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**DISCIPLINARY BOARD**

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BEFORE THE DISCIPLINARY BOARD OF THE  
WASHINGTON STATE BAR ASSOCIATION

In Re:	)	
	)	PUBLIC NO. 10 #00096
DAVID R. FOX,	)	
	)	FINDINGS OF FACT AND
Lawyer	)	CONCLUSIONS OF LAW AND
	)	RECOMMENDATION OF
WSBA No. 24317	)	HEARING OFFICER
	)	

In accordance with Rule 10.13 of the Rules for Enforcement of Lawyer Conduct (ELC), a hearing was held before the undersigned Hearing Officer February 21, 2012- February 24, 2012. Disciplinary Counsel Erica Temple appeared for the Washington State Bar Association (the Association) and the Respondent, David R. Fox appeared Pro Se.

**I. FORMAL COMPLAINT FILED BY DISCIPLINARY COUNSEL**

The Amended Formal Complaint filed by Disciplinary Counsel charged Respondent with six counts of violation of the rules of professional conduct. On February 22, 2012, the Association brought an oral motion to dismiss Count 5. The Association's motion was granted. The Association proceeded with a hearing on the following ten counts of misconduct:

Count 1 – By pressuring Mr. Gilbertson to have sex with him and/ or taking advantage of Mr. Gilbertson's emotional vulnerability and/ or engaging in criminal acts with Mr. Gilbertson (use of illegal substances) and/ or asking Mr. Gilbertson for money to buy drugs, Respondent violated

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW AND  
RECOMMENDATION OF  
HEARING OFFICER - 1

ORIGINAL

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1 RPC 1.7 (a)(2).

2 Count 2- By allowing Mr. Gilbertson to live in his home at no charge and providing other  
3 gifts, Respondent violated 1.8(e).

4 Count 3- By using illegal substances (RCW 69.50.4014) and/ or knowingly writing checks  
5 on an account that was overdrawn (RCW 9A.56.060) and/ or tampering with evidence (RCW  
6 9A.72.150), Respondent violated RPC 8.4(b) and/ or RPC 8.4(c) and/ or RPC 8.4(d).

7 Count 4- By engaging in sexual conduct with Mr. Mason in a jail visitation call,  
8 Respondent violated RPC 1.7(a)(2).

9 Count 6- By engaging in sexual conduct with Mr. Mason and/or by abusing his position as  
10 a lawyer to gain access to a client in jail for sexual purposes and/ or by filing documents with  
11 unsupported allegations against Judge Wood, Respondent violated RPC 8.4(d).

12 Count 7- By depositing funds belonging to himself into his IOLTA account, commingling  
13 his funds with client funds, withdrawing cash, disbursing funds to himself before a deposit  
14 cleared, and failing to reconcile trust account records, Respondent violated RPC 1.15A(c) and  
15 RPC 1.15A(h).

16 Count 8- By failing to maintain current trust account records, including checkbook  
17 registers, individual client ledgers, and trust account client ledger reconciliations, Respondent  
18 violated RPC 1.15B(a).

19 Count 9 -By writing checks on an account known to be overdrawn, Respondent violated  
20 RPC 8.4(b) and RPC 8.4(i).

21 Count 10- By stating, falsely, that the original overdraft was caused by a check from a  
22 client that was returned for insufficient funds, Respondent violated RPC 8.1(a) and RPC 8.4(c).

23 Count 11- By failing to respond to requests for documents related to this grievance, and  
24 by failing to cooperate with the Association's investigation, Respondent violated RPC 8.4(l).

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

## 3 II. FINDINGS OF FACT

4 At the hearing that took place on February 21, February 22, February 23, and February  
5 24, 2012, both the Respondent and the Association presented witnesses and evidence. Having  
6 considered the evidence and argument of counsel, the Hearing Officer finds that the following  
7 facts were proven by a clear preponderance of the evidence.

### 8 A. Background

9 1. Respondent, David R. Fox is approximately 50 years old. He was admitted to the  
10 practice of law in the State of Washington in November of 1994. His practice, which is located in  
11 Port Angeles, Clallum County, consists primarily of work in the areas of criminal and family law.  
12 Historically, he has had a modest legal practice and he has derived most of his livelihood from  
13 farming income. Prior to the complaints set out in this action, Mr. Fox had no other prior Bar  
14 complaints.

15 2. From the months of February 2010 through May 2010, Mr. Fox handled two criminal  
16 matters, one pertaining to Jordan Gilbert who was age 22 and the other to pertaining to Justin  
17 Mason, who was age 26. Both litigants are grievants in this proceeding. In the Spring of 2010,  
18 Mr. Fox began a run for Clallum County Prosecutor. However, he withdrew from the race when  
19 information about his alleged improper conduct in these two matters was reported in the local  
20 newspaper.

### 21 22 B. Specific facts pertaining to this grievance by Jordan Gilbertson.

23 3. Mr. Fox and Mr. Gilbertson were introduced to each other at a party in the Fall of  
24 2009. In December of 2009, Mr. Gilbertson was charged with a DUI, possession of marijuana,  
25 and possession of drug paraphernalia. Although a public defender was appointed to represent

1 him, Mr. Fox and Mr. Gilbertson had become more closely acquainted and on February 6, 2010,  
2 they entered into an attorney- client relationship.

3 4. On February 6, 2010, they executed a fee agreement indicating Mr. Fox would  
4 represent Mr. Gilbertson in any and all of Gilbertson's civil and criminal matters at the rate of  
5 \$100.00 per hour. Mr. Gilbertson testified that the written agreement was for appearances and  
6 that it was not intended to be enforceable. Mr. Fox corroborated Mr. Gilbertson's understanding  
7 by testifying that he performed primarily pro bono work, that although he always hoped to be  
8 compensated, compensation from Mr. Gilbertson was unlikely as he had no job and he didn't  
9 anticipate he could secure a job in this down economy.

10 5. Although it was unclear whether or not Mr. Gilbertson had been evicted from his then  
11 current residence, and whether or not that residence was shared with others, Mr. Fox was aware  
12 that Mr. Gilbertson was struggling financially and that he was behind on his rent. Unbeknownst  
13 to Mr. Fox, Mr. Gilbertson's family had withdrawn all financial support from him for fear it enabled  
14 his drug use that had become problematic.

15 6. On February 8, 2010, Mr. Fox and Mr. Gilbertson also entered into a landlord/ tenant  
16 relationship. According to the rental lease, Mr. Gilbertson and his dog, Cillah, would reside in  
17 Mr. Fox's home rent- free until April 1, 2010. Mr. Gilbertson was to have use of the basement  
18 apartment and access to the laundry, kitchen, bathroom, and garage. Although the rental lease  
19 did not specify, he also had use of the yard. No deposits were required and on April 1, 2010, Mr.  
20 Gilbertson was to begin paying \$300.00 a month.

21 7. Pursuant to the rental lease, Mr. Gilbertson could also earn handyman wages at the  
22 rate of \$12.00 per hour for performing tasks around the house. Mr. Gilbertson, in fact, earned  
23 wages performing yard work and other tasks while living with Mr. Fox.

24 8. Mr. Gilbertson provided credible and undisputed testimony that he smoked marijuana  
25 with Mr. Fox both prior to and after retaining Fox as a lawyer, and that before and after entering

1 into an attorney/ client relationship he secured marijuana and other illegal drugs for Mr. Fox.

2 9. Mr. Gilbertson lived in Mr. Fox's home from approximately February 8, 2010 and until  
3 March 14, 2010 when his stepfather, Witness Heindl, helped him move out of Mr. Fox's house.

4 10. Mr. Fox was both physically and romantically interested in Mr. Gilbertson prior to  
5 entering into the lease agreement. After entering into the attorney-client relationship, Mr. Fox  
6 communicated his romantic interest by treating Mr. Gilbertson to an occasional restaurant meal,  
7 providing him with marijuana and smoking it together, and by giving him gifts, such as a topsy-  
8 turvey plant and a spyglass/ monocular.

9 11. Mr. Fox communicated his interest by touching Mr. Gilbertson on the hand, the  
10 shoulder, and the hair. He also verbally discussed his romantic and sexual interests with Mr.  
11 Gilbertson. Although Fox believed that Mr. Gilbertson was receptive to his overtures and that the  
12 relationship was headed in a romantic and physical direction, he was mistaken.

13 12. Mr. Gilbertson was living at Mr. Fox's home because he could make money with Mr.  
14 Fox and because he could live in the home rent- free. Mr. Gilbertson testified that he is not gay,  
15 that he had no interest in Mr. Fox, that he believed Mr. Fox was trying to coax him into a sexual  
16 relationship and that it felt terrible. It was Mr. Gilbertson's undisputed testimony that Mr. Fox  
17 attempted to crawl into his bed with him on two occasions and that he responded by getting up  
18 out of bed and saying "no". Mr. Gilbertson was visibly distressed during his testimony. His  
19 distress and his testimony that Mr. Fox's overtures were unilateral and unwanted was credible.

20 13. On March 8 and 9, 2010, Mr. Fox wrote Mr. Gilbertson two checks for yard work  
21 done, one for \$100.00 and one for \$250.00. Mr. Gilbertson cashed those checks at his bank,  
22 First Federal. However, on May 14, 2010, First Federal sent Mr. Gilbertson notice that his  
23 account was debited \$100.00 and \$250.00 as Mr. Fox's bank, Merrill Lynch Chase, had not paid  
24 the funds.

25 14. Mr. Fox testified that he eventually put a stop payment on both checks and filed a

1 police report because he suspected that Mr. Gilbertson had taken two blank checks from his  
2 home. Although those blank checks were never found, Mr. Fox never reimbursed Mr. Gilbertson  
3 and Mr. Gilbertson still owes First Federal \$350.00 for the two dishonored checks. Mr.  
4 Gilbertson denies he took any checks from Mr. Fox's home.

5 15. On March 11, 2010, Mr. Fox gave Mr. Gilbertson an Addendum to the Residential  
6 Lease that had been executed on February 8, 2010. It stated that Mr. Gilbertson could borrow  
7 any "f—ing" thing he wanted, and that he could "use, abuse & otherwise wear & tear said items  
8 to his little heart's content." It indicated that landlord (Fox) would not accuse tenant (Gilbertson)  
9 of stealing the items.

10 16. Mr. Fox testified that he wrote the Addendum in an emotional state.<sup>1</sup> Mr. Gilbertson  
11 believed Mr. Fox wrote the Addendum in an effort to further coax him because he would not be  
12 Mr. Fox's boyfriend and because he would not do the things [romantic and sexual ] that Mr. Fox  
13 wanted him to do.

14 17. After his move on March 14, 2010, Mr. Gilbertson shared some of the text messages  
15 from Mr. Fox with his stepfather.

16 18. One text message read "unless you want to f—k me up the ass, I want you to".

17 19. Other text messages read "dazzle me", "need bump. Pleeaaaasse.", "Bump I beg",  
18 and "Need lawn....", and "Up? Good news. Pay 100/hour 4 mowing lawn. Need ASAP." Mr.  
19 Gilbertson testified that these latter texts were requests for him to provide Mr. Fox with drugs,  
20 and that "lawn" was marijuana.

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21  
22 <sup>1</sup> Mr. Fox's report to the police regarding the alleged check theft is worrisome. Within days of writing the two  
23 checks, Fox gave Mr. Gilbertson the addendum telling him he could take or use whatever he wanted without fear of  
24 theft allegations. Mr. Gilbertson believed the addendum was an effort by Mr. Fox to coax him into doing [romantic  
25 and sexual] things. On March 14, distressed by Mr. Fox's unwanted advances, he moved out. Mr. Gilbertson's  
December 21, 2009 Order of Release and Conditions prohibits him from violating any laws. The police abandoned  
the investigation due to lack of evidence as the checks never showed up. Although Mr. Fox experienced no loss, he  
still maintains the theft occurred and he has refused to reimburse Mr. Gilbertson for the dishonored checks. If the  
police had pursued the theft allegations and charges filed, Mr. Gilbertson would potentially have been exposed  
revocation of bail.

1           20. Witness Heindl expressed concern that Mr. Fox was asking his stepson for sexual  
2 favors and that by handling his stepson's legal representation, providing him housing, and  
3 providing him employment and gifts, Mr. Fox was positioning himself to use his stepson  
4 [Gilbertson]. He believed Mr. Fox's behaviors and text messages were inappropriate in light of  
5 Fox's role as his stepson's lawyer. He believed the behaviors to be harmful and threatening to  
6 his stepson and that they were scaring him.

7           21. Witness Heindl wanted Mr. Fox to know that his stepson was not alone and so at the  
8 next court hearing on March 16, 2010, he confronted Mr. Fox and told him that he had the text  
9 messages that Mr. Fox had sent.

10           22. Witness Heindl was visibly distressed during his testimony, particularly when  
11 describing his concern that Mr. Fox was seeking sexual favors.

12           23. Mr. Gilbertson's case proceeded to trial on March 17, 2010 and he was convicted on  
13 of the two charges. On March 19, 2010, prior to his sentencing , Mr. Gilbertson attempted,  
14 unsuccessfully, to terminate Mr. Fox's representation of him and asked to proceed to sentencing  
15 on a pro se basis.

16           24. Despite Mr. Gilbertson's move from Fox's home, and despite the stepfather's notice  
17 that he had the inappropriate text messages, Mr. Fox continued romantic and/ or sexual pursuit  
18 of Mr. Gilbertson. On March 31, Mr. Gilbertson's birthday, he left a birthday cake at his prior  
19 residence. He also performed sexual acts in a bed Mr. Gilbertson had left behind. He made Mr.  
20 Gilbertson aware of those acts, and then offered him the bed. He sent a text message to Mr.  
21 Gilbertson saying "Just wonder why u r not here... I love you more than life." Another text  
22 message read "I want you back."

23           25. To this day, running into Mr. Fox in the community and the thought of potentially  
24 running into Mr. Fox distresses Mr. Gilbertson.

1 WAIVER OF CONFLICT OF INTEREST PERTAINING TO GILBERTSON

2 26. Mr. Fox understood that there were special considerations if a lawyer stood in the duo  
3 role of friend, landlord, and lawyer to one person. However, he believed this representation was  
4 permissible so long as he explained to the potential client that there were special considerations  
5 and so long as the client agreed to the duo roles. Mr. Fox told Mr. Gilbertson that it was a  
6 conflict of interest to be both his lawyer and his landlord, and that there were special  
7 considerations but that this was permissible so long as Gilbertson agreed that he could play both  
8 roles. Gilbertson agreed to the representation.

9 27. However, Mr. Fox did not secure a written waiver of that conflict of interest. He also  
10 did not explain to him what exactly the dangers were should he agree to the conflict of interest.  
11 For example, he did not explain to Mr. Gilbertson that Gilbertson would be dependent on his  
12 professional judgment and that if Gilbertson were also dependent on him financially, that  
13 Gilbertson risked Fox using his dominant position to exploit him.

14 28. Mr. Fox also did not explain to Gilbertson that he had a romantic and sexual interest  
15 in him and that once dependent on him, Gilbertson might not feel free to rebuff unwanted  
16 advances or exercise his free choice for fear that this could reduce Fox's zeal for Gilbertson's  
17 case.

18 29. Likewise, he did not explain to Gilbertson that he had a lot at stake in his criminal  
19 proceeding, including his freedom, and that if Mr. Fox's personal interests might interfere with  
20 Gilbertson's best interests and result in poor judgment on his case or require Fox's withdrawal,  
21 and that this could damage Gilbertson legal position.

22  
23 TAMPERING OF EVIDENCE

24 30. At some point after Mr. Gilbertson's trial, Mr. Fox sent Mr. Gilbertson a text message  
25 stating that he had stolen some evidence and needed help in disposing of it. Mr. Gilbertson was



1 alarmed and testified that during his trial, he observed Mr. Fox walk up to the bench and grab the  
2 trial exhibit which was a pill container containing marijuana. He testified he observed Mr. Fox  
3 turn from the judge, open the container, put his finger in the container and then put his finger/  
4 hand directly into his pocket. He testified he observed Mr. Fox smell the container and that the  
5 judge then stated that he'd had enough and directed Mr. Fox to close the container.

6 31. Mr. Fox adamantly denied stealing evidence and testified that his text message was  
7 simply a joke.

8 32. The Clallum County Sheriff's office conducted an investigation regarding the alleged  
9 tampering of evidence. The marijuana evidence weighed .6 grams when it was initially  
10 submitted into evidence and .59 grams at the time of investigation. However, Detective T.D.  
11 Reyes noted that marijuana continues to dry over time, potentially causing the slight weight  
12 discrepancy.

13 33. Judge Porter testified that Mr. Gilbertson's trial was one of two jury trials that Mr. Fox  
14 had handled in his courtroom in 2010. He had no recollection of any trial irregularities, and he  
15 had no awareness of any theft of evidence. Judge Porter could also not recall anything specific  
16 about Mr. Gilbertson's demeanor as the defendant during trial.

17 34. In light of Judge Porter's testimony, and in light of the reasonable alternative  
18 explanation by the Clallum County Sheriff for the slight discrepancy in the weight of the  
19 marijuana evidence, there is insufficient evidence to find that the theft of evidence or tampering  
20 of evidence occurred.

21 35. Although it is not found that there was theft or tampering of evidence, Mr. Gilbertson's  
22 testimony regarding the alleged evidence tampering/ theft appeared sincere. However, Mr.  
23 Gilbertson had never been the subject of a criminal trial. Given the wildly inappropriate nature of  
24 Mr. Fox's text message, and given the wildly inappropriate nature of other behaviors by Fox  
25 which Mr. Gilbertson observed and experienced, he was understandably under stress and

1 fearful of the trial outcome. The great probability is that Mr. Gilbertson misinterpreted and  
2 misunderstood Mr. Fox's actions during his trial.

3  
4 **HARM TO MR. GILBERTSON**

5 36. Mr. Gilbertson believed that he received inadequate representation, that he had been  
6 assured of a dismissal of all charges and advised against accepting the plea offer extended by  
7 the prosecutor. However, there was no evidence of any written instructions by Mr. Gilbertson  
8 nor any other reliable record of Mr. Gilbertson's expressed wishes to Mr. Fox regarding the  
9 action to take in his case.

10 37. Mr. Fox testified that had he did not prevail in a motion to suppress evidence prior to  
11 trial, and that had he prevailed, he could have secured a dismissal. He testified that after losing  
12 the motion, and despite notice to Mr. Gilbertson that Judge Porter had a reputation for being a  
13 harsh judge, Mr. Gilbertson was adamant that he would not agree to any jail time and insisted  
14 that his matter proceed to trial. Mr. Fox's testimony was credible.

15 38. The loss of the suppression motion would have been an indicator to Mr. Gilbertson  
16 that there could be problems with his case. Mr. Gilbertson's testimony regarding Mr. Fox's  
17 recommendations prior to trial were not reliable. There is insufficient evidence to find that Mr.  
18 Gilbertson was harmed by omissions or unreasonable legal advice by Fox prior to trial.

19 39. At trial, Mr. Gilbertson was convicted on two charges and received 15 days in jail with  
20 no credit for time served, in addition to many conditions on probation.

21 40. Judge Porter didn't have a specific recollection of the facts of Mr. Gilbertson's case  
22 but he recalled that Mr. Fox's appearance before him in two matters in 2010<sup>2</sup>. He recalled noting  
23 that Mr. Fox appeared to have relatively little trial experience. He testified that during trial, he

24 \_\_\_\_\_  
25 <sup>2</sup> Mr. Fox testified and also advised Judge Porter that the two matters he tried before Judge Porter were the  
Gilbertson and Mason matters.

1 routinely assesses whether or not a defendant's constitutional rights are being protected and  
2 whether or not they are receiving an adequate defense. This is particularly true if a lawyer  
3 appears to be inexperienced. He further testified that had there been a great disparity between  
4 the jury verdict and what he would have been found had it been a bench trial, as a matter of  
5 practice, he would have declared a mistrial. In Judge Porter's opinion, Mr. Fox provided  
6 adequate representation in both matters tried before him.

7 41. There is insufficient evidence to determine that Mr. Gilbertson was harmed by any  
8 omission or deficiency in Mr. Fox's representation at trial.

9 42. As a result of Mr. Fox's romantic and sexual overtures towards Mr. Gilbertson, he  
10 experienced distress at the time of the representation and he continues to experience distress as  
11 a result.

12 43. Mr. Gilbertson experienced financial harm in that he still owes First Federal Bank  
13 \$350.00 for the dishonored checks written by Mr. Fox. Due to his indebtedness to the bank, his  
14 credit rating has been damaged and he has not been able to open a bank account.

15  
16 **B. Specific facts pertaining to this grievance by Justin Mason.**

17 44. Mr. Fox met Mr. Mason at a party in approximately 2008 and during the following year  
18 or so, ran into him periodically at social gatherings. Mr. Mason saw Mr. Fox as a smart man with  
19 an impressive social circle that included a couple of high profile lawyers in the community. Mr.  
20 Mason had been represented by public defenders on a number of occasions and he had not  
21 found those experiences satisfactory. In September of 2009, he sought representation by Mr.  
22 Fox for some criminal charges against him. Although they executed a fee agreement indicating  
23 there would be a charge of \$100.00 per hour, Mr. Mason understood services would be free of  
24 charge.

25 45. That criminal matter was concluded and no payment was ever requested by Mr. Fox.

1 On February 26, 2010, Mr. Mason again had criminal charges filed against him. Mr. Fox learned  
2 of the charges, appeared in court at Mr. Mason's first hearing and offered his services. Mr.  
3 Mason accepted and Mr. Fox entered a Notice of Appearance. New charges were brought  
4 against Mr. Mason in April of 2010 and Mr. Fox entered an appearance on those as well.

5 46. After an initial period of being in and out of custody, by mid March or so, Mr. Mason  
6 remained incarcerated and his communications with Mr. Fox were either by telephone, through  
7 the mail, or in-person at the Clallum County jail. He became concerned that Mr. Fox was not  
8 responding to his telephone calls inquiring into his case. Written communications he received  
9 from Mr. Fox were more social in nature and low on legal content. For example, a March 10  
10 communication stated:

11 "you need to think about your future in terms of relationships that are to the benefit of both  
12 parties & that move you towards your goals." (emphasis original).

13 47. On March 19, another stated:

14 "Found some hash or something on J's coaster. Havin' a good time w/ it... Are you green w/  
15 envy yet? ... Have you been thinking in terms of relationships where the costs & the benefits are  
16 shared, rather than bargained for? Yeah, I tried that too. Doesn't work. No brilliant solutions  
17 here. We'll spring ya! Dad gummit! End. Lots of crap."

18 48. Mr. Fox visited Mr. Mason in jail on at least four occasions with the first being after-  
19 hours on March 30 (ending in the wee hours of March 31). While conducting a shift count at  
20 approximately 12:20 a.m., the corrections officer smelled cigarette smoke and on opening the  
21 attorney visiting booth door to count Mr. Mason, he observed Mr. Mason with his jail coveralls  
22 rolled down to his waist, exposing his bare torso. Later, another corrections officer also  
23 overheard heard sexual bantering between them.

24 49. Between Mr. Mason's March 30, 2010 statements and his February 22, 2012  
25 testimony, Mr. Mason gave varying and somewhat inconsistent accounts pertaining to  
contraband provided by Mr. Fox and inappropriate sexual conduct by Mr. Fox towards him.  
However, on April 12, 2010, in response to questioning by Undersheriff Ron Peregine, Mr. Fox

1 admitted smoking cigarettes [ contraband] in the attorney booth and additionally, he  
2 acknowledge sexual bantering with Mr. Mason. On May 20, 2010, Detective Reyes interviewed  
3 Mr. Fox . Although Mr. Fox was somewhat evasive and unforthcoming in that interview, after  
4 being told that samples of bodily fluid had been collected from the attorney visitation booth, Fox  
5 admitted that on a couple different visits, he and Mr. Mason exposed their genitalia to each other  
6 and on at least one of those occasions, he [Fox ]masturbated and ejaculated while this occurred.

7 50. Mr. Fox testified that he found Mr. Mason to be "sexy" and that after Mr. Mason's  
8 incarceration, he communicated to Mr. Mason that he was interested in a sexual relationship. He  
9 communicated this to Mr. Mason through his body language, words, and gestures. Mr. Fox  
10 referred to one jail interview as an erotic, friendship type visit where he [Fox] removed all clothing  
11 except for his socks while in the attorney booth. Initially, Mr. Fox agreed that during the incident  
12 when he removed all his clothes, he and Mr. Mason touched each other's fingers under the  
13 under the window or slot. That admission was credible and reliable. Although he subsequently  
14 became non committal, indicating he did not recall, and then finally indicating he did not believe  
15 the touching of the fingers occurred, the retraction was not credible.

16 51. Mr. Mason provided credible testimony and it is found that during the attorney visits  
17 by Mr. Fox, Mr. Fox offered him cigarettes and other drugs, and that he cooperated with two of  
18 Mr. Fox's requests to roll down his coveralls and expose his genitalia while Mr. Fox  
19 simultaneously exposed his genitalia and ejaculated. On the first occasion, Mr. Fox asked that  
20 he [Mason] touch his finger through the window slot and Mr. Mason complied. He further  
21 testified that during these sexual encounters, Mr. Fox asked him to stroke his [Mason's] exposed  
22 penis. On other occasions, he testified that Mr. Fox described his ongoing drug use, and that Mr.  
23 Fox described drugging and performing a sexual act on a male named Jordan.

24 52. After one of the masturbation incidents, Mr. Mason told Mr. Fox that he "owned him",  
25 meaning that now Mr. Fox would need to attend to his case to avoid Mason disclosing the

1 conduct to authorities. He testified that Mr. Fox told him that no one would believe him.

2 53. On April 12, 2010 when questioned by of the jail officers if anything was amiss with  
3 his lawyer, Mason made no disclosure for fear that Mr. Fox would use his influence in the  
4 community to his [Mason's] detriment. Mason saw Mr. Fox as part of an elite crowd in the  
5 community, who had gone to school with the judges. He believed Mr. Fox had friends on the  
6 bench, in the public defenders office, in the sheriff's office and elsewhere in the community. He  
7 was afraid Mr. Fox would retaliate against him and ensure he [Mason] was sent to prison. He  
8 also feared that if Mr. Fox withdrew, a public defender would be appointed and that his case  
9 would be mishandled.

10 54. On April 28, 2010, Mr. Fox tried Mr. Mason's harassment case before a jury. Mr.  
11 Mason testified that prior to trial Mr. Fox did not discuss trial strategies with him and that he did  
12 not discuss witness testimony with him. In general, he believed that Mr. Fox focused on social/  
13 sexual issues and that he was not responsive to concerns raised by Mr. Mason regarding his  
14 pending case. He believed Mr. Fox was less responsive over time as he [Mason] had stopped  
15 cooperating with sexual type demands by Fox.

16 55. Mr. Mason did not believe Mr. Fox was prepared for trial and he was not happy with  
17 Mr. Fox's work. In May of 2010, while Mr. Mason's second case was still pending, Mr. Fox  
18 continued to focus on the social/ sexual aspects of his relationship with Mr. Mason. He sent in or  
19 carried in communications that had long acronyms or code on the outside of the envelope. One  
20 communication contained a flyer announcing an Open House for Mr. Fox's campaign for County  
21 Prosecutor. Jail security found the code to be irregular and questioned Mr. Mason about the  
22 meaning of the code. Although Mr. Mason didn't tell jail security, he believed they were sexual  
23 expressions. For example, on the back, one bore:

24 S.W.S.T.A.Y.P.F.  
25 C.And C.I.M.M.

56. Mr. Mason believed the end of the last line stood for "And come in my mouth". Prison

1 security officers also decoded the acronyms and believed they were messages of a sexual  
2 nature.

3 57. Mr. Mason was becoming increasingly concerned about the status of his pending  
4 case. He was concerned that Mr. Fox had neither the interest nor the necessary criminal law  
5 knowledge to handle his second matter which was still pending. He believed Mr. Fox's intent  
6 was to take advantage of his incarceration and fear of imprisonment in order to coerce him into  
7 complying with his sexual demands. He wrote a letter expressing his concerns that Mr. Fox  
8 needed to properly prepare his case and further demanding weekly consultations.

9 58. Mr. Fox was non responsive and on and around May 9, 2010, he sent Mr. Fox some  
10 distressed letters demanding a conference, describing legal steps Mr. Fox was to take on his  
11 behalf, and begging that Mr. Fox "quit being a flake." One letter exclaimed "this is my life at  
12 stake... I feel you don't care!" He advised Fox this was his last chance and he threatened to  
13 disclose the sexual conduct if Mr. Fox did not comply.

14 59. On May 14, 2010, Mr. Mason contacted prison authorities and asked to speak to Sgt.  
15 Finley who had inquired in April 2010 if something was amiss with his lawyer. As a result of a  
16 series of interviews by authorities of Mr. Mason and Mr. Fox, the potential conflict of interest was  
17 placed before George C. Wood, Superior Court Judge for Clallum County on May 21, 2010. The  
18 court found that Mr. Mason did not wish to be represented by Mr. Fox [ due to alleged sexual  
19 harassment, etc.]. Over Mr. Fox's objection, he was removed from the case and new counsel  
20 appointed.

21  
22 **WAIVER OF CONFLICT AND HARM TO MASON**

23 60. Mr. Fox took no steps to discuss or ensure that Mr. Mason understood the conflict of  
24 interest should Mr. Mason cooperate with his sexual advances and he did not secure a waiver of  
25 this conflict of interest.

1           61. As with Mr. Gilbertson, Mr. Fox did not explain to Mr. Mason that he [Fox] was in a  
2 position of power, that due to Mason's incarceration he was more vulnerable to manipulations by  
3 Mr. Fox in the form of withholding of necessary work if overtures were rebuffed or loss of zeal for  
4 his case.

5           62. Mr. Fox did not discuss with Mr. Mason the fact that it was contrary to jail regulations  
6 to participate in sexual activity with another person, that it was contrary to jail regulations to  
7 remove one's clothing in public areas, to bring contraband such as cigarettes or illegal drugs into  
8 the jail or to use that contraband in the jail, and that these activities which Mr. Fox initiated  
9 placed Mr. Mason in jeopardy.

10           63. Although Mr. Mason received a small benefit from Mr. Fox's advances in the form of  
11 cigarettes and drugs, Mr. Mason cooperation with Mr. Fox's sexual advances was coerced. The  
12 small pleasure he received from the use of contraband paled in comparison to the jeopardy in  
13 which Mr. Fox placed Mr. Mason. Likewise, although Mr. Mason attempted to secure Mr. Fox's  
14 necessary efforts on his case by threatening to disclose the sexual misconduct, Mr. Mason was  
15 repulsed by Mr. Fox's conduct and he was repulsed by the experience itself. He should not have  
16 been in a position where he needed to do something repulsive to himself in order to secure his  
17 lawyers attention to his case.

18           64. Mr. Mason experienced distressed about the status of his case and the potential  
19 negative result were he unable to get adequate representation from Mr. Fox.

20           65. There is insufficient evidence to find that Mr. Mason received inadequate  
21 representation or that the outcome of the case was effected by Mr. Fox's omission's and / or  
22 wildly inappropriate, activity, interactions, and sexual misconduct.

23           66. Judge Porter recalled the matter, and he recalled noting that Mr. Fox appeared to be  
24 unskilled in court. Judge Porter did not call a mistrial, as would have been his practice had he  
25 found that a defendant did not receive adequate representation.



1 REQUEST FOR RECUSAL AND ALLEGATIONS OF BIAS BY THE BENCH

2 67. The Sheriff's office was aware that Mr. Fox was a candidate for the office of  
3 Prosecuting Attorney. After Mr. Mason's disclosures on May 14, 2010, to avoid a conflict of  
4 interest [ between the Prosecuting Attorney and an opponent running for her office], they sought  
5 a consultation from the Attorney General's Office. The AG's office would not become involved  
6 without a referral from the Prosecutor's office.

7 68. On May 18, 2010, without disclosing any details, the Sheriff's office sought  
8 permission from the Prosecuting Attorney to refer Mr. Mason's complaint to the Attorney General  
9 for handling. The referral was given. Upon receipt, the attorney general's office advised the  
10 Prosecutor of the duty to bring the matter before the court for review regarding the potential  
11 conflict of interest between Mr. Fox and his client.

12 69. On May 20, 2010, the Prosecuting Attorney met with Mr. Fox in the hopes of securing  
13 his voluntary withdrawal from Mr. Mason's case. The Prosecutor was unsuccessful and so,  
14 placed the matter before Judge Wood on May 21, 2010 for a determination.

15 70. On May 24, 2010, Mr. Fox filed a motion or Request for Recusal of Judge Wood and  
16 further requesting his reinstatement as counsel for Mr. Mason. In his motion and supporting  
17 affidavit, he alleged that Judge Wood was acting in concert with the Prosecuting Attorney, Deb  
18 Kelly, to thwart the will of the voters. He alleges having a long history with Judge Wood. He  
19 alleged experiencing discrimination on the basis of his sexual orientation:

20 71. Despite the court's findings and Mr. Mason's testimony on May 21, 2010 and  
21 February 22, 2012 that he did not wish to be represented by Mr. Fox, Mr. Fox insists that Mr.  
22 Mason did not wish to terminate his services. He is adamant that the prosecutor's office sought  
23 his removal in order to bring his homosexuality before the public in order to eliminate him as a  
24 candidate for public office.

1 REFUSAL TO ACKNOWLEDGE SEXUAL ADVANCES ARE UNWANTED

2 72. Mr. Fox had no remorse regarding his conduct with Mr. Gilbertson and / or Mr.  
3 Mason. He viewed himself as a tall, highly educated, fun person, and he was candid in his belief  
4 that every client he ever had has fallen in love with him.

5 73. Mr. Fox was adamant that he and Mr. Mason had a personal adult consensual  
6 relationship with a sexual element. He also believed that his wish for a romantic and sexual  
7 relationship with Mr. Gilbertson was mutual. He did not believe that the development of romantic  
8 and/ or sexual relationship with his clients created a potential conflict of interest.

9 74. Mr. Fox conceded that his conduct in the jail's visitation booth was unprofessional,  
10 inappropriate and wrong. However, he was adamant that had it occurred outside of jail, in his  
11 own home for example, he would have had no regrets whatsoever.

12  
13 TRUST ACCOUNTS

14 75. Mr. Fox maintained a Pooled Iolita account with Bank of America. Although Mr. Fox  
15 also maintained a personal checking account with Merrill Lynch, starting as early as May of  
16 2009, Mr. Fox began to use his Bank of America trust account as a personal checking account.  
17 His main source of income was through his farming business and with very few exceptions, the  
18 funds deposited into his trust account were from his farming business or checks written from his  
19 account with Merrill Lynch, not from clients.

20 76. Mr. Fox wrote checks from his trust account to pay for living expenses such as to  
21 Qwest, Verizon, Foremost Insurance Company, and Walgreens. He also wrote many checks to  
22 himself for cash.

23 77. On April 13, 2010, Bank of America sent the Office of Disciplinary Counsel for WSBA  
24 a Trust Account Overdraft Notice in the amount of \$81.88. In response to a request from WSBA  
25 for an explanation, on May 3, 2010, Mr. Fox indicated that he taken \$100.00 in cash out of his

1 trust account when depositing a client's \$200.00 check. He indicated that when the check was  
2 subsequently returned due to uncollected funds, his trust account was left with a deficiency. He  
3 included a flyer indicating he was running for County Prosecutor.

4 78. In response to a May 5, 2010 request by WSBA for additional bank statements, bank  
5 reconciliations, client ledgers, client ledger reconciliations, and check registers, in a May 19,  
6 2010 email, Mr. Fox stated that the overdraft was caused by Merrill Lynch reaching into his  
7 IOLTA account "at will" and removing funds to satisfy Merrill Lynch checks that he had cashed at  
8 Bank of America.

9 79. On May 26, 2010, he sent bank statements for January through April of 2010. He  
10 made notations on the bank statements identifying withdrawals that he stated represented  
11 earned fees. He attributed earned fees to clients with the initials K.F., D. S., and J.G. In  
12 particular, he identified a deposit of \$3,333.33 on March 22, 2010 as being from client K.F. That  
13 check was actually a payment from Finkbeiner Farms, Inc. for wheat sold.

14 80. Mr. Fox did legal work primarily on a pro bono basis. For the months of January  
15 through April of 2010, Mr. Fox received only two checks associated with clients. Both checks  
16 were from Mr. Gilbertson. One check was for \$100.00 and it was used to pay diversion costs,  
17 and another was to Mr. Gilbertson from the Clallum County Sheriff's Department for \$74.06.

18 81. Although Mr. Fox testified that he had received \$100.00 a \$100.00 check dated  
19 February 10, 2010 written to Clallum County District Court for his client Christianson, his May 26,  
20 2010 accounting to WSBA for the months from January through April of 2010 did not identify any  
21 transactions pertaining to that client.

22 82. From April through June of 2010, Mr. Fox deposited many checks to his IOLTA  
23 account from his Merrill Lynch account. In the months of May and June 2010, nine checks  
24 written from his Merrill Lynch account to his trust account were returned. On May 27, 2010, Mr.  
25 Fox had a negative balance of \$269.00 in his trust account. On June 30, 2010, he had a

1 negative balance of \$669.88 in his trust account.

2 83. Mr. Fox attempted to correct his negative balance with Bank of America but that the  
3 bank refused his money.

4 84. Mr. Fox traveled to Spokane in August of 2010 where he attempted a run for U.S.  
5 Congress. On August 2, 4, and 5 of 2010, Mr. Fox wrote three checks from his Bank of America  
6 trust account to C.I. Shenanigans, a restaurant in Spokane Washington. These checks in the  
7 amounts of \$91.00, \$100.00, and \$66.00. These checks were returned unpaid due to insufficient  
8 funds. On January 26, 2011, legal counsel for Shenanigans advised WSBA that as of that date,  
9 Mr. Fox had not yet paid the checks totaling \$257.00. Mr. Fox testified that he had, in fact, paid  
10 the checks totaling \$257.00. After the hearing, on April 23, 2012, Mr. Fox forwarded an  
11 electronic attachment he alleged was proof of payment. However, the electronic file could not be  
12 opened by Disciplinary Counsel. She objected to the late submission of evidence both because  
13 it was late and because she was unable to open the file to determine if it was, in fact, evidence of  
14 payment.<sup>3</sup> In the absence of evidence of payment, it is found that Mr. Fox has not yet paid the  
15 funds owed to Shenanigans.

16 85. Mr. Fox testified that he began using his trust account for personal purposes because  
17 a personal account he had with Bank of America had been closed due to overdrafts. He testified  
18 he applied for a new account with four different banks but he was refused due to a poor credit  
19 rating that resulted from late mortgage payments.

20 86. After an initial April 2010 request for four months of trust account records, on June 15,  
21 2010, Disciplinary Counsel requested all Bank of America and trust account records for the  
22 period from June 1, 2008 and through the present, Merrill Lynch records from January 1, 2010

23 \_\_\_\_\_  
24 <sup>3</sup> This hearing officer also received the electronic communication and was also unable to view or access the  
25 attachment. This hearing officer is also unaware of any reply by Mr. Fox or submittal of a hard copy of proof of  
payment that could be reviewed. Had this additional evidence been received, the record would have been reopened to  
admit the additional evidence offered by Mr. Fox.

1 and through the present, account numbers for any other bank accounts (personal, trust and/ or  
2 business), and any correspondence from Merrill Lynch and/ or Bank of America pertaining to the  
3 overdrafts. As Respondent failed to respond to the request, on July 9, 2010, Disciplinary  
4 Counsel made a second demand for these records. Apart from one deposit slip from Bank of  
5 America and a letter from U.S. Bank dated September 15, 2010 that notified Mr. Fox that their  
6 account relationship was being discontinued, he did not respond to the request for records and  
7 documents.

#### 8 **IV. CONCLUSIONS OF LAW**

9 Based on the foregoing Findings of Fact, the Hearing Officer makes the following  
10 Conclusions of Law:

#### 11 **COUNT 1**

#### 12 **A. Violation of RPC 1.7(a)(2):**

13 RPC 1.7(a)(2) prohibits a lawyer from representing a client if there is a concurrent conflict  
14 of interest. A concurrent conflict of interests exists if there is a significant risk that the  
15 representation will be materially limited by a personal interest of the lawyer. Here, Respondent  
16 was aware that Gilbertson had limited financial means and that he had already been appointed a  
17 public defender. He was romantically and sexually interested in Mr. Gilbertson and attempted to  
18 manipulate and pressure Gilbertson into a romantic and sexual relationship by agreeing to  
19 representation at the rate of \$100.00 per hour and then providing him with free housing and  
20 money in the form of wages. Once living in his home, made wooed Mr. Gilbertson with occasional  
21 restaurant meals, marijuana, and other gifts and he made unwanted sexual advances. He  
22 secured no written waiver and/ or informed waiver of the conflict of interest.

23 Respondent violated RPC 1.7(a)(2) by a clear preponderance of evidence by failing to  
24 secure informed consent before engaging in representation that he knew or should have known  
25

1 was in the Respondent's interests and adverse to the clients interests.

2 **B. Presumptive sanction:** Violation of RPC 1.7(a)(2) violates ABA Standard 4.31: Failure  
3 to avoid conflict of interests.

4 Disbarment is generally appropriate when a lawyer, without the informed consent of the  
5 client:

6 (a) engages in representation of a client knowing that the lawyer's interests are adverse  
7 to the client's with the intent to benefit the lawyer or another , and causes serious or  
8 potentially serious injury to the client.

9 **C. Mitigating and Aggravating Factors:**

10 The mitigating and aggravating factors are as follows:

11 Mitigating: 9.31 (a)	No prior disciplinary offenses;
12 Aggravating: 9.22 (b)	Dishonest or selfish Motive;
13 Aggravating: 9.22 (c)	A pattern of misconduct;
14 Aggravating: 9.22 (d)	Multiple offenses;
15 Aggravating: 9.22(g)	Refusal to acknowledge the wrongful nature of conduct.
16 Aggravating: 9.22(h)	Vulnerability of victim – criminal clients
17 Aggravating: 9.22(i)	Substantial experience in the practice of law
18 Aggravating: 9.22(k)	Illegal conduct, including that involving the use of controlled substances.

19 **D. Actual or Potential Harm:** The Respondent engaged Mr. Gilbertson in the illegal use of  
20 marijuana thereby exposing him to criminal charges and also placed him as risk of violating the  
21 conditions of bail and thereby the risk of revocation of bail. He abused Mr. Gilbertson's trust and  
22 debased the essence of the lawyer- client relationship. He cast the legal profession into  
23 disrepute in the eyes of the public, and caused Mr. Gilbertson ongoing distress.

24 **E. Recommendation.** The Hearing Officer recommends disbarment.

25 **COUNT 2.**

**A. Violation of RPC 1.8(e):** There is insufficient evidence to find the existence of a  
violation of RPC 1.8 (e) which prohibits a lawyer from advancing or guaranteeing financial

1 assistance to a client in connection with contemplated or pending litigation. Although it is  
2 found that the Respondent provided free housing and other gifts to Mr. Gilbertson, RPC  
3 1.8(e) does not appear to be a general prohibition on gifts to clients.

4 The purpose of the rule appears to be to prevent the lawyer from "advancing" or  
5 "guaranteeing" financial assistance that might enable or encourage a client to pursue a  
6 lawsuit that might not otherwise be brought. The idea is that this gives the lawyer too great  
7 a financial stake in the litigation. In this case, Mr. Fox did not appear to give gifts in order to  
8 maintain a stake in the litigation, his goal appeared to be to seduce Mr. Gilbertson into a  
9 romantic and / or sexual relationship.

10 Count 2 is dismissed.

11  
12 **COUNT 3**

13 **A. VIOLATION OF RPC 8.4(b), 8.4(c), and (8.4(d))**

14 RPC 8.4(b) prohibits a lawyer from committing a criminal act that reflects adversely on the  
15 lawyer's honesty, trustworthiness or fitness as a lawyer in other respects. RPC 8.4(c) prohibits a  
16 lawyer from engaging in conduct that involves dishonesty, fraud, deceit or misrepresentations.  
17 RPC 8.4(d) prohibits a lawyer from engaging in conduct that is prejudicial to the administration of  
18 justice.

19 Pursuant to RCW 69.50.4014, the possession of forty grams or less of marijuana is a  
20 misdemeanor. Here, Respondent possessed marijuana during the period of time that he  
21 represented Mr. Gilbertson in a criminal case for possession of marijuana. On December 21,  
22 2009, Mr. Gilbertson had been released on bail and one of the conditions of his release was that  
23 he consume no alcohol, use no illegal drugs, or that he not violate the law in any way. Despite  
24 his representation of Mr. Gilbertson and the conditions of his release, Mr. Fox used Mr.  
25 Gilbertson to secure the marijuana. Mr. Fox also shared and smoked that marijuana with Mr.

1 Gilbertson.

2 Respondent knowingly engaged in criminal conduct by his use of marijuana and his  
3 involvement of Mr. Gilbertson in his illegal activity. This conduct reflects adversely on his fitness  
4 to honesty, trustworthiness and fitness as a lawyer. Respondent violated RPC 8.4 (b) by a clear  
5 preponderance of evidence.

6 Pursuant to RCW 9A.56.060, it is a gross misdemeanor to unlawfully issue a bank  
7 check. This crime is committed if, with intent to defraud, a person issues a check ( for \$750.00  
8 or less) and orders a stop-payment request directing the bank not to honor such a check  
9 and fails to otherwise arrange payment within 20 days.

10 Here, on March 8 and 9, 2010, Respondent issued two checks from his Merrill Lynch  
11 account to Mr. Gilbertson totaling \$350.00 as compensation for services performed. On March  
12 10, 2010, the checks were returned due to non –payment. The March 8 check was not honored  
13 as there was a hold on Mr. Fox’s funds and the March 9 check was not honored because the  
14 account was frozen or blocked. Mr. Fox has never paid Mr. Gilbertson the \$350.00, and he has  
15 never arranged a settlement with Mr. Gilbertson.

16 Although Mr. Fox testified that he placed a stop payment as Mr. Gilbertson allegedly stole  
17 two blank checks from him, that testimony is not credible and it would not be a basis for  
18 withholding earned wages. The missing checks were never found or negotiated for any amount,  
19 so Mr. Fox did not suffer any financial loss. Mr. Fox had a legal obligation to pay the money in  
20 the amount of the check or to reach a settlement with Mr. Gilbertson within 20 days and he did  
21 neither.

22 By intentionally committing a crime against his client involving fraud, Respondent violated  
23 RPC 8.4 (c) by a clear preponderance of evidence.

24 **B. 1. Presumptive sanction: Violation of RPC 8.4(b) violates ABA Standard 5.12.**



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

4 **2. Presumptive sanction: Violation of RPC 8.4(c) violates ABA Standard 5.11.**

5 Disbarment is generally appropriate when :

6 (a) a lawyer engages in serious criminal conduct, a necessary element of which includes  
7 fraud.

8 **C. Mitigating and Aggravating Factors:**

9 **1. Mitigating and Aggravating Factors regarding violation of RPC 8.4(b)**

10 Mitigating: 9.31 (a)	No prior disciplinary offenses;
11 Aggravating: 9.22 (b)	Dishonest or selfish Motive;
12 Aggravating: 9.22 (c)	A pattern of misconduct;
13 Aggravating: 9.22 (d)	Multiple offenses;
14 Aggravating: 9.22(g)	Refusal to acknowledge the wrongful nature of 15 conduct.
16 Aggravating: 9.22(h)	Vulnerability of victim – criminal clients
17 Aggravating: 9.22(i)	Substantial experience in the practice of law
18 Aggravating: 9.22(k)	Illegal conduct, including that involving the use of 19 controlled substances.

20 **2. Mitigating and Aggravating Factors regarding violation of RPC 8.4(c)**

21 Mitigating: 9.31 (a)	No prior disciplinary offenses;
22 Aggravating: 9.22 (b)	Dishonest or selfish Motive;
23 Aggravating: 9.22 (c)	A pattern of misconduct;
24 Aggravating: 9.22 (d)	Multiple offenses;
25 Aggravating: 9.22 (f)	Submission of false statements during the disciplinary proceeding
Aggravating: 9.22(g)	Refusal to acknowledge the wrongful nature of conduct
Aggravating: 9.22(h)	Vulnerability of victim – criminal clients
Aggravating: 9.22(i)	Substantial experience in the practice of law
Aggravating: 9.22 (j)	Indifference to making restitution;

26 **D. Potential or Actual Injury:**

27 **1. Violation of RPC 8.4(b):** The Respondent's use of marijuana and other illegal  
28 substances potentially impacted the Respondent's ability to properly attend to Mr.  
29 Gilbertson's case, and as the Respondent involved Mr. Gilbertson, a young man

1 struggling with substance abuse issues, in his drug use it exposed Mr. Gilbertson to  
2 criminal charges, created the potential for revocation of his bail, and made it difficult for  
3 Mr. Gilbertson to get clean and sober. Finally, as Mr. Gilbertson's family became aware  
4 of Mr. Fox's drug use and involvement of their son in his drug use, it harmed the public's  
5 trust of the legal profession.

6 **2. Violation of RPC 8.4(c):** Mr. Gilbertson was not paid for his labor, his credit was  
7 harmed, and he is unable to a checking account with any bank.

8  
9 **E. Recommendation.**

10 **Violation of 8.4(b): Possession of mariuana:** The Hearing Officer recommends a six  
11 month suspension.

12 **Violation of 8.4(c): Unlawful Issuance of Bank Check:** The Hearing Officer  
13 recommends disbarment. The Respondent shall provide restitution to Mr. Gilbertson in the  
14 amount of \$350.00, which are the wages he earned. That should be paid in addition to interest  
15 at the rate of 12% per annum beginning on May 14, 2010 when Mr. Gilbertson received notice  
16 that his account had been debited.

17  
18 **COUNT 4**

19 **A. VIOLATION OF RPC 1.7(a)(2)**

20 RPC 1.7(a)(2) prohibits a lawyer from representing a client if there is a concurrent conflict  
21 of interest without a written waiver of the conflict. A concurrent conflict of interests exists if there  
22 is a significant risk that the representation will be materially limited by a personal interest of the  
23 lawyer. Here, the Respondent sought to represent Mr. Mason whom he found to be sexually  
24 attractive. During Mr. Mason's incarceration, the Respondent made unwanted sexual advances.

25 Respondent violated RPC 1.7(a)(2) by a clear preponderance of evidence by failing to

1 secure informed consent before engaging in representation that he knew or should have known  
2 was in the Respondent's interests and adverse to the clients interests.

3 **B. Presumptive sanction:** Violation of RPC 1.7(2) violates ABA Standard 4.31(a):

4 Disbarment is generally appropriate when a lawyer, without the informed consent of  
5 client:

6 (a) engages in representation of a client knowing that the lawyer's interests are adverse  
7 to the client's with the intent to benefit the lawyer, and causes serious or potentially  
8 serious injury to the client.

9 **C. Mitigating and Aggravating Factors:**

10 Mitigating: 9.31 (a)	No prior disciplinary offenses;
11 Aggravating: 9.22 (b)	Dishonest or selfish Motive;
12 Aggravating: 9.22 (c)	A pattern of misconduct;
13 Aggravating: 9.22 (d)	Multiple offenses;
14 Aggravating: 9.22 (f)	Submission of false statements during the disciplinary proceeding
15 Aggravating: 9.22(g)	Refusal to acknowledge the wrongful nature of conduct
16 Aggravating: 9.22(h)	Vulnerability of victim – criminal clients
17 Aggravating: 9.22(i)	Substantial experience in the practice of law
18 Aggravating: 9.22 (j)	Indifference to making restitution;

19 **D. Potential or Actual Injury:** The Respondent put his own prurient interests before the  
20 attorney- client relationship by focusing on social/ sexual type communications rather than on  
21 attending to Mr. Mason's legal needs. He abused Mr. Mason's trust and debased the essence of  
22 the lawyer- client relationship. As he was flaunted his sexual advances by putting sexual code or  
23 sexual acronyms on the outside of communications, security officers at the jail became involved  
24 and this conduct by a lawyer cast the legal profession into disrepute in the eyes of the public.  
25 The sexual advances caused Mr. Mason distress.

**E. Recommendation.** The Hearing Officer recommends disbarment.

**COUNT 5**

**A. COUNT FIVE IS DIMISSED.**

**COUNT 6**

Pursuant to RPC 8.4(d), it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice, or to engage in an act of moral turpitude RPC 8.4(i). By abusing his privileges in the prison system as counsel of record, and by unfairly exploiting his fiduciary position and Mr. Mason's vulnerability to make unwanted sexual advances towards Mr. Mason during incarceration and coercing Mr. Mason into participating in erotic and sexual activity which involved masturbation, ejaculation and nudity, by using position as a lawyer to take contraband into the jail and to subject Mr. Mason to cryptic sexual written communications, Mr. Fox violated accepted practice norms, showed a disrespect for the rule of law, and acted with moral turpitude. He violated RPC 8.4(d) and RPC 8.4(i) by a clear preponderance of evidence.

By filing a Motion for Reinstatement making unfounded allegations of discrimination based on sexual orientation, and collusion by prosecutor and bench to remove him from campaign for public office, Mr. Fox violated RPC 8.4(d) by a clear preponderance of the evidence. It is possible to submit a misguided affidavit and still meet the requirements of CR11, when counsel must act under time constraints. <sup>4</sup> Here, the May 24, 2010 record is devoid of evidence suggesting collusion by prosecutor and bench and/ or discrimination by Judge Wood, and Mr. Fox presented no evidence in the hearing to support his allegations.

Although Mr. Fox may have a sincere subjective belief in the truth of his allegations, his representations are viewed by a reasonable person standard. It was his actions resulting in a conflict of interest, not his sexual orientation, which resulted in Judge Wood's Order of Removal. There is a clear preponderance of the evidence that Mr. Fox's May 24, 2010 pleading was a violation of RPC 8.4(d).

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<sup>4</sup> The Motion for Reinstatement was essentially a Motion for Reconsideration as Judge Wood had already ruled to remove him. The Order of Removal was entered on May 21 and the Motion for Reinstatement was brought on May 24, 3 days later.

1 **B. Presumptive sanction: Violation of RPC 8.4(d) and RPC 8.4(i).**

2 1. **Presumptive sanction: Prejudicial to the administration of justice:** Violation of

3 8.4(d) violates ABA Standard 5.22:

4 Disbarment is generally appropriate when a lawyer in an official or governmental  
5 position knowingly misuses the position with the intent to obtain a significant benefit  
6 or advantage for himself or another.

6 2. **Presumptive sanction: Moral turpitude 8.4(i).**

7 Violation of RPC 8.4(i) for moral turpitude is not governed by ABA Standards as the  
8 ABA Standards are based on the Model Rules and to not recognize acts involving  
9 moral turpitude. Washington case law governs presumptive sanctions for acts  
10 involving moral turpitude<sup>5</sup> and, under the facts of this case, the sanction should be  
11 disbarment.

11 3. **Presumptive sanction: Filing of Motion:** Violation of RPC 8.4(d) violates ABA  
12 Standard 6.13.

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

15 **C. Mitigating and Aggravating Factors:**

16 **Sexual Activity/ Coercion and violation of Prison rules:** Violation of RPC 8.4(i) and  
17 8.4(d)

18 Mitigating: 9.31 (a)

No prior disciplinary offenses;

19 Aggravating: 9.22 (b)

Dishonest or selfish Motive;

20 Aggravating: 9.22 (c)

A pattern of misconduct;

21 Aggravating: 9.22 (d)

Multiple offenses;

22 Aggravating: 9.22(g)

Refusal to acknowledge the wrongful nature of  
23 conduct

24 Aggravating: 9.22(h)

Vulnerability of victim – criminal clients

25 Aggravating: 9.22(i)

Substantial experience in the practice of law

Aggravating: 9.22(k)

Illegal conduct, including that involving the use of  
controlled substances.

<sup>5</sup> In Re Disciplinary Proceeding Against Day, 162 Wn. 2d 527, 173 P. 3<sup>rd</sup> 915 (2007).

1 **Filing of Motion: Violation of RPC 8.4(d)**

2 Mitigating: 9.31 (a) No prior disciplinary offenses;  
3 Aggravating: 9.22 (b) Dishonest or selfish Motive;  
4 Aggravating: 9.22 (c) A pattern of misconduct;  
5 Aggravating: 9.22 (d) Multiple offenses;  
6 Aggravating: 9.22(g) Refusal to acknowledge the wrongful nature of conduct  
7 Aggravating: 9.22(i) Substantial experience in the practice of law

8 **D. Potential or Actual Injury:**

9 **Violation of 8.4(i): Sexual Coercion:** The Respondent abused Mr. Mason's trust and  
10 debased the essence of the lawyer- client relationship. The sexual advances caused Mr. Mason  
11 distress and potential long term psychological harm.

12 **Violation of 8.4(d): Prejudicial to administration of justice:** Increased burden on the  
13 prison system for increased monitoring. Loss of flexibility in regulations for all attorneys/inmates.

14 **Violation of 8.4(d): Filing of Motion:** Reflects poorly on the legal community and  
15 potentially on the reputation of the prosecutor and bench.

16 **E. Recommendation.**

17 **Violation of 8.4(i): Sexual Coercion.** The Hearing Officer recommends disbarment.

18 **Violation of 8.4(d): Prejudice to administration of justice:** The hearing officer recommends  
19 disbarment.

20 **Violation of 8.4(d): Filing of motion:** The Hearing Officer recommends a reprimand.

21 **COUNT 7**

22 **A. VIOLATION OF RPC 1.15A( c), RPC 1.15A(h)**

23 RPC 1.15A(c) requires a lawyer to hold property of clients and third persons separate  
24 from the lawyer's own property. Funds deposited to a trust account must be held subject to the  
25 rules itemized at RPC 1.15A(h).

RPC 1.15A(h) requires a lawyer to comply with rules pertaining to trust accounts  
including that, absent a permissible exception such as to restore appropriate balances, RPC  
1.15(h)(1)(i), no funds belonging to the lawyer may be deposited into or retained in a trust  
account RPC 1.15A(h)(1). A lawyer must keep complete records as required by RPC 1.15B.

Pursuant to RPC 1.15A (h)(5), withdrawals from trust may not be made to cash, but must

1 be made to a named payee by check or by bank transfer. Pursuant to RPC 1.15A(h)(6), trust  
2 account records must be reconciled at least quarterly. Pursuant to RPC 1.15A (h)(7) absent a  
3 written agreement with the bank, a lawyer must not disburse funds from a trust account until  
4 deposits have cleared the banking process and been collected. Pursuant to RPC 1.15A (h)(8),  
5 disbursements on behalf of a client or third person may not exceed the funds of that person on  
6 deposit and the funds of a client or third person must not be used on behalf of anyone else.

7 From at least May of 2009 and through at least October of 2010, Mr. Fox deposited his  
8 personal farm earnings into his Bank of America IOLTA account and then wrote checks from his  
9 IOLTA account for personal living expenses. He regularly made checks payable to himself for  
10 cash. He did not create any records pertaining to his trust accounts and therefore, he did not  
11 reconcile those records with his bank statements. On February 10, 2010, he disbursed a  
12 payment to the District Court for the benefit of a client (or prospective) Christianson. However,  
13 he produced no record or evidence of a deposit being made into his trust account for this client.  
14 Apart from keeping a copy of his bank statements and check stubs, Mr. Fox did not create  
15 maintain any records for his trust accounts.

16 Respondent knew or should have known he dealing improperly with client property and  
17 that there was potential injury to client. Respondent violated RPC 1.15A(c), RPC 1.15(h)(1), RPC  
18 1.15(h)(5), RPC 1.15(h)(6), RPC 1.15(h)(7), RPC 1.15(h)(8) by a clear preponderance of  
19 evidence.

20 **B. Presumptive sanction:** Violation of RPC 1.15A(c), RPC 1.15(h)(1), RPC 1.15(h)(5), RPC  
21 1.15(h)(6), RPC 1.15(h)(7), RPC 1.15(h)(8) violates ABA Standard 4.12.

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

24 **C. Mitigating and Aggravating Factors:**

25	Mitigating: 9.31 (a)	No prior disciplinary offenses;
	Aggravating: 9.22 (c)	A pattern of misconduct;
	Aggravating: 9.22 (d)	Multiple offenses;
	Aggravating: 9.22 (f)	Submission of false statements during the disciplinary





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

3 **C. Mitigating and Aggravating Factors:**

4	Mitigating: 9.31 (a)	No prior disciplinary offenses;
5	Aggravating: 9.22 (c)	A pattern of misconduct;
6	Aggravating: 9.22 (d)	Multiple offenses;
6	Aggravating: 9.22 (f)	Submission of false statements during the disciplinary proceeding
7	Aggravating: 9.22(g)	Refusal to acknowledge the wrongful nature of conduct.
8	Aggravating: 9.22(i)	Substantial experience in the practice of law

9 **D. Potential or Actual Injury:** Potential harm to clients who have funds held by  
10 Respondent.

11 **E. Recommendations:** This hearing officer recommends a reprimand.  
12

13 **COUNT 9**

14 **A. VIOLATION OF RPC 8.4(b) and 8.4(i)**

15 RPC 8.4(b) prohibits a lawyer from committing a criminal act that reflects adversely on the  
16 lawyer's honesty, trustworthiness or fitness as a lawyer in other respects. RPC 8.4(c) prohibits a  
17 lawyer from engaging in conduct that involves dishonesty, fraud, deceit or misrepresentations.  
18 RPC 8.4(i) prohibits a lawyer from committing any act involving moral turpitude, or corruption, or  
19 any other act that reflects disregard for the rule of law.

20 Pursuant to RCW 9A.56.060(1), it is a gross misdemeanor to unlawfully issue a bank  
21 check. This crime is committed if, with intent to defraud, a person issues a check ( for \$750.00  
22 or less) issues a check for the payment of money knowing at the time that there are insufficient  
23 funds to cover the check.

24 Here, Mr. Fox had deposited 9 checks into his trust account from his Merrill Lynch  
25 account that he knew were returned unpaid. He knew that he had a negative balance of \$669.88

1 on June 30, 2010. Despite that, knowing he had inadequate funds in his account, in early  
2 August 2010, he made and delivered three checks to Shenanigan's Restaurant totaling \$257.00.  
3 Although he tried to rectify his negative balance, presumably to cover the outstanding checks,  
4 Bank of America refused his money.

5 As the Respondent committed a criminal act that involved fraud, he violated RPC 8.4 (b)  
6 and RPC 8.4 (c) by a clear preponderance of evidence.

7 As the Respondent appeared at the bank in person and attempted to deposit \$3800.00 in  
8 cash, there is insufficient evidence to find that he violated RPC 8.4(i) by acting with moral  
9 turpitude and/ or disregarding the rule of law.

10

11 **B. Presumptive sanction:** Violation of RPC 8.4(b) and 8.4(c) violate ABA Standard 5.11(a).

12 Disbarment is generally appropriate when:

13 (a) a lawyer engages in serious criminal conduct, a necessary element of which includes  
14 ... fraud.

14 **C. Mitigating and Aggravating Factors:**

15	Mitigating: 9.32 (a)	No prior disciplinary offenses;
16	Mitigating: 9.32 (d)	Timely good faith effort to rectify consequences of misconduct.
17	Aggravating: 9.22 (b)	Dishonest or selfish Motive;
18	Aggravating: 9.22 (c)	A pattern of misconduct;
19	Aggravating: 9.22 (d)	Multiple offenses;
20	Aggravating: 9.22(i)	Substantial experience in the practice of law
21	Aggravating: 9.22 (j)	Indifference to making restitution.

22 **D. Potential or Actual Injury:** Potential injury to clients who place funds in trust with  
23 Respondent. Although the unlawful check was not to a client, this action still calls into question  
24 his honesty and his ability to be entrusted with client or third-party funds.

25 **E. Recommendation.** The Hearing Officer recommends a three year suspension.

Although the presumptive sanction is disbarment, the Respondent's effort to timely rectify the  
situation by appearing at the bank to deposit cash is being given great weight. That is somewhat

1 countered by the fact that as of January 26, 2011, he had taken no additional steps to contact  
2 Shenanigan's to pay his debt.

3 The Respondent shall provide restitution to Shenanigan's Restaurant in the amount of  
4 \$257.00. That should be paid in addition to interest at the rate of 12% per annum beginning on  
5 August 5, 2010. If the Respondent provides evidence of payment to Disciplinary Counsel, then  
6 he shall only be responsible for interest accrued through the date of payment unless he paid that  
7 as well.

8 **COUNT 10**

9  
10 **A. VIOLATION OF RPC 8.4(c) and 8.1(a)**

11 RPC 8.1(a) prohibits a lawyer from knowingly making a false statement of material fact in  
12 connection with a disciplinary matter. Likewise, pursuant to RPC 8.4(c), it is professional  
13 misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or  
14 misrepresentation. Here, the Respondent falsely represented to WSBA that a client's returned  
15 check caused the April 2010 overdraft which initiated the inquiry into a potential trust account  
16 violation.

17 There is a clear preponderance of the evidence that Respondent violated RPC 8.1(a) and  
18 a clear preponderance of the evidence that he committed misconduct pursuant to 8.4(c) .

19 **B. Presumptive sanction: Violation of RPC 8.1(a) and 8.4(c) violate ABA Standard 5.13.**

20 Reprimand is generally appropriate when a lawyer knowingly engages in any other  
21 conduct that involves dishonesty, fraud, deceit, or misrepresentation and that adversely  
22 reflects on the lawyer's fitness to practice law.

23 **C. Mitigating and Aggravating Factors for Violation of 8.1(a) and 8.4(c):**

24	Mitigating: 9.31 (a)	No prior disciplinary offenses;
25	Aggravating: 9.22 (b)	Dishonest or selfish Motive;
	Aggravating: 9.22 (c)	A pattern of misconduct;
	Aggravating: 9.22 (d)	Multiple offenses;
	Aggravating: 9.22(g)	Refusal to acknowledge the wrongful nature of

1 Aggravating: 9.22(i) conduct  
2 Substantial experience in the practice of law

3  
4 **D. Potential or Actual Injury:** This resulted in increased work for Disciplinary Counsel in  
5 order to secure accurate information regarding the overdraft.

6 **E. Recommendation.** The Hearing Officer recommends reprimand.

7  
8 **COUNT 11**

9 **A. VIOLATION OF RPC 8.4(l)**

10 Pursuant to 8.4(l), a lawyer commits professional misconduct if he violates a duty in  
11 connection with a disciplinary matter, including the duties set forth at 1.5 of the Rules for  
12 Enforcement of Lawyer Conduct. Pursuant to ELC 5.3(e) a lawyer has a duty to furnish a prompt  
13 response to a request or inquiry for information. Pursuant to ELC 5.3(f), a lawyer's failure to  
14 cooperate is grounds for discipline. The Respondent failed to produce the records requested by  
15 disciplinary counsel.

16 There is a clear preponderance of the evidence that Respondent committed misconduct  
17 pursuant to RPC 8.4 (l).

18 **B. Presumptive sanction:** Violation of RPC 8.4(l) violates ABA Standard 7.2.

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

22 **C. Mitigating and Aggravating Factors:**

23 Mitigating: 9.31 (a) No prior disciplinary offenses;  
24 Aggravating: 9.22 (b) Dishonest or selfish Motive;  
25 Aggravating: 9.22 (c) A pattern of misconduct;  
Aggravating: 9.22 (d) Multiple offenses;  
Aggravating: 9.22 (f) Submission of false statements during the disciplinary proceeding  
Aggravating: 9.22(g) Refusal to acknowledge the wrongful nature of conduct  
Aggravating: 9.22(i) Substantial experience in the practice of law

1 D. Potential or Actual Injury: Injury to the lawyer disciplinary system as a whole, Harm to  
2 the Office of Disciplinary Counsel in the form of increased efforts and costs.

3 E. Recommendation. The Hearing Officer recommends a six month suspension.  
4

5  
6  
7 Dated this 1st day of June, 2012.  
8

9  
10  
11 Andrekeita Silva  
12 Andrekeita Silva, WSBA No. 17314  
13 Hearing Officer

14  
15 CERTIFICATE OF SERVICE

16 I certify that I caused a copy of the PDF, VOL 4 of AD's Recommendation  
17 to be delivered to the Office of Disciplinary Counsel and to be mailed  
18 to David Fox ~~Respondent~~ Respondent's Counsel  
19 at 101 W. 1st Ave. Port Angeles, WA 98301, by Certified first class mail  
20 postage prepaid on the 5th day of June, 2012.

21  
22  
23  
24  
25  
[Signature]  
Clerk/Counsel to the Disciplinary Board