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FILED

JUL 02 2013

DISCIPLINARY BOARD

BEFORE THE
DISCIPLINARY BOARD
OF THE
WASHINGTON STATE BAR ASSOCIATION

In re

MARLENE K. WENGER,

Lawyer (Bar No. 35478).

Proceeding No. 11#00033

STIPULATION TO REPRIMAND

Under Rule 9.1 of the Rules for Enforcement of Lawyer Conduct (ELC), the following Stipulation to Reprimand is entered into by the Washington State Bar Association (Association), through disciplinary counsel Natalea Skvir, Respondent lawyer Marlene K. Wenger, and Respondent's counsel Leland G. Ripley.

This matter was tried before a hearing officer in May 2012. That Hearing Officer was unable to enter Findings of Fact, Conclusions of Law and a Recommendation due to health problems that resulted in the Hearing Officer recusing from the matter in April 2013. Respondent understands that she is entitled under the ELC to have this matter re-tried before a new hearing officer, to present exhibits and witnesses on her behalf, and to have a new hearing officer determine the facts, misconduct and sanction in this case. Respondent further understands that she 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

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1 that a new hearing and appeal could result in an outcome more favorable or less favorable to
2 her. Respondent chooses to resolve this proceeding now by entering into the following
3 stipulation to facts, misconduct and sanction to avoid the risk, time, and expense attendant to
4 further proceedings.

5 I. ADMISSION TO PRACTICE

6 1. Respondent was admitted to practice law in the State of Washington on November 8,
7 2004.

8 II. STIPULATED FACTS

9 A. Boggs representation

10 Settlement distribution

11 2. In or around May 2009, Adina Boggs (Ms. Boggs) hired Respondent to represent her
12 in dissolution proceedings which were pending in Lewis County Superior Court.

13 3. Mr. and Ms. Boggs reached a settlement and a decree of dissolution was entered on
14 August 4, 2009.

15 4. The decree awarded Mr. Boggs the family home.

16 5. The decree awarded Ms. Boggs “any and all personal property in [her] possession at
17 the time of the entry of this Decree.”

18 6. The decree further stated:

19 To equalize the division of community assets, the husband shall pay the wife the
20 sum of \$70,500. Wife shall have until October 1, 2009 to vacate the premises
21 with any personal property that she would like to take with her. A cashier’s
22 check in the amount of \$35,250 made payable to Adina Boggs and Wenger and
23 Associates shall be given to her attorney within 24 hours of the entry of the
24 decree. The remaining \$35,250 shall be placed in trust with Marlene Wenger to
be paid to Ms. Boggs within one week of her vacating the premises on October 1,
2009.

7. Mr. Boggs tendered the first \$35,250 payment as specified in the decree and

1 Respondent endorsed it over to her client.

2 8. On September 14, 2009, Respondent received Mr. Boggs's second payment of
3 \$35,250 and she deposited it into her Timberland Bank trust account ending in -1147 on
4 September 16, 2009.

5 9. On or around September 28, 2009, Ms. Boggs vacated the family home.

6 10. Despite Ms. Boggs' request, Respondent did not release the \$35,250 within one
7 week of her vacating the home, as provided by the decree.

8 11. Shortly after Mr. Boggs took possession of the home, his attorney contacted
9 Respondent and instructed her not to disburse the second \$35,250 to Ms. Boggs because she had
10 left the home with badly damaged carpeting and counter tops.

11 12. This communication was followed by letters from Mr. Boggs' attorney which
12 included photographs of the alleged damage and also listed items of personal property missing
13 from the home, and the attorney asked Respondent not to release the second check to Ms. Boggs
14 until the parties could determine the value of the items, or until the items were returned.

15 13. Under the terms of the decree, the referenced items of personal property had been
16 awarded to Ms. Boggs, leaving the alleged damage to the carpets and countertops as the only
17 matter in dispute.

18 14. On or around October 15, 2009, Respondent received another letter from opposing
19 counsel, stating that the funds due to Ms. Boggs could not "be released in their entirety to Ms.
20 Boggs" because damages to the home would have to be repaired and deducted from them.

21 15. The October 15, 2009 letter also stated that opposing counsel would obtain quotes
22 for the damage, requested that Ms. Boggs return the personal items that belonged to Mr. Boggs,
23 and left open the possibility that the parties could reach agreement without further litigation.

1 16. Respondent continued to hold the entire \$35,250 from Mr. Boggs in her trust
2 account.

3 17. Because Ms. Boggs was frustrated by Respondent's continuing refusal to transmit
4 the second lump sum payment to her as provided in the dissolution decree, she informed
5 Respondent on October 20, 2009 that she was hired only to represent her in the dissolution and
6 was not authorized to handle post-dissolution matters.

7 18. Respondent maintained she was obligated to carry out the terms of the decree, but
8 refused to release the funds to her client absent a court order and she stated she was ceasing any
9 other work on the matter.

10 19. Respondent took no steps to ascertain how much of the second \$35,250 payment was
11 in dispute nor to resolve the dispute.

12 20. Respondent did not promptly distribute the undisputed portion of the \$35,250
13 payment to Ms. Boggs.

14 Billing

15 21. In or around early November 2009, Respondent issued a bill to Ms. Boggs.

16 22. This document showed there was a balance of \$950.11 due "for charges up to
17 November 5, 2009" but carried no other date indicating when it was issued.

18 23. This bill charged Ms. Boggs twice for preparing a Notice of Withdrawal.

19 24. The bill stated "A payment from your trust balance will be made three days after the
20 date of this bill."

21 25. Respondent's Trust Bank Journal indicated that she withdrew her fee for Ms.
22 Boggs's matter from her trust account by check number 3034 on November 5, 2009, and the
23 corresponding trust account bank statement showed that the check cleared on November 6,
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1 2009.

2 26. On November 9, 2009, Ms. Boggs sent an e-mail to Respondent stating "I contest the
3 bill."

4 27. The next day, Respondent sent Ms. Boggs a reply e-mail stating, "Ok you contest.
5 That makes no difference to me. I have earned the fees and will take them."

6 28. At the time she made this statement, Respondent had already withdrawn her fee from
7 the funds she was holding in trust for Ms. Boggs.

8 29. After receiving a letter dated December 4, 2009 from opposing counsel authorizing
9 the release of the second \$35,250 payment to Ms. Boggs, Respondent disbursed \$34,470.49 to
10 her client by a trust account check written on December 8, 2009, and this check cleared the
11 banking process on December 14, 2009. That sum reflected withdrawals totaling \$964.62 for
12 legal fees and the deposit of \$184.11 Ms. Boggs had paid for a previous bill.

13 30. Through her counsel, Respondent sent Ms. Boggs a cashier's check for \$950 on May
14 4, 2012 as reimbursement for fees that had been withdrawn from the second lump sum.

15 **B. Beck representation**

16 31. On or around April 3, 2009, George Peter Beck (Beck) and Respondent signed an
17 hourly fee agreement for representation in a dispute with a second mortgage lender regarding
18 predatory lending practices.

19 32. Respondent's associate, Deanna Johnson (Johnson), assumed responsibility for
20 handling Beck's case.

21 33. On or around August 4, 2009, Respondent terminated Johnson's employment with
22 her law firm.

23 34. Beck decided to have Johnson continue the representation.
24

1 35. On or around August 10, 2009, Beck requested an accounting of all funds
2 Respondent held in trust on his behalf.

3 36. That same day, Respondent faxed Beck an itemized bill and Trust Statement.

4 37. The bill included legal assistant charges calculated at a higher rate than the one set
5 forth in the fee agreement.

6 38. The Trust Statement indicated that, between July 21, 2009 and August 10, 2009,
7 Respondent had disbursed \$500 from Beck's funds in her trust account to her firm, "for services
8 rendered."

9 39. Beck was not given any advance notice of this disbursement or an opportunity to
10 object to the bill.

11 **III. STIPULATION TO MISCONDUCT**

12 40. By failing to ascertain how much of the second \$35,250 payment to Ms. Boggs was
13 disputed, and then not taking reasonable action to resolve the dispute so that she could promptly
14 distribute to Ms. Boggs the undisputed portion of the funds, Respondent violated RPC 1.3 and
15 RPC 1.15A(g).

16 41. By withdrawing fees from her trust account without allowing Ms. Boggs reasonable
17 time to receive and review her invoice, Respondent violated RPC 1.15A(h)(3).

18 42. By withdrawing from her trust account fees she claimed to have been earned in the
19 Beck matter without first providing Beck with reasonable notice of her intent to do so, through a
20 billing statement or other document, Respondent violated RPC 1.15A(h)(3).

21 **IV. PRIOR DISCIPLINE**

22 43. In August 2010, Respondent stipulated to a six-month suspension in connection with
23 her handling the probate of an estate. Respondent admitted that, in 2007, she had made a false
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1 statement of fact to a tribunal in violation of RPC 3.3(a)(1), RPC 8.4(c), and RPC 8.4(d);
2 unlawfully concealed a document with evidentiary value, in violation of RPC 3.4(a), RPC 8.4(c)
3 and RPC 8.4(d); engaged in conduct prejudicial to the administration of justice, in violation of
4 RPC 8.4(d); converted estate property entrusted to her, in violation of RPC 1.15A(b) and RPC
5 8.4(d); and failed to act competently, in violation of RPC 1.1.

6 **V. APPLICATION OF ABA STANDARDS**

7 44. The following American Bar Association Standards for Imposing Lawyer Sanctions
8 (1991 ed. & Feb. 1992 Supp.) apply to this case:

9 45. Standard 4.4 applies to Respondent's failure to ascertain how much of the second
10 lump sum was in dispute, to take reasonable action to resolve the dispute, and to promptly
11 disburse the undisputed portion to Ms. Boggs. It provides:

12 4.41 Disbarment is generally appropriate when:

13 (a) a lawyer abandons the practice and causes serious or potentially serious
injury to a client; or

14 (b) a lawyer knowingly fails to perform services for a client and causes
serious or potentially serious injury to a client; or

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

16 4.42 Suspension is generally appropriate when:

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

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

19 4.43 Reprimand is generally appropriate when a lawyer is negligent and does
not act with reasonable diligence in representing a client, and causes injury or
potential injury to a client.

20 4.44 Admonition is generally appropriate when a lawyer is negligent and does
not act with reasonable diligence in representing a client, and causes little or no
actual or potential injury to a client.

21 46. Respondent acted negligently. Ms. Boggs was injured by her inability to access, for
22 about two months, funds that were due her.

23 47. The presumptive sanction for these violations is reprimand
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1 48. Standard 4.1 applies to Respondent's withdrawal of fees from trust before providing
2 documentation of their having been earned and allowing her clients a reasonable time to review
3 her bills. It provides:

4 4.11 Disbarment is generally appropriate when a lawyer knowingly converts
client property and causes injury or potential injury to a client.

5 4.12 Suspension is generally appropriate when a lawyer knows or should
6 know that he is dealing improperly with client property and causes injury or
potential injury to a client.

7 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.

8 4.14 Admonition is generally appropriate when a lawyer is negligent in
dealing with client property and causes little or no actual or potential injury to a
9 client.

10 49. Respondent acted negligently. Ms. Boggs and Mr. Beck were harmed in that they
had no opportunity to question the items or amounts that appeared on Respondent's bills.

11 50. The presumptive sanction for these violations is reprimand.

12 51. The following aggravating factors apply under ABA Standards Section 9.22:

- 13 (a) prior disciplinary offenses;
14 (c) a pattern of misconduct; and
15 (d) multiple offenses.

16 52. The following mitigating factors apply under ABA Standards Section 9.32:

- 17 (c) personal or emotional problems;
18 (f) inexperience in the practice of law;
19 (g) character or reputation; and
(j) delay in disciplinary proceedings (through no fault of either party, the
matter has been awaiting decision for one year and the hearing officer has
now recused)..

20 53. On balance the aggravating and mitigating do not require a departure from the
21 presumptive sanction.

22 VI. STIPULATED DISCIPLINE

23 54. The parties stipulate that Respondent should receive a reprimand.

1 **VII. PROBATION**

2 55. Respondent is currently on inactive status.

3 56. Should Respondent change her membership to active status, she will at that time be
4 placed on probation under ELC 13.8 for a period of one year, commencing with the date she
5 resumes active status.

6 57. During the period of probation, if Respondent engages in private practice and
7 receives or handles client funds, she shall immediately notify Disciplinary Counsel. For any
8 period of private practice involving her receipt or handling of client funds during the
9 probationary period, Respondent shall have a CPA licensed in the State of Washington conduct
10 a review of her trust account covering the probationary period and provide a written report for
11 Disciplinary Counsel within 60 days of the conclusion of the probationary period as to whether
12 the trust account has been maintained in compliance with RPC 1.15A and RPC 1.15B.
13 Respondent is responsible for all costs associated with the review of her trust account activity
14 and the required report to Disciplinary Counsel..

15 **VIII. RESTITUTION**

16 58. Respondent has previously paid restitution to Ms. Boggs. Restitution is not
17 warranted with respect to the Beck case, in that Respondent eventually issued a bill that showed
18 Johnson had performed services for which her fee exceeded the amount withdrawn from trust.

19 **IX. COSTS AND EXPENSES**

20 59. In light of Respondent’s willingness to resolve this matter by stipulation, Respondent
21 shall pay reduced attorney fees and administrative costs of \$500 in accordance with ELC
22 13.9(i). The Association will seek a money judgment under ELC 13.9(l) if these costs are not
23 paid within 30 days of approval of this stipulation.

1 **X. VOLUNTARY AGREEMENT**

2 60. Respondent states that prior to entering into this Stipulation she has consulted
3 independent legal counsel regarding this Stipulation, that Respondent is entering into this
4 Stipulation voluntarily, and that no promises or threats have been made by the Association, nor
5 by any representative thereof, to induce the Respondent to enter into this Stipulation except as
6 provided herein.

7 **XI. LIMITATIONS**

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

13 62. This Stipulation is not binding upon the Association or the respondent as a statement
14 of all existing facts relating to the professional conduct of the respondent lawyer, and any
15 additional existing facts may be proven in any subsequent disciplinary proceedings.

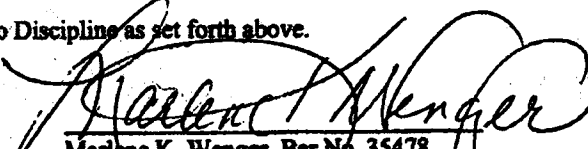
16 63. This Stipulation results from the consideration of various factors by both parties,
17 including the benefits to both by promptly resolving this matter without the time and expense of
18 hearings, Disciplinary Board appeals, and Supreme Court appeals or petitions for review. As
19 such, approval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

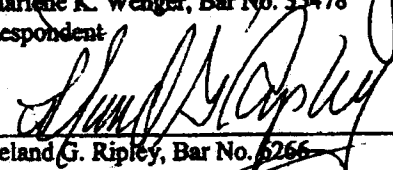
23 64. If this Stipulation is approved by the Hearing Officer, it will be followed by the
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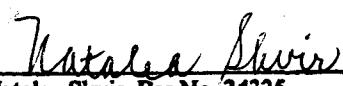
1 disciplinary action agreed to in this Stipulation. All notices required in the Rules for
2 Enforcement of Lawyer Conduct will be made.

3 65. If this Stipulation is not approved by the Hearing Officer, this Stipulation will have
4 no force or effect, and neither it nor the fact of its execution will be admissible as evidence in
5 the pending disciplinary proceeding, in any subsequent disciplinary proceeding, or in any civil
6 or criminal action.

7 WHEREFORE the undersigned being fully advised, adopt and agree to this Stipulation
8 to Discipline as set forth above.

9  Dated: 6/21/13
10 Marlene K. Wenger, Bar No. 35478
11 Respondent

12  Dated: 6/21/13
13 Leland G. Ripley, Bar No. 6266
14 Counsel for Respondent

15  Dated: 6/24/13
16 Natalea Skvir, Bar No. 34335
17 Disciplinary Counsel

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