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FILED

FEB 10 2014

DISCIPLINARY BOARD

BEFORE THE
DISCIPLINARY BOARD
OF THE
WASHINGTON STATE BAR ASSOCIATION

In re

KIRK T 'CHIP' MOSLEY,
Lawyer (Bar No. 29683).

Proceeding No. 12#00084

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 December 10 and 11, 2013. Respondent Kirk T 'Chip' Mosley (Respondent) appeared at the hearing and was represented by lawyer Kenneth Harmell. Disciplinary Counsel Marsha Matsumoto and Francesca D'Angelo appeared for the Washington State Bar Association (the Association).

FORMAL COMPLAINT FILED BY DISCIPLINARY COUNSEL

The Formal Complaint filed by Disciplinary Counsel charged Respondent with the following counts of misconduct:

Count 1 - By converting the Tuthill sale proceeds in which Patricia Tuthill had an undivided interest, Respondent violated RPC 1.15A(b) and/or RPC 8.4(c) and/or RPC 8.4(b)

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1 [by committing the crime of theft in the first degree (RCW 9A.56.030)].

2 Count 2 - By failing to maintain the Tuthill sale proceeds in a trust account, Respondent
3 violated RPC 1.15A(c) and/or RPC 1.15A(g).

4 Count 3 - By willfully disobeying and/or violating the May 30, 2008 court order
5 regarding the Tuthill sale proceeds, Respondent violated RPC 8.4(d) and/or RPC 8.4(j).

6 Count 4 - By failing to provide Wayne Tuthill with a complete and/or accurate written
7 accounting, Respondent violated RPC 1.15A(e) and/or RPC 8.4(d) and/or RPC 8.4(j) and/or
8 RPC 1.4(a) and/or RPC 1.4(b).

9 Count 5 - By failing to provide Patricia Tuthill and/or her counsel with a complete
10 and/or accurate written accounting, Respondent violated RPC 1.15A(e) and/or RPC 8.4(d)
11 and/or RPC 8.4(j).

12 Count 6 - By entering into a business transaction with Wayne Tuthill without meeting
13 the requirements of RPC 1.8(a)(1) and/or RPC 1.8(a)(2) and/or RPC 1.8(a)(3), Respondent
14 violated RPC 1.8(a).

15 Count 7 - By making false statements under oath at his deposition, Respondent violated
16 RPC 8.4(c) and/or RPC 8.4(d) and/or RPC 8.4(l) and/or ELC 5.3(e) and/or RPC 8.4(b) [by
17 committing the crime of false swearing (RCW 9A.72.040)].

18 Count 8 - By failing to maintain complete and/or accurate trust account records,
19 Respondent violated RPC 1.15A(h)(2) and/or RPC 1.15B.

20 Count 9 - By failing to reconcile his trust account check register to his bank statements
21 and/or by failing reconcile his trust account check register to a combined total of client ledgers,
22 Respondent violated RPC 1.15A(h)(6).

23 Count 10 - By making cash withdrawals from his trust account, Respondent violated
24

1 RPC 1.15A(h)(5).

2 Count 11 - By disbursing funds on behalf of a client in excess of the amount the client
3 had on deposit and/or by using one client's funds on behalf of another, Respondent violated
4 RPC 1.15A(h)(8).

5 Count 12 - By disbursing funds from his trust account before the corresponding deposits
6 cleared the banking system, Respondent violated RPC 1.15A(h)(7).

7 Count 13 - By converting Thomas Clark's funds, Respondent violated RPC 1.15A(b)
8 and/or RPC 8.4(c) and/or RPC 8.4(b) [by committing the crime of theft in the second degree
9 (RCW 9A.56.040)].

10 Count 14 - By failing to maintain Clark's funds in a trust account, Respondent violated
11 RPC 1.15A(c)(1).

12 Count 15 - By disbursing funds in excess of the amount client JD had on deposit and/or
13 by using Clark's funds for the benefit of another client, Respondent violated RPC 1.15A(h)(8).

14 Count 16 - By failing to pay Clark's medical expenses as directed by his client,
15 Respondent violated RPC 1.3 and/or RPC 1.15A(f).

16 Count 17 - By failing to promptly deliver to Clark the funds he was entitled to receive,
17 Respondent violated RPC 1.15A(f).

18 Count 18 - By failing to provide Clark with an accounting after disbursing his settlement
19 funds and/or annually, Respondent violated RPC 1.15A(e) and/or RPC 1.4(a) and/or RPC
20 1.4(b).

21 Count 19 - By failing to communicate with Clark regarding the status of his case and/or
22 failing to respond to Clark's requests for information, Respondent violated RPC 1.4(a).

23 Based on the pleadings in the case, the testimony and exhibits at the hearing, the Hearing
24

1 Officer makes the following:

2 **FINDINGS OF FACT**

3 1. Respondent was admitted to the practice of law in the State of Washington on
4 November 22, 1999.

5 2. At all times relevant to this proceeding, Respondent was a solo practitioner who
6 practiced primarily in the area of criminal defense. Respondent also handled cases in family
7 and personal injury law.

8 3. Respondent maintained a trust account #7900 at Bank of America (trust account)
9 for the deposit of client funds.

10 4. Respondent also maintained a business account #9908 at Bank of America
11 (business account).

12 5. Respondent was the only authorized signer on the trust account.

13 6. Respondent personally maintained the trust account records, prepared and signed
14 the trust account checks, transferred funds from the trust account to the business account, and
15 made most, if not all, of the deposits to the trust account.

16 **Trust Account Overdrafts**

17 7. On October 5, 2010, Bank of America issued an overdraft notice for Respondent's
18 trust account indicating that the account was overdrawn by \$245 on October 4, 2010.

19 8. Based on the overdraft notice, the Association opened a grievance investigation
20 against Respondent under WSBA File No. 10-01784. Exhibit (EX) 200.

21 9. Subsequently, the Association received two more overdraft notices from Bank of
22 America for Respondent's trust account. On October 8, 2010, Bank of America issued an
23 overdraft notice indicating that the account was overdrawn by \$45 on October 7, 2010. EX 201.

1 On October 12, 2010, Bank of America issued an overdraft notice indicating that the account
2 was further overdrawn by \$545 on October 7, 2010. EX 202.

3 10. The Association's Audit Manager Rita Swanson conducted an audit of
4 Respondent's trust account covering the time period of May 1, 2008 through May 31, 2011
5 (audit period).

6 **Trust Account Records**

7 11. During the grievance investigation, the Association asked Respondent to provide
8 his trust account records (e.g., bank statements, check register, client ledgers, bank statement
9 reconciliations, and client ledger reconciliations) for the period September 1, 2010 through
10 November 30, 2010. EX 206, 207. In response, Respondent informed the Association that his
11 trust account records were in the trunk of a vehicle he was driving when the vehicle was stolen
12 in December 2010. EX 208.

13 12. The Association requested additional information from Respondent. EX 209, 210.
14 When Respondent failed to respond, the Association issued a subpoena duces tecum for
15 Respondent's deposition. EX 211. Respondent then produced check stubs for the period
16 December 1, 2010 to June 6, 2011. EX 224. Respondent characterized the check stubs as his
17 trust account "check register." EX 150. However, the check stubs were inadequate to serve as
18 a check register because they did not include all of the transactions in the trust account, such as
19 Respondent's numerous cash withdrawals and transfers from his trust account to his business
20 account. Furthermore, the balances on the check stubs were not accurate. Consequently,
21 Respondent's "check register" was neither complete nor accurate. It did not identify whose
22 funds were deposited to and disbursed from the trust account or the total amount of funds in the
23 account.

1 13. For the time period September 1, 2010 through May 31, 2011, Respondent did
2 not reconcile his "check register" to the bank statements for his trust account. EX 150.

3 14. For the time period September 1, 2010 through May 31, 2011, Respondent did
4 not maintain any client ledgers for his trust account. EX 150.

5 15. Because Respondent did not maintain client ledgers and did not maintain a
6 complete or accurate check register for his trust account, he was unable to perform any client
7 ledger reconciliations for the time period September 1, 2010 through May 31, 2011. EX 150.

8 **Withdrawals by Means Other Than Check or Bank Transfer**

9 16. During the period May 1, 2008 through May 31, 2011, Respondent personally
10 made the following cash withdrawals, totaling more than \$55,000, from his trust account:

DATE	AMOUNT OF CASH WITHDRAWAL
May 6, 2008	60.00
June 9, 2008	2,300.00
June 19, 2008	600.00
June 30, 2008	500.00
July 16, 2008	1,000.00
July 31, 2008	500.00
August 1, 2008	400.00
August 6, 2008	305.00
August 8, 2008	1,000.00
August 15, 2008	510.00
August 27, 2008	460.00
September 8, 2008	125.00
September 10, 2008	200.00
September 12, 2008	2,500.00
September 15, 2008	2,500.00
September 22, 2008	1,000.00
September 26, 2008	504.00
October 1, 2008	100.00
October 14, 2008	1,050.00
October 15, 2008	200.00
October 27, 2008	1,600.00
October 29, 2008	250.00
October 31, 2008	400.00
November 4, 2008	275.00

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November 19, 2008	2,800.00
November 19, 2008	1,000.00
November 21, 2008	300.00
November 21, 2008	1,000.00
December 1, 2008	100.00
December 1, 2008	150.00
December 8, 2008	450.00
December 11, 2008	100.00
December 16, 2008	150.00
December 19, 2008	5,000.00
January 29, 2009	300.00
February 2, 2009	150.00
March 31, 2009	300.00
April 6, 2009	150.00
May 21, 2009	1,500.00
May 29, 2009	1,600.00
June 11, 2009	150.00
June 25, 2009	300.00
June 26, 2009	500.00
June 29, 2009	100.00
July 1, 2009	320.00
July 2, 2009	1,000.00
July 10, 2009	300.00
July 13, 2009	250.00
July 17, 2009	300.00
September 8, 2009	400.00
September 11, 2009	1,000.00
September 22, 2009	150.00
October 21, 2009	600.00
November 6, 2009	250.00
November 8, 2009	250.00
November 16, 2009	80.00
March 1, 2010	425.00
March 26, 2010	500.00
March 29, 2010	800.00
April 1, 2010	250.00
April 2, 2010	500.00
April 19, 2010	400.00
May 25, 2010	1,500.00
June 7, 2010	1,000.00
June 29, 2010	50.00
July 6, 2010	350.00
July 12, 2010	800.00
August 23, 2010	133.00
September 8, 2010	2,205.14

September 17, 2010	95.00
November 2, 2010	400.00
November 9, 2010	459.00
November 12, 2010	1,000.00
November 30, 2010	1,475.00
December 8, 2010	968.91
December 13, 2010	200.00
December 14, 2010	400.00
December 17, 2010	250.00
December 23, 2010	400.00
January 10, 2011	250.00
March 10, 2011	1,200.00
TOTAL	\$55,350.05

EX 3.

17. Respondent did not maintain adequate records to identify client matters for the cash withdrawals. EX 1 ¶18; EX 2. As evidenced by Respondent's check stubs, Respondent did not enter any of the cash withdrawals on his trust account records. EX 224.

Disbursing Funds in Excess of the Amount on Deposit for a Client and Using One Client's Funds on Behalf of Another

18. On June 15, 2009, Respondent issued trust account check 1083 in the amount of \$2,904.91 to client GF for a personal injury settlement, and the check was honored by Bank of America. EX 231; EX 234 Batestamp (BS) 14. At the time the check was issued, GF did not have any funds in the trust account. EX 1 ¶19; EX 2; EX 227.

19. On July 16, 2008, Respondent issued trust account check 1075 in the amount of \$400 to an expert on behalf of client TM, and the check was honored by Bank of America. EX 228; EX 234 BS 3. At the time the check was issued, TM did not have any funds in the trust account. EX 1 ¶20; EX 2. Respondent used funds belonging to Wayne and Patricia Tuthill to cover the check issued for client TM.

20. On October 1, 2008, Respondent issued trust account check 1078 in the amount of

1 \$1,000 to client JH for a refund, and the check was honored by Bank of America. EX 229; EX
2 234 BS 6. At the time the check was issued, JH did not have any funds in the trust account. EX
3 1 ¶21; EX 2; EX 227. Respondent used funds belonging to Wayne and Patricia Tuthill to cover
4 the check issued to client JH.

5 **Conversion of Tuthill Funds and Violation of Court Order**

6 21. On December 5, 2007, Wayne Tuthill filed a Petition for Dissolution of Marriage
7 (Petition) in Pierce County Superior Court, No. 07 3 04101 9, seeking to dissolve his 41-year
8 marriage to Patricia Tuthill. Mr. Tuthill filed the Petition pro se. EX 101.

9 22. In the Petition, Mr. Tuthill listed the parties' property as a home, logging truck,
10 corn roaster, Fleischkuechle stand,¹ vehicles, and various household and personal items. He
11 asked that the parties' interest in the sale of their home be divided as follows: 40% to Mr.
12 Tuthill, 60% to Ms. Tuthill. EX 101 ¶1.8.

13 23. The Tuthill home was the primary and most valuable asset of the marriage. EX 1
14 ¶23; EX 2.

15 24. On January 10, 2008, an Order of Default was entered against Ms. Tuthill. On
16 January 17, 2008, Daniel Smith of Campbell, Dille, Barnett, Smith, and Wiley, PLLC,
17 (Campbell law firm) filed a notice of appearance on behalf of Ms. Tuthill, and proceeded to
18 have the order of default vacated.

19 25. Respondent appeared on behalf of Mr. Tuthill. EX 1 ¶22; EX 2.

20 26. In or around May 2008, the Tuthills signed a Purchase and Sale Agreement for the
21 sale of their home.

22 27. In anticipation of the sale, Mr. Smith sent a May 21, 2008 letter to Respondent
23

24 ¹ Ms. Tuthill sold German meat pastries from the Fleischkuechle stand at local fairs.

1 with a Stipulated Order. In the letter, Mr. Smith explained that Ms. Tuthill wanted the majority
2 of the proceeds from the sale of the home (sale proceeds) to be held in trust pending resolution
3 of the dissolution, but that each party should receive \$10,000 at closing. Mr. Smith drafted the
4 following language in the Stipulated Order:

5 . . . when the proceeds are received from the sale of the family residence located
6 at 8402 Locust Ave. E., Bonney Lake, WA, 98391, each party shall receive
7 \$10,000 and the **remaining proceeds shall be placed in trust with Campbell,
Dille, Barnett, Smith & Wiley, P.L.L.C. pending further agreement of the
parties or by order of the court.**

8 EX 104 (emphasis added).

9 28. Mr. Smith testified that when a house sells during the pendency of dissolution
10 proceedings and the parties have not yet reached a settlement agreement, it is standard
11 procedure for the money to be placed in a trust account and released only by further order of the
12 court or agreement of the parties.

13 29. After receiving Mr. Smith's proposed Stipulated Order, Respondent asked Mr.
14 Smith to change the language so that the Tuthill sale proceeds would be deposited to
15 Respondent's trust account, instead of Mr. Smith's trust account.

16 30. Respondent testified at hearing that it was Mr. Tuthill, not Respondent, who
17 wanted the sale proceeds deposited to Respondent's trust account. The Hearing Officer does
18 not find this testimony credible.

19 31. On May 30, 2008, Mr. Smith sent Respondent a revised Stipulated Order
20 incorporating the change requested by Respondent. The revised Stipulated Order provided:

21 . . . when the proceeds are received from the sale of the family residence located
22 at 8402 Locust Ave. E., Bonney Lake, WA, 98391, each party shall receive
23 \$10,000 and the **remaining proceeds shall be placed in trust with Kirk T.
Mosley pending further written agreement of the parties or by order of the
court.**

1 EX 106 (emphasis added).

2 32. Respondent signed the revised Stipulated Order and returned it to Mr. Smith for
3 entry by the court. EX 106.

4 33. On May 30, 2008, Respondent sent a letter and a copy of the Stipulated Order to
5 Lisa Plog of Ticor Title, the closing agent for the Tuthill sale. In the letter, Respondent
6 informed Ms. Plog that the Stipulated Order "will be filed with the court" and wrote the
7 following instructions for the disbursement of the Tuthill sale proceeds:

8 When the proceeds are received from the sale of the family residence located at
9 8402 Locust Ave. E., Bonney Lake, WA 98391, each party (Wayne Tuthill and
Patricia Tuthill) shall receive Ten Thousand Dollars (\$10,000).

10 The remaining proceeds shall be placed in trust with Kirk "Chip" Mosley
11 pending further written agreement of the parties or by Order of the court.

12 Trust Account Information
13 Bank of America
Routing Number: 125000024
Account Number: [REDACTED] 7900

14 EX 107 (account number redacted).

15 34. Subsequently, on May 30, 2008, Respondent sent another letter to Ms. Plog in an
16 apparent attempt to clarify that Wayne and Patricia Tuthill were each to receive \$10,000 from
17 the sale proceeds. In the letter, he reiterated the instructions that "[t]he remaining proceeds shall
18 be placed in trust with Kirk "Chip" Mosley pending further written agreement of the parties or
19 by Order of the court." EX 108.

20 35. Meanwhile, Mr. Smith presented the Stipulated Order to the court, and the court
21 entered the order on May 30, 2008. EX 105.

22 36. On June 2, 2008, Mr. Smith sent a conformed copy of the Stipulated Order to Ticor
23 Title. EX 112.

1 37. On June 3, 2008, Mr. Smith sent a conformed copy of the Stipulated Order to
2 Respondent. EX 116.

3 38. The sale of the Tuthill home closed on May 30, 2008. EX 6, 113.

4 39. On May 30, 2008, Ticor Title paid fees and expenses relating to the sale of the
5 Tuthill residence, issued a check in the amount of \$10,000 to Patricia Tuthill, and issued a check
6 in the incorrect amount of \$20 to Wayne Tuthill. EX 6, 110, 111, 113.

7 40. On June 2, 2008, Ticor Title wired the remaining sale proceeds, totaling
8 \$118,044.47, to Respondent's trust account. EX 6, 113; EX 234 BS 2.

9 41. Before the deposit of the Tuthill sale proceeds, Respondent's trust account had a
10 balance of only \$1.73. Therefore, nearly all of the money in Respondent's trust account after
11 the deposit of the Tuthill sale proceeds belonged to the Tuthills.

12 42. On June 3, 2008, Respondent purchased a cashier's check with funds from his trust
13 account, payable to Wayne Tuthill, in the amount of \$9,980. Respondent sent the check to Mr.
14 Tuthill to correct the disbursement error made by Ticor Title at closing.

15 43. Following the \$9,980 disbursement to Mr. Tuthill, Respondent's trust account
16 should have contained \$108,064.47 in Tuthill sale proceeds. Respondent immediately began
17 using the Tuthill sale proceeds for his own benefit, without the permission of his client and in
18 violation of the Stipulated Order of the Court.

19 44. Between June 3, 2008 and October 16, 2008, Respondent made 57 disbursements
20 totaling more than \$53,000 from his trust account, and none of them were made to or on behalf
21 of the Tuthills. EX 149. Respondent made most of the disbursements by cash withdrawal or by
22 transferring funds from his trust account to his business account. In a few instances, he made
23 the disbursements by check, either to pay his personal expenses (e.g., home or office rent) or to
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1 pay obligations for clients who did not have money in the trust account. Respondent used the
2 Tuthill sale proceeds to cover all of these disbursements.

3 45. Respondent continued to use the Tuthill sale proceeds for his own benefit, causing
4 a shortage of Tuthill funds in his trust account that began on June 9, 2008 and lasted until
5 October 19, 2009. The shortage reached its highest point on March 19, 2009 when
6 Respondent's trust account was short \$95,608.27 in Tuthill funds. EX 149.

7 46. Respondent used the \$95,608.27 for his own benefit, without the knowledge or
8 agreement of Ms. Tuthill's counsel and without authorization from the court.

9 47. Respondent converted the \$95,608.67 intentionally, with the intent to deprive Ms.
10 Tuthill of her undivided share of those funds for some period of time.

11 48. Wayne Tuthill did not receive any benefit from the \$95,608.67 in Tuthill sale
12 proceeds that Respondent disbursed from his trust account during the period June 3, 2008 to
13 March 19, 2009. EX 3 No. 22.

14 49. Respondent testified during his deposition (EX 150) and at hearing that he gave
15 some of the \$95,608.27 to Wayne Tuthill in cash. The Hearing Officer does not find this
16 testimony credible. Respondent's admission that Wayne Tuthill did not receive any benefit
17 from the \$95,608.67 (EX 3 No. 22), and Respondent's inability to identify when he gave Mr.
18 Tuthill cash or how much.

19 50. A mandatory settlement conference was scheduled in the Tuthill dissolution for
20 April 3, 2009.

21 51. Throughout the dissolution proceedings, Respondent informed Mr. Smith that Mr.
22 Tuthill wanted to split the proceeds from the sale of the home equally. EX 119, 120.
23 Respondent communicated the same offer to the settlement judge. EX 122.

1 52. In the Tuthills' case, Respondent knew that when the dissolution was finalized, he
2 would have to disburse a significant portion of the \$108,064.47 to Ms. Tuthill. Ms. Tuthill had
3 an undivided interest in all of the sale proceeds while the dissolution was pending, regardless of
4 the final disposition of assets by the court.

5 53. Respondent converted Ms. Tuthill's undivided share of the Tuthill sale proceeds,
6 knowing that he was not entitled to those funds.

7 54. The settlement conference was held on April 3, 2009, and both parties appeared
8 with their counsel. Mr. Tuthill was represented by Respondent. Ms. Tuthill was represented by
9 Hillary Holmes of the Campbell law firm.

10 55. During the settlement conference, Ms. Holmes asked how much money
11 Respondent was holding for the Tuthills and how much interest was being earned. Respondent
12 replied that his law firm was holding the funds, but he did not have the information Ms. Holmes
13 was seeking at hand.

14 56. Respondent did not inform Ms. Holmes that, at the time of the settlement
15 conference, he had less than \$17,000 left in his trust account, when he should have been holding
16 \$108,064.47 (exclusive of interest) for the Tuthills. This statement was false and meant to
17 mislead opposing counsel and the court.

18 57. Ms. Holmes relied on Respondent's statement. Had Ms. Holmes known that
19 Respondent disbursed the Tuthill sale proceeds without agreement of the parties or court order,
20 she could have sought immediate relief from the court to protect Ms. Tuthill's interests.

21 58. The Tuthills reached an agreement during the settlement conference, and put the
22 agreement on the record. EX 124. Under the agreement, Mr. Tuthill was to receive 40% of the
23 net proceeds from the sale of the family home, and Ms. Tuthill was to receive 60%. In addition,
24

1 Ms. Tuthill was to receive \$7,500 for the logging truck, which had been sold by Mr. Tuthill.
2 The \$7,500 was to be paid from Mr. Tuthill's share of the home sale proceeds in Respondent's
3 trust account.

4 59. Following the settlement conference, Ms. Holmes agreed to prepare the Decree of
5 Dissolution (Decree) and Findings of Fact and Conclusions of Law (FFCL) because Ms. Tuthill
6 wanted to receive her funds and Ms. Holmes knew that she could prepare the papers right away.

7 60. Ms. Holmes drafted the Decree and FFCL, signed them, had her client sign them,
8 and sent them to Respondent on April 8, 2009. Respondent was responsible for having the
9 Decree and FFCL entered by the court.

10 61. Thinking the case would settle in the spring of 2009, Respondent began depositing
11 funds to his trust account to replace the Tuthill sale proceeds. EX 150 Transcript (TR) 142 lines
12 (ln) 17-20. For example, on May 6, 2009, Respondent deposited a \$20,000 check from his
13 mother, Patricia Davenport, to partially replace the Tuthill funds. EX 3 No. 24.

14 62. Respondent continued to deposit money to his trust account sporadically, but he
15 also continued to disburse money for his own benefit and the benefit of other clients. As of July
16 10, 2009, Respondent's trust account was still short \$62,742.18 in Tuthill funds.

17 63. Meanwhile, the Decree and FFCL prepared by Ms. Holmes were not entered.
18 From April to July 2009, Respondent and Mr. Smith continued to correspond regarding the
19 settlement terms, including payment of the Tuthills' back taxes. In late June and early July
20 2009, Respondent wrote to Mr. Smith insisting that he needed Ms. Tuthill's written
21 authorization so that he could disburse funds from his trust account to pay the Tuthills' back
22 taxes. EX 128, 129. Mr. Smith provided the written authorization in a July 8, 2009 letter. Only
23 then did Respondent issue a trust account check to the United States Treasury on behalf of the
24

1 Tuthills. EX 130, 131.

2 64. With the remaining issues resolved, Respondent knew that he needed to replace
3 more of the Tuthill sale proceeds to his trust account. Respondent asked his friend, David
4 Whitney, for money. On July 23, 2009, Respondent deposited an \$18,900 check from Mr.
5 Whitney to his trust account. EX 3 No. 26, 27; EX 132. After this deposit, Respondent's trust
6 account was still short \$36,192.18 in Tuthill funds.

7 65. On the same date, July 23, 2009, Respondent issued Check 1085 from his trust
8 account, payable to Wayne Tuthill, in the amount of \$10,000.

9 66. On July 27, 2009, the court entered the Decree and FFCL in the Tuthill case. EX
10 134, 135. The Decree entered by the court was the same Decree that Ms. Holmes sent to
11 Respondent in April 2009. It provided, in part:

12 The wife is awarded . . .

13 The sum of \$7,500 is awarded to wife as her share of the logging truck sale
14 proceeds. This sum shall be immediately paid to wife from husband's 40% share
15 of the net sale proceeds from the family residence which are held in the trust
16 account of Kirk Mosley.

17 Sixty percent (60%) of the net proceeds from the sale of the residence. The net
18 proceeds are held in the trust account of Kirk Mosley. Attorney Mosley shall
19 immediately provide a full accounting of all funds received in trust as well
20 disbursement from the trust account. In addition to the wife's 60% share, she
21 will receive the \$7,500 as referenced above for her share of the logging truck.

22 67. Mr. Smith and Ms. Holmes expected that, once the Decree was entered,
23 Respondent would immediately disburse funds to Ms. Tuthill. However, Respondent did not
24 disburse any funds to Ms. Tuthill.

25 68. Still needing to restore more of the Tuthill funds to his trust account, Respondent
26 asked his mother for additional money. On August 7, 2009, Respondent deposited a \$42,050.03
27 check from Ms. Davenport to his trust account. EX 3 No. 25; EX 136. After the deposit of Ms.
28

1 Davenport's check, Respondent's trust account remained short \$4,642.15 in Tuthill funds.

2 69. On August 14, 2009, Respondent issued Check 1087, payable to Mr. Tuthill, in the
3 amount of \$17,553.25. Respondent provided the check to Mr. Tuthill with an August 14, 2009
4 letter. EX 137. The letter discussed the distribution of the Tuthill sale proceeds, and indicated
5 that the \$17,553.25 check was the final disbursement to Mr. Tuthill for his share of the home
6 sale proceeds. The letter did not provide a full or accurate accounting of the Tuthill funds
7 received and disbursed from Respondent's trust account. It did not include any of the cash
8 withdrawals that Respondent took from the Tuthill funds, any of the bank transfers to
9 Respondent's business account, or any of the checks written to or on behalf of Respondent's
10 other clients who had no relation to the Tuthills.

11 70. Although Mr. Tuthill had been paid in full, Respondent still did not disburse any
12 funds to Ms. Tuthill.

13 71. On August 24, 2009, Mr. Smith's assistant emailed Respondent requesting the
14 "status of the disbursal of funds pursuant to the final pleadings that were entered with the
15 court." EX 142.

16 72. On August 30, 2009, Respondent sent a letter to Mr. Smith indicating that the
17 disbursement to Ms. Tuthill was delayed because his bookkeeper was out-of-state and had
18 possession of his trust account checks and ledgers. Since he had no ledgers for his Trust
19 Account, this was a deliberate falsehood. EX 139.

20 73. On September 8, 2009, Respondent sent Mr. Smith an email, letter, and Check
21 1088, payable to Mr. Smith's firm, in the amount of \$56,046.17 for Ms. Tuthill's share of the
22 home sale proceeds. EX 142, 140.

23 74. The \$56,046.17 check did not include the \$7,500 that Mr. Tuthill owed Ms. Tuthill
24

1 for the logging truck. After Respondent issued the \$56,046.17 check, he did not have enough
2 money in his trust account to pay Ms. Tuthill the \$7,500. His trust account balance was only
3 \$4,143.66.

4 75. In his September 8, 2009 letter to Mr. Smith, Respondent wrote:

5 My client owes Ms. Tuthill \$7,500.00 for the logging business. Mr. Tuthill will
6 provide me with a check (or cashier's check) made out to your firm in the above
7 amount, once he deposits his share of the funds from the sale of the home. Once
8 I receive the check, I will forward it to your office.

9 76. Respondent's September 8, 2009 letter was misleading. It suggested that
10 Respondent had disbursed Ms. Tuthill's \$7,500 to Mr. Tuthill and was waiting for Mr. Tuthill to
11 return the funds. In fact, Respondent did not disburse the \$7,500 to Mr. Tuthill. Respondent's
12 August 14, 2009 letter to Mr. Tuthill showed that Respondent held back the \$7,500 from Mr.
13 Tuthill's disbursement. Additionally, there was no need to wait for Mr. Tuthill to deposit his
14 share of the funds. The \$17,553.26 check to Mr. Tuthill was processed through Respondent's
15 trust account on August 17, 2009.

16 77. Respondent's September 8, 2009 letter did not provide the full accounting required
17 by the Decree. It did not reveal any of the cash withdrawals that Respondent took from the
18 Tuthill funds, any of the bank transfers to Respondent's business account, or any of the checks
19 written to or on behalf of Respondent's other clients who had no relation to the Tuthills.
20 Finally, the letter did not include all of the disbursements made to Mr. Tuthill. This
21 misrepresentation was intentional and done to conceal Respondent's conversion of his client's
22 and Ms. Tuthill's funds.

23 78. On October 9, 2009, Mr. Smith's assistant sent Respondent an email noting that it
24 had been over a month and Respondent still had not disbursed \$7,500 for Ms. Tuthill's share of
the logging truck. EX 143.

1 79. On October 10, 2009, Respondent replied by email, stating that he would be
2 meeting with his client to get the matter finalized. EX 143.

3 80. On October 14, 2009, Mr. Smith sent Respondent a letter requesting immediate
4 payment of the \$7,500, an itemized accounting of the Tuthill funds, and an accounting of the
5 interest accrued while the Tuthill funds were held in Respondent's trust account. EX 144.

6 81. During the period October 16 to 19, 2009, Respondent deposited more funds to his
7 trust account such that the account balance was \$9,181.55. Without these deposits,
8 Respondent's trust account did not contain sufficient funds to pay Ms. Tuthill the \$7,500.

9 82. On October 19, 2009, Respondent withdrew \$7,500 from his trust account to
10 purchase a cashier's check payable to Daniel Smith. Respondent sent the check to Mr. Smith on
11 October 20, 2009. He did not, however, provide Mr. Smith with an itemized accounting of the
12 Tuthill funds or an explanation of the interest accrued. EX 145.

13 83. Respondent never deposited the Tuthill sale proceeds into a separate interest
14 bearing trust account, which would have allowed interest to accumulate for the benefit of the
15 Tuthills. Mr. Smith testified that had the Tuthill sale proceeds been wired to his firm, instead of
16 to Respondent, he would have established a separate interest bearing trust account for the
17 Tuthill sale proceeds because interest rates at the time would have generated sufficient interest
18 to outweigh the cost of maintaining a separate trust account.

19 84. On February 17, 2010, Respondent sent Mr. Smith a letter providing the interest
20 rates that were in effect during the time he held the Tuthill sale proceeds. EX 146.

21 85. On March 5, 2010, Mr. Smith sent Respondent a letter stating that Ms. Tuthill's
22 share of the interest was \$538.70. Mr. Smith requested payment of the interest as well as a full
23 accounting of the Tuthill funds, which Respondent had not yet provided. EX 147.

24

1 86. Respondent never paid Ms. Tuthill the \$538.70 in interest.

2 87. Respondent never provided Ms. Tuthill or her counsel with a full or accurate
3 accounting of the Tuthill funds.

4 88. Ms. Tuthill incurred and paid \$260 in additional attorney's fees for legal services
5 necessitated by Respondent's failure to promptly deliver the \$7,500, failure to provide an
6 accounting, and failure to pay interest to Ms. Tuthill.

7 **Conflict of Interest with Mr. Tuthill**

8 89. After the Tuthill sale proceeds were deposited to his trust account, Respondent
9 testified that he asked Mr. Tuthill if he could borrow an undesignated amount of funds from the
10 sale proceeds, and Mr. Tuthill agreed providing the funds were available for distribution to him
11 and to Ms. Tuthill at the conclusion of the dissolution (the transaction). (For the purpose of this
12 finding, it is assumed that this conversation took place, although the Hearing Officer found very
13 little of Respondent's testimony to be credible.) EX 3 No. 15.

14 90. Respondent did not inform Mr. Tuthill of the risks or disadvantages of the
15 transaction. EX 3 No. 16.

16 91. Respondent did not pay interest on the Tuthill funds he used, or even discuss the
17 payment of interest with Mr. Tuthill. EX 1 ¶41; EX 2

18 92. Respondent did not provide Mr. Tuthill with a written disclosure of the terms of
19 the transaction. EX 1 ¶42; EX 2; EX 3 No. 17.

20 93. Respondent did not obtain Mr. Tuthill's written consent to the terms of the
21 transaction. EX 1 ¶45; EX 2.

22 94. The terms of the transaction were not fair and reasonable to Mr. Tuthill.

23 95. Respondent did not advise Mr. Tuthill, orally or in writing, of the desirability of
24

1 seeking independent counsel regarding the transaction. EX 1 ¶44; EX 2; EX 3 No. 18.

2 96. When Respondent disbursed funds from the Tuthill sale proceeds during the period
3 June 3, 2008 to March 19, 2009, he did not inform Mr. Tuthill of the disbursements he made.
4 EX 3 No. 21.

5 97. As Respondent disbursed the Tuthill sale proceeds for his own use, he did not
6 maintain a record of the funds he used.

7 98. Respondent did not provide Mr. Tuthill with an accounting beyond what he set
8 forth in his August 14, 2009 letter (EX 137), which was not the full accounting required by the
9 Decree or by Respondent's duty to account to his client.

10 **False and Misleading Testimony**

11 99. On July 14, 2011, Respondent appeared for his non-cooperation deposition by the
12 Association and testified regarding his disbursement of the Tuthill sale proceeds (EX 150), as
13 follows:

- 14 a. From time to time, he disbursed funds from his trust account to Mr. Tuthill when Mr.
15 Tuthill requested money to pay bills;
- 16 b. He met Mr. Tuthill at the bank to deliver the funds to him in cash; or, he transferred
17 funds from his trust account to his business account, and then disbursed funds to Mr.
18 Tuthill from his business account in cash;
- 19 c. He delivered thirty to forty thousand dollars in cash to Mr. Tuthill in the above
20 manner;
- 21 d. Mr. Tuthill told Respondent to check with him if Respondent ever needed money
22 and he would loan Respondent the money, but Respondent never did; and
- 23 e. Respondent received, at most, \$10,000 in fees from the Tuthill sale proceeds
24

1 disbursed from his trust account by March 2009.

2 100. The Hearing Officer finds that this testimony, as set forth above, was false.

3 101. Respondent knew that his testimony was false at the time he gave it.

4 102. Respondent gave the false testimony, under oath, in an attempt to mislead the
5 Association during a grievance investigation. His false testimony obscured the fact that he had
6 used the Tuthill funds for his own benefit.

7 103. During Respondent's July 14, 2011 deposition, he agreed to produce records that
8 he failed to bring with him to the deposition, to provide additional records such as Mr. Tuthill's
9 client file, and to resume his deposition on August 15, 2011.

10 104. Respondent appeared for his deposition on August 15, 2011 and testified that he
11 had used the Tuthill sale proceeds for his own benefit.

12 **Thomas Clark**

13 105. In 2008, Thomas Clark hired Respondent to represent him in a personal injury case
14 arising out of a motor vehicle collision. EX 1 ¶59; EX 2.

15 106. Respondent and Mr. Clark entered into a fee agreement providing for a one-third
16 contingency fee. EX 1 ¶60; EX 2.

17 107. In March 2010, Mr. Clark's case settled for \$8,500. EX 1 ¶61; EX 2.

18 108. On April 9, 2010, Respondent issued a check in the amount of \$2,723.41 to Mr.
19 Clark. EX 1 ¶62; EX 2.

20 109. At the time Mr. Clark received the \$2,723.41 check, he did not receive a settlement
21 statement or anything in writing showing how his settlement was being distributed.

22 110. Respondent and Mr. Clark agreed that Respondent would hold back funds from the
23 settlement to pay Mr. Clark's medical bills. EX 1 ¶63; EX 2.

1 111. Respondent did not pay any medical bills for Mr. Clark at the time of settlement.

2 112. In or around spring 2011, Mr. Clark learned that a medical bill from Cascade
3 Emergency Physicians had not been paid and that it was in collections. EX 1 ¶65; EX 2.

4 113. Mr. Clark called Respondent's office multiple times regarding the unpaid medical
5 bill. When Mr. Clark received a response from Respondent's office, he was informed that the
6 matter would be looked into and that the medical bill would be paid. EX 1 ¶66; EX 2.

7 114. Subsequently, Mr. Clark learned that the medical bill was still outstanding.

8 115. Mr. Clark called Respondent's office and left several messages, but did not receive
9 a response.

10 116. On November 24, 2011, Mr. Clark filed a grievance against Respondent with the
11 Association. EX 1 ¶69; EX 2; EX 325.

12 117. Only after Mr. Clark filed the grievance did Respondent personally call Mr. Clark
13 and inform him that the medical bill would be paid. EX 1 ¶70; EX 2.

14 118. On December 5, 2011, Respondent paid \$608.75, from his own funds, to satisfy
15 Mr. Clark's medical bill from Cascade Emergency Physicians. EX 1 ¶71; EX 2.

16 119. The original amount of Mr. Clark's medical bill from Cascade Emergency
17 Physicians was \$428. The additional amount paid by Respondent represented interest and fees
18 that had accumulated due to the delinquent payment. EX 300.

19 120. Respondent did not pay any other medical bills for Mr. Clark.

20 121. At the time of the hearing, Mr. Clark still had an unpaid emergency room bill
21 relating to his personal injury case in the amount \$1,531.50. EX 300.

1 **Conversion of Mr. Clark's Funds**

2 122. On March 24, 2010, Respondent deposited Mr. Clark's \$8,500 settlement check to
3 his trust account. EX 303, 304.

4 123. Before the deposit of Mr. Clark's settlement check, Respondent's trust account had
5 a balance of only \$1.55. Therefore, nearly all of the money in Respondent's trust account after
6 the deposit of Mr. Clark's settlement check belonged to Mr. Clark. EX 337.

7 124. Between March 24, 2010 and April 8, 2010, Respondent disbursed \$5,433 from his
8 trust account. Respondent:

- 9 a. Withdrew a total of \$2,050 in cash;
10 b. Transferred a total of \$3,103 to his business account; and
11 c. Issued a check in the amount of \$280 to pay a filing fee for client JD, when
12 client JD did not have any funds in the trust account.

13 Respondent used Mr. Clark's funds to cover these disbursements.

14 125. Even assuming that Respondent earned \$2,833.33 in attorney's fees for handling
15 Mr. Clark's case, Respondent was not entitled to withdraw his fees from his trust account until
16 he provided Mr. Clark with a billing statement or other document notifying Mr. Clark of his
17 intent to withdraw the fees, which Respondent never did.

18 126. Respondent did not use any of the \$5,433 disbursed between March 24, 2010 and
19 April 8, 2010 to pay Mr. Clark or to pay Mr. Clark's medical bills.

20 127. Respondent used all of the \$5,433 disbursed between March 24, 2010 and April 8,
21 2010 for his own benefit or for client JD, without entitlement to do so.

22 128. On each of the dates that Respondent transferred Mr. Clark's funds from his trust
23 account to his business account, Respondent checked the balance in his business account. On
24

1 April 2, 2010, Respondent made a balance inquiry and transferred \$2,500 from his trust account
2 to his business account. Respondent used these funds to cure an overdraft in his business
3 account and to fund a payment to the Washington State Bar Association for Respondent's
4 overdue licensing fee. EX 308. Respondent knew at the time he made the transfer that his
5 license would be suspended if he did not pay the fee. On April 8, 2010, Respondent made a
6 balance inquiry and transferred \$603 from his trust account to his business account. On the
7 same date, Respondent issued a check in the amount of \$600 to Susan Tofte as a "bonus" (EX
8 241 BS 57) and purchased a cashier's check in the amount of \$1,603 to pay his rent (EX 241 BS
9 58). EX 338.

10 129. Mr. Clark did not authorize Respondent to use his funds to pay Respondent's
11 licensing fee, to pay Ms. Tofte, or to pay Respondent's rent.

12 130. Respondent converted Mr. Clark's funds, knowing that he was not entitled to those
13 funds.

14 131. Respondent converted Mr. Clark's funds intentionally, with the intent to deprive
15 Mr. Clark of those funds for some period of time.

16 132. On April 9, 2010, Respondent disbursed \$2,723.41 to Mr. Clark, leaving \$343.59
17 of Mr. Clark's funds in Respondent's trust account. EX 307.

18 133. By September 30, 2010, the balance in Respondent's trust account was \$5.00. EX
19 ¶85; EX 2.

20 134. Respondent used all or nearly all of the \$343.59 for his own benefit, directly or
21 indirectly, without entitlement to do so.

22 135. Respondent converted the \$343.59, knowing that he was not entitled to those
23 funds.

1 136. Respondent converted the \$343.59 intentionally, with the intent to deprive Mr.
2 Clark of those funds for some period of time.

3 137. Respondent has not paid Mr. Clark any funds beyond the \$2,723.41 that
4 Respondent disbursed to him in April 2010.

5 138. Respondent did not provide Clark with a settlement statement or a written
6 accounting of his settlement funds. EX 1 ¶88; EX 2.

7 139. Mr. Clark is entitled to receive an additional \$2,515.26 from his settlement. As of
8 the hearing in this matter, Respondent had not yet delivered these funds to Mr. Clark.

9 **Additional Facts Relating to Sanction**

10 140. Respondent's conduct in failing to maintain the Tuthill funds in a trust account,
11 using the Tuthill funds for his own benefit, and violating the May 30, 2008 Stipulated Order
12 caused potentially serious injury to Ms. Tuthill in that the Tuthill sale proceeds were not
13 protected in a trust account. Ms. Tuthill was a retired woman of modest means, who made a
14 small amount of income selling meat pastries at local fairs. The Tuthill home was the primary
15 asset of the marriage and, if the sale proceeds had not been available for disbursement to Ms.
16 Tuthill, the impact on her would have been devastating.

17 141. Respondent's conduct also caused actual injury to Ms. Tuthill. Respondent
18 delayed paying Ms. Tuthill the funds she was entitled to receive, failed to pay Ms. Tuthill the
19 interest she was due, and caused Ms. Tuthill to incur additional attorney's fees in an attempt to
20 enforce the Decree.

21 142. Respondent's violation of the May 30, 2008 Stipulated Order was knowing and
22 willful. Respondent negotiated the order, signed it, transmitted it to Ticor Title for the Tuthill
23 closing, and insisted that Mr. Smith provide the written authorization required by the order so
24

1 that Respondent could disburse funds from his trust account for the Tuthills' back taxes.
2 Respondent knowingly and willfully violated the order each time he used the Tuthill funds for
3 his own benefit without authorization from Ms. Tuthill's counsel or the court.

4 143. Respondent had an obligation to inform Ms. Tuthill's counsel and the court that he
5 was removing the Tuthill funds from his trust account. Respondent's failure to do so was
6 knowing and with the intent to benefit himself. Respondent's conduct prevented Ms. Tuthill's
7 counsel and the court from taking action to stop Respondent's conversion and to protect the
8 Tuthill funds.

9 144. Respondent's violation of the May 30, 2008 Stipulated Order caused potentially
10 serious injury to the legal proceeding.

11 145. Respondent acted knowingly in failing to account for the Tuthill funds at the
12 conclusion of the dissolution. Respondent signed the Decree, had the Decree entered by the
13 court, and knew that the Decree required a full accounting. Moreover, he received Mr. Smith's
14 written requests for an itemized accounting. Respondent's failure to provide the accounting was
15 done with the intent to benefit Respondent.

16 146. Respondent's failure to account caused actual injury to Ms. Tuthill by denying Mr.
17 Smith the information he needed to represent his client, which delayed Ms. Tuthill's receipt of
18 funds she was entitled to receive. Respondent's failure to account also caused potential injury
19 to Mr. Tuthill.

20 147. Respondent's conduct seriously adversely reflects on his fitness to practice law.
21 Furthermore, Respondent's failure to recognize the serious nature of his violations and his lack
22 of remorse, raises concerns that he may engage in the same or similar misconduct in the future.

23 148. Respondent's conduct in giving false testimony, under oath, during a grievance
24

1 investigation, was knowing and intentional. Respondent made the false statements in an effort
2 to conceal or minimize his misconduct relating to the Tuthill funds.

3 149. Respondent's conduct caused potentially serious injury to the public, the
4 profession, and the disciplinary system. Had the overdraft of Respondent's trust account not
5 occurred and the grievance investigation ensued, it is questionable whether Respondent's
6 violations in the Tuthill matter would ever have been discovered.

7 150. Respondent represented Mr. Tuthill in the dissolution knowing that his interests
8 were adverse to Mr. Tuthill's in obtaining a "loan" of funds that were subject to the Stipulated
9 Order. Respondent knowingly failed to provide Mr. Tuthill with the necessary disclosures and
10 failed to obtain Mr. Tuthill's written consent. Respondent's conduct caused potentially serious
11 injury to Mr. Tuthill.

12 151. Respondent's knowing and intentional conversion of Mr. Clark's settlement funds
13 and failure to maintain Mr. Clark's funds in a trust account caused actual injury to Mr. Clark.
14 Mr. Clark's medical bills were not paid timely, he still has an unpaid emergency room bill, and
15 he has not received all of the funds he is entitled to receive.

16 152. Respondent's failure to communicate with Mr. Clark about the status of his case,
17 failure to respond to Mr. Clark's requests for information, failure to pay Mr. Clark's medical
18 bills, and failure to provide Mr. Clark with an accounting may have been negligent at first, but
19 became knowing. Respondent's multiple acts of misconduct served to conceal the fact that,
20 rather than pay Mr. Clark's medical bills, he used Mr. Clark's settlement money for himself.
21 There was actual injury to Mr. Clark in that his bill was sent to collections, he had to spend time
22 and energy trying to get Respondent to pay the bill and, when that failed, he had to file a
23 grievance with the Association.

1 153. Respondent's conduct in failing to maintain even the minimum trust account
2 records and failing to reconcile was knowing. His conduct caused potential injury to his clients.

3 154. Respondent knew his conduct in making cash withdrawals from his trust account
4 was in violation of the Rules for Professional Conduct. All attorneys are aware that the Trust
5 Account may not be used as a personal checking account. His conduct caused potential and
6 actual injury to his clients, particularly given his failure to maintain adequate records identifying
7 the clients for whom he purportedly made the withdrawals.

8 155. Respondent knew or should have known that he was disbursing funds in excess of
9 the amounts clients had on deposit. Respondent's conduct caused potential injury.

10 156. Respondent knew or should have known that he was disbursing funds before the
11 related deposits cleared the banking system. In each of the three overdrafts of Respondent's
12 trust account, Respondent deposited personal checks from clients and immediately withdrew
13 some or all of the deposited funds by taking cash. Respondent's conduct caused potential
14 injury.

15 **Additional Facts Relating to Aggravating and Mitigating Factors**

16 157. As to all counts, the following aggravating factors are applicable:

- 17 • ABA Standards §9.22(a) – Prior disciplinary offenses: Respondent was
18 reprimanded in 2004 for conduct involving deceit or misrepresentation, in
19 violation of RPC 8.4(c). EX 4;
- 20 • ABA Standards §9.22(d) – Multiple offenses: Respondent has committed 19
21 counts of misconduct;
- 22 • ABA Standards §9.22(e) – Bad faith obstruction of the disciplinary proceeding
23 by intentionally failing to comply with rules or orders of the disciplinary agency:
24

1 Respondent repeatedly failed to promptly or fully respond to the Association's
2 requests for information and records, requiring the Association to subpoena
3 Respondent for multiple depositions. EX 7;

- 4 • ABA Standards §9.22(i) – Substantial experience in the practice of law:

5 Respondent was licensed to practice law in Washington State in 1999.

6 158. Under ABA Standards §9.22(b), the aggravating factor of selfish motive is
7 applicable to Counts 1, 2, 3, 6, 7, 13, and 14.

8 159. Under ABA Standards §9.22(g), the aggravating factor of refusal to acknowledge
9 wrongful nature of conduct is applicable to Counts 1, 3, 7, and 13. Respondent has not
10 demonstrated any real recognition that his conduct was wrong or that his violations were
11 serious. Respondent has shown no remorse. Instead, he rationalizes his conduct by claiming
12 that the Tuthills were ultimately paid out of funds that he borrowed from his mother and friend;
13 that he did not read the transcript of the deposition where he testified falsely; that he thought
14 Mr. Clark's bills were paid; and that he was busy with his criminal law practice. His attempt to
15 quibble about whether he read his answers to questions in the depositions reflects his attempt to
16 evade responsibility for his actions and his willingness to mislead the Association and the
17 Hearing Officer.

18 160. Under ABA Standards §9.22(j), the aggravating factor of indifference to making
19 restitution is applicable to Count 17. As discussed above, despite the passage of more than
20 three years since Mr. Clark's case settled, Respondent has not paid Mr. Clark all of the funds he
21 is due.

22 161. None of the mitigating factors under ABA Standards §9.32 are applicable to this
23 matter.
24

1 162. Based on Respondent's testimony and other evidence, the Hearing Officer finds
2 that Respondent lacks any real remorse for his conduct. The Hearing Officer also finds that he
3 is a high risk for continuing to violate the Rules of Professional Conduct.

4 CONCLUSIONS OF LAW

5 Violation Analysis

6 163. The Hearing Officer finds that the Association has proved the following:

7 164. Count 1: The Association proved Count 1 by a clear preponderance of the
8 evidence. Respondent's conduct violated RPC 1.15A(b), RPC 8.4(c), and RPC 8.4(b) [(by
9 committing the crime of theft in the first degree (RCW 9A.56.030)]

10 165. Count 2: The Association proved Count 2 by a clear preponderance of the
11 evidence. Respondent's conduct violated RPC 1.15A(c) and RPC 1.15A(g).

12 166. Count 3: The Association proved Count 3 by a clear preponderance of the
13 evidence. Respondent's conduct violated RPC 8.4(d) and RPC 8.4(j).

14 167. Count 4: The Association proved Count 4 by a clear preponderance of the
15 evidence. Respondent's conduct violated RPC 1.15A(e), RPC 8.4(d), RPC 8.4(j), RPC 1.4(a),
16 and RPC 1.4(b).

17 168. Count 5: The Association proved Count 5 by a clear preponderance of the
18 evidence. Respondent's conduct violated RPC 1.15A(e), RPC 8.4(d), and RPC 8.4(j).

19 169. Count 6: The Association proved Count 6 by a clear preponderance of the
20 evidence. By failing to meet the requirements of RPC 1.8(a)(1), RPC 1.8(a)(2), and RPC
21 1.8(a)(3), Respondent violated RPC 1.8(a).

22 170. Count 7: The Association proved Count 7 by a clear preponderance of the
23 evidence. Respondent's conduct violated RPC 8.4(c), RPC 8.4(d), RPC 8.4(l), ELC 5.3(3), and
24

1 | RPC 8.4(b) [by committing the crime of false swearing (RCW 9A.72.040)].

2 | 171. Count 8: The Association proved Count 8 by a clear preponderance of the
3 | evidence. Respondent's conduct violated RPC 1.15A(h)(2) and RPC 1.15B.

4 | 172. Count 9: The Association proved Count 9 by a clear preponderance of the
5 | evidence. Respondent's conduct violated RPC 1.15A(h)(6).

6 | 173. Count 10: The Association proved Count 10 by a clear preponderance of the
7 | evidence. Respondent's conduct violated RPC 1.15A(h)(5).

8 | 174. Count 11: The Association proved Count 11 by a clear preponderance of the
9 | evidence. Respondent's conduct violated RPC 1.15A(h)(8).

10 | 175. Count 12: The Association proved Count 12 by a clear preponderance of the
11 | evidence. Respondent's conduct violated RPC 1.15A(h)(7).

12 | 176. Count 13: The Association proved Count 13 by a clear preponderance of the
13 | evidence. Respondent's conduct violated RPC 1.15A(b), RPC 8.4(c), and RPC 8.4(b) [by
14 | committing the crime of theft in the second degree (RCW 9A.56.040)].

15 | 177. Count 14: The Association proved Count 14 by a clear preponderance of the
16 | evidence. Respondent's conduct violated RPC 1.15A(c)(1).

17 | 178. Count 15: The Association proved Count 15 by a clear preponderance of the
18 | evidence. Respondent's conduct violated RPC 1.15A(h)(8).

19 | 179. Count 16: The Association proved Count 16 by a clear preponderance of the
20 | evidence. Respondent's conduct violated RPC 1.3 and RPC 1.15A(f).

21 | 180. Count 17: The Association proved Count 17 by a clear preponderance of the
22 | evidence. Respondent's conduct violated RPC 1.15A(f).

23 | 181. Count 18: The Association proved Count 18 by a clear preponderance of the
24 |

1 evidence. Respondent's conduct violated RPC 1.15A(e), RPC 1.4(a), and RPC 1.4(b).

2 182. Count 19: The Association proved Count 19 by a clear preponderance of the
3 evidence. Respondent's conduct violated RPC 1.4(a).

4 **Sanction Analysis**

5 183. A presumptive sanction must be determined for each ethical violation. *In re*
6 *Anschell*, 149 Wn.2d 484, 69 P.2d 844, 852 (2003). The following standards of the American
7 Bar Association's Standards for Imposing Lawyer Sanctions ("ABA Standards") (1991 ed. &
8 Feb. 1992 Supp.) are presumptively applicable in this case.

9 184. For Counts 1, 2, 13, 14, and 17, the presumptive sanction for Respondent's
10 conduct is disbarment under ABA Standards §4.11 and §5.11:

11 4.1 Failure to Preserve the Client's Property

12 **4.11 Disbarment is generally appropriate when a lawyer knowingly
converts client property and causes injury or potential injury to a
client.**

13 4.12 Suspension is generally appropriate when a lawyer knows or should
14 know that he is dealing improperly with client property and causes injury
or potential injury to a client.

15 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.

16 4.14 Admonition is generally appropriate when a lawyer is negligent in
dealing with client property and causes little or no actual or potential
17 injury to a client.

18 5.1 Failure to Maintain Personal Integrity

5.11 Disbarment is generally appropriate when:

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

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

1 5.12 Suspension is generally appropriate when a lawyer knowingly engages in
2 criminal conduct which does not contain the elements listed in Standard
3 5.11 and that seriously adversely reflects on the lawyer's fitness to
4 practice.

5 5.13 Reprimand is generally appropriate when a lawyer knowingly engages in
6 any other conduct that involves dishonesty, fraud, deceit, or
7 misrepresentation and that adversely reflects on the lawyer's fitness to
8 practice law.

9 5.14 Admonition is generally appropriate when a lawyer engages in any other
10 conduct that reflects adversely on the lawyer's fitness to practice law.

11 Respondent knowing and intentionally converted the Tuthill sale proceeds and the Clark
12 settlement funds from his trust account. Ms. Tuthill was potentially injured in that the Tuthill
13 sale proceeds were not protected in a trust account. Moreover, if Respondent had not been able
14 to replace the funds he converted, the injury to Ms. Tuthill would have been serious. Finally,
15 Ms. Tuthill experienced actual delay in receiving funds from Respondent following entry of the
16 Decree.

17 Mr. Clark was actually injured in that his medical expenses were not paid timely and one
18 of his bills was sent to collections. More than three years after his case settled, Mr. Clark still
19 has an unpaid emergency room bill and has not received all of the settlement funds he is entitled
20 to receive.

21 Finally, Respondent's conduct seriously adversely reflects on his fitness to practice law.

22 185. For Count 7, the presumptive sanction for Respondent conduct is disbarment under
23 ABA Standards §5.11 and §7.1:

24 7.0 Violations of Duties Owed as a Professional

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.

- 1 7.3 Reprimand is generally appropriate when a lawyer negligently engages in
2 conduct that is a violation of a duty owed as a professional and causes
3 injury or potential injury to a client, the public, or the legal system.
4 7.4 Admonition is generally appropriate when a lawyer engages in an
5 isolated instance of negligence that is a violation of a duty owed as a
6 professional, and causes little or no actual or potential injury to a client,
7 the public, or the legal system.

8 In testifying falsely, under oath, during a grievance investigation, Respondent knowingly
9 violated his duty as a professional, with intent to benefit himself. Respondent also engaged in
10 intentional dishonesty that seriously adversely reflects on his fitness to practice law.

11 By attempting to deceive the disciplinary process in order to avoid or minimize
12 disciplinary action, Respondent's conduct caused potentially serious injury to the public, the
13 profession, and the legal system.

14 186. For Count 3, the presumptive sanction for Respondent's conduct is disbarment
15 under ABA Standards §6.21:

16 6.2 Abuse of the Legal Process

17 Absent aggravating or mitigating circumstances, upon application of the factors
18 set out in Standard 3.0, the following sanctions are generally appropriate in
19 cases involving failure to expedite litigation or bring a meritorious claim, or
20 failure to obey any obligation under the rules of a tribunal except for an open
21 refusal based on an assertion that no valid obligation exists:

22 **6.21 Disbarment is generally appropriate when a lawyer knowingly
23 violates a court order or rule with the intent to obtain a benefit for
24 the lawyer or another, and causes serious injury or potentially
25 serious injury to a party or causes serious or potentially serious
26 interference with a legal proceeding.**

27 6.22 Suspension is generally appropriate when a lawyer knows that he or she
28 is violating a court order or rule, and causes injury or potential injury to a
29 client or a party, or causes interference or potential interference with a
30 legal proceeding.

31 6.23 Reprimand is generally appropriate when a lawyer negligently fails to
32 comply with a court order or rule, and causes injury or potential injury to
33 a client or other party, or causes interference or potential interference
34 with a legal proceeding.

35 6.24 Admonition is generally appropriate when a lawyer engages in an
36 isolated instance of negligence in complying with a court order or rule,

1 and causes little or no actual or potential injury to a party, or causes little
2 or no actual or potential interference with a legal proceeding.

3 Respondent knowingly and willfully violated the May 30, 2008 Stipulated Order and
4 withheld that information from Ms. Tuthill's counsel and the court for his own benefit. There
5 was potentially serious injury to the Tuthills and potentially serious interference with the legal
6 proceeding.

7 187. For Count 6, the presumptive sanction for Respondent's conduct is disbarment
8 under ABA Standards §4.31(a):

9 4.3 Failure to Avoid Conflicts of Interest

10 Absent aggravating or mitigating circumstances, upon application of the factors
11 set out in Standard 3.0, the following sanctions are generally appropriate in
12 cases involving conflicts of interest:

13 **4.31 Disbarment is generally appropriate when a lawyer, without the
14 informed consent of client(s):**

- 15 (a) **engages in representation of a client knowing that the lawyer's
16 interests are adverse to the client's with the intent to benefit the
17 lawyer or another, and causes serious or potentially serious injury to
18 the client;** or
19 (b) simultaneously represents clients that the lawyer knows have adverse
20 interests with the intent to benefit the lawyer or another, and causes
21 serious or potentially serious injury to a client; or
22 (c) represents a client in a matter substantially related to a matter in which
23 the interests of a present or former client are materially adverse, and
24 knowingly uses information relating to the representation of a client with
the intent to benefit the lawyer or another and causes serious or
potentially serious injury to a client.

4.32 Suspension is generally appropriate when a lawyer knows of a conflict of
interest and does not fully disclose to a client the possible effect of that
conflict, and causes injury or potential injury to a client.

4.33 Reprimand is generally appropriate when a lawyer is negligent in
determining whether the representation of a client may be materially
affected by the lawyer's own interests, or whether the representation will
adversely affect another client, and causes injury or potential injury to a
client.

4.34 Admonition is generally appropriate when a lawyer engages in an
isolated instance of negligence in determining whether the representation
of a client may be materially affected by the lawyer's own interests, or
whether the representation will adversely affect another client, and causes
little or no actual or potential injury to a client.

1 Respondent acted knowingly in seeking to obtain a personal financial benefit by asking
2 Mr. Tuthill for a loan. Respondent knew that he was in a position of trust, and that he was
3 responsible for safeguarding the Tuthill sale proceeds in his trust account. Respondent
4 knowingly failed to provide Mr. Tuthill with the necessary disclosures and failed to obtain his
5 written consent. Respondent's conduct caused potentially serious injury.

6 188. For Counts 8 and 9, the presumptive sanction is suspension under ABA Standards
7 §4.12:

8 4.1 Failure to Preserve the Client's Property

9 4.11 Disbarment is generally appropriate when a lawyer knowingly converts
10 client property and causes injury or potential injury to a client.

11 **4.12 Suspension is generally appropriate when a lawyer knows or should
12 know that he is dealing improperly with client property and causes
13 injury or potential injury to a client.**

14 4.13 Reprimand is generally appropriate when a lawyer is negligent in dealing
15 with client property and causes injury or potential injury to a client.

16 4.14 Admonition is generally appropriate when a lawyer is negligent in
17 dealing with client property and causes little or no actual or potential
18 injury to a client.

19 Respondent knew or should have known that he was dealing improperly with client
20 funds by failing to maintain complete and accurate records and failing to reconcile. His failure
21 to maintain adequate records made it impossible for the Association's Audit Manager to
22 determine whether there were shortages, beyond the Tuthill and Clark shortages, in
23 Respondent's trust account. Respondent's conduct caused potential injury to his clients.

24 189. For Count 10, the presumptive sanction is suspension under ABA Standards §4.12.
Respondent knew or should have known that he was dealing improperly with client property by
making cash withdrawals. His conduct caused potential injury to his clients, particularly given
the numerous cash withdrawals he made and his failure to maintain adequate records identifying
the clients for whom he purportedly made the withdrawals.

1 190. For Counts 11, 12, and 15, the presumptive sanction is suspension under ABA
2 Standards §4.12. Respondent knew or should have known that he was dealing improperly with
3 client property when he disbursed funds in excess of the amounts clients had on deposit, used
4 the Tuthill and Clark funds on behalf of other clients, and disbursed funds before the related
5 deposits cleared the banking system. Respondent's conduct caused potential injury.

6 191. For Counts 4 and 5, the presumptive sanction for Respondent's conduct is
7 suspension under ABA Standards §4.12 and §6.22. Under ABA Standards §4.12, Respondent
8 knew or should have known that he was dealing improperly with client and third party funds
9 when he made repeated withdrawals from the Tuthill sale proceeds without accounting to his
10 client or the opposing party who had an interest in the funds. Respondent's conduct caused
11 potential injury to the Tuthills and prevented Ms. Tuthill's counsel from taking action to protect
12 the Tuthill funds.

13 Under ABA Standards §6.22, Respondent's failure to provide a full accounting to the
14 Tuthills at the conclusion of their dissolution and in compliance with the Decree of Dissolution
15 was knowing and intentional. Respondent's conduct caused potential injury to the Tuthills and
16 potential interference with the legal proceeding.

17 192. For Counts 16, 18, and 19, the presumptive sanction for Respondent's conduct is
18 suspension under ABA Standards §4.12 and §4.42:

19 4.4 Lack of Diligence

20 Absent aggravating or mitigating circumstances, upon application of the factors
21 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:

22 4.41 Disbarment is generally appropriate when:

- 23 (a) a lawyer abandons the practice and causes serious or potentially serious
injury to a client; or
24 (b) a lawyer knowingly fails to perform services for a client and causes
serious or potentially serious injury to a client; or

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

3 **4.42 Suspension is generally appropriate when:**

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

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

8 4.43 Reprimand is generally appropriate when a lawyer is negligent and does
9 not act with reasonable diligence in representing a client, and causes
10 injury or potential injury to a client.

11 4.44 Admonition is generally appropriate when a lawyer is negligent and does
12 not act with reasonable diligence in representing a client, and causes little
13 or no actual or potential injury to a client.

14 Respondent's conduct in failing to communicate with Mr. Clark, failing to pay his
15 medical bills, and failing to provide Mr. Clark with an accounting of his funds may have been
16 negligent at first, but became knowing. Respondent's multiple failures served to conceal the
17 fact that, rather than pay Mr. Clark's medical bills as agreed, he used Mr. Clark's settlement
18 money for himself. Respondent's conduct caused actual injury to Mr. Clark.

19 193. When multiple ethical violations are found, the "ultimate sanction imposed should
20 at least be consistent with the sanction for the most serious instance of misconduct among a
21 number of violations." *In re Petersen*, 120 Wn.2d 833, 854, 846 P.2d 1330 (1993).

22 194. The following aggravating factors set forth in ABA Standards §9.22 are applicable
23 in this case:

24 (a) prior disciplinary offenses (Respondent was reprimanded in 2004 for
conduct involving deceit or misrepresentation, in violation of RPC
8.4(c));

(b) dishonest or selfish motive;

(d) multiple offenses;

(e) bad faith obstruction of the disciplinary proceeding by intentionally
failing to comply with rules or orders of the disciplinary agency
(Respondent repeatedly failed to promptly or fully respond to the
Association's requests for information and records, requiring the
Association to subpoena Respondent for his deposition);

(g) refusal to acknowledge wrongful nature of conduct;

- 1 (i) substantial experience in the practice of law (Respondent was licensed to
2 practice law in Washington in 1999);
3 (j) indifference to making restitution (Respondent has not paid Mr. Clark the
4 funds he is entitled to receive from his personal injury settlement, and he
5 has not paid Ms. Tuthill the interest he agreed to pay on the Tuthill sale
6 proceeds).

7 195. The Hearing Officer finds that no mitigating factors are applicable to this case.

8 **RECOMMENDATION**

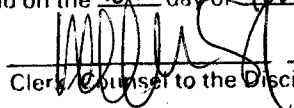
9 196. Based on the ABA Standards and the applicable aggravating and mitigating
10 factors, the Hearing Officer recommends that Respondent Kirk T 'Chip' Mosley be disbarred.
11 The Hearing Officer also recommends that Respondent be ordered to pay restitution as follows:
12 1) \$798.70 to Patricia Tuthill (representing \$538.70 interest on the Tuthill funds, plus \$260 in
13 attorney's fees incurred by Ms. Tuthill); and 2) \$2,515.26, plus interest at a rate of 12% from
14 April 9, 2010 until the amount is paid in full, to Thomas Clark.

15 Dated this 7th day of February, 2014.

16 
17 Gregory J. Wall, WSBA No. 8604
18 Hearing Officer

19 **CERTIFICATE OF SERVICE**

20 I certify that I caused a copy of the FOF, COL & HO's recommendation
21 to be delivered to the Office of Disciplinary Counsel and to be mailed
22 to Kentina Karmali Respondent/~~Respondent's Counsel~~
23 at 1325 W. 4th Avenue, #210 Kent WA 98101 by Certified first class mail,
24 postage prepaid on the 10th day of February, 2014

25 
26 Clerk/Counsel to the Disciplinary Board