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Disciplinary
Board

Docket # 010

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BEFORE THE
DISCIPLINARY BOARD
OF THE
WASHINGTON SUPREME COURT

In re

ERIK EUGENE HIGHBERG,

Lawyer (Bar No. 30589).

Proceeding No. 19#00005

ODC File No. 16-01435

STIPULATION TO THREE-YEAR
SUSPENSION

Under Rule 9.1 of the Washington Supreme Court's Rules for Enforcement of Lawyer Conduct (ELC), the following Stipulation to Suspension is entered into by the Office of Disciplinary Counsel (ODC) of the Washington State Bar Association (Association) through Disciplinary Counsel Benjamin J. Attanasio and Respondent lawyer Erik Eugene Highberg.

Respondent understands that he is entitled under the ELC to a hearing, to present exhibits and witnesses on his behalf, and to have a hearing officer determine the facts, misconduct, and sanction in this case. Respondent further understands that he is entitled under the ELC to appeal the outcome of a hearing to the Disciplinary Board, and, in certain cases, the Supreme Court. Respondent further understands that a hearing and appeal could result in an outcome more favorable or less favorable to him. Respondent chooses to resolve this proceeding now by entering into the following stipulation to facts, misconduct and sanction to

1 avoid the risk, time, and expense attendant to further proceedings.

2 **I. ADMISSION TO PRACTICE**

3 1. Respondent was admitted to practice law in the State of Washington on November
4 20, 2000.

5 **II. STIPULATED FACTS**

6 2. Respondent maintains a Bank of America trust account ending in 5087.

7 3. During the period from January 1, 2015 through November 30, 2016 (the “audit
8 period”), Respondent did not maintain a trust account check register or client ledgers, did not
9 reconcile his trust account records, and did not maintain any documentation of trust account
10 reconciliations.

11 **Client JB**

12 4. Respondent represented JB in a personal injury case that settled for \$600,000.

13 5. Respondent was entitled to a one-third contingent fee of \$200,000 and
14 reimbursement of \$100 in costs.

15 6. On February 27, 2015, Respondent deposited the \$600,000 settlement into his trust
16 account.

17 7. The same day he deposited the settlement, and before the deposit had cleared the
18 banking process and been collected, Respondent disbursed \$200,100 from the settlement funds
19 to himself.

20 8. On March 9, 2015, Respondent re-deposited \$140,000 of the \$200,100 into his
21 trust account “as a safeguard in the event [JB] somehow later disagreed with the distribution.”

22 9. Respondent soon began disbursing those funds back to himself.

23 10. Between March 16, 2015 and April 27, 2016, Respondent made nineteen
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1 disbursements related to JB's matter to himself, totaling \$145,500.

2 11. Respondent collected a total of \$205,500 in connection with JB's matter, which
3 was \$5,500 more than he was entitled to.

4 12. Respondent should have known he collected \$5,500 more than he was entitled to.

5 13. Respondent disbursed a total of \$605,355 from his trust account on behalf of JB,
6 which exceeded the amount of funds JB had on deposit in Respondent's trust account.

7 14. Respondent used other client funds to cover the excess disbursements made on
8 behalf of JB.

9 **Client DJ**

10 15. On May 21, 2015, Respondent deposited \$31,500 into his trust account on behalf
11 of his client DJ.

12 16. On the same date, Respondent disbursed \$11,380.25 of the \$31,500 to himself.

13 17. At the time Respondent disbursed the \$11,380.25, the \$31,500 deposit had not
14 cleared the banking process and been collected.

15 **Client MH**

16 18. On June 3, 2015, Respondent deposited \$21,000 into his trust account on behalf of
17 his client MH.

18 19. On the same date, Respondent disbursed \$18,900 of the \$21,000 to himself and
19 MH.

20 20. At the time Respondent disbursed the \$18,900, the \$21,000 deposit had not cleared
21 the banking process and been collected.

22 **Client YD**

23 21. On June 5, 2015, Respondent disbursed \$5,583 from his trust account to his client
24

1 YD.

2 22. As of that date, YD had no funds on deposit in Respondent's trust account.

3 23. Respondent used other client funds to cover the \$5,583 disbursement to YD.

4 24. On June 11, 2015, Respondent deposited \$11,482.72 into his trust account on
5 behalf of YD.

6 25. On the same date, Respondent disbursed \$3,545 of the \$11,482.72 to himself.

7 26. At the time Respondent disbursed the \$3,545, the \$11,482.72 deposit had not
8 cleared the banking process and been collected.

9 **Client JM**

10 27. On July 17, 2015, Respondent deposited \$5,400 into his trust account on behalf of
11 his client JM.

12 28. On the same date, Respondent disbursed \$3,905.86 of the \$5,400 to himself and
13 JM.

14 29. At the time Respondent disbursed the \$3,905.86, the \$5,400 deposit had not
15 cleared the banking process and been collected.

16 **Client H**

17 30. On August 23, 2015, Respondent disbursed \$3,248.52 from his trust account on
18 behalf of his client H.

19 31. As of that date, H had no funds on deposit in Respondent's trust account.

20 32. Respondent used other client funds to cover the \$3,248.52 disbursement.

21 **Client FH**

22 33. On November 23, 2015, Respondent deposited \$17,000 into his trust account on
23 behalf of his client FH.

1 34. FH had no other funds on deposit in Respondent's trust account.

2 35. Between November 24, 2015 and November 30, 2015, Respondent disbursed
3 \$17,676.16 from his trust account on behalf of FH.

4 36. The amount disbursed on behalf of FH exceeded the amount of funds FH had on
5 deposit in Respondent's trust account by \$676.16.

6 37. Respondent used other client funds to cover the excess disbursement made on
7 behalf of FH.

8 **Client KM**

9 38. On January 25, 2016, Respondent deposited \$8,500 into his trust account on behalf
10 of his client KM.

11 39. On the same date, Respondent disbursed the \$8,500 to himself and KM.

12 40. At the time Respondent disbursed the \$8,500, the deposit had not cleared the
13 banking process and been collected.

14 **Client DD**

15 41. On February 2, 2016, Respondent deposited \$15,000 into his trust account on
16 behalf of his client DD.

17 42. On the same date, Respondent disbursed the \$15,000 to himself and DD.

18 43. At the time Respondent disbursed the \$15,000, the deposit had not cleared the
19 banking process and been collected.

20 **Client MF**

21 44. On February 29, 2016, Respondent deposited \$50,000 into his trust account on
22 behalf of his client MF.

23 45. On the same date, Respondent disbursed \$12,500 of the \$50,000 to himself.

1 46. At the time Respondent disbursed the \$12,500, the \$50,000 deposit had not cleared
2 the banking process and been collected.

3 **Client AB**

4 47. On March 30, 2016, Respondent deposited \$1,500 into his trust account on behalf
5 of his client AB.

6 48. On the same date, Respondent disbursed \$500 of the \$1,500 to himself.

7 49. At the time Respondent disbursed the \$500, the \$1,500 deposit had not cleared the
8 banking process and been collected.

9 **Client CH**

10 50. On July 12, 2016, Respondent made two deposits totaling \$32,721.18 into his trust
11 account on behalf of his client CH.

12 51. CH had no other funds on deposit in Respondent's trust account.

13 52. On July 18, 2016, Respondent made two disbursements totaling \$32,754.18 from
14 his trust account on behalf of CH.

15 53. The amount disbursed on behalf of CH exceeded the amount of funds CH had on
16 deposit in Respondent's trust account by \$33.

17 54. Respondent used other client funds to cover the excess disbursement made on
18 behalf of CH.

19 **Client MW**

20 55. On October 11, 2016, Respondent deposited \$10,195.06 into his trust account on
21 behalf of his client MW.

22 56. On the same date, Respondent disbursed \$3,398 of the \$10,195.06 to himself.

23 57. At the time Respondent disbursed the \$3,398, the \$10,195.06 deposit had not
24

1 cleared the banking process and been collected.

2 **Client TW**

3 58. On October 17, 2016, Respondent disbursed \$2,558.32 from his trust account on
4 behalf of his client TW.

5 59. As of that date, TW had no funds on deposit in Respondent's trust account.

6 60. Respondent used other client funds to cover the \$2,558.32 disbursement.

7 **Client HH**

8 61. On November 1, 2016, Respondent deposited \$3,411.17 into his trust account on
9 behalf of his client HH.

10 62. On the same date, Respondent disbursed \$3,197.88 of the \$3,411.17 to HH.

11 63. At the time Respondent disbursed the \$3,197.88, the \$3,411.17 deposit had not
12 cleared the banking process and been collected.

13 **III. STIPULATION TO MISCONDUCT**

14 64. By failing to maintain a check register, client ledgers, and documentation of trust
15 account reconciliations between January 1, 2015 and November 30, 2016, Respondent violated
16 RPC 1.15A(h)(2), RPC 1.15B(a)(1), RPC 1.15B(a)(2), and RPC 1.15B(a)(8).

17 65. By failing to perform any bank statement or client ledger reconciliations on his
18 trust account between January 1, 2015 and November 30, 2016, Respondent violated RPC
19 1.15A(h)(6).

20 66. By collecting \$5,500 more than he was entitled to in JB's matter, Respondent
21 violated RPC 1.5(a) and RPC 1.15A(b).

22 67. By depositing fees earned from JB's matter back into his trust account in March
23 2015 and by retaining earned fees in his trust account, Respondent violated RPC 1.15A(h)(1).

1 68. By disbursing funds from his trust account before the deposits of those funds had
2 cleared the banking process and been collected, Respondent violated RPC 1.15A(h)(7).

3 69. By disbursing funds on behalf of clients in excess of the funds those clients had on
4 deposit in his trust account, and/or by using the funds of other clients to cover those excess
5 disbursements, Respondent violated RPC 1.15A(h)(8).

6 IV. PRIOR DISCIPLINE

7 70. Respondent has no record of prior discipline.

8 V. APPLICATION OF ABA STANDARDS

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

11 *4.1 Failure to Preserve the Client's Property*

12 Absent aggravating or mitigating circumstances, upon application of the
13 factors set out in 3.0, the following sanctions are generally appropriate in cases
14 involving the failure to preserve client property:

15 4.11 Disbarment is generally appropriate when a lawyer knowingly converts
16 client property and causes injury or potential injury to a client.

17 4.12 Suspension is generally appropriate when a lawyer knows or should
18 know that he is dealing improperly with client property and causes injury
19 or potential injury to a client.

20 4.13 Reprimand is generally appropriate when a lawyer is negligent in dealing
21 with client property and causes injury or potential injury to a client.

22 4.14 Admonition is generally appropriate when a lawyer is negligent in
23 dealing with client property and causes little or no actual or potential
24 injury to a client.

72. Respondent knew or should have known that he was dealing improperly with client
property.

73. Respondent's conduct caused injury to his clients.

74. The presumptive sanction is suspension.

75. The following aggravating factors apply under ABA Standard 9.22:

(c) a pattern of misconduct;

1 (d) multiple offenses;

2 (i) substantial experience in the practice of law (Respondent was admitted in
3 Washington in 2000).

4 76. The following mitigating factor applies under ABA Standard 9.32:

5 (a) absence of a prior disciplinary record.

6 77. It is an additional mitigating factor that Respondent has agreed to resolve this
7 matter at an early stage of the proceedings.

8 78. On balance, the aggravating and mitigating factors do not require a departure from
9 the presumptive sanction but do justify a three-year suspension.

10 **VI. STIPULATED DISCIPLINE**

11 79. The parties stipulate that Respondent shall receive a three-year suspension for his
12 conduct.

13 80. As a condition of reinstatement from suspension, Respondent shall complete the
14 following steps to determine whether any funds are owed to clients or third parties:

- 15 a) Respondent shall have a qualified bookkeeper reconstruct¹ his trust account records
16 in compliance with the requirements of RPC 1.15A and RPC 1.15B for the time
17 period of January 1, 2015 through the date of submission to ODC for consideration
18 of reinstatement, using all available client records and financial records to assist in
19 the identification of funds received and disbursed. Respondent shall do so at his
20 own expense. Respondent shall not be eligible for a certification of completion of
21 specific conditions of suspension under ELC 13.3(b)(1)(B) unless Respondent
22 provides the complete reconstructed trust-account records to ODC at least 60 days
23 prior to seeking certification of completion. Respondent shall promptly provide
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22 ¹ "Reconstruction" involves the preparation, for all funds put into and removed from the trust account,
23 of complete and accurate client ledgers, check register, reconciliations between the check register
24 balances and the balances of the bank statements, and reconciliations between the check register
balances and the combined total of all the client ledger balances.

1 additional records and information to ODC if requested to facilitate ODC's
2 assessment of the completeness and accuracy of the reconstruction.²

- 3 b) The reconstruction may, or may not, reveal that one or more clients have not
4 received all funds to which they are entitled. If the reconstructed trust-account
5 records indicate that any client is owed funds, then Respondent shall provide each
6 client, in writing, with a complete updated accounting of his/her receipt and
7 disbursement of all funds. The accounting shall identify the source, date and
8 amount of all funds received, and the recipient, purpose, date and amount of all
9 funds disbursed. Respondent shall not be eligible for a certification of completion
10 of specific conditions of suspension under ELC 13.3(b)(1)(B) unless Respondent
11 provides ODC with proof that he has done so, and with copies of the accountings, at
12 least 60 days prior to seeking certification of completion

13 81. Respondent will be subject to probation for a period of two years commencing
14 upon Respondent's reinstatement to the practice of law, with periodic reviews under ELC 13.8
15 of his trust account practices, and must comply with the specific probation terms set forth
16 below:

- 17 a) Respondent shall carefully review and fully comply with RPC 1.15A and RPC
18 1.15B, and shall carefully review the current version of the publication, Managing
19 Client Trust Accounts: Rules, Regulations, and Common Sense.
- 20 b) For all client matters, Respondent shall have a written fee agreement signed by the
21 client, which agreements are to be maintained for at least seven years (see RPC
22 1.15B(a)(3)).
- 23 c) On a monthly basis, using ODC's form report entitled "Monthly Reconciliation and
24 Review Report," Respondent shall review the trust-account records detailed on the
form report, review the completed report, and sign and date the completed report.
- d) On a quarterly basis, Respondent shall provide ODC's audit staff with all trust-
account records for the time period to be reviewed by ODC'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

² Respondent acknowledges and agrees that if information in reconstructed trust-account records or in other information or records provided to ODC under paragraph 80 reveals any acts of misconduct not specifically identified in this Stipulation, ODC may investigate and/or prosecute such additional misconduct to the extent otherwise authorized by the ELC.

1 records from the date of commencement of probation to the end of the third
2 full month.

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

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

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

15 v) Months 13 – 15. By no later than the 30th day of the sixteenth month after
16 the commencement of probation, Respondent shall provide the trust
17 account records from the end of the previously provided quarter through
18 the end of month fifteen.

19 vi) Months 16 – 18. By no later than the 30th day of the nineteenth month after
20 the commencement of probation, Respondent shall provide the trust
21 account records from the end of the previously provided quarter through
22 the end of month eighteen.

23 vii) Months 19 – 21. By no later than the 30th day of the twenty-second month
24 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 twenty-one.

The trust account records Respondent provides to ODC for each quarterly review of
his trust account will include: (a) copies of each completed “Monthly
Reconciliation and Review Report” referenced in sub-paragraph (c) above; (b) a
complete checkbook register for his trust account covering the period being
reviewed; (c) 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); and (d) copies of all trust-
account bank statements, deposit slips, and cancelled checks covering the period
being reviewed. ODC’s Audit Manager or designee will review Respondent’s trust
account records for each period.

e) On the same quarterly time schedule set forth in the preceding paragraph,
Respondent will provide ODC’s Audit Manager or designee with copies of any and
all fee agreements entered into within the time period at issue.

- 1 f) ODC's Audit Manager or designee may request additional financial or client
2 records if needed to verify Respondent's compliance with RPC 1.15A and/or 1.15B.
3 Within twenty days of a request from ODC's Audit Manager or designee for
4 additional records needed to verify Respondent's compliance with RPC 1.15A
5 and/or RPC 1.15B, Respondent will provide ODC's Audit Manager or designee the
6 additional records requested.
- 7 g) Respondent will reimburse the Association for time spent by ODC's Audit Manager
8 or designee in reviewing and reporting on Respondent's records to determine
9 his/her compliance with RPC 1.15A and RPC 1.15B, at the rate of \$85 per hour.
10 Respondent will make payment within thirty days of each written invoice setting
11 forth the auditor's time and payment due.

12 VII. RESTITUTION

13 82. If the reconstructed trust-account records described in paragraph 80 above indicate
14 that any client is owed funds, then Respondent is required to make full restitution to each client
15 of all funds owed. Respondent shall pay to the client interest on those funds, at a rate of 12%,
16 calculated from the date on which the client (or third party as directed by the client) was first
17 entitled to receive the funds to the date on which repayment is made. Reinstatement from
18 suspension is conditioned on full payment of restitution, with interest.

19 VIII. COSTS AND EXPENSES

20 83. In light of Respondent's willingness to resolve this matter by stipulation at an early
21 stage of the proceedings, Respondent shall pay attorney fees and administrative costs of \$1,000
22 in accordance with ELC 13.9(i). The Association will seek a money judgment under ELC
23 13.9(l) if these costs are not paid within 30 days of approval of this stipulation. Reinstatement
24 from suspension is conditioned on payment of costs.

IX. VOLUNTARY AGREEMENT

84. Respondent states that prior to entering into this Stipulation he had an opportunity
to consult independent legal counsel regarding this Stipulation, that Respondent is entering into
this Stipulation voluntarily, and that no promises or threats have been made by ODC, the

1 Association, nor by any representative thereof, to induce the Respondent to enter into this
2 Stipulation except as provided herein.

3 85. Once fully executed, this Stipulation is a contract governed by the legal principles
4 applicable to contracts, and may not be unilaterally revoked or modified by either party.

5 **X. LIMITATIONS**

6 86. This Stipulation is a compromise agreement intended to resolve this matter in
7 accordance with the purposes of lawyer discipline while avoiding further proceedings and the
8 expenditure of additional resources by the Respondent and ODC. Both the Respondent lawyer
9 and ODC acknowledge that the result after further proceedings in this matter might differ from
10 the result agreed to herein.

11 87. This Stipulation is not binding upon ODC or Respondent as a statement of all
12 existing facts relating to the professional conduct of Respondent, and any additional existing
13 facts may be proven in any subsequent disciplinary proceedings.

14 88. This Stipulation results from the consideration of various factors by both parties,
15 including the benefits to both by promptly resolving this matter without the time and expense of
16 hearings, Disciplinary Board appeals, and Supreme Court appeals or petitions for review. As
17 such, approval of this Stipulation will not constitute precedent in determining the appropriate
18 sanction to be imposed in other cases; but, if approved, this Stipulation will be admissible in
19 subsequent proceedings against Respondent to the same extent as any other approved
20 Stipulation.

21 89. Under ELC 9.1(d)(4), the Disciplinary Board reviews a stipulation based solely on
22 the record agreed to by the parties. Under ELC 3.1(b), all documents that form the record
23 before the Board for its review become public information on approval of the stipulation by the
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1 Board, unless disclosure is restricted by order or rule of law.

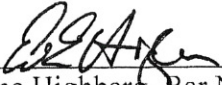
2 90. If this Stipulation is approved by the Disciplinary Board and Supreme Court, it will
3 be followed by the disciplinary action agreed to in this Stipulation. All notices required in the
4 Rules for Enforcement of Lawyer Conduct will be made.

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

9 WHEREFORE the undersigned being fully advised, adopt and agree to this Stipulation
10 to Suspension as set forth above.

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Erik Eugene Highberg, Bar No. 30589
Respondent

Dated: 5/14/19

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Benjamin J. Attanasio, Bar No. 43032
Disciplinary Counsel

Dated: 5/23/19

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