaquez's behalf, Respondent violated RPC 8.4(c).

Count 17 - By requesting from Jaquez at least $2,500 more in fees than he was entitled to receive and/or by suing Jaquez for over $10,000, Respondent violated current RPC 1.5(a).

Count 18 - By failing to place all or part of Dahl's February and/or May 2007 advance payments into his trust account, Respondent violated current RPC 1.15A(b), current RPC 1.15A(c), and/or current RPC 1.15A(h)(3).

Count 19 - By failing to properly account to Dahl regarding his receipt and disbursement of the client funds received in February 2007, Respondent violated current RPC 1.15A(e).

Count 20 - By failing to place any portion of Dahl's September 2007 payment into his trust account, Respondent violated current RPC 1.15A(c).

Count 21 - By filing a proof of claim in Dahl's bankruptcy case for an amount in excess of what she owed to him, Respondent violated current RPC 1.5(a), current RPC 3.3(a), and/or RPC 8.4(c).

Count 22 - By failing to place all or part of Johnson's July 2005 advance payment into his trust account, Respondent violated former RPC 1.14(a).

Count 23 - By failing to properly account to Johnson regarding his receipt and disbursement of the client funds received in July 2005, Respondent violated former RPC 1.14(b)(3).

Count 24 - By failing to promptly return Johnson's funds after the representation ended, Respondent violated former RPC 1.14(b)(4).

Count 25 - In 2007, by failing to account properly to Rushton regarding his receipt and/or disbursement of client funds, Respondent violated current RPC 1.15A(d)&(e).

Count 26 - By entering into a contingency fee agreement with Rushton without reducing that agreement to a writing signed by the client, stating the percentage of the contingent fee and

indicating whether expenses are to be deducted before or after the contingent fee is calculated, Respondent violated RPC 1.5(c).

Count 27 - By charging Rushton a fee that was more than the percentage contingency fee agreed upon or, in the alternative, by asserting a claim to a fee of $25,000 based on an hourly rate without providing Rushton with any billing or accounting of the dates and hours worked and tasks performed, Respondent violated RPC 1.5(a).

Count 28 - By failing to explain adequately the basis or rate of his fee for which Rushton would be responsible, Respondent violated RPC 1.5(b).

Count 29 - By converting client funds of Buerman and Evans, Respondent violated former RPC 1.14(a).

Count 30 - By converting client funds of Lea, Respondent violated former RPC 1.14(a).

Count 31 - By converting client funds of Larsen, Respondent violated RPC 1.15A(b), 1.15A(c), and/or RPC 1.15A(h)(3).

Count 32 - By failing to properly account to Larsen for an advance payment deposited to Respondent's trust account and then disbursed from his trust account, Respondent violated RPC 1.15A(e).

Count 33 - By converting client funds of Glaub, Respondent violated RPC 1.15A(b), 1.15A(c), and/or RPC 1.15A(h)(3).

Count 34 - By failing to properly account to Glaub for an advance payment deposited to Respondent's trust account and then disbursed from his trust account, Respondent violated RPC 1.15A(e).

Count 35 - By failing to provide prompt responses to one or more of ODC's requests regarding WSBA File No. 07-00804 and/or WSBA File No. 09-00629, Respondent violated RPC 8.4(l), by failing to comply with his duty to cooperate under ELC 5.3(e).

Count 36 - By making one or more misrepresentations in providing information to ODC during its investigation of WSBA File No. 07-00804, Respondent violated RPC 8.4(c) and/or RPC 8.4(l).

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

FINDINGS OF FACT

1. Respondent was admitted to the practice of law in the State of Washington on May 12, 1980.

Facts Regarding Respondent's Practice

2. Respondent's bookkeeping practices were ill-conceived, random and vague. Respondent himself described them as "seat of the pants." He did not handle client funds with the degree of care required by the Rules of Professional Conduct.

3. Unlike the situation presented in In re Kaegele, 149 Wn.2d 793, 72 P.3d 1067 (2003), Respondent did not enter into any kind of formal written fee agreement with a number of the clients whose cases were reviewed as part of this disciplinary proceeding. This lack of specificity between the Respondent and the clients led to confusion about the manner in which his fees would be handled.

4. Until these proceedings began, Respondent never had a clear understanding of the difference between a retainer and an advance fee deposit. His prior use of the term "retainer" did not conform to the meaning given to it by the Washington Supreme Court in In re Kaegele, 149 Wn.2d 793, 72 P.3d 1067 (2003).

5. Any confusion surrounding the withdrawal of Formal Ethics Opinion 186 does not apply to Respondent's benefit in this matter, as he admitted that he had not read or relied on it.

6. Respondent had a pattern of neglecting to timely inform clients of financial issues relating to his representation, including his billings and credits for advance fee deposits that were not used up.

7. Respondent demonstrated competence in the actual legal work performed for those clients who required assistance with litigated matters.

Facts regarding Counts 1 through 11

8. At all times in 2005 through March 2008, Respondent maintained an IOLTA trust account at Union Bank of California (account no. ending in 5514). Respondent personally made all deposits and withdrawals to the trust account, and maintained all records regarding the trust account transactions.

9. Following overdrafts of Respondent's trust account in April and May 2007, Association Audit Manager Rita Swanson conducted an audit of Respondent's trust account, covering the time period of January 1, 2006 through March 31, 2008 (audit period).

10. During the audit period, both before and after September 1, 2006, with regard to client funds that Respondent had deposited to his trust account, Respondent failed to properly maintain those funds in trust, resulting in shortages of the client funds that should have been held in the trust account. The amounts of the shortages do not take into account those funds received from clients discussed below that were never placed into the trust account.

11. As of February 28, 2006, the shortage was more than $8,000. See EX A-1. On March 15, 2006, aware of a shortage in his trust account, Respondent deposited $6,250 into the account so that he would have sufficient funds to make a disbursement (discussed below regarding clients Buerman and Evans). Nonetheless, as of the end of February 2007, the shortage was more than $6,500. See EX A-1.

February 2007 disbursals from trust

12. In February 2007, by means of a check for $4,500 dated February 15, 2007 payable to himself (EX A-6 p.27), Respondent intentionally withdrew funds from his trust account and immediately deposited them into his general account (EX A-14 p.37; EX A-262 p.5). Respondent removed most of the $4,500 from his general account that same day. (EX A-14 p.37; EX A-22). Within a week, Respondent had used all of the $4,500, disbursing all of those funds from his general account (EX A-22).

13. Respondent was not entitled to all of the $4,500. As a result of this withdrawal from trust, the running balance on his trust account became negative $1,442.83.[1] See EX A-3. As of February 15, 2007, Respondent should have been holding the following client funds in trust: $533.35 for Rushton, $2,500 in funds for Jaquez, and $1,916.69 in client NF funds, see EX A-2, in addition to the funds to cover the Johnson refund check. As a result, Respondent's shortage in his trust account was $6,392.87 as of 2/15/07. EX A-1.

14. Accordingly, Respondent's removal of $4,500 on February 15, 2007 increased the

[1] Because Respondent's refund check to client Terence Johnson in the amount of $1,860 had not yet been processed by the bank, there was not a negative bank balance at the time.

amount of the shortage of client funds in his trust account. See EX A-1.

15. Respondent was negligent in his bookkeeping practices, failing to take reasonable measures which would have informed him that he was not entitled to all of the $4,500.

16. Between February 15, 2007 and February 21, 2007, no transactions occurred in the trust account. See EX A-3.

17. In February 2007, by means of a check for $200 dated February 21, 2007 payable to himself (EX A-6 p.29), Respondent intentionally withdrew funds from his trust account and immediately deposited them into his general account (EX A-14 p.37; EX A-262 p.6). Respondent used the $200 in funds to cover a shortage in his general account that had occurred the preceding day (EX A-14 p.37; EX A-22). By the end of the day on February 21, 2007, Respondent had used all but $12.45 of the $200 (EX A-22).

18. Respondent was not entitled to the $200. As a result, Respondent's removal of $200 on February 21, 2007 increased the amount of the shortage of client funds in his trust account by $200. See EX A-1.

19. Respondent was negligent in his bookkeeping practices, failing to take reasonable measures which would have informed him that he was not entitled to the $200.

Commingling of ARAG telephone payments

20. On a regular basis up through January 2006, Respondent deposited and held earned fees received from ARAG, a prepaid insurance company, in his trust account. These payments were payments for telephone consultations to ARAG clients. Respondent received his last payment for ARAG telephone consultations in January 2006.

21. On December 28, 2005, Respondent deposited to his trust account $6,977.50 in funds from ARAG for telephone consultation. See EX A-2 at 3. As of January 1, 2006, only $714 of those funds had been disbursed (to his partner, Stephen Araki). Id. On January 20, 2006, Respondent deposited to his trust account an additional $4,789.50 of funds from ARAG for telephone consultation.

22. 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

23. As a general matter, during the audit period, Respondent maintained a handwritten check register and handwritten client ledgers for his trust account. In addition, he kept the monthly bank statements provided by the bank, cancelled checks provided by the bank, and deposit slips and other deposit records. If Respondent had properly recorded and identified all trust account transactions in his records, and had properly consulted with those records to determine whether and when funds should be removed from the trust account, these records would have been fully adequate to identify and track client funds. However, because Respondent did not do so, his records were not adequate to identify and track client funds.

24. During the audit period, both before and after September 1, 2006, Respondent's check register was not accurate, in that the entries for the running balance were not accurate.

25. During the audit period, both before and after September 1, 2006, Respondent's client ledgers were not complete, in that a number of transactions were not recorded. For example, the Buerman/Evans client ledger (A-8 at 2) failed to include the transactions in early 2006 disbursing funds to Respondent. The NF client ledger (A-8 at 9) failed to include transactions on 1/30/07, 1/31/07, 2/28/07, and 4/13/07. The Rushton client ledger (A-8 at 13) failed to include the entry regarding the disbursal of $1,100 in costs for mediation (which occurred on 2/6/07) until Respondent belatedly wrote that entry on the client ledger after the Association began its investigation.

26. During the audit period, both before and after September 1, 2006, Respondent's client ledgers were not accurate, in that one or more transactions were not accurately recorded. For example, the Buerman/Evans client ledger (A-8 at 2) inaccurately recorded an undated deposit of $6,211, when there was no such transaction and the opening balance of Buerman/Evans funds as of the start of 2006 was $12,750. The Johnson client ledger (A-8 at 5) inaccurately recorded a deposit of $5,000 into trust and a disbursement of $3,140 from trust when no such transactions occurred. The Lea client ledger (A-8 at 7) similarly recorded a deposit of funds to trust and a disbursal of fees from trust when no such transactions occurred. In a 2007 transaction (since the undated deposit occurred on 3/14/07), the Reinking client ledger (A-8 at 12) recorded a disbursal of $863.96 for fees when those funds did not leave the trust account in that amount at one time.

27. During the audit period, both before and after September 1, 2006, Respondent failed to reconcile properly the trust-account check register and bank statements to one another. Instead of reviewing and comparing the records to detect (and correct) any missing entries or errors, Respondent frequently would replace the check register balance with the bank statement balance so that the figures matched. As a result, they were of little or no use in guarding against the disbursement of the funds of one client for the benefit of another or the detection of the resulting shortages in the account.

28. During the audit period, both before and after September 1, 2006, Respondent failed to reconcile his client ledgers to either the trust-account check register or the bank statements.

29. During the audit period after September 1, 2006, Respondent failed to identify, on his trust-account check register, the client matter related to a number of transactions:

a) 1/31/07 transaction for $1,000;
b) 2/15/07 transaction for $4,500;
c) 2/21/07 transaction for $200;
d) 3/16/07 transaction for $20,000; and
e) 4/13/07 transaction for $4,000.

30. During the audit period after September 1, 2006, Respondent failed to identify, on his trust-account client ledgers, the purpose of the transaction, the date of the transaction, the check number for the disbursement, the payor or payee for the transaction, and/or the new client balance after the transaction, with regard to a number of transactions:

a) Bradford 6/5/07 entry does not indicate a purpose;
b) Bradford 6/11/07 entry does not indicate a check number;
c) Glaub 6/5/07 entry does not indicate a purpose;
d) Glaub 6/11/07 entry does not indicate a check number;
e) Lea $1,325.36 entry does not indicate the date, the check number, the payee or the balance of client funds after the transaction;
f) McAllister 7/26/07 entry does not indicate the payor or the purpose;
g) McAllister $1,524.72 entry does not indicate the date;
h) NF 4/27/07 entry does not indicate the payor, the purpose, or the balance;
i) second NF entry does not indicate a date, the purpose, or the balance;
j) third NF entry does not indicate a balance;
k) four NF entries are missing entirely (1/30/07, 1/31/07, 2/28/07, and 4/13/07);
l) first Reinking entry does not indicate a date;
m) second Reinking entry does not indicate a date or a check number;
n) Rushton 3/15/07 entry does not indicate the payor, the purpose, or the balance;
o) Rushton 3/16/07 entry does not indicate the purpose, the check number, or the balance;
p) Rushton entry for $34,783.35 does not indicate the date or the balance; and

q) Rushton entry for $4,000 does not indicate the date, the check number, the purpose, or the balance.

Jaquez (Counts 12 through 17)

31. In 2005, Respondent represented Theron Jaquez in litigation regarding a parenting plan. Respondent and Jaquez orally agreed to an hourly fee of $200 per hour, but did not have a written fee agreement. At the time, Jaquez had insurance coverage through ARAG, a prepaid legal insurance company.

32. Within a few days of agreeing to an hourly fee of $200 per hour, on October 3, 2005, Jaquez paid Respondent $2,500. While Respondent may have used the word "retainer" in requesting an up front payment from Jaquez, the $2,500 was an advance fee deposit. Both Jaquez and Respondent understood that the payment was not to be used unless ARAG refused to cover Respondent's representation of Jaquez (see EX A-171).

33. Respondent's testimony at hearing regarding his fee agreement with Jaquez consisted of an attempted reconstruction long after the fact that was not credible.

34. As of October 3, 2005, Respondent had not billed any work for Jaquez. As of October 3, 2005, Respondent had not worked 12.5 hours or more on the Jaquez matter.

35. Respondent intentionally deposited the $2,500 Jaquez payment into his general account rather than his trust account (EX A-262 ¶62).

36. Respondent was not entitled to the $2,500 on October 3, 2005 when he deposited it to his general account. By the end of the day on October 3, 2005, Respondent had used more than $1,000 of the $2,500, disbursing those funds from his general account (EX A-14 p.14; EX A-16).

37. Respondent knew or should have known that he was dealing improperly with $2,500 at the time he deposited it to his general account. This was a flat fee advance payment that should have been placed in his trust account and withdrawn as services were performed.

38. After receiving the $2,500, Respondent failed to account to Jaquez regarding the $2,500. He did not inform Jaquez that the $2,500 had not been deposited to his trust account, and did not inform Jaquez that he had treated the $2,500 as an earned fee payment.

39. On November 1, 2005, Respondent issued a bill for $6,700 for work done between October 19, 2005 and October 31, 2005 (EX A-161). The bill contained no time entries for work performed prior to Jaquez's October 3, 2005 payment of $2,500.

40. Jaquez's insurer, ARAG, paid Respondent the entire amount of the November 1, 2005 bill: $2,680 by check dated November 9, 2005 and $4,020 by check dated November 10, 2005.

41. Respondent appropriately deposited the $2,680 check into his general account, since he had worked and billed hours to cover all of that payment.

42. On November 21, 2005, Respondent appropriately deposited the $4,020 check into his trust account, since he had worked and billed sufficient hours to cover only $6,700 in payments, and had already received $2,500 and $2,680 in payments in October 2005 and earlier in November 2005. Thus, of the $4,020 deposited into his trust account, Respondent was entitled to remove $1,520 as earned fees, but was required to keep the remaining $2,500 in his trust account. Respondent had not yet worked or billed sufficient hours to earn the remaining $2,500.

43. By the end of February 2006, Respondent had removed the $4,020 from his trust account. See EX A-262 ¶73. He was not entitled to $2,500 of those funds.

44. Respondent knew or should have known that he was dealing improperly with $2,500 of those funds.

45. The transaction described in the preceding paragraph increased the amount of the shortage of client funds in his trust account. See EX A-1.

46. Respondent failed to account to Jaquez for how he handled the $4,020 payment, and failed to account to Jaquez regarding his removal of the $4,020 from his trust account.

47. In 2007, Respondent represented Jaquez regarding child relocation issues. In September 2007, Respondent sent Jaquez a bill for work done between May and September 2007. It listed a "total due and owing" of $6,760. The bill did not reflect any credit for the $2,500 in excess of the amount of the 2005 bill that had been received in 2005 by Respondent in the Jaquez matter.

48. After receiving the September 2007 bill, Jaquez asserted that Respondent owed him a $2,500 credit on the bill, referring to the $2,500 advance he had paid to Respondent in October 2005.

49. In an e-mail to Jaquez dated October 10, 2007, Respondent stated, "I have a record of two payments that have been made to me: $2,500 from Respondent on 10/3/05 and $2,680

from ARAG on 11/14/05. These total $5,180 and my 2005 bill was $6,700 . . . ." EX A-169. In fact, as of October 10, 2007, Respondent had a record of three payments that had been made to him – the two payments specified in his October 10, 2007 e-mail, and an additional ARAG payment of $4,020. See EX A-262 ¶86.

50. In response to Respondent's October 10, 2007 e-mail, Jaquez sent Respondent an e-mail on October 12, 2007 indicating that ARAG had paid his 2005 fees, and that the $2,500 advance he had paid to Respondent had not been utilized. EX A-170.

51. In an e-mail to Jaquez dated October 28, 2007, Respondent stated, "ARAG eventually did pay me $2,680 on my total bill (11/1/05) of $6,700, which left $1,520 unpaid." EX A-171. In a second e-mail to Jaquez dated October 28, 2007, Respondent again referred to ARAG having paid him $2,680 for Jaquez's case. EX A-172. In these two October 28, 2007 e-mails, Respondent again misrepresented the amount paid by ARAG on Jaquez's behalf, by failing to include the second ARAG payment of $4,020.

52. On January 24, 2008, Respondent filed a lawsuit against Jaquez alleging that Jaquez owed him $10,141.71 for unpaid fees and costs for legal services, EX A-182, and separately listing a request for an award of pre-judgment interest. Id. As of the filing of the lawsuit, Respondent had only sent Jaquez two bills, one dated November 1, 2005 in the amount of $6,700 (EX A-161) and one dated September 10, 2007 in the amount of $6,760 (EX A-167). As of the filing of the lawsuit, the first bill for $6,700 had been paid in full and the second bill for $6,760 had not been paid.

53. Prior to January 24, 2008, Respondent had asserted that Jaquez owed him no more than a total of $8,280. See EX A-171, A-179. Prior to January 24, 2008, Respondent had identified only 4 hours of unbilled time that he had worked on Jaquez's behalf. See EX A-171.

54. The amount sought by Respondent in his lawsuit was excessive. He sought $10,141.71 for unpaid fees and costs for legal services, not including pre-judgment interest. Even assuming that Respondent believed that he had not been paid in full for the 2005 bill,[2] Respondent still sued his former client for $1,861.71 more than the billed amounts that Respondent believed to have been unpaid. Adding in the unbilled hours identified by

[2] Respondent testified at hearing that throughout the fall 2007 e-mail exchange with Jaquez about the payments on his bill, and at the time of filing his lawsuit against Jaquez, he mistakenly believed that he had only been paid $5,180 on the 2005 bill, leaving $1,520 unpaid on that bill.

Respondent (4 hours at $200/hour), Respondent still was suing his former client for $1,061.71 more than the amounts he believed to have been unpaid.

55. During the representation, Jaquez and Respondent never discussed interest, and Jaquez never agreed to pay interest to Respondent on any unpaid bills. Respondent's bills to Jaquez contained no indication that interest would accrue.

56. In May 2008, Jaquez provided Respondent with proof that ARAG had paid the November 2005 bill in full. See EX A-186, A-187.

57. Prior to trial in his fees lawsuit, Respondent never amended the amount of $10,141.71 that he was seeking, and never acknowledged to Jaquez that he had been paid in full by ARAG for the 2005 work.

58. In June 2008, on the first day of trial in his fees lawsuit, after receiving Jaquez's proposed exhibits that included documentation indicating full payment of the 2005 bill by ARAG, Respondent informed the court and Jaquez in his opening statement that he was seeking only a principal amount of $4,260, which is the amount of the 2007 services ($6,760) less the $2,500 advance paid in 2005.

Dahl (Counts 18 through 21)

59. In February 2007, Respondent began representing Debra Dahl regarding a lawsuit brought against her by her former fiancé in Pierce County Superior Court, Mark Schrader v. Debra Dahl, 07-2-04855-9.

60. According to Respondent, he agreed to represent Dahl on an hourly fee basis, at a rate of $200 per hour. Their fee agreement was not put in writing.

61. On February 28, 2007, Dahl paid Respondent $2,500. Based on her discussions with Respondent about the $2,500 payment, Dahl reasonably understood the payment to be an advance.

62. Respondent's testimony at hearing regarding his fee agreement with Dahl pertaining to the $2,500 payment consisted of an attempted reconstruction long after the fact that was not credible.

63. As of February 28, 2007, Respondent had not billed any work for Dahl.

64. Respondent deposited the $2,500 Dahl payment into his general account rather than his trust account (EX A-262 ¶109).

65. Respondent was not entitled to the $2,500 on February 28, 2007 when he deposited it to his general account. At that time, he had less than $10 in his general account (EX A-22). By the next day, half of the $2,500 was used. EX A-14 at 39.

66. Respondent knew or should have known that he was dealing improperly with the $2,500 at the time he deposited it to his general account.

67. After receiving the $2,500, Respondent failed to account to Dahl regarding the $2,500. He did not inform Dahl that the $2,500 had not been deposited to his trust account, and did not inform Dahl that he had treated the $2,500 as an earned fee payment.

68. On May 26, 2007, Dahl paid Respondent a cost advance of $300. EX A-202.

69. As of May 29, 2007, Respondent had not expended $300 of his own funds for costs paid on Dahl's behalf.

70. On May 29, 2007, Respondent deposited the $300 Dahl payment into his general account rather than his trust account (EX A-262 ¶123).

71. Respondent did not provide Dahl with any bills or accountings until August 2007. On August 2, 2007, Respondent sent Dahl a bill for $3,339. That bill contained no charges for work performed prior to March 2007.

72. On September 21, 2007, Dahl paid Respondent $5,000.

73. Of the $5,000 paid on September 21, 2007, $1,661 was the amount exceeding the outstanding bill and was an advance.

74. Respondent deposited the $5,000 Dahl payment into his general account rather than his trust account (EX A-262 ¶138).

75. In early December 2007, in Mark Schrader v. Debra Dahl, the judge ruled against Dahl on a partial summary judgment motion.

76. By e-mail on December 14, 2007, Dahl fired Respondent. EX A-211. That same day, Respondent acknowledged that Dahl had fired him. EX A-214.

77. After firing Respondent on December 14, 2007, Dahl did not rehire Respondent to represent her and did not agree to pay Respondent for any work done after December 14, 2007.

78. At the time Dahl fired Respondent, a motion for sanctions against Dahl and Respondent under Civil Rule (CR) 11 was pending. By e-mail on December 15, 2007, Respondent told Dahl that he was going to respond to the outstanding Motion for Sanctions

because the opposing party was seeking sanctions against him personally. He also stated, "My response will be for me, personally. Since you have fired me, you are on your own." EX A-215.

79. Subsequently, Respondent prepared and filed documents related to the motion for CR 11 sanctions.

80. Dahl hired lawyer Steve Downing who appeared at the hearing on CR 11 sanctions. Dahl had decided not to contest the judge's December ruling on partial summary judgment and to file bankruptcy.

81. In May 2008, Dahl filed for Chapter 13 bankruptcy.

82. In October 2008, Respondent filed a "Proof of Claim" in Dahl's bankruptcy proceeding, asserting that she was indebted to him for $16,459. EX A-226. As of October 2008, Respondent had only provided Dahl with a single billing statement, the one dated August 2, 2007 for $3,339. That bill had been paid.

83. In support of his proof of claim in the bankruptcy proceeding, Respondent listed 90.6 hours worked between July 20, 2007 and May 2, 2008. Of the 90.6 hours listed, 41.4 hours were for work performed when Respondent knew that Dahl had fired him. In addition, Dahl had not agreed to pay for the 41.4 hours. Those hours for dates after his termination increased his proof of claim by $8,280.

Facts regarding Counts 22 through 24

84. In July and August 2005, Respondent represented Terence Johnson regarding paternity and parenting-plan issues.

85. On July 20, 2005, at their initial meeting, Respondent and Johnson agreed to an hourly fee of $200 per hour, but had no written fee agreement. That same day, Johnson paid Respondent $5,000 as an advance. Based on his discussions with Respondent, Johnson reasonably understood that these funds would be used as Respondent worked on his case.

86. Respondent's testimony at hearing regarding his fee agreement with Johnson pertaining to the $5,000 payment consisted of an attempted reconstruction long after the fact that was not credible.

87. As of July 20, 2005, Respondent had not billed any work for Johnson and had not worked 25 hours or more on the Johnson matter.

88. On July 21, 2005, Respondent deposited the $5,000 Johnson payment into his general account rather than his trust account (EX A-262 ¶166).

89. Respondent was not entitled to the $5,000 on July 21, 2005 when he deposited it to his general account. At that time, he had only $170.78 in funds in his general account (EX A-15). By the end of August 2005, he had used most of the $5,000 (EX A-14 at 10).

90. Respondent was not entitled to the $5,000 at the time he deposited it to his general account.

91. Respondent never accounted to Johnson regarding how he handled the $5,000 payment.

92. In or about early August 2005, Johnson fired Respondent and requested the return of all unearned fees. For over three months, Respondent delayed providing Johnson with an accounting or a refund.

On November 28, 2005, Respondent issued a bill for $3,140 covering the time period of July 20, 2005 through August 3, 2005. EX A-41. The bill indicated that he was providing a refund of $1,860. On November 28, 2005, Respondent issued Johnson a refund check for $1,860 from his trust account.

93. Respondent wrote Johnson's refund check on his trust account despite the fact that he had not deposited any of Johnson's funds to his trust account. By doing so, Respondent increased the amount of the shortage of client funds in his trust account.

Facts regarding Counts 25 through 28

94. Beginning in or about June 2006, Respondent represented client Selena Rushton in an employment matter. He replaced her former lawyer, Jeffrey Needle.

95. In 2006, Respondent and Rushton agreed that the representation would be on a one-third contingent fee basis. Respondent failed to put this contingent fee agreement with Rushton into a written agreement, signed by Rushton.

96. Respondent's testimony at hearing regarding that he had not taken the Rushton case on a contingent fee was not credible, as proven by his own ledger card for this case with "contingent" written on it in Respondent's handwriting.

97. On March 15, 2007, Respondent received a $57,500 settlement check for Rushton and deposited it into his trust account.

98. On March 16, 2007, Respondent disbursed $20,000 of the settlement funds from his trust account to himself as fees. As of that date, Respondent had not accounted to Rushton for how the settlement funds would be distributed, and Rushton had not agreed to this distribution.

99. On March 20, 2007, Rushton e-mailed Respondent indicating that she had not received his "recap or understanding of the payment process yet." EX A-248.

100. In a reply e-mail to Rushton on March 20-21, 2007, Respondent inaccurately listed the settlement amount as $56,500. EX A-248. Respondent also listed settlement disbursements totaling $56,500. The e-mail listed his undiscounted fees as $25,000, but indicated that he was discounting his fees by $2,750.

101. As of the date of the reply e-mail on March 20-21, 2007, Respondent had not provided Rushton with a billing or accounting of the hours he had worked on her case or an explanation of how he had arrived at his claimed undiscounted fee of $25,000. At hearing, Respondent claimed that the $25,000 represented the hours that he had worked on her case at an hourly rate of $200 per hour.

102. Rushton agreed to the e-mail accounting, EX A-250, despite Respondent's claim to a fee in excess of their agreement, because she felt that she could no longer deal with Respondent and needed to have the matter concluded.

103. In response to an e-mail inquiry from Rushton about the funds that had been transferred to Respondent from Needle, Respondent informed Rushton that she "get[s] all of what Needle transferred." EX A-249.

104. In 2007, other than the e-mails in EX A-248 and A-249, Respondent did not provide Rushton with an accounting of the settlement disbursement or the disbursement of funds transferred from Needle.

105. On March 29, 2007, Respondent disbursed $34,250 of the settlement funds (along with $533.35 in funds transferred from Needle, but not used for costs) to Rushton.

106. Within a few weeks, he disbursed the remainder of the settlement funds to himself, for a total fee disbursement to himself of $23,250. That amount equals slightly more than 40% of the settlement. That amount was $1,000 more than Respondent had informed Rushton he would be distributing. One third of the Rushton settlement was $19,166.66. But Respondent

took an additional $4,083.34 as fees in the Rushton matter, to which he was not entitled. See Perez v. Papas, 98 Wn.2d 835, 841, 659 P.2d 475 (1983).

107. Respondent acted intentionally in removing all of the Rushton settlement funds from trust after disbursing $34,250 of the settlement to Rushton. In so doing, however, he was aware that he was taking a fee in excess of a one-third contingency, but unaware that he was taking $1,000 more than he had represented in EX A-248. If, however, he had properly maintained Rushton's client ledger and properly identified the amounts being removed as fees in the Rushton matter, he would have realized that he had not properly accounted for $1,000 of the settlement funds.

108. Over a year later, when the Association was investigating a grievance regarding Respondent's trust account, in a letter dated May 1, 2008, Ms. Swanson pointed out to Respondent that his March 20-21, 2007 e-mail to Rushton listed the settlement amount inaccurately by $1,000. As a result, in June 2008, Respondent contacted Rushton. EX A-253. After an additional delay, Respondent paid Rushton an additional $500 on August 12, 2008.

Facts regarding Count 29

109. In April 2004, Aaron Buerman and Scott Evans hired Respondent to represent them in recovering funds paid for the construction of a custom boat. Buerman and Evans entered into a written 1/3 contingency fee agreement with Respondent.

110. In February 2005, Respondent settled the Buerman/Evans case. Between February and December 2005, Respondent received $41,750 in payments on the settlement and deposited them to his trust account.

111. On December 30, 2005, Respondent deposited the final settlement payment of $12,750 to his trust account. He was entitled to approximately $289 of the $12,750, with Respondent's clients being entitled to receive the remaining amount of approximately $12,461. EX A-262 ¶ 223.

112. Respondent did not notify his clients of his receipt of the $12,750 in December 2005, January 2006, or February 2006. In January and February 2006, he did, however, intentionally disburse approximately $6,250 to himself from the settlement funds that were owed to his clients.

113. Respondent's disbursal of the funds owed to Buerman and Evans occurred as a part of two transactions: a January 20, 2006 check in the amount of $2,500 and a February 15, 2006 check in the amount of $4,000.

114. Respondent's testimony at hearing regarding his reasons for disbursing approximately $6,250 of the Buerman/Evans settlement funds to himself in January and February 2006 was not credible.

115. Respondent removed the $2,500 and the $4,000 in Buerman/Evans settlement funds from his trust account, and deposited the funds into his general account. Respondent was not entitled to $6,211 of those funds. By the end of the day on February 15, 2006, Respondent had used almost all of the $4,000 deposit (EX A-14 p.22; EX A-20). By the end of the day on March 8, 2006, Respondent had used almost all of the $2,500 deposit (EX A-14 p.24; EX A-21).

116. Respondent knew or should have known that he was dealing improperly with the $2,500 and $4,000 at the time he deposited the funds to his general account.

117. Respondent's withdrawals of $2,500 on January 20, 2006 and $4,000 on February 15, 2006 increased the amount of the shortage of client funds in his trust account.

118. On March 1, 2006, Buerman sent Respondent an e-mail asking for an update on his case and complaining about Respondent's lack of communication.

119. On March 3, 2006, Respondent notified Buerman, for the first time, that Respondent had received the final settlement payment.

120. On March 14, 2006, Respondent sent Buerman and Evans a settlement accounting, and their final check for $12,461.

121. On March 15, 2006, Respondent transferred $6,250 to his trust account from his general account so that it would have sufficient funds in it to cover the check for $12,461. On the same date, he deposited funds into his general account to cover the $6,250 transfer.

122. At hearing, Respondent claimed that he was quite distressed to learn that he had taken settlement funds belonging to clients Buerman and Evans. However, Respondent did not subsequently change his practices regarding tracking and identifying client funds in the trust account, and did not subsequently exercise any greater level of care or caution in making sure that he was entitled to funds before removing them from the trust account.

Facts regarding Count 30

123. In March 2006, Heidi Lea hired Respondent to represent her in a dissolution matter. On March 21, 2006, Respondent and Lea orally agreed to an hourly fee of $200 per hour, but had no written fee agreement.

124. On March 23, 2006, Lea (through her brother) paid Respondent $2,500. Based on her discussions with Respondent, Lea reasonably assumed that these funds would be held by the Respondent and used as he worked on her case.

125. As of March 23, 2006, Respondent had not billed any work for Lea and had not worked 12.5 hours or more on the Lea matter. As of March 23, 2006, Respondent had spent only 1.5 hours on Lea's case, during his initial meeting with Lea on March 21, 2006.

126. On March 23, 2006, Respondent deposited the $2,500 Lea payment into his general account rather than his trust account (EX A-262 ¶244).

127. Respondent was not entitled to take the entire $2,500 as earned fees when he deposited it to his general account.

128. Respondent knew or should have known that he was not properly counseling clients as to fee arrangements and did not conform his practices to the requirements for advance fee deposits.

129. Respondent never informed Lea that he had taken the entire $2,500 as an earned fee payment.

130. In or about November 2006, Lea and her husband decided not to divorce. By December 1, 2006, Lea terminated her relationship with Respondent and requested that Respondent send her a refund check.

131. On December 1, 2006, Respondent prepared his first and only billing statement to Lea. EX A-73. In that statement, Respondent listed services performed and hours worked, and costs expended, totaling $1,174.64, and indicated that Lea was entitled to a $1,325.36 refund.

132. The December 1, 2006 billing statement, which Respondent sent by certified mail, was returned to Respondent unclaimed. EX A-72. He never resent the letter and Lea never received an accounting or billing from Respondent.

133. In or about May 2007, Lea called Respondent and asked him about the refund. EX A-262 ¶255. Respondent then provided a refund by means of a trust account check to Lea's brother dated May 3, 2007 in the amount of $1,325.36.

134. Respondent wrote Lea's refund check on his trust account despite the fact that he knew he had not deposited any of Lea's funds to his trust account. By doing so, Respondent increased the amount of the shortage of client funds in his trust account.

135. His account held insufficient funds for the Lea refund check, resulting in a notice from the bank of an overdraft. EX A-113.

Facts regarding Counts 31 and 32

136. In July 2006, Kay Michael Larsen hired Respondent to represent him in a dissolution matter. They orally agreed to an hourly fee of $200 per hour, but had no written fee agreement.

137. In July 2006, Larsen, by means of a check payable to Respondent's partner, Robert Kaufman, paid an advance of $2,500, which was deposited to Kaufman's trust account (which was separate from Respondent's trust account). Based on his discussions with Respondent, Larsen reasonably believed that the funds would be utilized as Respondent worked on his case.

138. Respondent's testimony at hearing regarding his fee agreement with Larsen pertaining to the $2,500 payment consisted of an attempted reconstruction long after the fact that was not credible.

139. On September 12, 2006, Kaufman billed Larsen for $450 worth of Kaufman's time, and provided Respondent with a check for the remaining $2,050. EX A-84.

140. On September 13, 2006, Respondent deposited the $2,050 payment to his trust account and immediately disbursed the entire $2,050 from his trust account to himself.

141. Respondent withdrew the $2,050 of Larsen funds without sending Larsen any billing statements or other written accounting of his hours worked and amounts earned.

142. While the Second Amended Formal Complaint contains allegations regarding Respondent's handling of $6,000 that Larsen later paid to Respondent in April 2007, the Association withdrew all charges related to that payment prior to hearing.

Facts regarding Counts 33 and 34

143. In June 2007, Dominique Glaub hired Respondent to represent her regarding a real estate lawsuit in Kitsap County.

144. Glaub and Respondent agreed to an hourly fee of $200 per hour, and entered into a written fee agreement dated June 4, 2007.

145. The fee agreement contained the following provision regarding advance payments:

> Client shall deposit with attorney, upon signing of this agreement a retainer of $3,000.00, to be deposited in attorney's trust account and used by attorney both for costs incurred by client and fees earned and billed by attorney. Attorney shall submit a billing to client, and upon so doing shall, within 3 business days following the mailing of the invoice be entitled to withdraw from said retainer deposit an amount equal to all costs incurred by attorney and all fees billed by attorney. . . .

EX A-92.

146. On or about the date she signed the fee agreement, Glaub paid Respondent the $3,000 advance referenced in the written fee agreement. On June 5, 2007, Respondent deposited the $3,000 advance to his trust account.

147. Six days later, on June 11, 2007, Respondent withdrew the $3,000 from his trust account and deposited it to his general account. At the time, he had not billed any work for Glaub and had not worked 15 hours or more on the Glaub matter. See EX A-97. As of that date, Respondent and Glaub had not agreed to any changes in the written fee agreement.

148. Respondent was not entitled to the $3,000 on June 11, 2007 when he deposited it to his general account. Respondent withdrew the $3,000, payable to himself, from his general account on the same day he deposited it (EX A-25).

149. Respondent knew or should have known that he was dealing improperly with the $3,000 at the time he deposited it to his general account.

Facts regarding Counts 35 and 36

WSBA File 07-00804

150. In May 2007, the Office of Disciplinary Counsel (ODC) opened a grievance against Respondent, WSBA File No. 07-00804, based on its receipt of a Trust Account Overdraft Notice from Respondent's bank related to the processing of the Johnson refund check. EX A-110.

151. Respondent provided a response to the grievance dated May 29, 2007. In his May 29, 2007 response, he stated:

> The overdraft was caused by a math error I made. An error was made when I paid out funds to a client in an amount that did not have costs deducted that had been incurred on behalf of the client. An incorrect, lesser figure for the check was recorded and that figure had the costs deducted that had been incurred on behalf of the client. The shortage was immediately corrected.

EX A-111.

152. Contrary to the claim he made in his May 29, 2007 letter, the overdraft was not caused by a math error made by Respondent and Respondent had not made an error in recording the amount of a trust-account check issued to a client. At hearing, Audit Manager Swanson testified that she looked for and could not find any such transaction. At hearing, Respondent testified that he was referring to the Rushton matter when he drafted his May 29, 2007 letter. However, the documentary evidence shows clear that Respondent's payment to Rushton did have costs deducted, and that Respondent's client ledger and his check register accurately recorded the amount of the check to Rushton.

153. By letter dated May 31, 2007, the Association's Audit Manager sent a letter to Respondent requesting that he provide additional information regarding this grievance. EX A-112.

154. By letter dated June 7, 2007, the Association's Audit Manager requested that Respondent provide an explanation of a second overdraft notice that ODC had received, related to the processing of the Lea refund check. EX A-113.

155. As of July 24, 2007, Respondent had not responded to either letter, nor had he requested an extension of time for providing his responses.

156. On July 24, 2007, ODC sent Respondent a "10-day" letter, by certified mail, advising him that he must provide the requested information and documents within 10 days, or he would be subject to a deposition, and reminding him of his duties to respond under ELC 5.3(e). Respondent's office received the July 24, 2007 letter within a few days. EX A-114.

157. Within the 10-day time frame, Respondent failed to provide a response and failed to communicate with ODC about the matter.

158. On August 16, 2007, ODC issued a subpoena duces tecum requiring Respondent to appear at the Association's office for a deposition on September 6, 2007, and to produce a number of documents. EX A-115. Respondent was served on August 20, 2007, and deposed on September 6, 2007.

159. By letter dated September 21, 2007, Respondent provided additional documents regarding the investigation. EX A-118.

160. In an attachment to his September 21, 2007 letter, Respondent made the following representations regarding the sources of the $19,295.56 in funds that were in his trust account as of January 1, 2006:

Penitsch	777.08
Buerman/Evans	6,211.00
Johnson	1,860.00
Lea	1,325.36
ARAG/Simmerly	9,122.12

These representations were false.

161. As of January 1, 2006, Respondent had no funds of client Penitsch in his trust account, having disbursed the Penitsch funds in 2004.

162. As of January 1, 2006, Respondent had $12,750 of client Buerman in his trust account, having deposited that amount on December 30, 2005.

163. As of January 1, 2006, Respondent had no funds of Johnson in his trust account, having never deposited any Johnson funds into his trust account.

164. As of January 1, 2006, Respondent had no funds of Lea in his trust account. Lea did not become Respondent's client until March 2006. Respondent never deposited any Lea funds into his trust account.

165. Respondent intentionally made the misrepresentations about the balances in his trust account as of January 1, 2006. He did so in an attempt to hide or disguise his misuse of client funds in 2006 and 2007.

166. In support of his misrepresentations about the balances in his trust account as of January 1, 2006, Respondent provided the Association with fabricated client ledgers for Penitsch, Buerman, Johnson and Lea, containing false entries regarding trust-account transactions.

a) The Penitsch client ledger that Respondent provided to Association on 9/21/07 (EX A-118 at 42) falsely indicated that $777.08 in Penitsch funds

were in the trust account at the beginning of 2006. Respondent admitted at hearing that he did not create the 2006 Penitsch client ledger until after the grievance process began, yet also conceded that he had represented to the Association at his deposition that the Penitsch ledger had been made contemporaneously.

b) The Buerman/Evans client ledger that Respondent provided to Association on 9/21/07 (EX A-118 at 39) falsely indicated that there had been a deposit of $6,211 and that the 2006 starting balance was $6,211 when it was actually $12,750. In addition, this client ledger failed to contain entries for the removal of Buerman/Evans funds on 1/20/06 and 2/15/06, and contained a misleading description of the deposit of $6,250 in March 2006 just prior to Respondent's final distribution of funds to his clients.

c) The Johnson client ledger provided to the Association on 9/5/07 (EX A-116 at 11) falsely indicated that there was a deposit of $5,000 to trust on an unspecified date and a disbursement of fees from trust in the amount of $3,140 on an unspecified date (when no such transactions existed). It also contained a misleading description of a "reconciliation" suggesting that the $5,000 had been disbursed from his trust account.

d) The Lea client ledger provided to the Association on 9/5/07 (EX A-116 at 12) falsely indicated that there was a deposit of $2,500 to trust on an unspecified date and a disbursement of fees from trust in the amount of $1,174.64 on an unspecified date (when no such transactions existed). It also contained a misleading description of a "reconciliation" suggesting that the $2,500 had been disbursed from his trust account.

167. By letter dated February 7, 2008, ODC requested that Respondent provide additional information regarding this grievance (WSBA No. 07-00804). EX A-120.

168. Respondent requested and received three extensions of time to respond to the February 7, 2008 letter, the last extension setting a deadline of March 18, 2008.

169. As of March 28, 2008, Respondent had not responded.

170. On March 28, 2008, ODC sent Respondent a 10-day letter. EX A-121. On April 10, 2008, Respondent hand-delivered his response, which was dated April 9, 2008. EX A-122.

171. By letter dated December 10, 2008, ODC requested that Respondent answer a number of questions regarding his handling of Rushton's funds, his relationship with ARAG, and his February 15, 2007 trust-account check for $4,500. The letter also requested that Respondent provide documents regarding client NF, documents regarding client Rushton, and a copy of his February 2007 general account bank statement. EX A-123.

172. By responsive letter dated January 26, 2009, Respondent indicated that he could not locate documents regarding client NF, but failed to answer the other questions and document requests set forth in ODC's December 10, 2008 letter. EX A-262 ¶364.

173. On December 31, 2008, ODC sent Respondent an analysis letter regarding its investigation of WSBA grievance no. 07-00804. In its letter, it put Respondent on notice that it considered Respondent's conduct in failing to provide timely responses to its request to have constituted a violation of the RPC.

174. On March 9, 2009, a Review Committee of the Disciplinary Board ordered to hearing WSBA File No. 07-00804 that had been opened as a result of a trust account overdraft notice.

WSBA File 09-00629

175. In April 2009, ODC opened a grievance in the name of the Washington State Bar Association against Respondent, WSBA File No. 09-00629, to investigate the Respondent's handling of the Buerman/Evans settlement funds. This WSBA grievance was later expanded to include Respondent's handling of hourly fee cases, including Lea, Larsen, and Glaub.

176. By letter dated April 20, 2009, the Association notified Respondent of this grievance, and asked Respondent to provide certain information and documents. EX A-140. As of May 22, 2009, Respondent had not provided a response, and had not requested an extension. By letter dated May 22, 2009, ODC sent Respondent a ten-day letter by certified mail. EX A-141.

177. By letter dated June 5, 2009 (after the expiration of the 10 days), Respondent provided a partial response. EX A-142.

178. On June 11, 2009 and July 2, 2009, ODC issued a subpoena duces tecum to obtain the rest of the requested information. EX A-143, A-144. On July 28, 2009, Respondent provided additional documents and was deposed. EX A-262 ¶382.

179. By letter dated August 19, 2009, ODC requested that Respondent provide additional information. EX A-146. As of September 24, 2009, Respondent had not provided a response, and had not requested an extension. EX A-262 ¶¶384-85. On September 24, 2009, ODC sent Respondent another ten-day letter. EX A-147. The last day of the ten-day window set forth in that letter was October 7, 2009.

180. On the afternoon of October 7, 2009, Respondent left a voicemail message for Disciplinary Counsel requesting a one-week extension. Disciplinary Counsel agreed not to issue a non-cooperation subpoena if the information was provided by October 14, 2009. EX A-262 ¶389. Respondent provided a response to ODC's August 19, 2009 letter on October 15, 2009.

181. By letter dated October 20, 2009, ODC requested that Respondent provide additional documents. EX A-150. As of November 23, 2009, Respondent had not provided a response, and had not requested an extension. EX A-262 ¶¶393-94. On November 23, 2009, ODC sent Respondent another ten-day letter. EX A-151. On November 30, 2009, Respondent provided the additional documents. EX A-262 ¶396.

ADDITIONAL FACTS REGARDING SANCTION

182. **Counts 1, 2, 3, 4, 14 and 29: Conversion of Client Funds From the Trust Account.** Respondent knew or should have known that he was acting improperly in converting client funds from his trust account. Respondent's clients were potentially injured in that their funds were no longer left intact and protected by being in the trust account. In fact, Respondent used the funds after depositing them to his general account. Clients Buerman/Evans, Jaquez, and Rushton were actually injured by the delays in receiving their funds.

183. **Count 24: Conversion of Client Funds Not Deposited Into the Trust Account.** Respondent knew or should have known that he was acting improperly in converting client Johnson's funds that should have been placed into his trust account but were instead put into his general account. Johnson was potentially injured in that his funds were used before they were earned, and his funds were not protected by placement in a trust account.

184. **Count 5: Commingling.** Respondent knew or should have known that he was handling client funds improperly when he commingled funds belonging to his law partners and himself with client funds. There is potential injury when a lawyer commingles funds. A lawyer cannot use a trust account as a personal bank, which endangers all of the client funds entrusted to the lawyer. As the Court noted in In re Disciplinary Proceeding Against McKean, 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 the 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."

185. **Counts 6, 7, 8, 9, and 10: Inadequate Trust-Account Records.** Respondent knew or should have known that he was dealing improperly with client funds by inadequate trust-account records. A number of Respondent's clients were potentially injured because Respondent's recordkeeping failed to reveal problems with his handling of their funds. Client Rushton was actually injured when Respondent's recordkeeping did not reveal that $1,000 of the settlement funds were not distributed in accord with his e-mail accounting to Rushton.

186. Counts 15, 19, 23, 25, 32, and 34: Failure to Account. Respondent knew or should have known he was acting improperly in failing to account to his clients. His actions caused actual injury to the clients, since his failure to account resulted in the clients not knowing that their funds had been taken by Respondent and not having the opportunity to object to Respondent's handling of their funds. In the Jaquez and Rushton matters, Respondent's actions resulted in the clients not knowing that they were entitled to receive funds.

187. **Count 16: Misrepresentations to Jaquez.** Respondent misrepresented the amount owed by Jaquez to Respondent in the fall 2007, despite records in his possession that accurately showed the amounts Respondent had been paid on the 2005 bill. There was potential injury in that Jaquez could have ended up paying Respondent more than owed.

188. **Counts 17, 21, and 27: Unreasonable Fees.** With regard to Respondent's taking of fees beyond a one-third contingency in the Rushton matter, he acted knowingly.[3] There was actual injury to Rushton, who still has not been fully reimbursed. As discussed above, Respondent acted negligently in failing to properly credit all payments to Jaquez while he acted knowingly in filing a lawsuit for an excessive amount of money.

189. **Count 21: Misrepresentation to the Bankruptcy Court.** Respondent knew that he was falsely representing to the court that Ms. Dahl had an obligation to pay him for the time

[3] Although Respondent acted negligently when he underreported the settlement amount to Rushton, and thus acted negligently in failing to pay Rushton the $500 that he reimbursed in August 2008, Respondent acted knowingly in taking an additional $3,500 of fees beyond what their fee agreement contemplated.

he spent defending himself after his services had been terminated by her. His actions caused potential injury in the legal proceeding.

190. **Counts 26 and 28: Improper Contingent Fee Agreement and Failure to Adequately Explain Basis of Fee.** Respondent knew that he failed to enter into a written contingent fee agreement. His actions caused injury or potential injury to Ms. Rushton, who did not have a clear basis for challenging or questioning Respondent's claim for fees after the case settled.

191. **Count 34 – Non-cooperation**. Respondent acted knowingly with regard to his conduct in this Count. This conclusion is supported by Respondent's extensive pattern of failing to respond in a timely fashion and the multiple reminders. His conduct resulted in injury to the public, the disciplinary system and the profession, by delaying the investigation of the grievances and increasing the resources necessary to conduct the disciplinary investigations.

192. **Count 35 – Non-cooperation**. Respondent acted intentionally and knowingly with regard to his conduct in this Count, with the intent to benefit himself regarding the disposition of grievance issues. His actions caused actual injury to the disciplinary system, by disguising the full extent of the shortages in his trust account, which were uncovered and corrected only after the Association obtained additional documents regarding transactions in 2005 that preceded the start date of the audit period (1/1/06). The Association's auditor then spent a substantial amount of time correcting her reconstructed check register, client ledgers, and shortage calculations, so that she no longer relied upon the representations of Respondent regarding the sources of the funds in the trust account as of January 1, 2006. His actions caused injury to the public and the legal system as a whole, which is harmed by lawyers who make misrepresentations during the course of disciplinary investigations. See In re Disciplinary Proceeding Against Whitt, 149 Wn.2d 707, 719, 72 P.3d 173 (2003).

Facts regarding aggravating and mitigating factors.

193. With regard to Respondent's misrepresentations during the course of disciplinary investigation, as set forth above, he acted with both a dishonest and a selfish motive.

194. With regard to his conversion of client funds removed from his trust account, his conversion of client advance fee deposits never placed into his trust account and his failure to cooperate with the grievance investigations, Respondent engaged in patterns of misconduct.

195. Respondent has committed multiple offenses.

196. Respondent was admitted to practice in 1980 and has substantial experience in the practice of law.

197. Respondent has no prior discipline.

CONCLUSIONS OF LAW

Violations Analysis

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

199. On or about February 15, 2007, by taking $4,500 from his trust account without entitlement to all of those funds, Respondent violated RPC 1.15A(c)(1). Count 1 is proven by a clear preponderance of the evidence.

200. On or about February 21, 2007, by taking $200 from his trust account without entitlement, Respondent violated RPC 1.15A(c)(1). Count 2 is proven by a clear preponderance of the evidence.

201. Between January and August 2006, by failing to hold all client funds in his trust account, Respondent violated former RPC 1.14(a). Count 3 is proven by a clear preponderance of the evidence.

202. Between September 2006 and March 2008, by failing to hold all client funds in his trust account, Respondent violated RPC 1.15A(c)(1). Count 4 is proven by a clear preponderance of the evidence.

203. In early 2006, by commingling non-client funds with client funds in his trust account, Respondent violated former RPC 1.14(a). Count 5 is proven by a clear preponderance of the evidence.

204. Between January and August 2006, by failing to keep adequate and accurate books and records regarding his trust account, Respondent violated former RPC 1.14(b)(3). Count 6 is proven by a clear preponderance of the evidence.

205. Between September 2006 and March 2008, by failing to keep adequate and accurate books and records regarding his trust account, Respondent violated RPC 1.15A(h) and RPC 1.15B(a). Count 7 is proven by a clear preponderance of the evidence.

206. By failing to reconcile, on a timely basis, his check register balance to the bank statement balance and reconcile the check register balance to the combined total of all client ledger records, Respondent violated RPC 1.15A(h)(6). Count 8 is proven by a clear preponderance of the evidence.

207. On multiple occasions between September 2006 and March 2008, by failing to identify, on his trust-account check register, the client matter for each disbursement and/or the check number for each disbursement, Respondent violated RPC 1.15B(a)(1). Count 9 is proven by a clear preponderance of the evidence.

208. On multiple occasions between September 2006 and March 2008, by failing to identify, on his trust-account client ledgers, the purpose for which trust funds were received or disbursed, the date on which funds were disbursed, the client matter for each disbursement and/or the check number for each disbursement, Respondent violated RPC 1.15B(a)(2). Count 10 is proven by a clear preponderance of the evidence.

209. During the course of the hearing, the Association agreed to the dismissal of Count 11. Count 11 is dismissed.

210. Counts 12 and 13 were not proven by a clear preponderance of the evidence and are dismissed.

211. Between November 2005 and August 2007, by failing to return to Jaquez the $2,500 overpayment on the November 2005 bill, Respondent violated former RPC 1.14(b)(4) and RPC 1.15A(f). Count 14 is proven by a clear preponderance of the evidence.

212. In 2005, by failing to properly account to Jaquez regarding his receipt and/or disbursement of the $2,500 payment in October 2005, the $2,680 payment in November 2005 and the $4,020 payment in November 2005, Respondent violated former RPC 1.4 and former RPC 1.14(b)(1)&(3). Count 15 is proven by a clear preponderance of the evidence.

213. In multiple e-mail communications in October 2007, by misrepresenting to Jaquez the payments he had received on Jaquez's behalf, Respondent violated RPC 8.4(c). Count 16 is proven by a clear preponderance of the evidence.

214. By requesting from Jaquez at least $2,500 more in fees than he was entitled to receive, Respondent violated RPC 1.5(a). Count 17 is proven by a clear preponderance of the evidence.

215. Count 18 was not proven by a clear preponderance of the evidence and is dismissed.

216. By failing to properly account to Dahl regarding his receipt and disbursement of the client funds received in February 2007, Respondent violated RPC 1.15A(e). Count 19 is proven by a clear preponderance of the evidence.

217. Count 20 was not proven by a clear preponderance of the evidence and is dismissed.

218. By filing a proof of claim in Dahl's bankruptcy case for an amount in excess of what she owed to him, Respondent violated RPC 1.5(a), RPC 3.3(a), and RPC 8.4(c). Count 21 is proven by a clear preponderance of the evidence. At hearing, Respondent claimed that he was entitled to include charges for work done after he was fired under the legal principle of *quantum meruit*. *Quantum meruit* does not apply in this situation, where a lawyer seeks recovery for work performed after his services have been terminated.

219. Count 22 was not proven by a clear preponderance of the evidence and is dismissed.

220. By failing to properly account to Johnson regarding his receipt and disbursement of the client funds received in July 2005, Respondent violated former RPC 1.14(b)(3). Count 23 is proven by a clear preponderance of the evidence.

221. By failing to promptly return Johnson's funds after the representation ended, Respondent violated former RPC 1.14(b)(4). Count 24 is proven by a clear preponderance of the evidence.

222. In 2007, by failing to account properly to Rushton regarding his receipt and disbursement of client funds, Respondent violated RPC 1.15A(d)&(e). Count 25 is proven by a clear preponderance of the evidence.

223. By entering into a contingency fee agreement with Rushton without reducing that agreement to a writing signed by the client, Respondent violated RPC 1.5(c). Count 26 is proven by a clear preponderance of the evidence.

224. By charging Rushton a fee that was more than the percentage contingency fee agreed upon, Respondent violated RPC 1.5(a). Count 27 is proven by a clear preponderance of the evidence.

225. By failing to explain adequately the basis or rate of his fee for which Rushton would be responsible, Respondent violated RPC 1.5(b). Count 28 is proven by a clear preponderance of the evidence.

226. By converting client funds of Buerman and Evans, Respondent violated former RPC 1.14(a). Count 29 is proven by a clear preponderance of the evidence.

227. Counts 30 and 31 were not proven by a clear preponderance of the evidence and is dismissed.

228. By failing to properly account to Larsen for the September 2006 payment deposited to Respondent's trust account and then disbursed from his trust account, Respondent violated RPC 1.15A(e). Count 32 is proven by a clear preponderance of the evidence.

229. Counts 33 and 34 were not proven by a clear preponderance of the evidence and is dismissed.

230. By failing to provide prompt responses to a number of ODC's requests regarding WSBA File No. 07-00804 and WSBA File No. 09-00629, Respondent violated RPC 8.4(l):

a) Additional request for information dated 5/31/07, EX A-112;
b) Additional request for response dated 6/7/07, EX A-113;
c) 10-day letter dated 7/24/07, EX A-114;
d) Additional request for information dated 2/7/08, EX A-120;
e) Additional request for information dated 12/10/08, EX A-123;
f) Request for response dated 4/20/09, EX A-140;
g) 10-day letter dated 5/22/09, EX A-141;
h) Additional request for information dated 8/19/09, EX A-146;
i) 10-day letter dated 9/24/09, EX A-147; and
j) Additional request for information dated 10/20/09, EX A-150.

Count 35 is proven by a clear preponderance of the evidence.

231. By making misrepresentations in providing information to ODC during its investigation of WSBA File No. 07-00804, Respondent violated RPC 8.4(c) and RPC 8.4(l). Count 36 is proven by a clear preponderance of the evidence.

Sanction Analysis

232. A presumptive sanction must be determined for each ethical violation. In re Anschell, 149 Wn.2d 484, 501, 69 P.3d 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:

a) Counts 1, 2, 3, 4, 14, and 29: Conversion of Client Funds From the Trust Account

ABA Standards section 4.1 is most applicable to the duty to preserve client funds. See Appendix. As indicated above, Respondent knew or should have known that he was dealing improperly with client property in converting client funds from his trust account. Respondent's clients were potentially injured in that their funds were no longer left intact and protected by being in the trust account. In fact, Respondent used the funds after depositing them to his general account. Certain clients, such as Buerman/Evans, Jaquez, and Rushton were actually injured by the significant delays in receiving all funds they were entitled to. Accordingly, section 4.12 applies and the presumptive sanction is suspension.

b) Count 24: Conversion of Client Funds Not Deposited Into the Trust Account

ABA Standards section 4.1 is most applicable to the duty to preserve client funds. See Appendix. As indicated above, Respondent negligently did not place Johnson's funds into his trust account, instead putting them into his general account. Johnson was potentially injured in that his funds were used before they were earned, and not protected by placement in a trust account. Johnson was actually injured by the delays in receiving all funds he was entitled to. Accordingly, section 4.13 applies and the presumptive sanction is reprimand.

c) Count 5: Commingling

ABA Standards section 4.1 (see Appendix) also applies to Count 5 (commingling). Respondent knew or should have known that he was handling client funds improperly when he commingled funds belonging to his law partners and himself with client funds. There is potential injury when a lawyer commingles funds, and thus subjects the trust funds to a lawyer's creditors seeking to attach property. Accordingly, section 4.12 applies and the presumptive sanction is suspension.

d) Counts 6, 7, 8, 9, and 10: Inadequate Trust-Account Records

ABA Standards section 4.1 (see Appendix) is most applicable to the duty to keep records regarding client funds. Respondent knew or should have known that he was dealing improperly with client funds by keeping inadequate trust-account records. A number of Respondent's clients were potentially injured because Respondent's recordkeeping failed to reveal problems with his handling of their funds. Client Rushton was actually injured when Respondent's recordkeeping did not reveal that $1,000 of the settlement funds were not distributed in accord with his e-mail accounting to Rushton. Accordingly, section 4.12 applies and the presumptive sanction is suspension.

e) Counts 15, 19, 23, 25, and 32: Failure to Account

The applicable Standard to apply to the violations for failure to account to clients is ABA Standards section 4.1 (see Appendix). Respondent knew or should have known he was acting improperly in failing to account to his clients. His actions caused actual injury to the clients, since his failure to account resulted in the clients not knowing that their funds had been taken by Respondent and not having the opportunity to object to Respondent's handling of their funds. In the Jaquez and Rushton matters, Respondent's actions resulted in the clients not knowing that they were entitled to receive funds. Accordingly, section 4.12 applies and the presumptive sanction is suspension.

f) Count 16: Misrepresentations to Jaquez

The applicable standard to apply regarding the duty of honesty in communicating with a client to the violations for making a misrepresentation to a client is ABA Standards section 4.6. See Appendix. As discussed above, Respondent acted recklessly in misrepresenting to Jaquez the amount that Jaquez owed to Respondent in fall 2007. There was actual injury to Jaquez in terms of the time and stress of dealing with Respondent's false claims. Accordingly, section 4.63 applies and the presumptive sanction is reprimand.

g) Counts 17, 21, and 27: Unreasonable Fees

No ABA Standard applies directly to violations of RPC 1.5(a). ABA Standards section

7.0 (see Appendix) is most applicable to the duty to charge a reasonable fee. As discussed above, with regard to Respondent's taking of unreasonable fees in the Rushton matter, he acted knowingly. There was actual injury to Rushton, who still has not been fully reimbursed. As discussed above, Respondent acted recklessly in failing to properly credit all payments to Jaquez while he acted knowingly in filing a lawsuit for an excessive amount of money. There was actual injury to Jaquez in terms of the time and stress of dealing with Respondent's inflated demands for fees. Accordingly, section 7.2 applies and the presumptive sanction is suspension.

h) Count 21: Misrepresentation to the Bankruptcy Court

With regard to Respondent's inflated proof of claim filed in Dahl's bankruptcy proceeding, ABA Standards section 6.1 (see Appendix) is most applicable. Respondent knew that he was falsely representing to the court that Ms. Dahl had an obligation to pay him for the time he spent defending himself after his services had been terminated by her. His actions caused potential injury in the legal proceeding. By falsely inflating the amount of his claim, he would potentially receive a larger share of distributions than he would otherwise be entitled to. Accordingly, section 6.12 applies and the presumptive sanction is suspension.

i) Counts 26 and 28: Improper Contingent Fee Agreement and Failure to Adequately Explain Basis of Fee

With regard to Respondent's failure to put his contingent fee agreement with Rushton in writing, and his failure to adequately explain to Rushton at the outset the basis for his fee, ABA Standards section 4.6 (see Appendix) is most applicable. Respondent knew that he failed to enter into a written contingent fee agreement. His actions caused injury or potential injury to Ms. Rushton, who did not have a clear basis for challenging or questioning Respondent's claim for fees after the case settled. Accordingly, section 4.62 applies and the presumptive sanction is suspension.

j) Count 35: RPC 8.4(l) Failing to Comply with Duty to Cooperate under ELC 5.3(e)

No standard applies directly to violations of RPC 8.4(*l*). ABA Standards section 7.0 (see

Appendix) applies by analogy. As discussed above, with regard to the failure to cooperate, Respondent acted knowingly. His conduct has caused injury to the public and the legal system by delaying the investigation of the grievance and increasing the resources necessary to conduct the investigation. Accordingly, section 7.2 applies and the presumptive sanction is suspension.

k) Count 36: RPC 8.4(l) Failure to Cooperate and RPC 8.4(c) Dishonesty

ABA Standard 7.0 applies to Count 36. See Appendix. As discussed above, Respondent acted knowingly with regard to his conduct in this Count, with the intent to benefit himself regarding the disposition of grievance issues. His actions caused injury or potential injury to the public and the legal system as a whole, which is harmed by lawyers who make misrepresentations during the course of disciplinary investigations. See Whitt, 149 Wn.2d at 719. Accordingly, section 7.2 applies and the presumptive sanction on Count 36 is suspension.

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

(b) dishonest or selfish motive;
(c) a pattern of misconduct;
(d) multiple offenses;
(g) refusal to acknowledge wrongful nature of conduct;
(i) substantial experience in the practice of law [Respondent was admitted in 1980].

234. The following mitigating factors set forth in Section 9.32 of the ABA Standards are applicable to this case:

(a) absence of a prior disciplinary record.

235. 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).

Recommendation

236. Based on the ABA Standards and the applicable aggravating and mitigating factors, the Hearing Officer recommends that Respondent be suspended from the practice of law for a period of one year. In addition, I recommend that restitution to Rushton be ordered in the amount of $3,583.34, plus 12% interest from April 1, 2007, to the date of payment. See Association's Hearing Brief, Appendix 4.

DATED this 3rd day of December, 2010.

William S. Bailey

William S. Bailey, Bar No. 7307
Hearing Officer

CERTIFICATE OF SERVICE

I certify that I caused a copy of the FOF, COL & HO's Recommendation to be delivered to the Office of Disciplinary Counsel and to be mailed to Kim Bullock, Respondent/~~Respondent's Counsel~~ at 710 W Third Ave #3 Spokane WA 99201 by Certified/first class mail, postage prepaid on the 7th day of December, 2010.

Clerk/Counsel to the Disciplinary Board