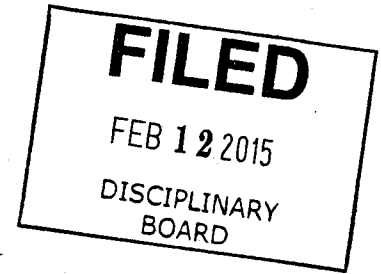


BEFORE THE
DISCIPLINARY BOARD
OF THE
WASHINGTON STATE BAR ASSOCIATION



In re

BRIAN HUY XUAN NGUYEN,

Lawyer (Bar No. 35947).

Proceeding No. 14#00022

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND HEARING OFFICER'S
RECOMMENDATION

The undersigned Hearing Officer held the hearing on December 1 - 3, 2014, under Rule 10.13 of the Rules for Enforcement of Lawyer Conduct (ELC). Respondent Brian Huy Xuan Nguyen appeared at the hearing represented by Sam Franklin. Disciplinary Counsel Linda B. Eide appeared for the Office of Disciplinary Counsel (ODC) of the Washington State Bar Association.

FORMAL COMPLAINT FILED BY DISCIPLINARY COUNSEL

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

Count 1 - Nguyen wrote and executed a Promissory Note from the LLC to himself, in violation of RPC 1.7(a)(2) and/or RPC 1.8(a).

Count 2 - Nguyen used and/or converted \$300,000 without authorization, in violation of RPC 8.4(b) (by committing the crime of theft in the first degree (RCW 9A.56.030)), RPC 8.4(c), and/or RPC 1.15A(b).

Count 3 - Nguyen testified that the LLC's money was in a CD or other account at the Bank of America, when at least \$300,000 of it had been used by Nguyen to buy his townhouse, in violation of RPC 8.4(b) (by committing perjury (RCW 9A.72.020) or by committing false

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swearing (RCW 9A.72.040)), RPC 8.4(c), RPC 3.3(a), and/or RPC 3.4(a)(b).

Count 4 - Nguyen failed to provide requested documents and/or otherwise obstructed Chang's efforts to discover what happened to her family's share of the LLC assets in the civil case discovery, in violation of RPC 3.4(a), 3.4(b), and/or 3.4(d).

Count 5 - Nguyen failed to comply with Judge Armstrong's order to pay the remaining LLC funds into the registry of court, in violation of RPC 3.4(c) and/or RPC 8.4(j).

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

FINDINGS OF FACT

1. Nguyen was admitted to the practice of law in the State of Washington on December 14, 2004. Formal Complaint and Answer ¶ 1. Nguyen has no prior discipline.
2. In early 2006, Brian Nguyen worked for Thi Huyen's One Law Firm, PLLC. Formal Complaint and Answer ¶ 2.
3. On August 30, 2006, Kyoung Sook Kim (Kim) signed a fee agreement with Brian H. Nguyen of One Law Firm, PLLC for the "Dissolution of Kent Investments, LLC (the LLC), wrapping up process, and distribution of LLC assets". Formal Complaint and Answer ¶ 3.
4. Nguyen also had Kim sign a "Power of Attorney (POA) for Finances (Full Power)" making Nguyen her Attorney-in-Fact for banking and business operating transactions. Formal Complaint and Answer ¶ 4.
5. There were only two partners of the LLC, Kim and Key Back Song (Song).
6. The POA did not include the power to act in real estate transactions. By its terms, the POA terminated August 30, 2007. Formal Complaint and Answer ¶ 5.
7. In or about March 2007, Nguyen left One Law Firm. He started his own firm, BHN

Law. Nguyen continued to handle the LLC dissolution. Formal Complaint and Answer ¶ 6. When Nguyen left One Law, he failed to provide new contact information to Kim or to Chang.

8. By his own admission, Nguyen did not have significant prior legal experience in working with LLC's.

9. Nguyen was not bringing in much legal work at this time and was focused on obtaining a great amount public defense work with King County.

10. On July 28, 2007, the LLC had \$754,953 in an account at the Bank of America (BOA) ending in #5904. A month later, that account balance was \$0. Formal Complaint and Answer ¶ 7. Nguyen had received a bank statement showing where the LLC's assets were located. He also had a copy of an Assignment Agreement, EX 4, showing that Kim and Song each owned 50 percent of the LLC, and he had a copy of the LLC Operating Agreement.

11. On or about August 7, 2007, Nguyen used \$3,200 to pay a CPA's invoice for LLC tax returns. Formal Complaint and Answer ¶ 8.

12. The CPA did not tell Nguyen that any money had to be paid to the government on behalf of the LLC.

13. Nguyen did not ask the CPA about any potential inheritance tax issues faced by the LLC.

14. Two tax filings on behalf of the LLC were done by Nguyen, who did not recall whether he signed on behalf of the LLC or whether he ever provided copies of the returns to his clients.

15. Nguyen was vague about what additional legal work he may have done at this point to wind down the LLC and did not direct additional bills to the client.

16. Nguyen acknowledges that he had no client authority to continue the LLC.

17. On or about August 7, 2007, Nguyen caused a \$372,500 wire transfer from BOA account ending in #5904 to a checking account ending in #8451. Kim received the \$372,500. Formal Complaint and Answer ¶ 9.

18. On or about August 7, 2007, Nguyen used the balance of \$379,253 in BOA account ending in #5904 to buy a Certificate of Deposit (CD) in the LLC's name for an account ending in #7904. Formal Complaint and Answer ¶ 10.

19. Nguyen had the LLC bank statements sent to his home office address in Seattle. Formal Complaint and Answer ¶ 11. EX 18.

20. Kim was the surviving member of the LLC. Her business partner, Key Back Song (Song) had died. Kim gave Nguyen the name and address for Song's daughter in Korea, Da Lae Chang (Chang). Formal Complaint and Answer ¶ 12.

21. Kim was a Korean national with limited English language capability. She had Ms. Lee, a friend with better English language skills, accompany her when meeting with Mr. Nguyen.

22. In 2007, Nguyen was working out of his apartment, admitting that this was a "dry year" for income from his practice, "cobbling together" appointed misdemeanor cases. He estimated that he earned a gross amount of \$50,000 from the practice of law in 2007.

23. Nguyen admitted that he had been looking for an investment property to purchase in the then-rising Seattle real estate market in the six months or so leading up to August 2007.

24. On January 5, 2008, Nguyen took \$300,000 of the \$379,253 remaining LLC assets and used the funds to buy a townhouse in the Madison Valley area of Seattle, titled in his name with his girlfriend, Kelli Johnson. EX 21.

25. Nguyen's use of LLC funds to make a personal investment in a townhouse that

would last for a period of years is fundamentally inconsistent with what he was retained to do, dissolve the LLC.

26. Nguyen admitted that he did not have Chang's permission to invest LLC funds. He was not entitled to the \$300,000 as fees or reimbursement of costs. Formal Complaint and Answer ¶ 14.

27. On January 25, 2008, Nguyen, as "borrower," signed a Promissory Note for \$300,000 promising to repay the LLC in five years, with interest accrued at an annual rate of five percent (5%). Nguyen also signed the Promissory Note as the "lender" based on the expired POA. Formal Complaint and Answer ¶ 15. EX 20.

28. Nguyen recorded nothing to evidence the \$300,000 debt to the LLC. Formal Complaint and Answer ¶ 16. He testified that he was not sophisticated in these matters and the only security for the loan was the real property.

29. Nguyen failed to disclose to his client that he would be "borrowing" \$300,000 for a home titled in his name. He did not forward a copy of the note to Kim.

30. Nguyen failed to advise his client in writing to seek independent legal counsel. Formal Complaint and Answer ¶ 18.

31. Nguyen failed to obtain informed consent in writing to his "borrowing" \$300,000 for a home titled in his name. Formal Complaint and Answer ¶ 19.

32. Though Nguyen intended to pay back the client funds after selling the townhouse at a profit, he did not have the authority to use them in the first place, and did not have the financial wherewithal to protect the client funds in the event of a market downturn..

33. Dalae Song Chang (Chang), Song's heir, contacted Nguyen through counsel, Jennifer C. Rydberg, who had obtained Letters of Administration for Chang under King

County Superior Court Cause No. 10-4-02101-6 KNT. She sought the LLC assets due the estate. In response, Nguyen paid nothing.

34. The only other member of the LLC, Ki Baek Song, had died in August 2006. EX 10. Kim had provided contact information for Song's daughter in Korea: Chang. Nguyen contacted her by letter, EX 13, in early December 2006, and they exchanged emails, EX 14, while he still worked at One Law.

35. Chang contacted Rydberg in August 2009 because two and one half years after their first contact, Nguyen still had failed to wind up the LLC or distribute Song's share of LLC assets to his estate. Chang and her husband were frustrated and frightened by Nguyen's handling of this matter.

36. Given the negative experience with Nguyen, it took Rydberg some months to win Chang's trust. In April 2010, Rydberg obtained Letters of Administration making Chang the Personal Representative of her father's estate. EX 53. This should have overcome Nguyen's alleged concerns about Song's rightful heirs. Even though he previously had cashed Kim out of the LLC, he failed to distribute the assets he had reason to know were owing to Song's estate.

37. Though Nguyen would claim that he could not distribute the money due to Song's estate because of insufficient documentation, the real reason was that these funds were tied up in the Madison Valley townhouse he purchased as a personal investment without client authorization.

38. Nguyen naively felt that he would be able to refinance the townhouse if Chang demanded the money due the estate, failing to anticipate the abrupt downturn in the real estate market. This occurred in 2007, at almost the same time as he took possession.

39. Though Nguyen thought this transaction would be "good for everybody," in fact, it

was not. Nguyen exposed Chang to significant risk by taking the money due the estate without client authorization, putting it in his own real estate investment. The property was worth much less almost immediately following the completion of the transaction, almost all of the loss from which would have to be absorbed by the client.

40. Rydberg never met Nguyen, but left two voicemail messages on the phone number listed for Nguyen on the WSBA website. Neither message was returned. This lack of responsiveness characterizes Nguyen's behavior throughout this matter.

41. Though Nguyen would later claim that he was holding onto the Song estate's money out of a sense of due diligence, attempting to get appropriate documentation, in fact, this was a subterfuge. The real reason Nguyen did not turn over the client's money or even provide an accounting of the funds is because the real estate investment he had made with them without client authorization was running significantly in the red. He could not refinance the townhouse with any bank and make Chang whole.

42. In August 2010, Chang's new lawyer, Kristi S. Anderson, sued Nguyen under King County Superior Court Cause No. 10-2-297287-0 SEA (the civil case). Formal Complaint and Answer ¶ 21.

43. Anderson attempted to contact Nguyen a number of times, both by voicemail and email, asking him to release the funds to belonging to Kent LLC.

44. Nguyen failed to respond to most of Anderson's communications, prompting her to state that she would file a Bar complaint against him if she did not hear from him.

45. Anderson asked Nguyen for an accounting of the LLC funds, both the amount and where the money was held. Nguyen did not provide this.

46. Anderson met with Nguyen after she filed a Bar complaint. Nguyen initially had

insisted that he only would meet with her if she agreed to dismiss the complaint.

47. Anderson and Nguyen met on August 25, 2010, at which time Anderson stated that one-half of the total LLC funds belonged to Chang.

48. Though Nguyen agreed to provide Anderson with pertinent LLC documents following the August 25, 2010 meeting, in fact, he never did so.

49. Anderson was very frustrated with Nguyen, deciding to create a record of his conduct when the requested documents were not produced. She still hoped to save her clients the expense of full discovery and continued litigation.

50. In November 2010, Anderson provided Nguyen with Kim's notarized release representing she had received her full share of the LLC assets and stating that any remaining balance should be distributed to Chang for the Song Estate.

51. Kim's release made it clear that she had no claim on the remaining funds of the LLC. At this point, Nguyen should have turned over the money, as there was no more possible good faith basis for withholding these funds.

52. Nguyen's hearing testimony claiming good faith grounds for having suspicion of the validity of the Kim release was not credible.

53. Nguyen did not respond to Kim's release, continuing to hide his use of the LLC funds for the townhouse investment without client authorization. Formal Complaint and Answer ¶ 22. Nguyen had represented that he was concerned about potential liability to Kim, and that if she signed a release, then he could distribute the LLC assets. But even after receiving the release, he failed to do so.

54. In or about November 2010, Nguyen provided discovery responses with many objections and limited information. He failed to produce documents showing what happened

to the LLC's money. Formal Complaint and Answer ¶ 23. EXs 58A, 58B 59. While he promised to provide documents to Anderson, Nguyen never did so, either informally or in response to her formal discovery requests. He failed to respond to her numerous requests to meet and confer as required by Rule 26(i) of the Civil Rules (CR) about the inadequacy of his discovery responses, which included pages of general objections. His November 2010 interrogatory answers included a chart allegedly showing where some of the LLC's money had been expended, including the \$372,500 payout to Kim. But he failed to include the \$300,000 taken in early 2008 to buy the townhouse, titled not in the name of the LLC, but rather, in his name with his girlfriend.

55. Nguyen's testimony before the hearing officer regarding his interactions with Anderson was less than candid. Rather than admitting he had been evasive and dishonest with Anderson, Nguyen attempted to minimize his conduct and parse words. He only admitted that a few answers were "evasive" and that "he might have been over-literal" in his responses.

56. Nguyen testified at his May 2011 deposition in the civil case that the LLC's assets, after paying out Kim's interest, remained in a CD or bank account at BOA. This statement was false. Nguyen knew it was false. As noted above, by that time, the bulk of the LLC's remaining assets had been invested in Nguyen's townhouse.

57. Anderson met with Nguyen after his deposition. This would be the first time Nguyen told the whole truth of what had happened, admitting that he had "borrowed" funds from the LLC. Formal Complaint and Answer ¶ 26. Also, he admitted that he had "no reasonable excuse or justification that could be satisfactory to explain my indiscretions...." EX 43. Before this, Nguyen never disclosed to Chang, or her lawyer, or her husband, Bomin Chang, that he had taken \$300,000.

58. Nguyen sent an email to Anderson after his deposition, promising to produce bank documents relating to the funds of the LLC. EX 41. He never did this.

59. Anderson hired a private investigator and later determined that Nguyen had no equity in the townhouse.

60. Nguyen's testimony that he never contested that the Song estate was entitled to money and did not want extended litigation over entitlement to the funds is inconsistent with his behavior in this matter.

61. Anderson wanted to file a Bar complaint, earlier, but was concerned about harming her client if it resulted in Nguyen losing his ability to earn income.

62. Nguyen's testimony that Kim's authority was sufficient to spend LLC funds on a personal investment was not credible.

63. On June 10, 2011, Nguyen wired \$296,206.18 to Chang's lawyer, Anderson, from BOA account ending in #4926. Nguyen had refinanced the townhouse to provide \$180,000, took a \$25,000 personal loan from a family member, and used the remaining LLC funds to make the payment. Formal Complaint and Answer ¶ 25. He also contributed personal funds.

64. On January 17, 2012, the Honorable Sharon Armstrong ordered Nguyen to pay the remainder of the LLC's funds into the Registry of Court. Nguyen failed to do so. EX 62, 55. Later in January 2012, Nguyen filed a declaration with the court declaring under penalty of perjury that "all remaining funds from Kent Investments, LLC were directly wired to the Plaintiff's counsel, Kris Anderson's trust account...." EX 63. He failed to note that he owed additional funds and could not pay the remainder of the LLC's funds into the Registry of Court because the funds were tied up in his townhouse.

65. The parties went into mediation and Nguyen agreed to make payments over time

for the remaining funds still owing to the LLC.

66. In February 2012, the parties agreed to dismiss the civil suit and entered into a Stipulated Judgment requiring Nguyen and BHN Law to pay \$88,000 more, at \$1,200 per month, to Chang, as the Administrator of Song's estate. Formal Complaint and Answer ¶ 28.

67. Nguyen claims that he received the authority to use the LLC funds to purchase the townhouse from Kim, but knew that she already had received all the money to which she was entitled.

68. In 2013, Nguyen and Johnson sold the townhouse for \$475,000, and offered a lump sum to Chang in full and final settlement. Chang accepted. Formal Complaint and Answer ¶ 29.

69. As to each count of the Formal Complaint, Nguyen acted intentionally.

70. Nguyen's conflict of interest as charged in Count 1 caused at least serious potential injury and was done knowing that his interests were adverse to the client's with the intent to benefit the lawyer or another. Nguyen used client funds to buy a townhouse and evidenced that with a note he signed as both maker and borrower even after any authority under a Power of Attorney had expired and no such authority had ever been granted by the Power of Attorney. He failed to record his client's purported security interest based on the note.

71. The theft and conversion as charged in Count 2 caused actual serious injury in that the rightful recipients were deprived of the use of their funds for years and had to expend their own funds on attorney's fees before Nguyen made any effort at restitution.

72. Nguyen's false testimony at his deposition as charged in Count 3 caused actual serious injury because it impeded the plaintiff's access to evidence and because it impeded both the tribunal and the opposing party in their quest for the truth. Lawyers who lie under

oath cause actual serious injury to the profession.

73. Nguyen's failure to respond to discovery requests as charged in Count 4 caused actual serious injury for the same reasons outlined in the prior paragraph.

74. Nguyen's failure to comply with Judge Armstrong's order as charged in Count 5 caused potentially serious injury to the opposing party because the court had tried to place any funds due the plaintiff in a secure location (the court registry) until the litigation concluded. If anything had happened to Nguyen before the case settled, plaintiffs might have been permanently deprived of those funds.

75. While a dishonest or selfish motive most obviously applies to the criminal conduct as charged and found in Counts 2 and 3, I find that Nguyen acted with a dishonest or selfish motive as to all counts. Based on the violations found, Nguyen committed multiple offenses. Finally, he has refused to acknowledge the wrongful nature of his conduct. The rationalizations of his Answer to the Formal Complaint that he merely "invested" client funds carried through to his hearing testimony.

76. The ODC concedes that Nguyen has no prior discipline.

CONCLUSIONS OF LAW

Violations Analysis

The Hearing Officer finds that ODC proved the following by a clear preponderance of the evidence:

77. By writing and executing a Promissory Note from the LLC to himself, Nguyen admits that he entered into a business transaction with his client, Kent Investments, LLC, without obtaining the necessary written informed consent in violation of RPC 1.7(a)(2) and RPC 1.8(a) as charged in Count 1 and admitted in the Formal Complaint and Answer ¶ 30.

78. By using and converting \$300,000 without authorization, Nguyen violated RPC 8.4(b) (by committing the crime of theft in the first degree (RCW 9A.56.030)), RPC 8.4(c) and RPC 1.15A(b) as charged in Count 2.

79. By testifying that the LLC's money was in a CD or other account at the Bank of America, when at least \$300,000 of it had been used by Nguyen to buy his townhouse, Nguyen violated RPC 8.4(b)(by committing false swearing (RCW 9A.72.040)), RPC 8.4(c), RPC 3.3(a), and RPC 3.4(a)(b) as charged in Count 3. The Office of Disciplinary Counsel (ODC) voluntarily dismissed the perjury charge. Bar File #34 (ODC's Hearing Brief at 7).

80. By failing to provide requested documents and by otherwise obstructing Chang's efforts to discover what happened to her family's share of the LLC assets in the civil case discovery, Nguyen violated RPC 3.4(a), 3.4(b) and 3.4(d), as charged in Count 4.

81. By failing to comply with Judge Armstrong's order to pay the remaining LLC funds into the registry of court, Nguyen violated RPC 3.4(c) and RPC 8.4(j), as charged in Count 5.

Sanction Analysis

82. A presumptive sanction must be determined for each ethical violation. In re Anschell, 149 Wn.2d 484, 69 P.3d 844, 852 (2003). The following standards of the American Bar Association's Standards for Imposing Lawyer Sanctions ("ABA Standards") (1991 ed. & Feb. 1992 Supp.) are presumptively applicable in this case:

83. The presumptive ABA Standard for Count 1 is 4.3 (Failure to Avoid Conflicts of Interest). The presumptive sanction is disbarment under ABA Standard 4.31 because Nguyen acted with knowledge that his interests were adverse to the client's with the intent to benefit the lawyer or another and caused at least serious potential injury to a client. The cited Standard provides as follows:

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

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

84. The presumptive ABA Standard for theft as charged in Count 2 is disbarment under ABA Standard 5.11(a)(Failure to Maintain Personal Integrity). The presumptive ABA Standard for the dishonesty and conversion also charged in Count is disbarment under ABA Standard 4.11 (Failure to Preserve the Client's Property). Those Standards follow.

5.11(a) Disbarment is generally appropriate when:

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

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

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

85. The presumptive ABA Standard for false swearing as alleged in Count 3, is also disbarment under ABA Standard 5.11(a) set out above.

86. The presumptive ABA Standard for the misconduct charged in Count 4 for failing to comply with court rules regarding discovery is disbarment under ABA Standard 6.21 (Abuse of the Legal Process) or disbarment for improperly withholding material information under ABA Standard 6.11 (False Statements, Fraud, and Misrepresentation). The cited provisions follow.

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

6.11 Disbarment is generally appropriate when a lawyer, with the intent to deceive the court, makes a false statement, submits a false document, or improperly withholds material information, and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding.

87. The presumptive ABA Standard for the misconduct charged in Count 5 for failing to comply with a court order is ABA Standard 6.21 quoted above and carries a presumptive sanction of disbarment.

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

89. Based on the Findings of Fact and Conclusions of Law and application of the ABA Standards, the appropriate presumptive sanction is disbarment.

90. The following aggravating factors set forth in Section 9.22 of the ABA Standards are applicable in this case:

- (b) dishonest or selfish motive;
- (d) multiple offenses; and
- (g) refusal to acknowledge wrongful nature of conduct.

91. The following mitigating factor set forth in Section 9.32 of the ABA Standards is applicable to this case:

- (a) absence of a prior disciplinary record.

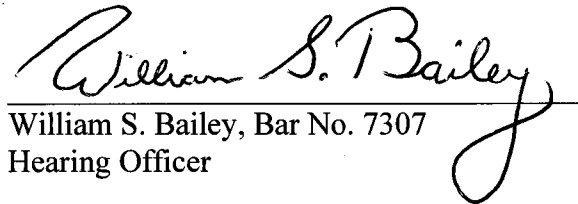
This lone mitigating factor cannot overcome the consequences of the serious ethical violations found.

Recommendation

92. Based on the ABA Standards and the applicable aggravating and mitigating factors,

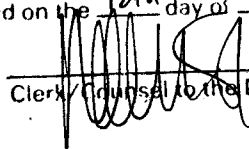
the Hearing Officer recommends that Respondent Brian Huy Xuan Nguyen be disbarred. No restitution is appropriate, as Nguyen has settled the civil case by payments to Song's Estate. Reinstatement should be conditioned on the payment of this proceeding's costs.

Dated this 6th day of February, 2015.


William S. Bailey, Bar No. 7307
Hearing Officer

CERTIFICATE OF SERVICE

I certify that I caused a copy of the DOF, COE & HD's Recommendation
to be delivered to the Office of Disciplinary Counsel and to be mailed
to Sam Franklin, Respondent/Respondent's Counsel
at 701 Pike St #1200 Seattle WA 98101 by Certified/first class mail,
postage prepaid on the 12th day of February, 2015


Clerk/Counsel to the Disciplinary Board