

**FILED**

Sep 13, 2022

**Disciplinary  
Board**

Docket # 022

DISCIPLINARY BOARD  
WASHINGTON STATE BAR ASSOCIATION

In re

**NICHOLAS A. FAY,**  
Lawyer (Bar No. 47603).

Proceeding No. 22#00032

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

The undersigned Hearing Officer held a default hearing on September 7, 2022 under Rule 10.6 of the Washington Supreme Court's Rules for Enforcement of Lawyer Conduct (ELC).

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

1. The Formal Complaint (Bar File No.3) charged Nicholas A. Fay with misconduct as set forth therein. A copy of the Formal Complaint is attached to this decision.

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

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

4. COUNT 1 - By failing to keep Kauffman reasonably informed about the status of the 2018 Whatcom County case and by failing to promptly comply with Kauffman's reasonable

1 requests for information, Respondent violated RPC 1.3 and RPC 1.4.

2 5. COUNT 2 - By failing to act with reasonable diligence in representing Kauffman and  
3 in handling the 2018 Whatcom County case, Respondent violated RPC 1.3 and RPC 3.2.

4 6. COUNT 3 - By charging and collecting an unreasonable fee of more than \$18,000,  
5 Respondent violated RPC 1.5(a).

6 7. COUNT 4 - By failing to respond to the Kauffman grievance, Respondent violated  
7 RPC 8.1(b) and 8.4(l) by violating Respondent's duties under ELC 1.5, 5.3(f), and 5.3(g).

8 8. COUNT 5 - By failing to promptly provide L.B. an accounting of L.B.'s funds upon  
9 L.B.'s request, Respondent violated RPC 1.15A(e).

10 9. COUNT 6 - By failing to respond to requests to explain the IOLTA account overdrafts,  
11 failing to appear for the November 2021 deposition, and failing to produce documents in response  
12 to a subpoena, Respondent violated RPC 8.1(b) and 8.4(l) by violating Respondent's duties under  
13 ELC 1.5, 5.3(f), and 5.3(g).

14 10. COUNT 7 - Respondent wrote and deposited checks totaling \$17,000 made out to  
15 Respondent, without sufficient funds to meet those checks. In so doing, Respondent violated  
16 RPC 8.4(c) by engaging in fraudulent and deceitful conduct.

17 11. COUNT 8 - By failing to communicate with L.B. and Kauffman, by failing to provide  
18 a way for clients to obtain information about their legal matters, and by failing to maintain  
19 professional channels of communication by which Respondent could be located or corresponded  
20 with by clients and others (such as the Association and process servers), Respondent abandoned  
21 Respondent's practice without providing for Respondent's clients' needs in violation of RPC 1.3,  
22 RPC 1.4(a), and RPC 1.16(d).

1 **FINDINGS OF FACTS AND CONCLUSIONS OF LAW**  
2 **REGARDING RECOMMENDED SANCTION**

3 12. Respondent acted knowingly in failing to communicate with Kauffman and L.B., and  
4 knowingly in failing to take action in their cases.

5 13. Respondent acted knowingly in failing to respond to ODC's request for responses to  
6 the Kauffman grievance and the IOLTA overdrafts.

7 14. Respondent acted knowingly in writing and depositing checks without sufficient funds  
8 to cover them, and these acts were fraudulent and deceitful.

9 15. Respondent caused serious injury to Kauffman and L.B.

10 16. Respondent caused injury to the lawyer discipline system.

11 17. Respondent abandoned Respondent's practice of law.

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

15 19. ABA Standard 4.4 is most applicable to cases involving violations of RPC 1.3 and  
16 RPC 1.4 (Count 1 and 2). Respondent's knowing lack of diligence caused serious injury to  
17 Kauffman, whose lawsuit was dismissed and who received no value for the \$18,037.90 Kauffman  
18 paid to Respondent. The presumptive sanction is disbarment.

19 20. ABA Standard 6.2 is most applicable to cases involving violations of RPC 3.2 (Count  
20 2). Respondent acted knowingly in failing to expedite the litigation. Respondent's actions caused  
21 interference with the legal proceeding and injury to a client. The presumptive sanction is  
22 suspension.

23 21. ABA Standard 7.0 is most applicable to cases involving violations of RPC 1.5 (Count  
24 3). Respondent acted knowingly in charging and collecting an unreasonable fee, causing serious

1 injury to Kauffman. The presumptive sanction is disbarment.

2 22. ABA Standard 7.0 is most applicable to cases involving violations RPC 8.1(b) and  
3 RPC 8.4(l) (Counts 4 and 6). The lawyer discipline system, which depends on lawyers'  
4 cooperation to function properly, was harmed by Respondent's knowing failure to cooperate. The  
5 presumptive sanction for Counts 4 and 6 is suspension.

6 23. ABA Standard 4.1 is most applicable to cases involving violations of RPC 1.15A  
7 (Count 5). Respondent caused serious injury to L.B., who received no value for the \$14,000 paid  
8 to Respondent, and Respondent did not respond to L.B.'s requests for an accounting and refund.  
9 The presumptive sanction is suspension.

10 24. ABA Standard 5.1 is most applicable to cases involving violations of RPC 8.4(c)  
11 (Count 7). Respondent knowingly wrote and deposited checks totaling \$17,000 made out to  
12 Respondent, drawn on Respondent's IOLTA account, without sufficient funds to meet those  
13 checks. In so doing, Respondent intentionally engaged in fraudulent and deceitful conduct that  
14 adversely reflected on Respondent's fitness to practice. The presumptive sanction is disbarment.

15 25. ABA Standard 4.4 is most applicable to cases involving violations of RPC 1.3, RPC  
16 1.4(a), and RPC 1.16(d) wherein a lawyer abandons their practice (Count 8). Respondent  
17 knowingly abandoned the practice of law, causing serious injury to clients. The presumptive  
18 sanction is disbarment.

19 26. Under In re Disciplinary Proceeding Against Petersen, 120 Wn.2d 833, 854, 846 P.2d  
20 1330 (1993), the "ultimate sanction imposed should at least be consistent with the sanction for  
21 the most serious instance of misconduct among a number of violations."

22 27. The presumptive sanction is disbarment.

23 28. The following aggravating factors set forth in Section 9.22 of the ABA Standards  
24

1 apply in this case:

- 2 (b) dishonest or selfish motive;
- 3 (d) multiple offenses;
- 4 (j) indifference to making restitution.

5 29. It is an additional aggravating factor that Respondent failed to file an answer to the  
6 Formal Complaint as required by ELC 10.5(a).

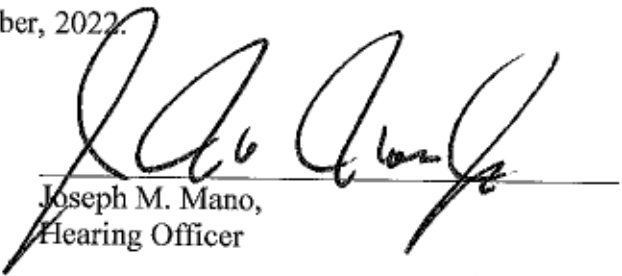
7 30. The following mitigating factor set forth in Section 9.32 of the ABA Standards applies  
8 to this case:

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


### 10 RECOMMENDATION

11 31. Based on the ABA Standards and the applicable aggravating and mitigating factors,  
12 the Hearing Officer recommends that Respondent Nicholas A. Fay be disbarred, and that  
13 Respondent be ordered to pay restitution in the amount of \$18,037.90 to Greg Kauffman and  
14 \$14,000 to L.B.

15 DATED this 13<sup>th</sup> day of September, 2022.

16   
17 Joseph M. Mano,  
18 Hearing Officer

I certify that I caused a copy of the FOF, COL and HO's Recommendation to be emailed to the Office of Disciplinary Counsel and to Respondent Nicholas A. Fay, at [nick@nickfay.com](mailto:nick@nickfay.com), on the 13<sup>th</sup> day of September, 2022.

A handwritten signature in blue ink, appearing to be 'M. J. ...', positioned above a horizontal line.

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Clerk to the Disciplinary Board

**FILED**

Jun 16, 2022

Disciplinary  
Board

Docket # 003

DISCIPLINARY BOARD  
WASHINGTON STATE BAR ASSOCIATION

In re

**NICHOLAS A. FAY,**  
Lawyer (Bar No. 47603).

Proceeding No. 22#00032

FORMAL COMPLAINT

Under Rule 10.3 of the Washington Supreme Court's Rules for Enforcement of Lawyer Conduct (ELC), the Office of Disciplinary Counsel (ODC) of the Washington State Bar Association charges the above-named lawyer with acts of misconduct under the Washington Supreme Court's Rules of Professional Conduct (RPC) as set forth below.

**ADMISSION TO PRACTICE**

1. Respondent Nicholas A. Fay (Respondent) was admitted to the practice of law in the State of Washington on July 23, 2014.

**FACTS REGARDING COUNTS 1-4**

The Kauffman Grievance

2. In 2018, Greg Kauffman hired Respondent to handle a dispute with a neighbor related to buried utility lines.

1           3. Respondent told Kauffman that Respondent would charge an hourly rate and that  
2 Kauffman would be responsible for some costs.

3           4. On November 29, 2018, Respondent filed a complaint related to the utility line  
4 dispute in Whatcom County Superior Court No. 18-2-02244-37 (the 2018 Whatcom County  
5 case).

6           5. Initially, Respondent kept Kauffman verbally informed about the litigation.

7           6. In early 2019, the opposing party offered to settle for \$7,000, but on Respondent's  
8 advice, Kauffman declined the offer.

9           7. As of April 2019, Kauffman had paid Respondent a total of \$7,848.31 for fees and  
10 costs.

11           8. On August 2, 2019, Respondent filed a Second Amended Complaint and, on August  
12 30, 2019, the defendants filed an answer, affirmative defenses, and counterclaims.

13           9. In September 2019, Kaufman paid Respondent an additional \$10,189.59 for fees  
14 and costs.

15           10. On December 8, 2020, after no action of record had been taken in the 2018  
16 Whatcom County case for twelve months, the court clerk filed and served a Clerk's Notice For  
17 Dismissal For Want of Prosecution.

18           11. Respondent did not file a response.

19           12. On January 22, 2021, the court dismissed the 2018 Whatcom County case without  
20 prejudice.

21           13. Meanwhile, between November 2019 and May 2021, Kauffman sent Respondent  
22 multiple emails asking about the status of the 2018 Whatcom County case and requesting that  
23 Respondent communicate with Kauffman.



1 14. Respondent last communicated with Kauffman by an email on May 3, 2021, in  
2 which Respondent claimed Respondent would be in touch "tomorrow."

3 15. Respondent did not tell Kauffman about the dismissal of the 2018 Whatcom County  
4 case.

5 16. Respondent did not keep Kauffman reasonably informed about the status of the  
6 2018 Whatcom County case.

7 17. Respondent abandoned the litigation in the 2018 Whatcom County case before it  
8 was concluded.

9 18. Respondent acted knowingly in failing to communicate with Kauffman, and  
10 knowingly in failing to take action in the 2018 Whatcom County case.

11 19. Respondent caused injury to Kauffman, whose lawsuit was dismissed and who  
12 received no value for the \$18,037.90 Kauffman paid to Respondent.

13 Failure to Cooperate with ODC

14 20. On June 3, 2021, Kauffman filed a grievance (the Kauffman grievance) with ODC.

15 21. By letter dated August 18, 2021, ODC requested Respondent's response.

16 22. Respondent did not respond.

17 23. On September 24, 2021, ODC sent a letter to Respondent requesting a response  
18 within ten days.

19 24. Respondent did not respond.

20 25. Respondent never provided a response to the Kauffman grievance.

21 26. Respondent acted knowingly in failing to respond to ODC's request for a response  
22 to the Kauffman grievance.

23 27. Respondent caused injury to the lawyer discipline system, which expended

1 additional resources because of Respondent's failure to cooperate.

2 **COUNT 1**

3 28. By failing to keep Kauffman reasonably informed about the status of the 2018  
4 Whatcom County case and/or by failing to promptly comply with Kauffman's reasonable  
5 requests for information, Respondent violated RPC 1.3 and/or RPC 1.4.

6 **COUNT 2**

7 29. By failing to act with reasonable diligence in representing Kauffman and/or in  
8 handling the 2018 Whatcom County case, Respondent violated RPC 1.3 and/or RPC 3.2.

9 **COUNT 3**

10 30. By charging and/or collecting an unreasonable fee of more than \$18,000,  
11 Respondent violated RPC 1.5(a).

12 **COUNT 4**

13 31. By failing to respond to the Kauffman grievance, Respondent violated RPC 8.1(b)  
14 and/or 8.4(d) by violating Respondent's duties under ELC 1.5, 5.3(f), and/or 5.3(g).

15 **FACTS REGARDING COUNTS 5-8**

16 Representation of L.B.

17 32. In 2018, L.B. hired Respondent to represent L.B. in a landlord-tenant dispute.

18 33. L.B. paid Respondent \$300 to begin work and agreed to Respondent's hourly rate  
19 of approximately \$200-250 per hour.

20 34. By the fall of 2018, L.B. had paid Respondent \$6,000 for pre-litigation work.

21 35. In February 2019, L.B.'s friend paid Respondent an additional advance fee of  
22 \$14,000 on L.B.'s behalf.

23 36. Respondent informed L.B. that Respondent would bill against this advance fee

1 deposit.

2 37. In March 2019, Respondent filed a complaint on behalf of L.B. in Whatcom  
3 County Superior Court No. 19-2-00544-37 (the 2019 Whatcom County case).

4 38. Shortly after the case was filed, L.B. had difficulty reaching Respondent. L.B.  
5 attempted to contact Respondent numerous times via email in 2019 and early 2020, but  
6 Respondent was not responsive to most of L.B.'s communications.

7 39. Respondent last communicated with L.B. via email on February 14, 2020, wherein  
8 Respondent wrote that Respondent would provide an update.

9 40. After that, L.B. attempted to reach Respondent through Kulshan Law Group  
10 (Kulshan), where Respondent was formerly employed. The receptionist informed L.B. that  
11 Respondent was no longer with the firm.

12 41. After February 2020, L.B. did not receive any information about the work  
13 Respondent did on L.B.'s case, and Respondent did not respond to any of L.B.'s requests for  
14 an update on the case.

15 42. Respondent did not provide L.B. with an accounting or refund, despite L.B.'s  
16 requests.

17 43. On February 2, 2021, the court clerk filed a Clerk's Notice for Dismissal for Want  
18 of Prosecution.

19 44. Respondent did not file a response.

20 45. On March 8, 2021, the court entered a Clerk's Order of Dismissal without  
21 prejudice in the 2019 Whatcom County case.

22 46. In January 2022, L.B.'s email to Respondent was returned as undeliverable.

23 47. Respondent did not tell L.B. that the 2019 Whatcom County case was dismissed.

1 48. Respondent did not keep L.B. reasonably informed about the status of the 2019  
2 Whatcom County case.

3 49. Respondent abandoned the litigation in the 2019 Whatcom County case before it  
4 was concluded.

5 50. Respondent acted knowingly in failing to communicate with L.B., and knowingly in  
6 failing to take action in the 2019 Whatcom County case.

7 51. Respondent caused injury to L.B., whose lawsuit was dismissed and who received  
8 no value for the \$14,000 paid to Respondent.

9 Trust Account Overdrafts and Failure to Cooperate

10 52. Kulshan closed in 2020 and another lawyer from Kulshan gave Respondent a check  
11 in the amount of \$4,837.24, dated December 31, 2020, representing funds belonging to five  
12 clients, including \$3,125.64 belonging to L.B.

13 53. On January 5, 2021, Respondent opened an IOLTA account at People's Bank for  
14 Fay Professional Services PLLC.

15 54. On January 14, 2021, Respondent deposited the check from Kulshan into this  
16 account.

17 55. Respondent wrote Check #1026 on Respondent's Peoples Bank IOLTA in the  
18 amount of \$12,000, dated June 11, 2021, and made payable to Respondent.

19 56. At the time Respondent wrote Check #1026, there were insufficient funds in the  
20 IOLTA to cover the check.

21 57. When Respondent deposited Check #1026 into another account, it was dishonored  
22 and returned for insufficient funds.

23 58. Respondent wrote Check #1027 on Respondent's Peoples Bank IOLTA in the

1 amount of \$1,000, dated June 11, 2021 and made payable to Respondent.

2 59. Respondent deposited Check #1027 into another account, and the check was  
3 honored.

4 60. Respondent wrote Check #1028 on Respondent's Peoples Bank IOLTA in the  
5 amount of \$5,000, dated June 15, 2021 and made payable to Respondent.

6 61. At the time Respondent wrote Check #1028, there were insufficient funds in the  
7 IOLTA to cover the check.

8 62. When Respondent deposited Check #1028 into another account, it was dishonored  
9 and returned for insufficient funds.

10 63. Respondent acted knowingly in writing and depositing Checks #1026 and #1028,  
11 and knew that the checks were drawn on insufficient funds.

12 64. Respondent's conduct in writing and depositing checks when Respondent knew  
13 there were insufficient funds in the bank account to pay the checks was fraudulent and/or  
14 deceitful.

15 65. On June 21, 2021, ODC received a notice of overdraft from Peoples Bank related to  
16 Check #1026.

17 66. On June 23, 2021, ODC sent Respondent a letter requesting an explanation of the  
18 cause of the overdraft and Respondent's trust account records.

19 67. Respondent did not respond.

20 68. On June 25, 2021, ODC received a notice of overdraft from Peoples Bank related to  
21 Check #1028.

22 69. On June 28, 2021, ODC sent Respondent a letter requesting an explanation of the  
23 cause of the second overdraft and Respondent's trust account records.

1 70. Respondent did not respond.

2 71. On July 29, 2021, ODC sent Respondent a letter requesting a response within ten  
3 days.

4 72. Respondent did not respond.

5 73. On September 9, 2021, ODC sent Respondent a Subpoena via certified mail.

6 74. The Subpoena required Respondent's appearance at a deposition on September 30,  
7 2021.

8 75. The Subpoena required Respondent to produce Respondent's IOLTA account  
9 records.

10 76. On September 29, 2021, via email to ODC, Respondent acknowledged receipt of  
11 the Subpoena and requested a continuance of the deposition.

12 77. ODC agreed to continue the deposition to October 14, 2021.

13 78. On October 14, 2021, Respondent appeared at the deposition with a lawyer.

14 79. Before going on the record, Respondent's lawyer requested a continuance of the  
15 deposition to allow another lawyer to appear on Respondent's behalf.

16 80. The deposition was continued to November 1, 2021.

17 81. Respondent failed to appear at the deposition on November 1, 2021 and failed to  
18 produce records in response to the Subpoena. No lawyer appeared on Respondent's behalf.

19 82. On November 17, 2021, ODC filed a Petition for Interim Suspension with the  
20 Washington Supreme Court based on Respondent's failure to cooperate with the investigation  
21 of the IOLTA overdrafts and the Kauffman grievance.

22 83. On November 24, 2021, the Court entered an Order to Show Cause ordering  
23 Respondent to appear before the Court on January 11, 2022.

1 84. Respondent did not appear before the Court on January 11, 2022.

2 85. On January 13, 2022, the Court entered an order immediately suspending  
3 Respondent's license to practice pending compliance with disciplinary investigation requests  
4 and subpoenas.

5 86. Respondent acted knowingly in failing to respond to ODC's requests for an  
6 explanation of the IOLTA overdrafts, in failing to produce IOLTA account records, in failing  
7 to appear for the November 1, 2021 deposition, and/or in failing to respond to the Court's  
8 Order to Show Cause.

9 87. Respondent caused injury to the lawyer discipline system, which expended  
10 additional resources because of Respondent's failure to cooperate.

11 88. Respondent never provided an explanation of the cause of the overdrafts or  
12 produced IOLTA account records.

13 Abandonment of Practice

14 89. On multiple occasions beginning in August 2021, ODC tried to personally serve  
15 Respondent with a Subpoena Duces Tecum. Beginning in November 2021, ODC tried to  
16 personally serve Respondent with the Court's Order to Show Cause.

17 90. Neither process servers nor ODC's investigators were able to locate Respondent for  
18 personal service, despite multiple attempts, including asking Respondent's known associates  
19 where Respondent might be found. Respondent could not be found at any of Respondent's  
20 addresses of record with the Washington State Bar (Association).

21 91. Certified mail sent to Respondent's address of record with the Association in  
22 December 2021 was returned unclaimed.

23 92. In January and February 2022, ODC sent emails to Respondent's email address of

1 record with the Association. The emails were returned as undeliverable.

2 93. As of May 2021, Respondent had stopped communicating with both L.B. and  
3 Kauffman.

4 94. As of May 2021, Respondent had knowingly abandoned Respondent's practice of  
5 law.

6 **COUNT 5**

7 95. By failing to promptly provide L.B. an accounting of L.B.'s funds upon L.B.'s  
8 request, Respondent violated RPC 1.15A(e).

9 **COUNT 6**

10 96. By failing to respond to requests to explain the IOLTA account overdrafts, failing  
11 to appear for the November 2021 deposition, and/or failing to produce documents in response  
12 to a subpoena, Respondent violated RPC 8.1(b) and/or 8.4(d) by violating Respondent's duties  
13 under ELC 1.5, 5.3(f), and/or 5.3(g).

14 **COUNT 7**

15 97. Respondent wrote and deposited checks totaling \$17,000 made out to Respondent,  
16 without sufficient funds to meet those checks. In so doing, Respondent violated RPC 8.4(c) by  
17 engaging in fraudulent and deceitful conduct.

18 **COUNT 8**

19 98. By failing to communicate with L.B. and/or Kauffman, by failing to provide a way  
20 for clients to obtain information about their legal matters, and/or by failing to maintain  
21 professional channels of communication by which Respondent could be located or  
22 corresponded with by clients and others (such as the Association and process servers),  
23 Respondent abandoned Respondent's practice without providing for Respondent's clients'



1 needs in violation of RPC 1.3, RPC 1.4(a), and/or RPC 1.16(d).

2           THEREFORE, Disciplinary Counsel requests that a hearing be held under the Rules for  
3 Enforcement of Lawyer Conduct. Possible dispositions include disciplinary action, probation,  
4 restitution, and assessment of the costs and expenses of these proceedings.

5  
6           Dated this 16th day of June, 2022.

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10 Erica Temple, Bar No. 28458  
11 Senior Disciplinary Counsel  
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