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FILED
SUPREME COURT
STATE OF WASHINGTON
3/26/2020
BY SUSAN L. CARLSON
CLERK

THE SUPREME COURT OF WASHINGTON

In re John Rolfing Muenster, Lawyer (Bar No. 6237)	)	**ORDER ON MOTIONS**
	)	No. 201,872-6

On March 9, 2020, this Court received "PETITIONER/APPELLANT'S MOTION FOR RECONSIDERATION", "PETITIONER-APPELLANT'S MOTION TO TRANSMIT PETITIONER'S ANSWER AND AFFIRMATIVE DEFENSES, DKT. NO. 23.00, TO SUPREME COURT" and "PETITIONER - APPELLANT'S MOTION TO UPDATE CASE CAPTION" in the above matter.

Now, therefore, it is hereby

ORDERED:

The motion for reconsideration and motion to supplement the record are both denied. Pursuant to RAP 3.4, the motion to update the case caption is granted only to the extent that the case title will be changed to the same title as used by the WSBA Disciplinary Board, which is: In re John Rolfing Muenster, Lawyer (Bar No. 6237).

DATED at Olympia, Washington this 26th day of March, 2020.

Stegner, C. J.
CHIEF JUSTICE

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FILE
IN CLERKS OFFICE
SUPREME COURT, STATE OF WASHINGTON
DATE FEB 20 2020
CHIEF JUSTICE

This opinion was
filed for record
at 8:00 am on Feb. 20, 2020
Deputy
for Susan L. Carlson
Supreme Court Clerk

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In the Matter of the Disciplinary Proceeding Against JOHN ROLFING MUENSTER, Attorney at Law (Bar No. 6237)	No. 201,872-6 En Banc Filed FEB 20 2020

WIGGINS, J.—The issue before this court is whether the Disciplinary Board (Board) of the Washington State Bar Association (WSBA) sustainably declined sua sponte review of the hearing officer's decision in this case. We affirm the Board's order declining sua sponte review, adopting the hearing officer's decision, and ordering that John Rolfing Muenster be disbarred and that he pay restitution with interest as set forth therein. *See* Administrative R. (AR) at 22 (Findings of Fact, Conclusions of Law and Hearing Officer's Recommendation).

FACTS AND PROCEDURAL HISTORY

Muenster was admitted to the practice of law in Washington in 1975. In 2016, he was subjected to disciplinary proceedings. These proceedings concerned his mismanagement and conversion of client funds.

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In common with many lawyers, Muenster maintained a trust account for processing collections, distributing funds, and other functions. AR at 8.[1] Muenster maintained the account himself, making bank deposits and withdrawing funds. *Id.* Significantly, Muenster's trust account contained funds belonging to several clients, as well as funds belonging to Muenster. *Id.* at 9.

The WSBA's Office of Disciplinary Counsel (ODC) brought a formal complaint against Muenster in July 2016, alleging six counts of violations of the Rules of Professional Conduct (RPCs). *Id.* at 1-3. The hearing took place on April 23-26, 2018. *Id.* at 5. The hearing included six counts brought by the ODC and six counts brought by Douglas Myser, one of Muenster's clients. *Id.*

The first six counts against Muenster stemmed from his management of client funds. From 2011 through 2015, Muenster "did not maintain individual client ledgers or equivalent records for each client that identified the purpose for which the client's funds were received, disbursed, or transferred," and other information. *Id.* at 8. Nor did he "reconcile his trust account check register balance to his bank statements on a monthly basis," and he "did not keep copies of his reconciliation reports" on the occasions when he *did* reconcile the check register with the bank statements. *Id.* at 9. He thus "did not, and could not, reconcile his check register to the total of the balances on his client ledgers because he did not maintain client ledgers for all his clients." *Id.* "As a result of

[1] The record before this court does not include materials the hearing officer used to make her decision—there are no transcripts, no exhibits, and so on. We therefore rely solely on the hearing officer's findings of fact to reconstruct the record, as "a hearing[ ] officer's unchallenged findings of fact are treated as verities on appeal." *In re Disciplinary Proceeding Against Conteh*, 187 Wn.2d 793, 800, 389 P.3d 591 (2017).

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these deficiencies, [Muenster] could not always be certain that his trust account actually contained the amount of money reflected in his check register, and one could not readily identify whose funds were in the account at any given moment." *Id.* He also repeatedly withdrew funds from the trust account "as he needed the funds, e.g., to pay bills." *Id.* at 10. Over the course of one year, he appropriated approximately $100,000 in this manner. *Id.*

The second six counts against Muenster stemmed from his interactions with his client Myser beginning in 2012. *Id.* at 10-11. Muenster entered into a fee agreement with Myser in early 2012. *Id.* at 11. "Because the agreement did not include the requirements set forth in RPC 1.5(f)(2), Myser's payments were not [Muenster's] property upon receipt." *Id.* Nor were they a retainer. *Id.* Rather, "[u]nder RPC 1.5(f), RPC 1.15A(c)(2) and (h)(3)[,] [Muenster] was required to deposit and hold Myser's payments [to Muenster as his attorney] in trust until the fees were earned and billed, or the expenses had been incurred." *Id.* This Muenster failed to do. *Id.* Instead, he deposited a number of Myser's checks not into the trust account, as required, but into his own bank account. *Id.* He did not keep track of Myser's funds and provided Myser with no notice whatsoever to inform Myser that he was withdrawing Myser's funds. *Id.* In total, between December 1, 2013 and November 30, 2014, Myser sent Muenster $70,000 for fees—which Muenster had requested from him in excess of the $45,000 maximum in their fee agreement—and $28,000 for costs and expenses. *Id.* at 13-14. Yet at the end of that period, owing to Muenster's withdrawals, the trust account held only $528.43. *Id.* Muenster never informed Myser of his withdrawal of Myser's funds. *Id.* at 14.

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Muenster did not ultimately keep every dollar he had received from Myser. Of the $28,000 Myser had sent him for costs and expenses, Muenster appropriated $20,000. *Id.* Muenster used $1,330.14 for costs and expenses, while he returned to Myser a $6,000 check Myser had written out to him. *Id.* He later mailed another $1,558.09 check to Myser. *Id.* at 17.

The hearing officer issued her "Findings of Fact, Conclusions of Law and Hearing Officer's Recommendation" on December 4, 2018. The hearing officer concluded that the ODC proved all 12 counts by "a clear preponderance the evidence." *Id.* at 18. She also concluded that six aggravators were applicable in this case: "dishonest or selfish motive," "a pattern of misconduct," "multiple offenses," "refusal to acknowledge wrongful nature of conduct," "substantial experience in the practice of law," and "indifference making restitution." *Id.* at 21. The hearing officer found one applicable mitigating factor: the "absence of a prior disciplinary record." *Id.* The hearing officer recommended that "Muenster be disbarred, and that he be ordered to pay restitution in the amount of $44,111.77,[2] with 12% interest calculated from the date Myser terminated Respondent's services, i.e., March 23, 2015." *Id.* at 22.

Muenster filed a notice of appeal to the Board. *Id.* at 24. However, he failed to file a timely opening brief. *Id.* at 57 (WSBA Disciplinary Bd. Order Dismissing Appeal).

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[2] The hearing officer explained this calculation in detail:

> "The restitution is calculated as follows: (a) $25,000 for fees paid over and above the $45,000 required by the fee agreement; (b) $28,000 advanced for costs and expenses, minus $1,330.14 for expenses actually incurred and paid, minus $6,000 for the uncashed check Respondent returned to Myser, minus the $1,558.09 that Respondent returned to Myser in April 2016, leaving $19,111.77 that should be refunded to Myser. Thus, $25,000 + 19,111.77= $44,111.77 total restitution."

AR at 22 n.4.

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The ODC successfully moved to dismiss his appeal under ELC 11.9(b)(2), which states that "[f]ailure to file an opening brief within the required period constitutes an abandonment of the appeal."

After the dismissal of the appeal for failure to timely file an opening brief, the matter next went to the Board. In this case, the Board declined sua sponte review and unanimously adopted the hearing officer's decision 8 to 0. AR at 59 (Disciplinary Bd. Order Declining Sua Sponte Review & Adopting Hr'g Officer's Decision).

Pursuant to ELC 13.9, the ODC also assessed costs and expenses against Muenster, in an amount of $11,312.13. Order Assessing Costs and Expenses, *In re Muenster*, Pub. File No. 16#00008 (WSBA Disciplinary Bd. July 16, 2019).

Muenster filed a notice of appeal to this court on May 30, 2019. AR at 197.

STANDARD OF REVIEW

"This court has plenary authority to determine the nature of lawyer discipline." *In re Disciplinary Proceeding Against Cramer*, 168 Wn.2d 220, 229, 225 P.3d 881 (2010). "This court bears the ultimate responsibility for lawyer discipline in Washington." *In re Disciplinary Proceeding Against Vanderveen*, 166 Wn.2d 594, 604, 211 P.3d 1008 (2009). We have, however, "delegated specific responsibilities" of managing lawyer discipline to the WSBA. *Cramer*, 168 Wn.2d at 229.

We review conclusions of law de novo and uphold them if they are supported by findings of fact. *In re Disciplinary Proceeding Against Conteh*, 187 Wn.2d 793, 800, 389 P.3d 591 (2017) (quoting *Vanderveen*, 166 Wn.2d at 604). "This court also reviews sanction recommendations de novo, but will generally affirm the Board's sanction recommendation unless the court can articulate a specific reason to reject it." *Id.*

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Nevertheless, "a hearing[ ] officer's unchallenged findings of fact are treated as verities on appeal." *Id.* (citing *In re Disciplinary Proceeding Against Marshall*, 167 Wn.2d 51, 66, 217 P.3d 291 (2009)). Further, we generally defer to the Board's decisions, especially when the Board's decision is unanimous. *Id.* (citing *Vanderveen*, 166 Wn.2d at 616).

ANALYSIS

I. The Board sustainably declined sua sponte review

In the past, when an attorney has appealed the Board's decision declining sua sponte review, we treated the sustainability of the Board's decision as the sole issue on appeal. *Id.*; *see also In re Disciplinary Proceeding Against Osborne*, 187 Wn.2d 188, 196, 386 P.3d 288 (2016) (same). We do the same here and treat the issue of whether the Board sustainably declined sua sponte review as the sole issue on appeal.

"The Board should order sua sponte review only in extraordinary circumstances to prevent substantial injustice or to correct a clear error." ELC 11.3(d). The attorney facing discipline has the burden of proving the sanction is erroneous. *Conteh*, 187 Wn.2d at 800 (citing *Vanderveen*, 166 Wn.2d at 616). Muenster does not meet this burden. He presents no argument why the Board erred in declining sua sponte review. He does not argue the circumstances are extraordinary or that review is necessary to prevent a substantial injustice or to correct a clear error. *See* ELC 11.3(d). Without any argument that sua sponte review was necessary, Muenster cannot prevail. *See Conteh*, 187 Wn.2d at 800 (citing *Vanderveen*, 166 Wn.2d at 616).

Muenster does *claim* to challenge the hearing officer's findings of fact. Pet'r/Appellant's Reply Br. at 9. However, he asserts, without explanation, only that the

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"proposed findings are incorrect." *Id.* (boldface omitted). He also refers to "the contents of the Answer and Affirmative Defenses to the first amended complaint." *Id.* This document is not in the record. He asserts that "[t]estimony given by [Muenster] and Andi Knight and exhibits . . . should have been considered." *Id.* at 10. There is no indication of to what or to whom this refers, and no such document can be found in the record. In any event, "argument incorporated by reference to other briefing is not properly before this court." *State v. Gamble*, 168 Wn.2d 161, 180-81, 225 P.3d 973 (2010). Muenster's argument does not prove "substantial injustice" or "clear error." ELC 11.3(d).

Rather, "no error is apparent" in the Board's decision to decline sua sponte review. *Conteh*, 187 Wn.2d at 802. As in *Conteh*—and as the ODC correctly identifies—Muenster "'makes no specific assignments of error and fails to identify any findings he disagrees with in his briefing.'" Answering Br. of ODC at 20 (quoting *Conteh*, 187 Wn.2d at 802). Thus, as in *Conteh*, the Board "complied with the directives of ELC 11.3(a)" when it declined sua sponte review. *Conteh*, 187 Wn.2d at 802. ELC 11.3(a) provides:

> If neither the Respondent nor Disciplinary Counsel files a timely notice of appeal from a Decision recommending suspension or disbarment, the Decision shall be distributed to the Board members for consideration of whether to order sua sponte review and the matter shall be scheduled for consideration by the Board. The Decision shall be distributed to the Board within 30 days after the last day to file a notice of appeal. An order for sua sponte review shall set forth the issues to be reviewed. If the Board declines to order sua sponte review, the Board shall issue an order declining sua sponte review and adopting the Decision of the hearing officer.

While Muenster did file a timely *notice* of appeal, he failed to perfect his appeal by failing to file a timely brief. The Board's actions therefore accorded with what ELC

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11.3(a) demands: it "decline[d] to order sua sponte review" and "issue[d] an order declining sua sponte review and adopting the Decision of the hearing officer." The Board's actions were not erroneous, and it sustainably declined sua sponte review.

Muenster asserts, in his reply brief, that he did properly appeal the hearing officer's decision to the Board. Pet'r/Appellant's Reply Br. at 5. He refers us to what he calls his "brief/memorandum with his motion to dismiss for lack of jurisdiction," which, he says, he attached to his notice of appeal to the Board. *Id.* But this document was not a brief under ELC 11.9 because Muenster expressly stated it was not such a brief in the memorandum itself. He instead wrote that "[t]his memorandum is *not* submitted pursuant to the Rules for Enforcement of Lawyer Conduct," claiming that "[t]hose rules do not apply . . . because I am not a member of the WSBA." AR at 214 n.1. ELC 11.9(b)(1) requires an opening brief filed under its rules within 45 days. By stating that this memorandum was not filed under the ELCs, it cannot have been the required memorandum under ELC 11.9.

We hold that the Board sustainably declined sua sponte review.

II. We decline to reach Muenster's other arguments

Muenster makes several additional arguments regarding the lawfulness of the disciplinary proceedings. We do not consider them here. Following *Conteh* and *Osborne*, we treat as beyond the scope of review any question other than whether the Board sustainably declined sua sponte review. *See Conteh*, 187 Wn.2d at 799; *Osborne*, 187 Wn.2d at 196.

In any event, we are unconvinced by these arguments. Muenster primarily argues that he resigned from the practice of law in a letter he sent to the WSBA and

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then Chief Justice Mary Fairhurst in November 2018, before the hearing officer issued her recommendation, and, because of his purported resignation, he could not have been subjected to the ongoing disciplinary proceedings against him. Although Muenster's alleged resignation is not at issue, the proper method for an attorney subjected to disciplinary proceedings to resign is defined by ELC 9.3, "Resignation in Lieu of Discipline." Muenster provides no indication that he resigned pursuant to ELC 9.3.

Nor are we persuaded by Muenster's arguments that mandatory bar membership is unconstitutional under the First, Fourteenth, and Thirteenth Amendments to the federal constitution. As to the First and Fourteenth Amendments, he relies primarily on a case in which a petition for certiorari has been docketed but not yet granted or decided in his favor. Pet'r/Appellant's Reply Br. at 24-25 (citing *Fleck v. Wetch*, 937 F.3d 1112, 1115-16 (8th Cir. 2019) *petition for cert. filed*, No. 19-670 (U.S. Nov. 21, 2019)). An undecided case cannot help him. As to the Thirteenth Amendment, courts have consistently rejected the argument that the burdens imposed on attorneys as part of their bar membership violate the Thirteenth Amendment. *E.g.*, *United States v. Bertoli*, 994 F.2d 1002, 1022 (3d Cir. 1993) ("A requirement that an attorney perform uncompensated service after entering an appearance in a criminal matter does not evoke in our minds the burdens endured by the African slaves in the cotton fields or kitchens of the antebellum south" and, thus, does not violate the Thirteenth Amendment.); *Verner v. Colorado*, 533 F. Supp. 1109, 1118-19 (D. Colo. 1982) (rejecting the argument that requiring lawyers and judges to take CLEs to maintain

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good standing violated the Thirteenth Amendment), *aff'd*, 716 F.2d 1352 (10th Cir. 1983) (not addressing this issue expressly).

In any event, those issues are beyond the scope of Muenster's appeal.

CONCLUSION

We hold that the Board sustainably declined sua sponte review. We affirm the Board's order, adopt the hearing officer's decision, and order Muenster disbarred and required to pay $44,111.77 plus 12 percent interest in restitution to Myser calculated from March 23, 2015, the date Myser terminated Muenster's services. We also affirm the Order Assessing Costs & Expenses, *In re Muenster*, *supra* (WSBA Disciplinary Bd. July 16, 2019), in the amount of $11,312.13 in costs and expenses against Muenster. Muenster's challenges to that order repeat the arguments he made regarding the constitutionality of the bar association and his status as an attorney. As these arguments do not bear on the amount of costs and expenses awarded against him and those costs and expenses were duly awarded pursuant to ELC 13.9, we uphold the award of costs and expenses against Muenster.

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WE CONCUR.

Stephens, C.J.

González, J.

Madsen, J.

Korsmo, J.P.T.