

MAR 29 2016

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7 BEFORE THE
8 DISCIPLINARY BOARD
9 OF THE
10 WASHINGTON STATE BAR ASSOCIATION

11 In re

12 **DAVID J. MCAULIFF,**
13 Lawyer (Bar No. 40687).

Proceeding No. 15#00051

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

14 The undersigned Hearing Officer held a default hearing on March 29, 2016 under Rule
15 10.6 of the Rules for Enforcement of Lawyer Conduct (ELC).

16 **FINDINGS OF FACTS AND CONCLUSIONS OF LAW**
17 **REGARDING CHARGED VIOLATIONS**

18 1. The Formal Complaint (Bar File (BF) 2) charged David J. McAuliff with
19 misconduct as set forth therein. A copy of the Formal Complaint is attached to this decision.

20 2. Under ELC 10.6(a)(4), the Hearing Officer finds that each of the facts set forth in
21 the Formal Complaint is admitted and established.

22 3. Under ELC 10.6(a)(4), the Hearing Officer concludes that each of the violations
23 charged in the Formal Complaint is admitted and established as follows:

24 **Count 1** - By failing to maintain a complete and accurate check register, on a

1 contemporaneous basis, Respondent violated RPC 1.15A(h)(2) and RPC
2 1.15B(a)(1).

3 **Count 2** - By failing to maintain client ledgers, on a contemporaneous basis,
4 Respondent violated RPC 1.15A(h)(2) and RPC 1.15B(a)(2).

5 **Count 3** - By failing to reconcile his trust account, on a monthly or quarterly
6 basis, Respondent violated RPC 1.15A(h)(6).

7 **Count 4** - By depositing client funds to an account that was not a trust account
8 and by failing to maintain client funds in a trust account, Respondent violated
9 RPC 1.15A(c) and RPC 1.15A(i).

10 **Count 5** - By disbursing funds in excess of the amount client JL had on deposit
11 and by using other clients' funds on behalf of JL, Respondent violated RPC
12 1.15A(h)(8).

13 **Count 6** - By failing to respond promptly to inquiries and requests during a
14 grievance investigation, Respondent violated RPC 8.4(i) and ELC 1.5 and ELC
15 5.3(f) and (g).

16 **FINDINGS OF FACTS AND CONCLUSIONS OF LAW**
17 **REGARDING RECOMMENDED SANCTION**

18 4. Respondent knew or should have known he was failing to maintain a complete and
19 accurate checkbook register. Prior to the November 2013 overdraft of his trust account,
20 Respondent maintained checkbook stubs, but the stubs did not include all transactions or a
21 running balance after each transaction. Therefore, the stubs did not provide a complete record
22 of all funds being deposited to and disbursed from the trust account, and did not show how
23 much money was in the account at any given point in time.

24 5. Respondent's failure to maintain a complete and accurate checkbook register
caused potential injury by placing his clients' funds at risk due to his inability to fully account
for the funds entrusted to him.

6. Respondent knew he was failing to maintain client ledgers and failing to perform
bank and client ledger reconciliations. Without client ledgers and reconciliations, Respondent
was unable to track the funds that were in his possession for each client, and unable to

1 determine whether he was properly holding all client funds in his trust account.

2 7. Respondent's conduct in depositing client funds into his "Business Fundamentals
3 Checking" account, which was not a trust account, was knowing. Respondent's actions caused
4 potential injury by removing client funds from the protection of a trust account and making
5 them vulnerable to Respondent's creditors.

6 8. Respondent should have known that, when he issued check #1466 to JL in the
7 amount of \$1,192.21, JL had only \$24.31 on deposit in the trust account. Respondent's conduct
8 caused actual and potential harm in that check #1466 was paid by invading other clients' funds,
9 causing a shortage in Respondent's trust account.

10 9. Respondent's failure to promptly respond to inquiries and requests during a
11 grievance investigation was knowing.

12 10. Respondent's conduct caused actual and potential harm by obstructing the
13 investigation and requiring ODC to expend additional time and resources to subpoena
14 Respondent and take his deposition.

15 11. The following standards of the American Bar Association's Standards for
16 Imposing Lawyer Sanctions ("ABA Standards") (1991 ed. & Feb. 1992 Supp.) presumptively
17 apply in this case:

18 12. ABA Standards 4.12 is most applicable to Respondent's violations of RPC
19 1.15A(h)(2), RPC 1.15B(a)(1), RPC 1.15B(a)(2), RPC 1.15A(h)(6), RPC 1.15A(c), RPC
20 1.15A(i), and RPC 1.15A(h)(8):

21 4.12 **Suspension** is generally appropriate when a lawyer knows or should have
22 known that he was dealing improperly with client property and causes injury or
potential injury.

23 13. The presumptive sanction for Respondent's misconduct under each of Counts 1
24

1 through 5 is suspension.

2 14. ABA Standards 7.2 is most applicable to Respondent's violations of RPC 8.4(I),
3 ELC 1.5 and ELC 5.3(f) and (g):

4 7.2 **Suspension** is generally appropriate when a lawyer knowingly engages in
5 conduct that is a violation of a duty owed as a professional and causes injury or
6 potential injury to a client, the public, or the legal profession.

7 15. The presumptive sanction for Respondent's misconduct under Count 6 is
8 suspension.

9 16. The following aggravating factors set forth in Section 9.22 of the ABA Standards
10 apply in this case:

- 11 (d) multiple offenses;
- 12 (i) substantial experience in the practice of law (Respondent was admitted to
13 practice law in California in 1995, and in Washington in 2008).

14 17. It is an additional aggravating factor that Respondent failed to file an Answer to
15 the Formal Complaint as required by ELC 1.5 and ELC 10.5(a).¹

16 18. The following mitigating factor set forth in Section 9.32 of the ABA Standards
17 applies to this case:

- 18 (a) absence of a prior disciplinary record.

19 19. On balance, the aggravating and mitigating factors support a minimum suspension
20 of six months.

21 **RECOMMENDATION**

22 20. Based on the ABA Standards and the applicable aggravating and mitigating
23 factors, the Hearing Officer recommends that Respondent be suspended for six months with
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¹ ELC 10.5(a) provides: "Failure to file an answer as required may be grounds for discipline and for an order of default under rule 10.6."

1 reinstatement conditioned on the following: (1) Respondent will produce trust account records
2 and reconciliations meeting the requirements of RPC 1.15B for the period beginning three
3 months prior to the effective date of Respondent's suspension up through the date of his
4 application for reinstatement; and (2) Respondent will provide documentation demonstrating he
5 has disbursed funds to all clients and third parties entitled to receive funds. The Hearing Officer
6 further recommends that, upon reinstatement from suspension, Respondent be subject to
7 probation for a period of two years, with periodic reviews under ELC 13.8 of his trust account
8 practices.

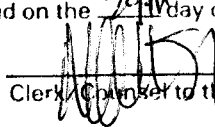
9 DATED this 21st day of March, 2016.

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12 Christopher Strawn,
13 Hearing Officer

14 CERTIFICATE OF SERVICE

15 I certify that I caused a copy of the FOF COL & HO's Recommendation
16 to be delivered to the Office of Disciplinary Counsel and to be mailed
to David McHugh Respondent/Respondent's Counsel
at 1925 SE 30th Street, Bellevue, WA 98004 Certified/first class mail
17 postage prepaid on the 21st day of March, 2016

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20 Clerk/Counselor to the Disciplinary Board