

FILED

AUG 26 2013

DISCIPLINARY BOARD

BEFORE THE DISCIPLINARY BOARD OF THE
WASHINGTON STATE BAR ASSOCIATION

In Re:
Marion Ellen Morgenstern

Public No. 13 # 00013

Lawyer
Bar # 222466

**FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND HEARING OFFICER'S
RECOMMENDATION**

Pursuant to Rule 10.3 of Rules of Enforcement of Lawyer Conduct (ELC) a hearing was conducted on written materials provided by the Association to the Hearing Officer by e-mail on July 18, 2013 and hard copy the next week. The Hearing Officer reviewed the complaint, which was not contested, the Association's Brief and the Associations Proposed Findings and Conclusions, subsequent to a default hearing and entry of order of Default signed June 11, 2013. Notarized proof of service of the Association's Service of Subpoena Dueces Tecum was attached to the Association's Declaration for Default.

FINDINGS

1. FORMAL COMPLAINT

The Formal Complaint, a copy of which is attached hereto, charged Marion Ellen Morgenstern with misconduct as set forth therein. The allegations in the formal complaint are admitted and established, pursuant to ELC 10.6(a)(4). The allegations of the complaint are incorporated herein as if set forth in full as findings of fact.

2. FINDINGS REGARDING CHARGED VIOLATIONS

Count 1 Respondent knowingly failed to provide Beaver Lake with an accounting after April, 2008.

FINDINGS OF FACT, CONCLUSIONS OF LAW
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Count 2. Respondent knowingly failed to return client funds to Beaver Lake and other unidentified clients after she closed her law practice.

Count 3. Respondent knowingly failed to notify and advise Beaver Lake of her suspension from the practice of law.

Count 4. Respondent knowingly failed to respond to Beaver Lake's attempts to contact her regarding return of their funds.

Count 5. Respondent knowingly failed to maintain bank statements, canceled checks, and other required records.

Count 6. Respondent knowingly failed to promptly reply to requests for records and information relevant to a grievance.

3. CONCLUSIONS OF LAW, VIOLATIONS OF RULES OF PROFESSIONAL CONDUCT (RPC)

Respondent failed to answer the Association complaint and by operation of ELC10.6(a)(4), Respondent admits and establishes the charged violations.

Count 1. Respondent knowingly violated RPC 1.15A(e); safeguarding property.

Count 2. Respondent knowingly violated RPC 1.15A(f); failure to promptly pay or deliver property to client and 1.16(d); failure to protect client interests upon termination of representation.

Count 3. Respondent knowingly violated RPC 8.4(l) by failing to; respond to inquiries, file an answer to the complaint, cooperate with an examination of books and records, as set forth in ELC 1.5 and violating ELC 14.1(c) by failing to notify client of; suspension, reason for the suspension, and advise client to seek legal advice elsewhere, if necessary, and provide client with their property.

Count 4. Respondent knowingly violated RPC 1.4(a)(4); prompt reply for information.

Count 5. Respondent knowingly violated RPC1.15(A)(h)(2) and 1.15(B) failure to keep complete records.

Count 6. Respondent knowingly violated RPC 8.(1)(b) failing to maintain integrity of the profession by knowingly failing to respond to a lawful demand for information from a disciplinary authority, and knowingly violating RPC 8.4(l) the duty imposed by the sanction of suspension, to notify clients of suspension, and knowingly violated ELC 5.3(e) by failing to promptly respond and allow copying or inspection of

records relevant to the investigation.

4. PRESUMPTIVE SANCTIONS

A presumptive sanction must be determined for each ethical violation. *In re Anshell*, 149 Wn.2d 484, 502, 69 P2d 844, (2003).

Under the ABA Standards, the court engages in a two-step process in making sanction decisions. First, the court determines a presumptive sanction, considering the ethical duty violated, the lawyer's mental state, and the extent of the harm caused by the misconduct. ABA Standards std. 3.0; *In re Anshell I*, 141 Wash.2d at 608, 9 P.3d 193 (2000). Then the court considers aggravating or mitigating factors that may alter the presumptive sanction. *Id.* at 608, 9 P.3d 193; *In re Disciplinary Proceedings Against Johnson*, 118 Wash.2d 693, 701, 826 P.2d 186 (1992).
In re Anshell, 149 Wn.2d 484, 501, 69 P2d 844, (2003).

Count 1

The Respondent knowingly violated her duty of loyalty and diligence to her client when she failed to provide an accounting of the funds paid to her by the client Bear Lake. The Respondent knew she had a trust account, and the injury to the client was the two years they did not have their property and the time, money and effort expended in requesting the accounting and ultimately filing a grievance with the Association.

Section 4 of the ABA standards applies to trust accounts and client funds.

Standard 4.42 Suspension is the appropriate presumed standard.

Suspension is generally appropriate when: (a) lawyer knowingly fails to perform a service for a client and causes injury or potential injury to a client.

Count 2

Respondent knowingly violated RPC 1.15(A)(f) failure to return property upon request, a duty of loyalty and diligence to the clients, and knowingly violated RPC 1.16(d) when she failed to protect client property and legal claims upon termination of her practice, the same duties of loyalty and diligence to the clients. The injury or potential injury is loss of property, and potentially, the loss of a legal claim, but to date there is no evidence of serious injury, or the intent to gain a benefit for herself or others when she terminated her practice that is normally associated with a disbarment. The presumptive sanction is the same for Count 2 as Count 1, suspension.

ABA Standard 4.42 is the appropriate presumed sanction.

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ABA Standard 4.42 Suspension is generally appropriate when: (a) lawyer knowingly fails to perform a service for a client and causes injury or potential injury to a client.

Count 3

Respondent knowingly or should have known she violated RPC 8.4, (I) by failing to abide by ELC 14.1(c) when she knowingly violated her duty of loyalty to the client by failing to communicate to Bear Lake her suspension, failing to explain how it would impact her ability to represent them and, failing to advise them to seek other legal counsel during her suspension as required by the ELC. The Association analyzes this violation of the duty to the profession, for failing to adhere to disciplinary standards. Standard 4.6, the duty of candor to the client is also a duty Respondent violated. The Respondent was not forthcoming with her clients about her suspension, she did not tell them she could no longer practice law, and advise them of the consequences of that barrier. Bear Lake lost time it took to send the multiple requests, and to file a grievance, and they were denied the use of their property for over two years.

ABA Standard 4.6 Lack of Candor

4.62 Suspension is generally appropriate when a lawyer knowingly deceives a client and causes injury or potential injury to the client.

ABA Standard 7.2 also would result in the presumptive standard of suspension. 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 potential injury to a client, the public, or the legal system.

Count 4

The Respondent knowingly violated her duty of diligence to the client when she failed to return the client's property as requested. The client's money was held over two years, and was finally paid with a trust account check. The client suffered injury as set forth in the prior counts. ABA Standard 4.42(2) Suspension is the proper sanction.

Suspension is generally appropriate when (a) lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client.

Count 5

Respondent knowingly violated her duty of loyalty to her clients set forth at RPC 15A and 15B by failing to keep bank account and trust account records that would identify the holders of the \$23, 833.53 left in her trust account. The potential injury is they don't have their property and may have lost valuable legal claims, since the Respondent

didn't keep proper records and abandoned her practice. The appropriate sanction is ABA Standard 4.12, because there is no evidence of Respondent knowingly converting the client's property.

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

Count 6

Respondent knowingly violated her duty owed as a professional when she failed to respond for requests for records (ELC 5.3e), a violation of RPC 8.1(b), and failed to comply with the requirements of 8.(4)(I) by violating her duties under her suspension. RPC Standard 7.0 Violations of Other Duties Owed As a Professional applies. Disbarment is not the appropriate sanction because there is no evidence the Respondent intended to obtain a benefit for herself or others, Suspension does not seem appropriate because the injury to the client has been serious, they cannot be reimbursed since they cannot be identified. ABA 7.2 is applied here, because of the total lack of evidence intent on the part of Respondent to benefit herself or others not her clients.

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 potential injury to a client, the public or the legal system.

5. AGGRAVATING AND MITIGATING FACTORS

Aggravating , multiple offenses, substantial experience in the practice of law, indifference to making restitution. The Association also urges bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rule or orders of the disciplinary agency and an aggravating factor. The Supreme Court considered this factor in *In Re Disciplinary Proceedings Against John Scannell*, 169 Wn. 2d, 239 P.3d 332(2010).

We adhere to the Board's finding that Scannell intentionally failed to cooperate in disciplinary proceedings with the intent to frustrate and delay those proceedings. The Board correctly determined that the presumptive sanction for such obstruction, which intended to delay any sanction against Scannell and required the Bar to expend excessive resources investigating him, is disbarment. See ABA STANDARDS std. 7.1 (recommending disbarment for knowing violations of ethical rules with intent to benefit the lawyer, if the violations cause serious injury to the legal system). ¶ 42 Scannell has caused serious injury to the legal system by dragging out his disciplinary proceedings for five years. The resources of the Bar to prosecute ethical violations are limited and depend upon the cooperation of the attorneys involved. *Scannell* at 169 Wn. 2d 745.

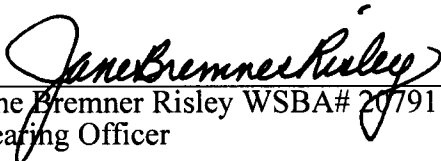
This is not the case in this action, while Respondent has frustrated the Association's investigation to determine whose money is in her trust account, she has not delayed the imposition of sanctions by even filing an answer to the formal complaint. The resources of the Bar are spared and the imposition of sanctions is not delayed. This aggravating factor will carry little weight in the analysis of this recommendation.

7. RECOMMENDATION

Having considered the facts, the presumptive sanctions, reviewed several cases¹ for imposition of sanctions and considered the aggravating and mitigating factors, the Hearing Officer recommends a two year suspension, two more years of probation during which Ms. Morgenstern will allow quarterly audits by the Association, and comply with any training the Association requests to improve her bookkeeping skills. Because she was suspended for continuing legal education violations prior to this action, those credits must be earned prior to reinstatement.

Further, the Association's request that the Respondent be required to (a) provide a complete accounting of funds in her trust account as of November 30, 2012 and (b) pay those funds, with interest, to the persons entitled to receive them prior to reinstatement is recommended.

Signed this 23rd day of August, 2013.


Jane Bremner Risley WSBA# 20791
Hearing Officer

CERTIFICATE OF SERVICE

I certify that I caused a copy of the PDF, COL, HO's Recommendation
to be delivered to the Office of Disciplinary Counsel and to be mailed
to Mallon Morgenstern, Respondent/Respondent's Counsel
at 1704 SE 27th St. Kent, WA 98032, by Certified first class mail,
postage prepaid on the 23rd day of August, 2013


Clerk/Counsel to the Disciplinary Board

¹ See, *In re Disciplinary Proceeding Against Tasker*, 9 P.3d 822, 141 Wn.2d 557 (2000) an attorney who commingles funds in his client trust account and pays business and personal expenses out of the commingled account, but without intent to permanently deprive any clients of money given a two year suspension.

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MAR 26 2013

BEFORE THE
DISCIPLINARY BOARD
OF THE
WASHINGTON STATE BAR ASSOCIATION

<p>In re</p> <p>MARION ELLEN MORGENSTERN,</p> <p>Lawyer (Bar No. 22466).</p>	<p>Proceeding No. 13#00013</p> <p>FORMAL COMPLAINT</p>
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Under Rule 10.3 of the Rules for Enforcement of Lawyer Conduct (ELC), the Washington State Bar Association (the Association) charges the above-named lawyer with acts of misconduct under the Rules of Professional Conduct (RPC) as set forth below.

ADMISSION TO PRACTICE

1. Respondent Marion Ellen Morgenstern was admitted to the practice of law in the State of Washington on May 18, 1993.

FACTS REGARDING ALL COUNTS

2. Respondent worked at the law firm of Strichartz Morgenstern, PLLC, until it was dissolved in late 2005.

3. While she worked at Strichartz Morgenstern, PLLC, Respondent provided legal

DEM

1 services to the Beaver Lake Estates Homeowners Association ("Beaver Lake").

2 4. In January 2006, Respondent transferred \$1,013.03 belonging to Beaver Lake from
3 Strichartz Morgenstern to her new law firm, Morgenstern Law Office.

4 5. In April 2008, Respondent billed Beaver Lake for \$67.50 and withdrew that
5 amount from her trust account.

6 6. As of April 16, 2008, Respondent was holding \$945.53 belonging to Beaver Lake.

7 7. Respondent did no work for Beaver Lake after April 16, 2008.

8 8. After April 2008, Respondent did not provide Beaver Lake with any accounting of
9 the funds she held on Beaver Lake's behalf.

10 9. Respondent knew that she was holding funds belonging to Beaver Lake, and she
11 knew or should have known that she was dealing improperly with client funds by failing to
12 provide an accounting.

13 10. Respondent ended her law practice in or before September 2010.

14 11. When she ended her law practice, Respondent knowingly failed to return the funds
15 of Beaver Lake and other clients.

16 12. Respondent knew or should have known that she was dealing improperly with
17 client funds by failing to return those funds when she ended her law practice.

18 13. On September 29, 2010, Respondent was administratively suspended for failing to
19 report MCLE credits, and she has remained in a suspended status since that date.

20 14. Respondent knew of her suspension shortly after September 29, 2010.

21 15. Following her suspension, Respondent knowingly failed to notify Beaver Lake of
22 her inability to act as its lawyer, and she knowingly failed to advise Beaver Lake to seek legal
23 advice elsewhere.

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1 16. In late 2011, Richard Dunn, a Beaver Lake representative, determined that
2 Respondent still held Beaver Lake's funds.

3 17. Between September 2011 and February 2012, Mr. Dunn and other Beaver Lake
4 representatives made multiple attempts to contact Respondent and secure the return of Beaver
5 Lake's funds.

6 18. Respondent knowingly failed to respond to the Beaver Lake representatives'
7 attempts to contact her.

8 19. On February 25, 2012, Mr. Dunn filed a grievance against Respondent.

9 20. On March 2, 2012, a copy of the grievance was sent to Respondent at her address
10 on file with the Association in Kent, Washington, along with a request for her written response.

11 21. Respondent received the March 2, 2012, request for response, but she knowingly
12 failed to respond.

13 22. On April 5, 2012, a second notice was sent to Respondent by certified mail at her
14 Kent address informing her that under ELC 5.3(e) she was required to provide a written
15 response to the grievance within ten days.

16 23. Respondent received the second notice on April 10, 2012, but she knowingly failed
17 to respond.

18 24. On April 26, 2012, the Association issued a subpoena duces tecum to Respondent
19 under ELC 5.3(f) commanding her to appear for a deposition on May 17, 2012, and to produce
20 the following documents:

21 Your complete file and whatever documents may be in your possession or control
22 relating to your representation of the Beaver Lake Estates Homeowners Association, and
23 all financial records, including trust account and client ledgers, canceled checks, and
bank statements relating to funds received in connection with your representation of the
Beaver Lake Estates Homeowners Association.

24 25. Service was attempted at Respondent's Kent address on file with the Association,

1 36. On or about June 28, 2012, Respondent remitted a check drawn on her lawyer trust
2 account for \$945.53 to Beaver Lake.

3 37. The records that Respondent provided showed that she still held funds belonging to
4 one or more former clients other than Beaver Lake.

5 38. Respondent knew that she still had client funds in her lawyer trust account even
6 though she had ended her law practice in or before September 2010.

7 39. The Association's investigator interviewed Respondent by telephone on August
8 29, 2012.

9 40. Respondent terminated the August 29, 2012, interview before it was complete, and
10 told the Association's investigator that she would call back on September 4, 2012, to complete
11 the interview.

12 41. Respondent never called back.

13 42. The Association's investigator made at least four attempts to contact Respondent
14 after September 4, 2012, but Respondent knowingly failed to respond.

15 43. Because of Respondent's failure to respond, the Association's investigator was
16 never able to complete the interview.

17 44. On September 26, 2012, Disciplinary Counsel sent Respondent an Additional
18 Request for Response to Grievance.

19 45. Disciplinary Counsel requested copies of Respondent's trust account check register
20 and client ledgers, as well as other trust account records relating to one particular client matter
21 referenced in the records that Respondent had provided with her June 28, 2012, response to the
22 grievance.

23 46. Respondent knowingly failed to respond to the September 26, 2012, Additional
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1 but Respondent could not be found.

2 26. A skip tracer later found Respondent residing in Florida.

3 27. Respondent had not informed Beaver Lake or the Association that she had moved
4 to Florida or that she was no longer at her address on file with the Association.

5 28. On May 15, 2012, the Association issued a second subpoena duces tecum under
6 ELC 5.3(f) commanding Respondent to appear for a deposition on June 15, 2012 and to produce
7 the same documents described in the first subpoena duces tecum.

8 29. Respondent was personally served in Florida with the second subpoena duces
9 tecum on May 29, 2012.

10 30. On June 7, 2012, Respondent contacted Disciplinary Counsel and requested a
11 postponement of the deposition.

12 31. Disciplinary Counsel agreed to postpone the deposition on the condition that by
13 June 29, 2012, Respondent provide (1) the documents described in the subpoena duces tecum
14 and (2) a complete accounting of all funds received and disbursed in connection with her
15 representation of Beaver Lake.

16 32. On June 28, 2012, Respondent provided a written response to the grievance. With
17 it, she provided some, but not all, of the documents described in the subpoena duces tecum.

18 33. Respondent did not provide any bank statements or canceled checks, which she did
19 not maintain.

20 34. Respondent knew or should have known that she was dealing improperly with
21 client funds by failing to maintain bank statements, canceled checks, and other required records.

22 35. Respondent admitted that that she still held \$945.53 belonging to Beaver Lake in
23 her lawyer trust account.

1 Request for Response to Grievance.

2 47. Because of Respondent's failure to respond, the Association served a subpoena on
3 Respondent's bank.

4 48. As of November 30, 2012, there had been no activity in Respondent's lawyer trust
5 account since May 8, 2009, except for one \$945.53 withdrawal that occurred on August 2, 2012,
6 when Beaver Lake negotiated its refund check.

7 49. As of November 30, 2012, \$23,886.73 in client funds remained in Respondent's
8 lawyer trust account.

9 50. Because of Respondent's failure to respond to the Association's requests for
10 records and information, the Association cannot determine to which client or clients those funds
11 belong.

12 **COUNT 1**

13 51. By failing to provide Beaver Lake with any accounting after April 2008 of the
14 funds she held on Beaver Lake's behalf, Respondent violated RPC 1.15A(e).

15 **COUNT 2**

16 52. By failing to promptly return the funds of Beaver Lake and other still-unidentified
17 clients after ending her law practice, Respondent violated RPC 1.15A(f) and/or 1.16(d).

18 **COUNT 3**

19 53. By failing to notify and advise Beaver Lake as required by ELC 14.1(c) after she
20 was suspended from the practice of law, Respondent violated ELC 1.5, RPC 8.4(l), and/or ELC
21 14.1(c).

22 **COUNT 4**

23 54. By failing to respond to Beaver Lake's attempts to contact her and secure the
24 return of Beaver Lake's funds, Respondent violated RPC 1.4(a)(4).

1 **COUNT 5**

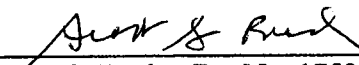
2 55. By failing to maintain bank statements, canceled checks, and other required
3 records, Respondent violated RPC 1.15A(h)(2) and/or RPC 1.15B.

4 **COUNT 6**

5 56. By failing to promptly respond to requests for records and information relevant to
6 a grievance, Respondent violated RPC 8.1(b), RPC 8.4(l), and/or ELC 5.3(e).

7
8 THEREFORE, Disciplinary Counsel requests that a hearing be held under the Rules for
9 Enforcement of Lawyer Conduct. Possible dispositions include disciplinary action, probation,
10 restitution, and assessment of the costs and expenses of these proceedings.

11
12 Dated this 26th day of March, 2013.

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15 _____
16 Scott G. Busby, Bar No. 17522
17 Disciplinary Counsel
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