FILED

JUL 20 2011

DISCIPLINARY BOARD

BEFORE THE
DISCIPLINARY BOARD
OF THE
WASHINGTON STATE BAR ASSOCIATION

In re **PAUL E. SIMMERLY** Lawyer (WSBA No.10719)	Proceeding No. 09#00016 DISCIPLINARY BOARD ORDER MODIFYING HEARING OFFICER'S DECISION

This matter came before the Disciplinary Board at its July 15, 2011, meeting, on automatic review of Hearing Officer William S. Bailey's December 3, 2010, decision recommending a one year suspension and restitution.

Having reviewed the materials submitted by the parties, heard oral argument and considering the applicable case law and rules;

IT IS HEREBY ORDERED THAT the Hearing Officer's decision is modified as follows:[1] (1) Counts 12, 13, 18, 22 and 33 are reinstated; (2) the presumptive sanction for Count 36 is disbarment; (3) the recommended sanction is disbarment.

COUNT 12

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)[2].

[1] The vote on this matter was unanimous. Those voting were: Bahn, Butterworth, Greenwich, Handmacher, Ivarinen, Maier, Ogura, Stiles, Trippett, Waite and Wilson.

[2] Former RPC 1.14(a) stated: all funds of clients paid to a lawyer or law firm, including advances for costs and expenses, shall be deposited in one or more identifiable interest-bearing trust accounts maintained as set forth in section (c), and no funds belonging to the lawyer or law firm shall be deposited therein except as follows: (1) funds reasonably sufficient to pay bank charges may be deposited therein; (2) funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging

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The Hearing Officer made the following Findings of Fact:

> (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).
>
> (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 provided.

These findings establish that Count 12 is proven by a clear preponderance of the evidence. The Hearing Officer's Conclusion of Law in ¶ 210 is reversed.

ABA Standard 4.12 applies to Count 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.

The presumptive sanction for Count 12 is suspension.

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to the lawyer or law firm may be withdrawn when due unless disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

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COUNT 13

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).

The Hearing Officer made the following findings of fact:

> (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.

These facts establish that Count 13 is proven by a clear preponderance of the evidence. The Hearing Officer's Conclusion of Law in ¶ 210 is reversed.

ABA Standard 4.12 applies to Count 13.

> 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.

The presumptive sanction for Count 13 is suspension.

COUNT 18

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

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RPC 1.15A(b)[3], current RPC 1.15A(c)[4], and/or current RPC 1.15A(h)(3)[5].

The Hearing Officer made the following findings of fact:

> (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.
>
> (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.

These facts establish that Count 18 was proven by the clear preponderance of the evidence. The Hearing Officer's Conclusion of Law in ¶ 215 is reversed.

ABA Standard 4.12 applies to Count 18.

> 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.

The presumptive sanction for Count 18 is suspension.

COUNT 22

Count 22:

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[3] RPC 1.15A(b) states: A lawyer must not use, convert, borrow or pledge client or third person property for the lawyer's own use.

[4] RPC 1.15A(c) states: A lawyer must hold property of clients and third persons separate from the lawyer's own property.

[5] RPC 1.15A(h)(3) states: A lawyer may withdraw funds when necessary to pay client costs. The lawyer may withdraw earned fees only after fiving reasonable notice to the client of the intent to do so, through a billing statement or other document.

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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).

The Hearing Officer made the following findings of fact:

(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.

(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 into his general account.

These facts establish that Count 22 is proven by a clear preponderance of the evidence. The Hearing Officer's Conclusion of Law in ¶ 219 is reversed.

ABA Standard 4.12 applies to Count 22.

> 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.

The presumptive sanction for Count 22 is suspension.

COUNT 33

Count 33:

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

The Hearing Officer made the following findings of fact:

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(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 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.

These facts establish that Count 33 was proven by a clear preponderance of the evidence. The Hearing Officer's Conclusion of Law in ¶ 229 is reversed.

ABA Standard 4.12 applies to Count 33.

> 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.

The presumptive sanction for Count 33 is suspension.

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COUNT 36

232(k) is amended to conclude that Respondent's actions caused serious injury or potential injury to the public and the legal system as a whole, which is seriously harmed by lawyers who make misrepresentations during the course of disciplinary investigations.

This change is supported by the Hearing Officer's findings and conclusions and case law.

> ¶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: [I]n support of his misrepresentation 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.

Falsifying information during an attorney discipline proceeding is one of the most egregious charges that can be leveled against an attorney. In re *Whitt,* 149 Wn.2d 707, 720, 72 P.3d 174. The *Whitt* Court found that providing false information during a discipline investigation justifies disbarment even if the lawyer admits to lying later in the investigation. *Id.*

Serious injury corresponds to ABA Standard 7.1.[6] The presumptive sanction for Count 36 is disbarment.

Respondent's conduct is similar to that in *Whitt.* In both cases, the lawyer's conduct toward the client may have required a suspension. However, the intentional misrepresentations to WSBA, supported by fabricated documents, elevates the appropriate

[6] 7.1 Disbarment is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system.

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sanction to disbarment. Disbarment is the appropriate sanction with or without the five counts reinstated by the Board.

Dated this 20th day of July, 2011.

H.E. Stiles, II
Disciplinary Board Chair

CERTIFICATE OF SERVICE

I certify that I caused a copy of the DB Order Modifying HO's Decision to be delivered to the Office of Disciplinary Counsel and to be mailed to Kurt Bulmer, Respondent/~~Respondent's Counsel~~ at 240 Belmont Pl. E #3 Seattle WA 98102 by ~~Certified/first class mail~~, postage prepaid on the 20th day of July, 2011.

Clerk/Counsel to the Disciplinary Board

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