

FILED

JAN 28 2013

DISCIPLINARY BOARD

BEFORE THE
DISCIPLINARY BOARD
OF THE
WASHINGTON STATE BAR ASSOCIATION

In re

JAMES JOSEPH ROSENBERGER,
Lawyer (Bar No. 16043).

Proceeding No. 11#00105
File No. 10-02192

STIPULATION TO
NINE-MONTH SUSPENSION

Under Rule 9.1 of the Rules for Enforcement of Lawyer Conduct (ELC), the following Stipulation to Nine-Month Suspension is entered into by the Washington State Bar Association (Association), through Disciplinary Counsel M Craig Bray and Natalea Skvir, Respondent lawyer James Joseph Rosenberger, and Respondent's counsel Paul James Burns.

On August 10, 2012, Disciplinary Counsel M Craig Bray initiated disciplinary proceedings against Respondent by filing a Formal Complaint alleging misconduct in connection with his representation of Jody McNamer. The hearing in that matter has yet to be scheduled. Several weeks before, Disciplinary Counsel Natalea Skvir sent Respondent's counsel a letter informing him of the results of an investigation into Respondent's trust account practices. The investigation had been initiated after the Association received notice that his trust account had been overdrawn and the letter indicated that a Review Committee of the Disciplinary Board would be provided the assembled evidence and asked to order the matter to

014

1 a hearing.

2 By entering into this Stipulation, Respondent, his counsel and the Office of Disciplinary
3 Counsel wish to resolve both the pending formal proceedings and to obviate the necessity of
4 initiating such proceedings in connection with the trust account matter. Respondent understands
5 that he is entitled under the ELC to a hearing, to present exhibits and witnesses on his behalf,
6 and to have a hearing officer determine the facts, misconduct and sanction in the formal case,
7 and to have a Review Committee determine whether such proceedings are warranted in the trust
8 account matter. Respondent further understands that he is entitled under the ELC to appeal the
9 outcome of a hearing to the Disciplinary Board, and, in certain cases, the Supreme Court.
10 Respondent further understands that a hearing and appeal could result in an outcome more
11 favorable or less favorable to him. Respondent chooses to resolve both matters now by entering
12 into the following stipulation to facts, misconduct and sanction to avoid the risk, time, expense
13 and publicity attendant to further proceedings.

14 **I. ADMISSION TO PRACTICE**

15 1. Respondent was admitted to practice law in the State of Washington on June 9,
16 1986.

17 **II. STIPULATED FACTS**

18 McNamer case

19 2. Jody McNamer (McNamer) hired Respondent in January 2005 to represent him in an
20 auto accident case.

21 3. After Respondent obtained a settlement for the policy limits with the at-fault driver
22 in May 2005, he negotiated with McNamer's own insurer to recover additional funds under his
23 uninsured motorist coverage.

24 4. Negotiations with this insurer appeared to break down and an arbitration was

1 | scheduled for August 20, 2009.

2 | 5. Respondent cancelled the arbitration on August 13, 2009, less than two weeks
3 | before the scheduled date, because he had not yet deposed defense experts.

4 | 6. Because the arbitration was canceled less than two weeks prior to its scheduled
5 | date, the arbitrator required payment of a \$2,000 fee before the arbitration could be rescheduled.

6 | 7. Respondent did not tell McNamer the true reason for canceling the arbitration nor
7 | inform him that \$2,000 would have to be paid in order for it to be rescheduled.

8 | 8. Respondent did not pay the \$2,000 fee or take any steps to reschedule the
9 | arbitration.

10 | 9. Respondent set a deposition of defense expert William Kauppila for September 17,
11 | 2009 but it did not go forward because Respondent's father died on or about September 9, 2009.

12 | 10. Respondent did no further work on McNamer's case.

13 | 11. McNamer called the arbitrator approximately two months after the arbitration had
14 | been canceled, i.e., in October 2009, and learned details of the cancellation.

15 | 12. McNamer immediately terminated Respondent's representation and requested that
16 | Respondent turn over his client file. Respondent did not do so.

17 | 13. After McNamer filed a grievance on March 26, 2010, Respondent gave his client
18 | file to the Association.

19 | 14. McNamer still had time to pursue his uninsured motorist claim after terminating
20 | Respondent's representation.

21 | Trust account matter

22 | a. Non-cooperation

23 | 15. On November 29, 2010, the Association received notice from Union Bank that
24 | Respondent's IOLTA trust account was overdrawn.

1 16. The Association's Audit Manager wrote to advise Respondent that a grievance file
2 was being opened concerning the overdraft and asked him to provide an explanation of the
3 overdraft and supporting documentation within two weeks. Respondent did not reply to this
4 letter.

5 17. On January 25, 2011, disciplinary counsel sent Respondent a letter warning that his
6 failure to respond within ten days could subject him to being subpoenaed for deposition.
7 Respondent did not reply to this letter.

8 18. Respondent was subpoenaed to appear for deposition on February 28, 2011 and to
9 produce his trust account records for the period August 1, 2010 through January 31, 2011.

10 19. On February 28, 2011, Respondent appeared for deposition but brought no records,
11 stating he was unable to find any of the requested trust account records after he had moved.

12 20. Respondent stated he would obtain the records from his bank and was directed to
13 produce them within two weeks. He did not do so. As a result, it was necessary for disciplinary
14 counsel to obtain the records from Respondent's bank by subpoena.

15 21. Respondent was again subpoenaed for deposition and to produce trust account and
16 other records on May 3, 2011. This deposition was postponed twice at his request.

17 22. Respondent appeared for deposition on June 14, 2011 and brought with him two
18 sample fee agreements but none of the other records requested, such as a check register, client
19 ledgers, bank statement reconciliations, or settlement statements.

20 23. At this deposition and by letter the next day, Respondent was asked to produce
21 within two weeks contact information for particular clients and their client files, his trust
22 account bank statements for May and June 2011, and the settlement statement for a particular
23 personal injury client. He did not do so.

1 24. On July 5, 2011, the Association received another trust account overdraft notice
2 from Respondent's bank and disciplinary counsel wrote to him the next day, asking for an
3 explanation and supporting documentation within two weeks. He did not respond.

4 25. Respondent's bank notified the Association of five more overdrafts that occurred in
5 his trust account between July 6 and July 21, 2011.

6 26. On July 29, 2011, Respondent produced the client files and contact information that
7 had been requested earlier, but no explanation of the overdrafts and no other documents.

8 27. On August 9, 2011, disciplinary counsel sent Respondent another ten-day warning
9 letter and he sent disciplinary counsel an e-mail explaining the July 2011 overdrafts. He
10 produced other information and documents by the end of August 2011.

11 b. Trust account

12 28. Other than his trust account, Respondent testified he had no other personal or
13 business bank account.

14 29. At the time this grievance was investigated, Respondent maintained no trust account
15 check register, client ledgers or reconciliations, and he did not know how long he kept his trust
16 account bank statements.

17 30. Respondent did not know to whom the balance in his trust account belonged.

18 31. Respondent testified at deposition that 80 to 90 per cent of his cases were criminal
19 matters for which he charged what he considered to be a flat fee. Because he did not use fee
20 agreements for these clients, he was required to deposit such fees into his trust account until
21 they were earned and to withdraw them only after notifying the clients in writing of his intent to
22 do so. Respondent did not deposit these fees into his trust account or so notify these clients.

23 32. At times, funds held in Respondent's trust account on behalf of one client were
24

1 that client had on deposit, Respondent violated RPC 1.5A(h)(8).

2 41. By repeatedly failing to respond to the Association's requests for information and
3 documents as required by ELC 5.3(e), Respondent violated RPC 8.4(I).

4 IV. PRIOR DISCIPLINE

5 42. Respondent was suspended for 30 days, effective May 29, 2002, for practicing law
6 while his license to practice law was suspended for non-payment of dues during July and
7 August 2001.

8 V. APPLICATION OF ABA STANDARDS

9 43. The following American Bar Association Standards for Imposing Lawyer Sanctions
10 (1991 ed. & Feb. 1992 Supp.) apply to this case :

11 44. ABA Standard 4.1 applies to Respondent's failure to deal properly with client
12 property and maintain accurate records for his trust account. It states:

13 4.11 Disbarment is generally appropriate when a lawyer knowingly converts
client property and causes injury or potential injury to a client.

14 4.12 Suspension is generally appropriate when a lawyer knows or should
15 know that he is dealing improperly with client property and causes injury or
potential injury to a client.

16 4.13 Reprimand is generally appropriate when a lawyer is negligent in dealing
with client property and causes injury or potential injury to a client.

17 4.14 Admonition is generally appropriate when a lawyer is negligent in
dealing with client property and causes little or no actual or potential injury to a
18 client.

19 45. Respondent knew or should have known that his recordkeeping was grossly
20 inadequate, that he was required to deposit advanced fees into his trust account, and that he
should not disburse one client's trust account funds on behalf of a different client.

21 46. The actual injuries were (a) an inability to determine to whom the funds in
22 Respondent's trust account belonged, and (b) his failure to protect the funds he was supposed to
23 be holding on behalf of certain clients.
24

1 47. The presumptive sanction is suspension.

2 48. ABA Standard 4.4 applies to Respondent's failure to act with reasonable diligence
3 and promptness in representing McNamer and to communicate with him. It states:

4 4.41 Disbarment is generally appropriate when:

5 (a) a lawyer abandons the practice and causes serious or potentially serious
injury to a client; or

6 (b) a lawyer knowingly fails to perform services for a client and causes
serious or potentially serious injury to a client; or

7 (c) a lawyer engages in a pattern of neglect with respect to client matters and
causes serious or potentially serious injury to a client.

8 4.42 Suspension is generally appropriate when:

9 (a) a lawyer knowingly fails to perform services for a client and causes
injury or potential injury to a client, or

10 (b) a lawyer engages in a pattern of neglect and causes injury or potential
injury to a client.

11 4.43 Reprimand is generally appropriate when a lawyer is negligent and does
not act with reasonable diligence in representing a client, and causes injury or
potential injury to a client.

12 4.44 Admonition is generally appropriate when a lawyer is negligent and does
not act with reasonable diligence in representing a client, and causes little or no
actual or potential injury to a client.

13 49. Respondent acted negligently in his handling of McNamer's case.

14 50. The actual injury to McNamer was delay in the resolution of his claim.

15 51. The presumptive sanction is a reprimand.

16 52. ABA Standard 7.0 applies to Respondent's failure to cooperate with the
17 Association's investigation. It states:

18 7.1 Disbarment is generally appropriate when a lawyer knowingly engages in
19 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
20 serious injury to a client, the public, or the legal system.

21 7.2 Suspension is generally appropriate when a lawyer knowingly engages in
conduct that is a violation of a duty owed as a professional and causes injury or
22 potential injury to a client, the public, or the legal system.

23 7.3 Reprimand is generally appropriate when a lawyer negligently engages in
conduct that is a violation of a duty owed as a professional and causes injury or
potential injury to a client, the public, or the legal system.

24 7.4 Admonition is generally appropriate when a lawyer engages in an

1 isolated instance of negligence that is a violation of a duty owed as a
2 professional, and causes little or no actual or potential injury to a client, the
public, or the legal system.

3 53. Respondent's failure to cooperate was knowing.

4 54. Respondent conduct caused significant harm to the system of lawyer discipline in
5 that it substantially prolonged the investigation and unnecessarily increased costs and consumed
6 resources of the Office of Disciplinary Counsel.

7 55. The presumptive sanction is suspension.

8 56. The following aggravating factors apply under ABA Standard 9.22:

- 9 (a) prior disciplinary offense;
10 (d) multiple offenses; and
(i) substantial experience in the practice of law.

11 57. The following mitigating factor applies under ABA Standard 9.32:

- 12 (c) personal or emotional problems: During his representation of
13 McNamer, Respondent's father died.

14 58. Respondent's agreement to resolve this matter at an early stage of the proceedings is
15 also a mitigating factor.

16 59. Where there are multiple ethical violations, the "ultimate sanction imposed should at
17 least be consistent with the sanction for the most serious instance of misconduct among a
18 number of violations." In re Disciplinary Proceeding Against Petersen, 120 Wn.2d 833, 854,
19 846 P.2d 1330 (1993).

20 60. In light of the aggravating factors, the period of suspension should be greater than
21 the six-month presumptive suspension.

22 VI. STIPULATED DISCIPLINE

23 61. The parties stipulate that Respondent will be suspended from the practice of law for
24 nine months, to be followed by two years of probation after his reinstatement.

1 62. Reinstatement from suspension shall be conditioned upon Respondent's payment of
2 costs as set forth below.

3 63. During the two-year probationary period following his reinstatement, Respondent
4 shall comply with the requirements set forth in paragraphs 64 through 81.

5 64. Respondent shall have a written fee agreement signed by the client for every client
6 matter, which agreements are to be maintained for at least seven years (see RPC 1.15B(a)(3)).

7 65. Respondent shall provide receipts for all fees received in whatever form (e.g., cash,
8 check, electronic transmittal, credit card) and maintain copies thereof.

9 66. All fees, regardless of the form of payment (including cash) must be deposited into
10 a bank account, whether a client trust account, a business account or personal account. No
11 client checks may be presented to a bank for cashing, but must be deposited into a bank account
12 for which records are kept.

13 67. All advance fees must be placed in a client trust account in compliance with RPC
14 1.15A unless the Respondent and the client have signed a written flat fee agreement that
15 complies with RPC 1.5(f)(2), in which case the fee may be placed in a business account or
16 personal account for which appropriate records are maintained.

17 68. Respondent shall carefully review and fully comply with RPC 1.15A and RPC
18 1.15B, and shall carefully review the Association's publication, "Managing Client Trust
19 Accounts: Rules, Regulations, and Common Sense."

20 69. On a quarterly basis, Respondent shall provide the Association's audit staff with all
21 trust account records for the time period to be reviewed by the Association's audit staff and
22 disciplinary counsel for compliance with the RPC, as set forth in paragraphs 70 through 80.

23 70. Months 1 – 3. By no later than the 30th day of the fourth month after Respondent's
24

1 reinstatement, Respondent shall provide the trust account records from the date of his
2 reinstatement to the end of the third full month.

3 71. Months 4 – 6. By no later than the 30th day of the seventh month after
4 Respondent's reinstatement, Respondent shall provide the trust account records from the end of
5 the previously provided quarter through the end of month six.

6 72. Months 7 – 9. By no later than the 30th day of the tenth month after Respondent's
7 reinstatement, Respondent shall provide the trust account records from the end of the previously
8 provided quarter through the end of month nine.

9 73. Months 10 – 12. By no later than the 30th day of the thirteenth month after
10 Respondent's reinstatement, Respondent shall provide the trust account records from the end of
11 the previously provided quarter through the end of month twelve.

12 74. Months 13– 15. By no later than the 30th day of the sixteenth month after
13 Respondent's reinstatement, Respondent shall provide the trust account records from the end of
14 the previously provided quarter through the end of month fifteen.

15 75. Months 16 – 18. By no later than the 30th day of the nineteenth month after
16 Respondent's reinstatement, Respondent shall provide the trust account records from the end of
17 the previously provided quarter through the end of month eighteen.

18 76. Months 19 – 21. By no later than the 30th day of the twenty-second month after
19 Respondent's reinstatement, Respondent shall provide the trust account records from the end of
20 the previously provided quarter through the end of month twenty-one.

21 77. The trust account records Respondent provides to the Association for each quarterly
22 review of his trust account will include: (a) a complete checkbook register for his trust account
23 covering the period being reviewed, (b) complete individual client ledger records for any client
24

1 with funds in Respondent's trust account during all or part of the period being reviewed, as well
2 as for Respondent's own funds in the account (if any), (c) copies of all trust-account bank
3 statements, deposit slips, and cancelled checks covering the period being reviewed, (d) copies of
4 all trust account client ledger reconciliations for the period being reviewed, and (e) copies of
5 reconciliations of Respondent's trust account check register covering the period being reviewed.
6 On the same quarterly time schedule set forth in paragraphs 70 through 76, Respondent will
7 provide the Association's Audit Manager or designee with copies of any and all fee agreements
8 entered into within the time period at issue.

9 78. The Association's Audit Manager or designee may request additional financial or
10 client records if needed to verify Respondent's compliance with RPC 1.15A and/or 1.15B.
11 Within twenty days of a request from the Association's Audit Manager or designee for
12 additional records needed to verify Respondent's compliance with RPC 1.15A and/or RPC
13 1.15B, Respondent will provide the Association's Audit Manager or designee the additional
14 records requested.

15 79. The Association's Audit Manager or designee will review Respondent's trust
16 account records for each period.

17 80. Respondent will comply with any recommendations made by the Association's
18 Audit Manager or designee.

19 81. Respondent will reimburse the Washington State Bar Association for time spent by
20 the Association's Audit Manager or designee in reviewing and reporting on Respondent's
21 records to determine his compliance with RPC 1.15A and RPC 1.15B, at the rate of \$85 per
22 hour. Respondent will make payment within thirty days of each written invoice setting forth the
23 auditor's time and payment due.

1 **VII. COSTS AND EXPENSES**

2 82. In light of Respondent's willingness to resolve this matter by stipulation at an early
3 stage of the proceedings, Respondent shall pay reduced attorney fees and administrative costs of
4 \$1,000 in accordance with ELC 13.9(i). The Association will seek a money judgment under
5 ELC 13.9(l) if these costs are not paid within 30 days of approval of this stipulation.
6 Reinstatement from suspension or disbarment is conditioned on payment of costs.

7 **VIII. VOLUNTARY AGREEMENT**

8 83. Respondent states that prior to entering into this Stipulation he has consulted
9 independent legal counsel regarding this Stipulation, that Respondent is entering into this
10 Stipulation voluntarily, and that no promises or threats have been made by the Association, nor
11 by any representative thereof, to induce the Respondent to enter into this Stipulation except as
12 provided herein.

13 **IX. LIMITATIONS**

14 84. This Stipulation is a compromise agreement intended to resolve this matter in
15 accordance with the purposes of lawyer discipline while avoiding further proceedings and the
16 expenditure of additional resources by the Respondent and the Association. Both the
17 Respondent lawyer and the Association acknowledge that the result after further proceedings in
18 this matter might differ from the result agreed to herein.

19 85. This Stipulation is not binding upon the Association or the respondent as a statement
20 of all existing facts relating to the professional conduct of the respondent lawyer, and any
21 additional existing facts may be proven in any subsequent disciplinary proceedings.

22 86. This Stipulation results from the consideration of various factors by both parties,
23 including the benefits to both by promptly resolving this matter without the time and expense of
24


1 hearings, Disciplinary Board appeals, and Supreme Court appeals or petitions for review. As
2 such, approval of this Stipulation will not constitute precedent in determining the appropriate
3 sanction to be imposed in other cases; but, if approved, this Stipulation will be admissible in
4 subsequent proceedings against Respondent to the same extent as any other approved
5 Stipulation.

6 87. Under Disciplinary Board policy, in addition to the Stipulation, the Disciplinary
7 Board shall have available to it for consideration all documents that the parties agree to submit
8 to the Disciplinary Board, and all public documents. Under ELC 3.1(b), all documents that
9 form the record before the Board for its review become public information on approval of the
10 Stipulation by the Board, unless disclosure is restricted by order or rule of law.


11 88. If this Stipulation is approved by the Disciplinary Board and Supreme Court, it will
12 be followed by the disciplinary action agreed to in this Stipulation. All notices required in the
13 Rules for Enforcement of Lawyer Conduct will be made.

14 89. If this Stipulation is not approved by the Disciplinary Board and Supreme Court, this
15 Stipulation will have no force or effect, and neither it nor the fact of its execution will be
16 admissible as evidence in the pending disciplinary proceeding, in any subsequent disciplinary
17 proceeding, or in any civil or criminal action.


1 WHEREFORE the undersigned being fully advised; adopt and agree to the facts and
 2 terms of this Stipulation to Discipline as set forth above.

3
 4 
 5 James Joseph Rosenberger, Bar No. 16043
 Respondent

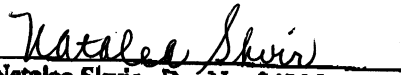
Dated: 10/19/12

6
 7 
Paul James Burns, Bar No. 13320
 Counsel for Respondent

Dated: 10-19-12

8
 9 
M Craig Bray, Bar No. 20821
 Disciplinary Counsel

Dated: 10/19/2012

10
 11 
Natalea Skvir, Bar No. 34335
 Disciplinary Counsel

Dated: 10/19/12

13
 14
 15
 16
 17
 18
 19
 20
 21
 22
 23
 24