FILED
DEC 17 2013
DISCIPLINARY BOARD

BEFORE THE
DISCIPLINARY BOARD
OF THE
WASHINGTON STATE BAR ASSOCIATION

In re **JUSTIN C. OSEMENE** Lawyer (Bar No. 28082).	Proceeding No. 12#00035 FINDINGS OF FACT, CONCLUSIONS OF LAW AND HEARING OFFICER'S RECOMMENDATION

In accordance with Rule 10.13 of the Rules for Enforcement of Lawyer Conduct (ELC), the undersigned Hearing Officer held the hearing on October 7, 2013 through October 14, 2013, and October 23, 2013. Respondent Justin C. Osemene appeared at the hearing and represented himself *pro se*. Disciplinary Counsel Randy Beitel appeared for the Washington State Bar Association (the Association).

FORMAL COMPLAINT FILED BY DISCIPLINARY COUNSEL

The Amended Formal Complaint filed by Disciplinary Counsel charged Justin C. Osemene (Respondent) with the following counts of misconduct:

COUNT 1: By making counteroffers and/or other settlement offers without his clients' authorization, Respondent violated RPC 1.2(a).

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COUNT 2: By making settlement offers and/or counteroffers to opposing counsel when he had not been authorized to do so by his clients, and/or concealing from opposing counsel that he had been discharged by his clients, and/or misrepresenting to opposing counsel that he had spoken to his client and was authorized to make a counteroffer when he had not spoken with his client and had not obtained authority to make a counteroffer, Respondent violated RPC 4.1(a) and/or RPC 8.4(c) and/or RPC 8.4(d).

COUNT 3: By failing to withdraw from the representation when discharged by his clients, Respondent violated RPC 1.16(a)(3).

COUNT 4: By failing to provide his file to his clients and/or their new attorney upon being discharged, Respondent violated RPC 1.16(d).

COUNT 5: By failing to keep his clients advised as to his accumulating fee charges, Respondent violated RPC 1.4(a) and/or RPC 1.4(b).

COUNT 6: By failing to provide his clients the November 15, 2010 check payable to them, Respondent violated RPC 1.15A(f).

COUNT 7: By failing to take reasonable action to resolve the fee dispute regarding the settlement funds, Respondent violated RPC 1.15A(g).

COUNT 8: By failing to promptly respond to requests from the WSBA Audit Manager and/or disciplinary counsel for responses to investigative inquiries and/or records, Respondent violated his duties under ELC 5.3(e) and/or ELC 1.5 in violation of RPC 8.4(l).

COUNT 9: By failing to maintain a trust account check register with a contemporaneous running balance, Respondent violated RPC 1.15B(a)(1)(v) and/or RPC 1.15A(h)(2).

COUNT 10: By failing to maintain individual client trust account ledger records with contemporaneous running balances, Respondent violated RPC 1.15B(a)(2)(v) and/or RPC 1.15A(h)(2).

COUNT 11: By failing to identify all trust account transactions by client, Respondent violated RPC 1.15B(a)(1)(i) and/or RPC 1.15A(h)(2).

COUNT 12: By failing to reconcile his client ledger records with his trust account check register and bank statements, Respondent violated RPC 1.15A(h)(6).

COUNT 13: By making deposits, which he split between his trust account and his general account, Respondent failed to keep all deposits intact in violation of RPC 1.15A(h)(4).

COUNT 14: By depositing fully earned fees into his trust account, Respondent commingled his own funds with client funds in violation of RPC 1.15A(c) and RPC 1.15A(h)(1).

COUNT 15: By making cash withdrawals from his trust account, Respondent violated RPC 1.15A(h)(5).

COUNT 16: By not giving his clients reasonable written notice of his intent to remove their funds from his trust account to pay his fees before removing such funds to pay his fees, Respondent violated RPC 1.15A(h)(3).

COUNT 17: By not providing clients with written accountings advising that he had removed their funds from his trust account to pay his fees, Respondent violated RPC 1.15A(e).

COUNT 18: By disbursing funds from his trust account prior to the underlying deposit clearing the banking process, Respondent violated RPC 1.15A(7).

HEARING

At the hearing conducted on October 7, 2013 through October 14, 2013, and on October 23, 2013, witnesses were sworn and presented testimony, and over 200 exhibits were admitted

into evidence. Having considered the evidence and argument of counsel, the Hearing Officer makes the following findings of fact, conclusions, and recommendation:

FINDINGS OF FACT

The following facts were proven by a clear preponderance of the evidence. ELC 10.14(b).

1. Respondent was admitted to the practice of law in the State of Washington on December 20, 1997.

FACTS REGARDING REPRESENTATION OF THE WILLIAMSES (COUNTS 1 – 7)

2. Respondent represented Yoshiko Williams (Ms. Williams) and her daughter, Anika Williams, in a dispute with their former landlord regarding a security deposit.

3. In May 2010, Respondent entered into an Attorney-Client Legal Services Agreement with Ms. Williams and her daughter (the Williamses). EX 101. Per the agreement, the Williamses paid a $750 Availability and Engagement Fee and Respondent was to provide services for an hourly fee of $150. Respondent did not provide any billing or accounting statement to the Williamses until February 16, 2011, after he was discharged. EX 138.

4. In July 2010, Respondent filed a lawsuit on behalf of the Williamses against their former landlord. EX 157.

5. Respondent represented Yoshiko Williams and Anika Williams jointly. The Williamses agreed among themselves that Yoshiko Williams would be the primary contact person with Respondent. Respondent knew this to be the case and nearly all of his communications were with Yoshiko Williams.

6. Yoshiko and Anika Williams made all decisions regarding the matter jointly and their interests in the matter never diverged.

7. Lawyer Randy Redford appeared on behalf of the defendant former landlord.

8. In November 2010, Mr. Redford's client determined that unrelated to the claims Respondent had brought on behalf of the Williamses in the lawsuit, the Williamses were entitled to a refund from the defendant of $329.64 based on a mistake the landlord had made in calculating the amount due based on when the apartment had been rented out to others.

9. The defendant issued a November 15, 2010 check payable to Yoshiko Williams and Anika Williams for $329.64, which Mr. Redford forwarded to Respondent to pass on to the Williamses. Respondent was not a payee on the check. EXs 103, 104.

10. Respondent's initial confusion regarding what to make of the check was reasonable. As a result, he inquired of Mr. Redford as to the purpose of the check. EX 105. Mr. Redford referred Respondent to his answer to Interrogatory No. 19. EXs 106, 107. Hearing Transcript, hereinafter "TR" 657 – 664.

11. The $329.64 check had no restriction on its endorsement, and no release or other settlement agreement was proposed with the check. EX 104. Mr. Redford did not consider the $329.64 check to be part of any settlement of the lawsuit claims. TR 278 – 280.

12. Respondent met with his clients and advised that the $329.64 might be part of a settlement attempt, which he considered to be too low. Respondent retained the $329.64 check in his case file. TR 669 – 670; 828 -829.

13. The lawsuit was scheduled for a March 1, 2011 trial.

14. Mr. Redford communicated to Respondent, via a January 25, 2011 letter, defendant's settlement offer of a single lump sum payment of $1,650, without costs or fees, which offer, by its terms, was to remain open until noon on February 3, 2011. EX 109.

15. Respondent conveyed the defendant's offer to Yoshiko Williams, and in a January 27, 2011 email, recommended that she make a counteroffer asking the defendant to also pay a

portion of the fees the Williamses owed to Respondent. EXs 110-A, 111, 110-C.

16. On January 27, 2011, Respondent had a telephone conversation with Yoshiko Williams in which Ms. Williams sought to tell Respondent that she just wanted to accept the $1,650 offer and be done with the lawsuit. Respondent frightened Ms. Williams by shouting at her that if she did so that she would be responsible for his fees, which he described as $10,000. Ms. Williams was taken aback by Respondent's aggressive behavior and determined as a result of that conversation that she could no longer rely on Respondent as her legal counsel and that she needed to get new legal counsel. TR 833 – 835.

17. Respondent sent Ms. Williams emails telling her that he could not accept or reject the settlement offer without her express written instructions and that he needed her authorization in writing if she wished to accept the $1,650 offer or ask for a larger sum to compensate her for costs and fees. In his emails, Respondent made a clear recommendation that Ms. Williams authorize asking for the larger sum to compensate for her costs and fees. EXs 110-C, 111.

18. Despite additional emails from Respondent seeking authorization to either accept the settlement offer, reject the settlement offer, or make a counteroffer, neither Yoshiko Williams nor Anika Williams provided Respondent with either written, or specific verbal authorization as to how to respond to the settlement offer prior to the February 3, 2011 deadline. EX 112-A; TR 970 – 972.

19. Respondent did not request Mr. Redford to extend the February 3, 2011 settlement offer deadline.

20. On February 2, 2011, Respondent wrote to Mr. Redford with a counteroffer to accept the offered $1,650, but only if the defendant added an additional $6,500 for the Williamses' costs and Respondent's fees. EX 114.

21. Neither Ms. Williams nor her daughter authorized Respondent to make the February 2, 2011 counteroffer.

22. Although Respondent has claimed that Yoshiko Williams gave him blanket authority to settle the matter and/or authority to act on her behalf if he believed her to be incapacitated, Respondent has presented no documentation memorializing any such authority.

23. Neither Yoshiko Williams nor Anika Williams gave Respondent blanket authority to settle the lawsuit against Pan Pacific, nor did Yoshiko Williams authorize Respondent to act in her behalf if he believed her to be incapacitated. TR 829 – 830.

24. Respondent's emails to Ms. Williams in the January 27, 2011 to February 2, 2011 time frame did not make any inquiry as to Yoshiko Williams' capacity to act in her own interests.

25. While Yoshiko Williams did not substantively reply to Respondent's emails seeking settlement instructions after the January 27, 2011 telephone conversation in which Ms. Williams became frightened of Respondent, there was no reasonable basis for Respondent to conclude that he was authorized to act in her behalf.

26. On or about February 2, 2011, the Williamses hired a new lawyer, Naoko Inoue Shatz, to represent them in the lawsuit.

27. On February 3, 2011, at 10:09 p.m., Ms. Williams sent Respondent an email informing him that she was changing attorneys, telling him her new lawyer was Ms. Shatz, and asking him to send the file to Ms. Shatz. EX 117.

28. Anika Williams was aware of the February 3, 2011 email, concurred in the decision to change attorneys to Ms. Shatz, and believed the February 3, 2011 email applied to her representation as well as that of her mother. TR 58 – 59.

1 29. Respondent received the February 3, 2011 email, reading it on either February 4th or
2 5th but neither withdrew from the representation at that time nor provided the Williamses' file to
3 Ms. Shatz at that time. TR 723 - 726 & 1107. Initially, Respondent was not certain whether one
4 or both of the Williamses had discharged him.

5 30. Respondent called Yoshiko Williams on February 14, 2011 and left a voice mail
6 message asking her to have Anika Williams call him because he still considered himself to be
7 representing Anika. TR 758 – 759. Neither Yoshiko nor Anika Williams returned Respondent's
8 voicemail message. Neither Yoshiko Williams nor Anika Williams communicated with Re-
9 spondent after the February 3, 2011, 10:09 p.m. email. TR 846.

10 31. Respondent neither wrote directly to Anika Williams nor placed a call nor sent an
11 email directly to Anika Williams to ascertain whether he was still representing Anika Williams.

12 32. Respondent did not contact Ms. Shatz to inquire as to whether Ms. Shatz was repre-
13 senting Anika Williams as well as Yoshiko Williams.

14 33. On February 8, 2011, Ms. Shatz sent an email to Respondent requesting that he pro-
15 vide the Williamses' file. EX 118.

16 34. In her February 8, 2011 email, Ms. Shatz advised Respondent that the file was need-
17 ed promptly because the matter had a March 1, 2011 trial date. EX 118.

18 35. The February 8, 2011 email from Ms. Shatz was delivered by Respondent's
19 luxsci.com email server directly to Respondent's email inbox on February 8, 2011, within se-
20 conds of its transmission. EX 138, 154, pp. 25 – 27, Exhibits E2 and E3.

21 36. Respondent's luxsci.com email server did not quarantine the February 8, 2011 email
22 from Ms. Shatz.

23

24

37. On February 9, 2011, Mr. Redford sent Respondent a letter by email attachment in which he responded to Respondent's February 2, 2011 letter. Mr. Redford indicated that the defendants considered Respondent's counteroffer to have been a rejection of their January 25, 2011 offer, and that they rejected the February 2, 2011 counteroffer. EX 122. Although Respondent was aware that Ms. Shatz was the new lawyer for at least Yoshiko Williams, he did not forward Mr. Redford's February 9, 2011 letter to the Williamses or Ms. Shatz.

38. On or about February 9, 2011, without having had any further communication or authorization from the Williamses since Yoshiko Williams February 3, 2011 email discharging him, Respondent telephoned Mr. Redford and discussed the February 2, 2011 counteroffer.

39. Respondent did not inform Mr. Redford that he had been terminated, or that Ms. Shatz was representing one or both of the Williamses. Respondent believed this was in the best interests of his clients in light of his uncertainty regarding his representative status.

40. During the February 9, 2011 conversation, Respondent modified the counteroffer, suggesting a settlement figure of $3,500. EX 139. Regardless of whether Respondent had been discharged by one or both of the Williamses, the Williamses had neither authorized Respondent to continue settlement negotiations nor authorized a settlement figure of $3,500.

41. Mr. Redford informed Respondent he would convey the $3,500 figure to his client and get back to him. EX 139.

42. On February 14, 2011, Mr. Redford conveyed to Respondent a counteroffer from the defendant of a settlement figure somewhat higher than $1,650. Respondent told Mr. Redford he would have to check with his clients and get back to him regarding the counteroffer, but did not advise Mr. Redford that he had been discharged as plaintiffs' attorney by one or both of the Williamses.

43. On February 14, 2011 at 10:56 a.m., Respondent sent Ms. Williams an email indicating that there was an increased settlement offer and asked her to contact him. EX 125.

44. Ms. Williams did not reply to the email or otherwise communicate with Respondent regarding the increased settlement offer because she had hired Ms. Shatz to represent her on February 2. 2011 and discharged Respondent as her lawyer on February 3, 2011.

45. Later on February 14, 2011, Ms. Shatz telephoned Mr. Redford and advised him that she was now representing the Williamses. Ms. Shatz confirmed this with an email at 11:23 a.m. to Mr. Redford, to which she attached a copy of the February 3, 2011 discharge email that Yoshiko Williams had sent to Respondent. EX 126.

46. At 12:25 p.m. on February 14, 2011, Mr. Redford sent an email to Respondent advising him of what Ms. Shatz had informed him, withdrawing the offer that he had conveyed earlier that morning, and indicating that he would be dealing with Ms. Shatz on the matter. EX 127.

47. At 1:54 p.m. on February 14, 2011, Mr. Redford sent an email to Ms. Shatz inquiring whether she was representing Anika Williams as well as Yoshiko Williams. EX 128. Mr. Redford's confusion regarding the status of Anika Williams' representation, supports Respondent's initial confusion regarding his continuing representation of Anika. Ms. Shatz and Mr. Redford then spoke by telephone and Ms. Shatz confirmed she was representing both Anika and Yoshiko Williams. Ms. Shatz then filed a February 14, 2011 a notice of appearance on behalf of both Anika and Yoshiko Williams. EX 129.

48. Later, on February 14, 2011, not having seen Mr. Redford's 12:25 p.m. email, Respondent telephoned Mr. Redford and misrepresented that he had spoken with the Williamses and that they had rejected the increased settlement figure but had authorized settlement for $2,500 plus a written apology from the defendants. Mr. Redford then told Respondent that he

had been contacted by Ms. Shatz and had been notified of the February 3, 2011 email discharging him and the February 8, 2011 email to Respondent from Ms. Shatz. Mr. Redford indicated he was withdrawing all pending offers and indicated he would be communicating with Ms. Shatz regarding the matter from that point forward. EX 139.

49. Respondent had not in fact spoken to the Williamses, and they had not authorized Respondent to reject the increased settlement offer and make the $2,500 counteroffer.

50. Respondent made the representation to Mr. Redford that he had spoken with the Williams and that they had rejected the increased settlement offer and had authorized a $2,500 counteroffer, knowing this to be untrue.

51. On February 14, 2011, at 6:21 p.m., Respondent emailed a response to Ms. Shatz's February 8, 2011 email explaining that he was "remiss in replying earlier due to other pressing client matters and trial proceedings." EX 132-B. In his email to Ms. Shatz, Respondent did not claim, as he was later to claim to others, that he had been unaware of Ms. Shatz's February 8th email because it had been quarantined by his computer spam filter.

52. In his February 14, 2011 email to Ms. Shatz, Respondent refused to provide the Williamses' file, but offered to allow Ms. Shatz to review the file at his office and make copies for 15¢ per page. EX 132-B.

53. Neither the fee agreement between Respondent and the Williamses, nor any other agreement, provided that the Williamses' file would not be provided to the client at the conclusion of the representation or upon request. EX 101.

54. Neither the fee agreement between Respondent and the Williamses, nor any other agreement provided that the Williamses would be provided copies of their file only upon payment of 15¢ per page. EX 101.

55. On February 15, 2011, at 12:52 p.m., Respondent did send Ms. Shatz by FAX some 17 pages from the Williamses' file consisting of the Williamses' lease agreement and copies of three court orders in the matter. EXs 162, 163, 164. Respondent's FAX cover sheet told Ms. Shatz that she could get all other orders from the court clerk's office. EX 163.

56. On or about February 15, 2011, Respondent provided Mr. Redford with a notice of lien on any settlement or court award for fees and costs in the matter. EX 134.

57. The amount at issue in the Pan Pacific litigation was between $1,000 and $2,500. Although Respondent's hourly fee charges were already in excess of $3,000 by the end of August 2010, Respondent provided no billing statement to the Williamses as his fee balance exceeded the amount in dispute. TR 840, 849 – 851.

58. On February 16, 2011, Respondent sent to the Williamses his first and only billing for the representation, claiming $5,500 was due. EX 138. That billing statement included an admission dated February 9, 2011, which reads "Received and review email from Ms. Shatz advising that Williams have engaged her as new counsel."

59. On or about February 16, 2011, Ms. Shatz and Mr. Redford negotiated a settlement of the Williamses' matter against Pan Pacific for payment of $1,650. EXs 136, 137.

60. On February 16, 2011, Mr. Redford advised Ms. Shatz that because Respondent had claimed a lien, he would have to make the settlement check payable to the Williamses and Respondent's law firm, Intellex Law Group. EX 135.

61. On or about February 17, 2011, Mr. Redford provided Ms. Shatz with his trust account check for $1,650 payable to Yoshiko Williams & Anika Williams & Intellex Law Group. EX 139.

62. On February 17, 2011, Respondent refused to deliver to his clients the $329.64

check that had remained in his case file unless they resolved his outstanding claims for fees. EX 140-A.

63. On February 17, 2011, Mr. Redford emailed a letter to Respondent claiming that Ms. Williams discharged him by her February 3, 2011 email and that Ms. Shatz advised him on February 8, 2011 that she was the new lawyer for the Williamses. Mr. Redford indicated his client had incurred approximately $900 in fees for the continued negotiations with Respondent after he had been discharged on February 3rd, and that his client was considering seeking sanctions and/or filing a Bar grievance regarding Respondent's conduct. EX 139. Respondent replied to Mr. Redford with his February 17, 2011 email claiming he was unaware of the Williamses' email advising him of having changed attorneys until February 14, 2011 due to his spam filter not delivering the messages. EX 141. At the time, Respondent made that claim, he knew this to be a false statement.

64. On February 25, 2011, the Snohomish County District Court notified Ms. Shatz that the Judge would not enter the order dismissing the case until Respondent filed a notice of withdrawal. Upon being informed of this requirement by the court, Respondent immediately filed his withdrawal on February 25, 2012. EX 142.

65. On July 28, 2011, Respondent emailed Ms. Shatz and offered to settle his claim for fees and costs for the sum of $750 of the settlement funds. EX 149.

66. The Williamses declined to accept that offer.

67. Respondent did not take further action to resolve the dispute regarding his fee claim on the settlement proceeds until three weeks after the commencement of this disciplinary proceeding. On October 25, 2012, Respondent sent a letter to Ms. Shatz, again offering to settle his fee claim for $750 of the settlement proceeds. Respondent also enclosed the $329.64 November

15, 2010 check payable to Yoshiko Williams and Anika Williams from Pan Pacific Properties, Inc. EX 150.

68. Respondent's October 25, 2012 letter was mailed to an address from which Ms. Shatz had moved in late February 2011. Ms. Shatz did not receive the letter, nor did Mr. Osemene receive the letter back. It appears the time for forwarding the letter had expired.

69. At no point did Respondent request that the funds be interpleaded into the registry of the court to resolve the dispute. Respondent made no further attempt to settle the dispute as to his fee claim on the settlement funds until September 26, 2013 when he sent a letter to Ms. Shatz indicating he was rescinding his attorney's lien and would "forego further demands for recompense." EX 156.

70. At the time of the hearing, the defendants were re-issuing the $1,650 check payable only to Yoshiko Williams and Anika Williams, as well as re-issuing the $329.64 check payable to Yoshiko Williams and Anika Williams.

71. The Williamses paid Ms. Shatz approximately $1,200 for her services.

FACTS REGARDING TRUST ACCOUNT INVESTIGATION (COUNT 8)

72. The bank where respondent maintained his IOLTA trust account reported to the Association overdrafts having occurred in that account on July 31, 2009, August 20, 2009, and September 1, 2009. EXs 201, 202, 203.

73. By a September 28, 2009 letter, the WSBA Audit Manager initially requested Respondent to submit his trust account records for the months of June, July and August 2009. EX 206.

74. On November 18, 2009, Respondent provided the requested records for June, July

and August 2009. EX 208.

75. After reviewing those records, the WSBA Audit Manager was concerned because it appeared that Respondent was disbursing funds for clients who had no funds in the account, in effect using the funds of some clients to fund disbursements for other clients. On this basis the WSBA Audit Manager determined it was necessary to examine Respondent's records for a broader period of time. On December 4, 2009, the WSBA Audit Manager requested Respondent to provide by December 18, 2009, his trust account records regarding the period November 2008 through October 2009. EX 209.

76. Respondent did not provide the requested records and sent the WSBA Audit Manager a December 31, 2009 letter citing his previous attempts at compliance and objection to the Associations' expanded investigation into what Respondent considered a "singular exception" to his normal practice. Thus, Respondent refused to provide the requested records unless the Association explained to him the basis for the request. EX 211.

77. On January 6, 2010, disciplinary counsel sent Respondent a letter explaining that the reason for requesting the additional records was "because it appears from the information and records you have already provided that you may have violated RPC 1.15A and/or RPC 1.15B." Disciplinary counsel further explained that "[w]e are requiring you to provide additional records so that we may determine the extent and seriousness of any misconduct." Respondent was told that he had until January 19, 2010, to provide the requested trust account records or he would be subject to being subpoenaed for deposition to obtain the records. Respondent signed for the letter on January 8, 2010. EX 212.

78. Respondent did not provide the records for the expanded period, and on January 21,

2010, Respondent was personally served with a subpoena for deposition and for the production of the documents for the time frame of November 2008 through October 2009, requiring him to appear for deposition on February 10, 2010, with the requested trust account records. EX 213.

79. On February 8, 2010, the Association received notice of two additional overdrafts on Respondent's trust account, an overdraft of $500 that occurred on February 1, 2010. EX 216 and an overdraft of $7,000 that occurred on February 2, 2010. EX 217.

80. Respondent appeared for deposition on February 10, 2010 with some of the subpoenaed records, but he failed to bring copies of his trust account reconciliations, copies of some of the deposited items, copies of some of the cancelled checks and portions of his trust account check register. EX 218.

81. At the February 10, 2010 deposition, Respondent indicated his sister had recently died and that he was about to travel to be with his family and requested that the deposition be continued to allow that. Disciplinary counsel agreed to continue the deposition to April 16, 2010 with an agreement that Respondent would provide the additional documents at that time. EXs 401, 218.

82. At the April 16, 2010 deposition, Respondent brought some, but not all of the requested records. He failed to bring copies of the deposit items and cancelled checks that had been requested on December 4, 2009 and at the February 10, 2010 deposition. He also testified that his trust account was reconciled only on a quarterly basis. Respondent provided some records in the QuickBooks format, and at the deposition agreed to provide the QuickBooks records in an electronic format. EX 402.

83. Following the April 2010 deposition, the WSBA Audit Manager communicated with

Respondent's bookkeeper regarding getting the QuickBooks files in a format that could be opened and examined. EXs 220, 221, 222, 223. Thereafter, the WSBA Audit Manager attempted to reconstruct a set of trust account records from the records provided to ascertain if all client funds had been accounted for.

84. On February 9, 2011, disciplinary counsel sent Respondent a comprehensive letter providing Respondent with a more detailed response to his inquiries for the basis of the Association's investigation into his trust account. The letter also requested additional trust account records through March 31, 2010, and requested that Respondent provide information as to the client identification and purpose for 33 specific transactions in his trust account. EX 224.

85. Respondent did not provide the information and documents requested in the February 9, 2011 letter. On March 28, 2011, disciplinary counsel sent Respondent a second request for the information and documents. EX 225.

86. Respondent did not provide the information and records in response to disciplinary counsel's March 28, 2011 request. On April 27, 2011, Respondent was personally served with a subpoena duces tecum requiring him to appear for deposition on May 13, 2011 with the requested records and such records as necessary to provide the client identification for the 33 transactions that had been requested by the February 9, 2011 inquiry. EX 226.

87. Respondent appeared for deposition on May 13, 2011. The task of reconstructing the client identification of various transactions proved difficult and lengthy for Respondent, and the deposition had to be concluded on a second day, May 20, 2011. EXs 403, 404.

88. By a June 28, 2011 letter, Respondent provided additional information and documents that he had been requested to provide at the May 2011 depositions. Based on Respondent's deposition testimony and the additional information, the WSBA Audit Manager continued

her attempts to indentify all transactions by client and to determine the ownership of all funds in the account by client. On November 3, 2011, disciplinary counsel sent Respondent a letter providing the WSBA Audit Manager's reconstruction of Respondent's trust account, seeking additional trust account records, and requesting that Respondent provide information as to specific transactions in his trust account. EX 229.

89. Respondent did not provide the information and documents requested by the November 3, 2011 letter, and on December 8, 2011, disciplinary counsel sent Respondent a second request for the information and documents. EXs 230, 231.

90. Respondent did not provide the information and documents in response to disciplinary counsel's December 8, 2011 request. On December 20, 2011, Respondent sent an email to disciplinary counsel indicating he was traveling in Asia and not due back in Seattle for a month. He noted that he had been advised that several "confidential" letters had been received. Disciplinary counsel responded with a December 27, 2011 email to Respondent that attached a copy of the November 3, 2011 inquiry and advised that if a response were not received by January 27, 2012, a subpoena would be issued to obtain the requested documents and information. EX 232.

91. When the information and documents were not received by January 27, 2013, Respondent was personally served on February 8, 2012 with a subpoena duces tecum requiring him to appear for deposition on February 24, 2012, with the requested documents. EXs 233, 234.

92. Respondent appeared for deposition on February 24, 2012, with such records as he had available, and testified. EX 405.

93. At the deposition, Respondent requested the opportunity to further address the caus-

es of the overdrafts on his trust account. Respondent provided a March 9, 2012 letter and materials to address those overdrafts. EX 235. Among other explanations and defenses, Respondent correctly stated that there was no evidence of fraud or actual harm to any client.

94. Thereafter, the WSBA Audit Manager finalized her audit report on April 27, 2012. EX 307. A copy of the audit report was provided to Respondent with disciplinary counsel's analysis letter on May 9, 2012. The matter was then submitted to a Review Committee, which on August 23, 2012 ordered the matter to hearing and to be consolidated with other matters ordered to hearing. The formal complaint was filed in this matter on October 5, 2012.

FACTS REGARDING RESPONDENT'S TRUST ACCOUNTING (COUNTS 9 – 18)

95. During the period January 1, 2009 through March 31, 2010, Respondent did not maintain a trust account check register in which all receipts, disbursements, or transfers were entered on a current basis with a new trust account balance being entered after each receipt, disbursement or transfer, prior to the next transaction occurring, with a contemporaneous running balance. Instead, respondent used a carbon copy check system (EXs 321 – 344, 382) to keep track of checks written, and kept notes as to deposits and transfers. However, Respondent made no entries into any system with a contemporaneous running balance.

96. During parts of this time frame, Respondent had a bookkeeper come in on a monthly basis. During other parts of this time frame, Respondent had a bookkeeper come in on a quarterly basis. The bookkeeper would make entries based on the carbon copy checks and the notes regarding deposits and transfers into either an Excel spread sheet system (EXs 301, 302, 303) or into a QuickBooks system (EXs 304, 305, 306). Using this system, Respondent did not have any objective records reflecting the total balance of his account on a daily basis.

97. During the period January 1, 2009 through March 31, 2010, Respondent did not maintain on a current basis individual client trust account ledger records with a new client fund balance after each receipt, disbursement, or transfer. No client ledgers were maintained on a current basis, the spreadsheets and the QuickBooks being prepared by the bookkeeper on a monthly or quarterly basis. Although the spreadsheets had columns for each client, there was no running balance, the balance of the client funds only being calculated at the end of the calendar quarter. EXs 301, 202. While the QuickBooks records displayed a running balance, because they were only prepared on a monthly or quarterly basis, they did not provide a current running balance. Furthermore, the majority of the entries in the Respondent's QuickBooks records were not identified by individual client, but were aggregated together under an "Other" category. EX 305.

98. During the period January 1, 2009 through March 31, 2010, Respondent did not identify many of the transactions in this trust account check register by client. This made it difficult for the WSBA Audit Manager to reconstruct the trust account records, and although the WSBA Audit Manager eventually prepared a reconstruction, she had reservations about its accuracy because in some instances she had to rely on Respondent's memory as to the client identification for certain transactions. Respondent's own bookkeeper was unable to identify the majority of transactions by client. EX 305.

99. During the period January 1, 2009 through March 31, 2010, although Respondent received his bank statements on a monthly basis, he did not reconcile his client ledger records with his trust account check register and bank statements until the end of each quarter.

100. During the period January 1, 2009 through March 31, 2010, on at least six occasions,

Respondent made client deposits, which he failed to keep intact, by splitting the deposits between his trust account and his general account. EX 346.

101. During the period January 1, 2009 through March 31, 2010, on several occasions, Respondent deposited and maintained fully earned fees into his trust account. On April 9, 2009, Respondent deposited into his IOLTA account a check from GEICO Insurance payable to Respondent in payment of a personal collision claim. Respondent deposited these funds into his IOLTA account, as he described it, "trying to be safe" until he was ready to pay them out. EX 403 pp. 70 -73.

102. On at least five occasions (April 15, 2009, April 22, 2009, July 25, 2009, September 14, 2009, and October 19, 2009) Respondent used his own funds that he was holding in his IOLTA account to pay his personal mortgage payments to Sovereign Bank. EX 307, Bates pp. 00009 – 00012.

103. During the period January 1, 2009 through March 31, 2010, on at least nine occasions, Respondent made cash withdrawals from his trust account. EX 356.

104. In five of those instances of cash withdrawals from the trust account, Respondent's trust account records did not identify the clients whose funds were withdrawn by cash withdrawals. EX 356. These instances became problematic for the WSBA Audit Manager in reconstructing Respondent's trust account in that she had to rely on Respondent's memory as to client identification for the transactions.

105. During the period January 1, 2009 through March 31, 2010, Respondent did not regularly give advance notice to his clients of his intent to remove their funds from trust to pay his fees. EX 403, Tr. 132. EX 408 ¶ 93. Respondent misinterprets his ethical obligation as requiring prior client "consent" and, thus, incorrectly rejects it as unreasonable.

106. During the period January 1, 2009 through March 31, 2010, although Respondent did give ongoing and institutional clients written accountings advising that he had removed their funds from his trust account to pay his fees, he did not so advise individual clients with single matters. EX 403, Tr. 128-29.

107. During the period January 1, 2009 through March 31, 2010, on several occasions Respondent disbursed funds from his trust account prior to the underlying deposits clearing the banking process. EX 372. Each of the five instances of overdrafts on Respondent's trust account were caused in whole or in part by disbursing funds prior to the underlying funds clearing the banking process. EX 307, pp. 6 – 7.

108. The evidence is clear that none of Respondent's trust fund violations were fraudulently motivated or resulted in actual harm to any client.

FACTS REGARDING AGGRAVATING AND MITIGATING FACTORS

109. As to all counts, I find the following mitigating factors applicable:

ABA Standards §9.32(a) - Absence of a prior disciplinary record: Respondent has not received prior disciplinary action.

110. As to all counts, I find the following aggravating factors applicable:

ABA Standards §9.22(d) – Multiple offenses: Respondent has committed 18 separate counts of disciplinary violations.

ABA Standards §9.22(i) – Substantial experience in the practice of law: Respondent was admitted to the practice of law in 1998 and has experience in a number of types of law practice.

111. As to Count 2, I find the aggravating factor of ABA Standards §9.22(b) – dishonest or selfish motive to be applicable. The violations entailed in Count 2 all relate to knowing acts of misrepresentation by Respondent continuing to negotiate with the lawyer for Pan Pacific

after February 4, 2011, knowing that he had been discharged by at least Yoshiko Williams. All of those communications were made with the implicit representation that he was still authorized to act on behalf of Yoshiko Williams, when he knew that was not the case. I do not find, as Respondent has claimed, that his actions in continuing to negotiate beyond February 4, 2011 were motivated by a desire to protect the interests of Anika Williams. Had Respondent been so motivated, he would have been insistent in his efforts to ascertain whether his discharge in the February 3, 2011 email from Yoshiko Williams also applied to Anika Williams' representation. Other than leaving a voice mail with Yoshiko Williams asking for Anika Williams to call him, Respondent made no effort to contact Anika Williams to determine the status of his continuing authority to represent her and/or advise her of any concerns he had as to how her interests might be at risk. I find that Respondent's motive in continuing to negotiate with the lawyer for Pan Pacific was to obtain a higher settlement figure which would help fund his claim for fees and possibly convince Yoshiko Williams to rescind her discharge of him. Respondent's motives were selfish.

112. As to Counts 2, 3, and 4, I find the aggravating factor of ABA Standards §9.22(f) – submission of false evidence, false statements, or other deceptive practices during the disciplinary process to be applicable. Respondent made knowing misrepresentations as to the circumstances by which he became aware of the February 8, 2011 email from Ms. Shatz (EX 118). Respondent claims that he did not see the February 8, 2011 email because it had been quarantined in a "junk email holding folder," and that he remained unaware of the email until Mr. Redford brought it to his attention on February 14, 2011 whereupon he then found it in a quarantine box. Respondent made this claim at least four times:

- In a February 17, 2011 email to Mr. Redford (EX. 141) in response to Mr. Redford's letter to him threatening to file a Bar grievance (EX 139).
- In Respondent's March 31, 2011 response to the grievance of Yoshiko Williams (EX 147, p.00005).
- In Respondent's December 10, 2012 Answer to Formal Complaint (EX 408 ¶¶ 21, 30).
- In Respondent's hearing testimony. TR 776 – 788.

The computer forensic evidence establishes by a clear preponderance that his luxsci.com email server did not, as claimed by Respondent, quarantine the Feb. 8th email, as it was in fact delivered directly into Respondent's inbox within seconds of the email having been sent by Ms. Shatz. EX 154, Ex. E2, p. 25, and EX 154, Ex. E2, pp. 26-27. It is also significant that when Respondent replied to the email on February 14th, he did not cite the 'caught in the span filter' reason for the delay in his response. Instead, he explained "I am remiss in replying earlier due to other pressing client matters and trial proceedings." EX 132-B. It is also significant that on February 15 – 16, 2011, a week after the February 9, 2011 email was sent from Ms. Shatz to Respondent, Respondent drafted an invoice for the Williams. That invoice included an entry under the date of February 9, 2011 stating: "received and review email from Ms. Shatz advising that Williams have engaged her as new counsel." EX 138. Respondent's claim that he did not see the Feb. 8th email from Ms. Shatz because it had been quarantined by this email server is not credible. The clear preponderance of the evidence establishes that the Feb. 8th email from Ms. Shatz was neither quarantined nor held in any sort of spam filter or junk file. As such, Respondent's various statements to the contrary were false and deceptive practices in the disciplinary process.

113. As to Count 7, I find the aggravating factor of ABA Standards §9.22(j) - Indifference to making restitution to be applicable. Despite the grievance of Yoshiko Williams filed February 18, 2011, and the grievance of Naoko Shatz filed March 8, 2011, and the formal complaint in this matter being filed on October 5, 2012, charging Respondent with misconduct for failing to take action to resolve the dispute regarding his lien on the $1,650 settlement for his fees, Respondent failed to resolve the dispute until sending his September 26, 2013 letter withdrawing his attorney's lien. As a result, the Williamses had no access to any portion of the settlement funds from February 2011 to October 2013, evidencing indifference to making restitution.

114. While Respondent argues that his withdrawal of his attorney's lien some eleven days prior to the hearing should be considered in mitigation, ABA Standards §9.4(a) provides that forced or compelled restitution should not be considered as either aggravating or mitigating.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact, the Hearing Officer makes the following Conclusions of Law.

Violations Analysis

115. **Count 1**. The Association proved Count 1 by a clear preponderance of the evidence. Respondent had no explicit authorization from either Yoshiko or Anika Williams to make the February 2, 2011 counteroffer. EX 114. Respondent's claim of blanket authority to settle and/or authorization to act on behalf of Yoshiko Williams based on her incapacity is not credible. Even if such blanket authority had been granted, by telling Ms. Williams that he needed her specific written authorization as to how to respond to the defendant's settlement, Respondent took the matter out of any such blanket authorization. Respondent violated RPC

1.2(a) by making the February 2, 2011 counteroffer without authorization from his clients.

116. It is true that neither the February 3, 2011, 10:09 p.m. email from Yoshiko Williams to Respondent (EX 117) nor the February 8, 2011 email from Ms. Shatz to Respondent (EX 118) articulated that the decision to discharge Respondent was made on behalf of Anika Williams as well as Yoshiko Williams. Respondent claims that he continued to act on behalf of Anika Williams in negotiating offers and counteroffers between February 9, 2011 and February 14, 2011. However, in his February 14, 2011 email to Ms. Shatz, Respondent indicated "I am informed by Ms. Williams that she no longer wishes for me and my firm to continue representing her and her daughter . . . ." (Emphasis added). EX 132-B. Ms. Williams' last communication to Respondent, having been her February 3, 2011 email, which Respondent read on either February 4th or 5th, he had to have been aware that he was no longer representing either Yoshiko Williams or Anika Williams as of that time on February 4th or 5th. Respondent's claim that he believed he was obligated to continue to represent Anika Williams when he continued to negotiate with Mr. Redford is not credible. Respondent violated RPC 1.2(a) by continuing to pursue settlement negotiations with Mr. Redford after he had been discharged.

117. **Count 2.** The Association proved Count 2 by a clear preponderance of the evidence. Respondent made three sets of knowing misrepresentations:

a. By making the February 2nd settlement counteroffer, knowing that he was not authorized by his client to make such an offer, Respondent represented the counteroffer as being authorized by his clients when he knew that it had not been so authorized.

b. By continuing between February 9th and 14th to represent settlement offers and counteroffers to Mr. Redford as being those of the Williamses, when he knew that he

1 no longer represented the Williamses in the matter, Respondent made knowing mis-
2 representations to Mr. Redford.
3 c. By representing to Mr. Redford on February 14, 2011 that he had spoken that
4 day with the Williamses and that they had specifically rejected a settlement figure
5 and had proposed a different figure and terms, when he knew that he had so not spo-
6 ken with or been so advised by the Williamses, Respondent made knowing misrepre-
7 sentations to Mr. Redford.
8 Such knowing misrepresentations are not, as Respondent has claimed, the kind of things
9 you do in negotiating settlement. By making these misrepresentations, Respondent vio-
10 lated RPC 8.4(c). Because the misrepresentations were of material facts, Respondent vio-
11 lated RPC 4.1(a). Because making such misrepresentations to opposing counsel is a clear
12 violation of accepted practice norms, the conduct was prejudicial to the administration of
13 justice in violation of RPC 8.4(d).
14 118. **Count 3.** The Association proved Count 3 by a clear preponderance of the evi-
15 dence. As noted above, Respondent knew by February 4th or 5th that he had been discharged as
16 to both Yoshiko Williams and Anika Williams and that he no longer represented either. By tak-
17 ing no action to withdraw until forced to do so on February 25, 2011, Respondent violated RPC
18 1.16(a)(3).
19 119. **Count 4.** The Association proved Count 4 by a clear preponderance of the evi-
20 dence. Yoshiko William's February 3, 2011 email discharging Respondent asked him to send
21 her file to the new lawyer, Ms. Shatz. Given that trial was less than a month away, and that no
22 agreement authorized Respondent to require payment for copies of file materials upon dis-
23 charge, Respondent violated RPC 1.16(d) by refusing to send the entire file as requested and
24

offering only to make portions of the file available for review by Ms. Shatz, with copies available for a charge.

120. **Count 5**. The Association proved Count 5 by a clear preponderance of the evidence. By not providing the Williamses with any billing statement during the period of his representation and not until after he had been discharged, in a matter in which his fee balance quickly exceeded the amount of any reasonable damage recovery, Respondent violated his duties under RPC 1.4(a) to keep the client reasonably informed about the status of the matter and violated his duties under RPC 1.4(b) to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

121. **Count 6**. The Association proved Count 6 by a clear preponderance of the evidence. The un-cashed November 15, 2010 check payable to the Williamses for $329.64 from Pan Pacific Properties was the property of the Williamses. Mr. Redford sent the check to Respondent because he did not want to communicate directly with the Williamses who were being represented by Respondent. Although Respondent incorrectly considered the check to be part of some attempt to settle the Williamses' lawsuit against Pan Pacific, the check was an unconditional payment to the Williamses and was not part of any settlement offer or agreement.

122. Upon his termination, the $329.64 check remained client property and was not subject to any lien under RCW 60.40. Upon being discharged, by refusing, to provide the check to the Williamses unless he was paid his outstanding fees, Respondent violated his duty under RPC 1.15A(f) to promptly deliver to a client property, which the client was entitled to receive.

123. **Count 7**. The Association proved Count 7 by a clear preponderance of the evidence. By filing an attorney's lien on the $1,650 settlement funds in February 2011, thereby

depriving the Williamses of any portion of those funds until the attorney's lien for his fee claim was resolved, and then failing to resolve that dispute until a few days prior to this hearing, Respondent violated his duties under RPC 1.15A(g) to take reasonable action to resolve the dispute, including interpleading the disputed funds when appropriate.

124. **Count 8**. The Association proved Count 8 by a clear preponderance of the evidence. An investigation into overdrafts on Respondent's IOLTA Trust Account was begun in September 2009. On numerous occasions between December 2009 and December 11, 2009 Respondent failed to comply with investigative requests from the WSBA Audit Manager and disciplinary counsel. These requests were based upon an ongoing series of overdrafts in Respondent's trust account and were reasonable investigative requests based on the legitimate concerns the WSBA Audit Manager had after her initial review of Respondent's trust accounting. Respondent's failure to provide the information and documents requested, in particular his open refusal to provide additional documents unless the Association proved to him the integrity of the Association's inquiry, necessitated taking Respondent's deposition to obtain the information on three occasions. Respondent has noted that he did always appear for deposition, but that is no defense to the violation entailed in the Association having to issue a subpoena and conduct a deposition to obtain information and documents that the Respondent was obligated to promptly provide in response to the various requests under ELC 5.3(e). By failing on numerous occasions to provide the prompt responses required by ELC 5.3(e), Respondent violated ELC 1.5 and RPC 8.4(*l*). Failing to appear in response to a valid subpoena would have constituted a separate and independent violation of the ELCs and RPCs.

125. At hearing, Respondent complained that the investigation into his trust account took much too long. Having extended from September 2009 to May 2012, the investiga-

tion was lengthy. This appears to have been attributable to two causes. First, there was a rolling series of overdrafts on Respondent's trust account, a first series of overdrafts being in August 2009, and a second series of overdrafts in February 2010. Second, and much more significantly, the investigation was continually hampered and delayed by the numerous instances of Respondent failing to provide the prompt responses required by ELC 5.3(e), such that follow-up letters under ELC 5.3(f)(1) had to be pursued and then non-cooperation depositions under ELC 5.3(f)(1) had to be taken.

126. **Count 9**. The Association proved Count 9 by a clear preponderance of the evidence. By not having records that computed on a current basis the balance of his trust account after each receipt, disbursement or transfer, Respondent violated RPC 1.15B(a)(1)(v) and RPC 1.15A(h)(2). The failure to have such records appears to have contributed to at least one of the overdrafts on Respondent's trust account, that being the July 31, 2009 overdraft. EX 201. Respondent has argued that keeping records on a current basis places an undue burden on a sole practitioner with no support staff. The trust account requirements of the Rules of Professional Conduct do not make exceptions based on whether one has support staff. Respondent has also argued that he does not have bookkeeping or accounting skills. The Rules of Professional Conduct do not make exceptions based on a lawyer's degree of bookkeeping or accounting skills. The Association publishes a trust account booklet with clear instructions as to how to keep an adequate set of trust account records. Respondent testified that he has always had a copy of the WSBA trust account booklet. Many Washington lawyers have no support staff and have little if any bookkeeping or accounting training, yet they comply with these rules, as must Respondent.

127. **Count 10**. The Association proved Count 10 by a clear preponderance of the evidence. By not maintaining on a current basis client ledgers that reflected the new client

fund balance after each receipt, disbursement, or transfer, Respondent violated RPC 1.15B(a)(2)(v) and RPC 1.15A(h)(2).

128. **Count 11**. The Association proved Count 11 by a clear preponderance of the evidence. By failing to identify the client matter for the majority of the transactions in his trust account records, Respondent rendered his records virtually useless for keeping track of the individual client balances that comprised the pooled balance in the IOLTA account, and violated RPC 1.15B(a)(1)(i) and RPC 1.15A(h)(2).

129. **Count 12**. The Association proved Count 12 by a clear preponderance of the evidence. By reconciling his client ledgers with his check register and bank statements on a quarterly basis rather than monthly upon receipt of his bank statements, Respondent violated RPC 1.15A(h)(6).

130. **Count 13**. The Association proved Count 13 by a clear preponderance of the evidence. By splitting deposits between his trust account and his business account on six occasions, Respondent failed to deposit receipts intact in violation of RPC 1.15A(h)(4). Although Respondent has admitted the allegation and violation, he has argued that he was unaware that split deposits were prohibited and that in some instances made the split deposits on the suggestion of bank personnel. There is no intent element in RPC 1.15A(h)(4), and Respondent, not bank personnel, is responsible for knowing and complying with the Rules of Professional Conduct.

131. **Count 14**. The Association proved Count 14 by a clear preponderance of the evidence. By placing and maintaining his own funds in his IOLTA account, Respondent failed to keep his funds separate from the funds of clients and third parties in violation of RPC 1.15A(c) and RPC 1.15A(h)(1).

132. **Count 15**. The Association proved Count 15 by a clear preponderance of the evidence. By making a number of withdrawals to cash rather than to a named payee, several of which were not identified by client, Respondent violated RPC 1.15A(h)(5). Respondent admits making the cash withdrawals but argues that his conduct was neither knowing nor intentional, but was instead motivated by a desire for convenience. There is neither a knowledge nor intent element to a violation of RPC 1.15A or RPC 1.15B, and administrative convenience is no justification for violation of the trust account rules.

133. **Count 16**. The Association proved Count 16 by a clear preponderance of the evidence. By failing to give his clients reasonable written notice of his intent to remove their funds from his trust account to pay his fees before removing such funds from his trust account, Respondent violated RPC 1.15A(h)(3). Respondent misconstrues this rule to require "consent" rather than prior written "notice."

134. **Count 17**. The Association proved Count 17 by a clear preponderance of the evidence. Although Respondent did give ongoing and institutional clients written accountings advising that he had removed their funds from his trust account to pay his fees, he did not so advise individual clients with single matters. The Rules of Professional Conduct do not distinguish institutional clients or ongoing clients as opposed to individual clients with single matters. By failing to give individual clients with single matters a written accounting after distribution of their property, Respondent violated RPC 1.15A(e).

135. **Count 18**. The Association proved Count 18 by a clear preponderance of the evidence. By disbursing funds before the underlying deposits had cleared the banking process, Respondent violated RPC 1.15A(h)(7). Respondent has the duty to determine whether funds have cleared before disbursing funds from his trust account.

Sanction Analysis

136. A presumptive sanction must be determined for each ethical violation. In re Anschell, 149 Wn.2d 484, 501, 69 P.2d 844 (2003). The following standards of the American Bar Association's Standards for Imposing Lawyer Sanctions ("ABA Standards") (1991 ed. & Feb. 1992 Supp.) are presumptively applicable in this case:

ABA Standard 4.4 - Counts 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17 and 18:

> **4.1 Failure to Preserve the Client's Property**
> Absent aggravating or mitigating circumstances, upon application of the factors set out in 3.0, the following sanctions are generally appropriate in cases involving the failure to preserve client property:
> 4.11 Disbarment is generally appropriate when a lawyer knowingly converts client property and causes injury or potential injury to a client.
> 4.12 Suspension is generally appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client.
> 4.13 Reprimand is generally appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client.
> 4.14 Admonition is generally appropriate when a lawyer is negligent in dealing with client property and causes little or no actual or potential injury to a client.

137. **As to Count 6**, Respondent either knew or should have known that he was dealing improperly with client property when he failed to promptly provide to the Williamses the November 15, 2010 check which was neither payable to Respondent nor subject to Respondent's February 13, 2011 attorney's lien. The conduct harmed his clients whose receipt of funds has been delayed for two and one-half years. The presumptive sanction is a suspension under ABA Standard 4.12.

138. **As to Count 7**, Respondent either knew or should have known that he was dealing improperly with client property when he failed to take reasonable action to resolve his fee dispute regarding the settlement funds. This conduct has harmed his clients who for more than two and one-half years have not received any portion of the settlement funds in the matter. The

presumptive sanction is a suspension under ABA Standard 4.12.

139. **As to Count 9 and Count 10**, Respondent either knew or should have known that he was dealing improperly with client property when he failed to maintain contemporaneous running balances in his trust account check register and in his client ledgers. This conduct caused potential injury to his clients and contributed to overdrafts on his trust account. The presumptive sanction is a suspension under ABA Standard 4.12.

140. **As to Count 11**, Respondent either knew or should have known that he was dealing improperly with client property when he failed to identify all trust account transactions by client. This conduct caused potential injury to his clients and contributed to overdrafts on his trust account. The presumptive sanction is a suspension under ABA Standard 4.12.

141. **As to Count 12**, Respondent either knew or should have known that he was dealing improperly with client property when he failed to reconcile his client ledger records with his trust account check register and bank statements on a monthly basis. This conduct caused potential injury to his clients and contributed to overdrafts on his trust account. The presumptive sanction is a suspension under ABA Standard 4.12.

142. **As to Count 13**, Respondent either knew or should have known that he was dealing improperly with client property when he made deposits that he split between his trust account and his general account, thereby failing to keep all deposits intact. This conduct caused potential injury to his clients and contributed to overdrafts on his trust account. The presumptive sanction is a suspension under ABA Standard 4.12.

143. **As to Count 14**, Respondent either knew or should have known that he was dealing improperly with client property when he deposited and maintained fully earned fees into his trust account, thereby commingling his own funds with client funds. This conduct caused

potential injury to his clients and contributed to overdrafts on his trust account. The presumptive sanction is a suspension under ABA Standard 4.12.

144. **As to Count 15,** Respondent either knew or should have known that he was dealing improperly with client property when he made cash withdrawals from his trust account. This conduct caused potential injury to his clients and contributed to overdrafts on his trust account. The presumptive sanction is a suspension under ABA Standard 4.12.

145. **As to Count 16,** Respondent either knew or should have known that he was dealing improperly with client property when he failed to give his clients reasonable written notice of his intent to remove their funds from his trust account to pay his fees before removing such funds. This conduct caused potential injury to his clients. The presumptive sanction is a suspension under ABA Standard 4.12.

146. **As to Count 17,** Respondent either knew or should have known that he was dealing improperly with client property when he failed to provide written accountings to clients advising that he had removed their funds from his trust account to pay his fees. This conduct caused potential injury to his clients. The presumptive sanction is a suspension under ABA Standard 4.12.

147. **As to Count 18,** Respondent either knew or should have known that he was dealing improperly with client property when he disbursed funds from his trust account prior to the underlying deposit clearing the banking process. This conduct caused potential injury to his clients and contributed in overdrafts on his trust account. The presumptive sanction is a suspension under ABA Standard 4.12.

ABA Standard 4.4 - Counts 1 and 5:

> **4.4 Lack of Diligence**
> Absent aggravating or mitigating circumstances, upon application of the factors set

out in Standard 3.0, the following sanctions are generally appropriate in cases involving a failure to act with reasonable diligence and promptness in representing a client:

4.41 Disbarment is generally appropriate when:
(a) a lawyer abandons the practice and causes serious or potentially serious injury to a client; or
(b) a lawyer knowingly fails to perform services for a client and causes serious or potentially serious injury to a client; or
(c) a lawyer engages in a pattern of neglect with respect to client matters and causes serious or potentially serious injury to a client.

4.42 Suspension is generally appropriate when:
(a) a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client, or
(b) a lawyer engages in a pattern of neglect and causes injury or potential injury to a client.

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

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

148. **As to Count 1**, Respondent's conduct in making counteroffers and other settlement offers without his client's authorization was knowing and caused injury or potential injury to the Williamses in that that they were deprived of their right to make decisions regarding their settlement options. The presumptive sanction is a suspension under ABA Standard 4.42(a).

149. **As to Count 5**, Respondent's failure to keep his clients apprised of their fee balance during the representation appears to have been negligent conduct. It caused injury to the client in that it deprived the client of information the client needed to know to make informed decisions as to the direction of the representation. The presumptive sanction is a reprimand under ABA Standard 4.43.

ABA Standard 5.1 - Count 2:

5.1 Failure to Maintain Personal Integrity

Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving commission of a criminal act that reflects adversely on the lawyer's hon-

esty, trustworthiness, or fitness as a lawyer in other respects, or in cases with conduct involving dishonesty, fraud, deceit, or misrepresentation:

5.11 Disbarment is generally appropriate when:

(a) a lawyer engages in serious criminal conduct, a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft; or the sale, distribution or importation of controlled substances; or the intentional killing of another; or an attempt or conspiracy or solicitation of another to commit any of these offenses; or

(b) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

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

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

5.14 Admonition is generally appropriate when a lawyer engages in any other conduct that reflects adversely on the lawyer's fitness to practice law.

150. **As to Count 2**, in making settlement offers and counteroffers to opposing counsel when he had not been authorized to do so by his clients, concealing from opposing counsel that he had been discharged by his clients, and misrepresenting to opposing counsel that he had spoken to his client and was authorized to make a counteroffer when he had not spoken with his client and had not obtained authority to make a counteroffer, it appears Respondent's conduct was part of an intentional course of conduct to mislead and misrepresent to opposing counsel. While this is a serious violation involving dishonesty and misrepresentation, it does not rise to the level under ABA Standard § 5.11 warranting disbarment. ABA Standard § 5.13, regarding a reprimand, is no better fit for this conduct in that this dishonesty was more than knowing, it was intentional. The suspension standard, Standard § 5.12, is limited to criminal conduct. This is a situation where the ABA Standards do not specifically address the misconduct. Because this misconduct appears to lie somewhere between the sanction of disbarment deemed appropri-

ate under ABA Standard § 5.11(b), and the sanction of reprimand deemed appropriate under ABA Standard § 5.13, it appears a suspension is the most appropriate presumptive sanction for Count 2.

ABA Standard 7.0 - Counts 3, 4 and 8:

> **7.0 Violations of Duties Owed as a Professional**
> Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving false or misleading communication about the lawyer or the lawyer's services, improper communication of fields of practice, improper solicitation of professional employment from a prospective client, unreasonable or improper fees, unauthorized practice of law, improper withdrawal from representation, or failure to report professional misconduct.
>
> 7.1 Disbarment is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system.
>
> 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.
>
> 7.3 Reprimand is generally appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.
>
> 7.4 Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence that is a violation of a duty owed as a professional, and causes little or no actual or potential injury to a client, the public, or the legal system.

151. **As to Count 3**, Respondent's delay in withdrawing after he had been discharged by his client while continuing to negotiate for a higher settlement figure, in part to provide more funds for Respondent's fee, was knowing conduct which injured his client who was delayed in having representation by the counsel of her choice, and injured the opposing party who expended funds on having its lawyer continue to negotiate unnecessarily with Respondent after he had been terminated. The presumptive sanction is a suspension under ABA Standard 7.2.

152. **As to Count 4**, Respondent's delay in providing his complete file to his clients and/or their new lawyer was knowing conduct. Because the lawsuit was settled within two

1 weeks of his discharge and the request that the file be sent to the new lawyer, there appears to
2 have been no actual injury, but there was potential injury. The presumptive sanction is a sus-
3 pension under ABA Standard 7.2.

4 153. **As to Count 8,** it was repeatedly necessary to issue subpoenas and take deposi-
5 tions to get trust account records and obtain explanations from Respondent as to questions
6 raised by the WSBA auditor. That conduct was knowing and caused injury by frustrating and
7 delaying the Association's investigation. The presumptive sanction is a suspension under ABA
8 Standard 7.2.

9 Recommendation

10 154. When multiple ethical violations are found, the "ultimate sanction imposed should at
11 least be consistent with the sanction for the most serious instance of misconduct among a num-
12 ber of violations." In re Petersen, 120 Wn.2d 833, 854, 846 P.2d 1330 (1993).

13 155. The presumptive sanction is suspension for Counts 1, 2, 3, 4, 6, 7, 8, 9, 10, 11, 12,
14 13, 14, 15, 16, 17, and 18. The presumptive sanction is a reprimand for Count 5. Given that the
15 vast majority of counts have suspension as the presumptive sanction, the analysis of the appro-
16 priate sanction in this matter begins with a suspension. In In re Disciplinary Proceeding
17 Against Cohen, 149 Wn.2d 323, 339, 67 P.3d 1086 (2003), the Court noted that when a suspen-
18 sion is appropriate,

19 A period of six months is generally the accepted minimum term of suspension. In re Disciplinary Proceeding Against Halverson, 140 Wash.2d 475, 495, 998
20 P.2d 833 (2000). The minimum suspension is appropriate in cases where there are both no aggravating factors and at least some mitigating factors, or when the
21 mitigating factors clearly outweigh the aggravating factors. Halverson, 140 Wash.2d at 497, 998 P.2d 833.
22

23 156. Throughout the Association's investigation and the hearing of this matter, Respond-
24 ent exhibited an apparent air of self-righteous indignation toward the charges made against him

that is not justified by the facts.

157. On the other hand, some of Respondent's transgressions verge on technical in nature where no actual harm was done to a client. Others could be characterized as closely related and overlapping. And some may have been aggravated by cross-cultural differences in styles of communication arising from Respondent's foreign roots. The latter were testified to by Respondent and observed by the Hearing Officer during six days of hearing. While understandable, they do not excuse Respondent from strictly abiding by the Rules of Professional Conduct applicable to all members of the Washington State Bar.

158. Here, the aggravating factors outweigh the one mitigating factor of a lack of prior discipline. In particular three aggravators, the multitude of violations, the selfish motive, and the false statements and deceptive practices during the disciplinary process, require a suspension longer than the minimum six months.

159. Based on the ABA Standards and the applicable aggravating and mitigating factors, the Hearing Officer recommends that Respondent Justin C. Osemene be suspended for one year.

160. The Hearing Officer further recommends that upon reinstatement, at such time as Respondent resumes a practice that involves receipt of funds of clients or third parties, Respondent be placed on probation under ELC 13.8 for a period of one year, with quarterly reviews of his trust account practices, under the probationary terms set forth below:

(a) Respondent shall carefully review and fully comply with RPC 1.15A and RPC 1.15B, and shall carefully review the current version of the Association's publication, Managing Client Trust Accounts: Rules, Regulations, and Common Sense.

(b) For all client matters, Respondent shall have a written fee agreement signed by the client, which agreements are to be maintained for least seven years (see RPC 1.15B(a)(3)).

(c) For all client matters involving an hourly fee agreement, Respondent will provide monthly billing statements.

(d) For all matters involving client funds being held in trust, Respondent will withdraw earned fees only after giving reasonable notice to the client of the intent to do so, through a billing statement or other document.

(e) On a quarterly basis, Respondent shall provide the Association's audit staff with all trust-account records for the time period to be reviewed by the Association's audit staff and disciplinary counsel for compliance with the RPC:

(i) Months 1 – 3. By no later than the 30th day of the fourth month after the commencement of probation, Respondent shall provide the trust account records from the date of the commencement of his probation to the end of the third full month.

(ii) Months 4 – 6. By no later than the 30th day of the seventh month after the commencement of probation, Respondent shall provide the trust account records from the end of the previously provided quarter through the end of month six.

(iii) Months 7 – 9. By no later than the 30th day of the tenth month after the commencement of probation, Respondent shall provide the trust account records from the end of the previously provided quarter through the end of month nine.

(iv) Months 10 – 12. By no later than the 30th day of the thirteenth month after the commencement of probation, Respondent shall provide the trust account records from the end of the previously provided quarter through the end of month twelve.

(f) The trust account records Respondent must provide to the Association for each quarterly review of his trust account will include:

- a complete checkbook register for his/her trust account covering the period being reviewed,
- complete individual client ledger records for any client with funds in Respondent's trust account during all or part of the period being reviewed, as well as for Respondent's own funds in the account (if any),
- copies of all trust-account bank statements, deposit slips, and cancelled checks covering the period being reviewed,
- copies of all trust account client ledger reconciliations for the period being reviewed, and
- copies of reconciliations of Respondent's trust account check register covering the period being reviewed.

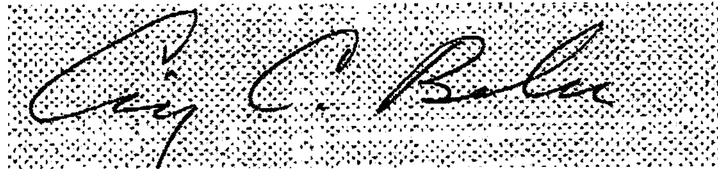
(g) The Association's Audit Manager or designee will review Respondent's trust account records for each period.

(h) On the same quarterly time schedule set forth above, Respondent will provide the Association's Audit Manager or designee with copies of any and all fee agreements entered into within the time period at issue.

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

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

Dated this 17th day of December, 2013.



Craig C. Beles, Bar No. 6329
Hearing Officer

CERTIFICATE OF SERVICE

I certify that I caused a copy of the FOF, COL & HO's Recommendation to be delivered to the Office of Disciplinary Counsel and to be mailed to Justin Osemene, Respondent/Respondent's Counsel at PO Box 45331 Seattle, WA 98145, by Certified/first class mail, postage prepaid on the 17th day of December, 2013

Clerk/Counsel to the Disciplinary Board