Supplement to Disciplinary Board Reporter – Volume 6

January 1, 1992 to December 31, 1992

Supreme Court
Attorney Discipline Cases
for 1992

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Editor

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SUPPLEMENT TO
DISCIPLINARY BOARD REPORTER

SUPREME COURT ATTORNEY DISCIPLINE CASES
FOR 1992

Volume 6

January 1, 1992 to December 31, 1992

Preface

This supplement to the Disciplinary Board Reporter, Volume 6, has been prepared in response to several requests from Disciplinary Board members.

It contains 1992 Oregon Supreme Court attorney discipline decisions involving suspensions of more than sixty (60) days and those in which Supreme Court review was requested either by the Bar or the Accused. It also includes a subject matter index and cross references to Disciplinary Rules and statutes.

Questions concerning this compilation should be directed to the undersigned.

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SUPREME COURT DECISIONS

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IN THE SUPREME COURT OF THE
STATE OF OREGON

In re Complaint as to the Conduct of
Robert L. WOLF,
Accused.
(OSB 88-49; SC S38205)

In Banc

On review of the decision of the Disciplinary Board Trial Panel of the Oregon State Bar.

Argued and submitted January 14, 1992.

James G. Rice, Portland, argued the cause for the accused. With him on the briefs was Mark A. Gordon, Portland.

James H. Clarke, Portland, argued the cause and filed the brief for the Oregon State Bar.

PER CURIAM

The accused is suspended from the practice of law for a period of 18 months, effective on issuance of the appellate judgment. The Oregon State Bar is awarded its actual and necessary costs and disbursements. ORS 9.536(4).

PER CURIAM

This is a lawyer disciplinary proceeding. The Oregon State Bar charges that the accused engaged in criminal conduct that reflected adversely on his fitness to practice law, in violation of DR 1-102(A)(2),[1] and that he continued professional employment even though his exercise of professional judgment reasonably could have been affected by his personal interests, in violation of *former* DR 5-101(A).[2]

The trial panel found the accused guilty of violating DR 1-102(A)(2) and *former* DR 5-101(A) and ordered that he be suspended from the practice of law for three years, with the suspension stayed after one year if certain probationary terms are satisfied. The accused seeks review. We review the record *de novo*. ORS 9.536(3); BR 10.6. The Bar has the burden of establishing ethical misconduct by clear and convincing evidence. BR 5.2.

We find the accused guilty of violating DR 1-102(A)(2) and *former* DR 5-101(A). We suspend him from the practice of law for 18 months.

FINDINGS OF FACT

Many of the essential facts are undisputed and may be summarized briefly.

The accused was admitted to practice law in Oregon in 1977. At the time of the hearing, he handled personal injury cases and criminal defense. Criminal defense had been a significant part of his practice for about ten years. Previously, he had served as a deputy district attorney for almost two years. The accused was born in 1949 and was married at the time of the events in question.

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[1] DR 1-102(A)(2) provides:

"It is professional misconduct for a lawyer to:

"* * * * *

"(2) Commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness to practice law[.]"

[2] At the time of the events in question, *former* DR 5-101(A) provided in part:

"Except with the consent of the lawyer's client after full disclosure, a lawyer shall not accept employment if the exercise of the lawyer's professional judgment on behalf of the lawyer's client will be or reasonably may be affected by the lawyer's own financial, business, property, or personal interests."

In late 1987, the accused undertook to represent a teenage girl and her parents in a personal injury action, arising from an automobile accident in which the girl suffered injuries. The injuries included a closed head injury, injuries to the pelvis, and permanent facial scarring. The girl was in a coma for several days, suffered from short-term loss of memory, and had to undergo rehabilitation therapy. The girl turned 16 years old in October 1987.

On the girl's behalf, the accused settled the personal injury case for $200,000. On April 29, 1988, a limousine was rented for the girl so that she could celebrate the settlement by spending the day in Portland. That afternoon, at the girl's urging, the accused served her wine and engaged in sexual intercourse with her in the back seat of the limousine. He knew that the girl was 16 years old and that it is a crime to give alcohol to a person who is under 21.

A grand jury indicted the accused for contributing to the sexual delinquency of a minor,[3] sexual abuse in the third degree,[4] and furnishing alcohol to a minor.[5] The circuit court rejected a civil compromise proposed jointly by the accused and by the girl and her parents. The accused entered into a one-year diversion program, which he completed successfully, and the criminal charges were dismissed.

Initially the parents were upset and angry at the accused. The accused admitted at the hearing that he knew

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[3] ORS 163.435(1)(a) provides:

"A person 18 years of age or older commits the crime of contributing to the sexual delinquency of a minor if:

"(a) Being a male, he engages in sexual intercourse with a female under 18 years of age[.]"

[4] ORS 163.415(1)(b) provides:

"A person commits the crime of sexual abuse in the third degree if the person subjects another person to sexual contact; and

"* * * * *

"(b) The victim is incapable of consent by reason of being under 18 years of age, mentally defective, mentally incapacitated or physically helpless."

[5] ORS 471.410(2) provides:

"No one other than the person's parent or guardian shall sell, give or otherwise make available any alcoholic liquor to a person under the age of 21 years. A person violates this subsection who sells, gives or otherwise makes available alcoholic liquor to a person with the knowledge that the person to whom the liquor is made available will violate this subsection."

that the parents would not approve of his having sexual relations with the girl and that if he had realized that they would find out, "that would have stopped me."

Additional facts, some of which are disputed, will be discussed as appropriate below.

DR 1-102(A)(2)

The accused's conduct violated three criminal statutes: sexual abuse in the third degree, contributing to the sexual delinquency of a minor, and giving alcohol to a minor. In *In re White*, 311 Or 573, 589, 815 P2d 1257 (1991), this court held:

> "Each case must be decided on its own facts. [In order for a criminal act to serve as a predicate to disciplinary action, t]here must be some rational connection other than the criminality of the act between the conduct and the actor's fitness to practice law. Pertinent considerations include the lawyer's mental state; the extent to which the act demonstrates disrespect for the law or law enforcement; the presence or absence of a victim; the extent of actual or potential injury to a victim; and the presence or absence of a pattern of criminal conduct."

We begin by considering the lawyer's mental state and the extent to which the acts demonstrate disrespect for the law or law enforcement. The accused acted intentionally and for personal gratification. He also knew that he was violating the law.

The next factor to be considered is the extent of actual or potential injury to a victim. The accused testified, and argues before us, that the girl suffered no actual harm. He does not, and could not reasonably, argue that the criminal acts that he committed did not carry with them substantial potential injury to a victim. We find, by clear and convincing evidence, that the accused caused actual harm, including psychological harm, to the girl and to her parents. For example, the girl's pastor testified that she wrote a note after the incident, blaming herself for the accused's difficulties and contemplating suicide, and the girl's mother testified that the girl "was taking things, I think, very, very hard" in the aftermath of the incident. The mother also testified that the situation was very painful for the rest of the family.

Finally, this record does not establish a pattern of criminal conduct by the accused.

From a review of all the facts, we conclude that there is a rational relationship between the accused's criminal conduct and his fitness to practice law. The accused's crimes involved a girl who was the beneficiary of his professional efforts. Moreover, the accused testified that he thought that the girl understood him to be her lawyer. *See In re Weidner*, 310 Or 757, 770, 801 P2d 828 (1990) (lawyer-client relationship may be based on reasonable expectation of putative client).

The accused's crimes had as their victim a person whose interests he was representing and a person whom the law deems incapable of making certain important decisions, such as the decision to consent to sexual intercourse and the decision to prosecute or settle a tort claim. Such conduct shows disrespect for the law, which the lawyer has sworn to support, ORS 9.250, and bears on the trustworthiness of a lawyer who is retained to assist a vulnerable person. *See In re Howard*, 297 Or 174, 681 P2d 775 (1984) (conviction for prostitution supported a stipulation for lawyer discipline, because crime was a misdemeanor involving moral turpitude); *In re Bevans*, 294 Or 248, 655 P2d 573 (1982) (lawyer who was convicted of sexual abuse in the second degree committed a misdemeanor that involved moral turpitude and was suspended summarily; reinstatement allowed on proof of rehabilitation). Courts in other states have held that similar offenses reflect adversely on fitness to practice law. *See Com. on Pro. Ethics & Conduct v. Hill*, 436 NW2d 57 (Iowa Sup Ct 1989) (lawyer sanctioned for accepting sex from client in lieu of a fee); *Matter of Herman*, 108 NJ 66, 527 A2d 868 (1987) (lawyer suspended on grounds of moral turpitude for making unlawful sexual advances to child, unrelated to practice of law); *Office of Disciplinary Counsel v. King*, 37 Ohio St 3d 77, 523 NE2d 857 (1988) (consensual sex with 15-year-old non-client reflected adversely on fitness to practice law).

The accused's criminal acts reflect adversely on his fitness to practice law; he violated DR 1-102(A)(2).

FORMER DR 5-101(A)

Former DR 5-101(A) prohibited a lawyer from accepting employment if the exercise of professional judgment on the client's behalf would be or reasonably could be affected by the lawyer's personal interests, unless the lawyer obtained informed consent. That disciplinary rule also included continued, as well as initial acceptance of, employment. *In re Moore*, 299 Or 496, 507, 703 P2d 961 (1985).[6]

The accused argues that his employment by the girl's parents was, for all practical purposes, at an end when the crimes occurred. We disagree. The accused's employment as a lawyer was not at an end, even though a settlement had been reached. The proceeds of the settlement had not been distributed, and the record shows that the accused ultimately transferred the file to another lawyer, who received a fee for finishing work on the case. Thus, the accused's employment was continuing.

The accused also had a personal interest. He testified that, before the settlement had been approved by the court, he realized that he had developed a strong sexual interest in the girl, and she in him.

Although the record does not disclose an actual compromise of the accused's professional judgment in the conduct of the personal injury action, the exercise of his professional judgment on his clients' behalf reasonably might have been affected by his personal interest. From his testimony, the accused appears to have recognized that possibility.

Finally, the girl's consent to the acts does not amount to informed consent to the accused's continuing representation.

We conclude that the accused's acts violated *former* DR 5-101(A).

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[6] DR 5-101(A) has been amended. Effective January 2, 1991, it expressly states that a lawyer "shall not accept *or continue* employment" in the described circumstances. (Emphasis added.)

SANCTION

In deciding on the appropriate sanction, this court refers for assistance to the American Bar Association Standards for Imposing Lawyer Sanctions (ABA Standards). *In re White*, *supra*, 311 Or at 591. ABA Standard 3.0 sets out the factors to consider: the duty violated, the lawyer's mental state, the potential or actual injury caused by the misconduct, and the existence of aggravating or mitigating factors.

The accused breached his duty to the minor whose interests he was representing, and to her parents, when he took advantage of their professional relationship for personal gratification. He breached his duty to the legal system by violating criminal laws. He breached his duty to the public by undermining confidence in members of the legal profession to fulfill professional obligations properly toward vulnerable persons.

As noted above, the accused acted intentionally, with knowledge that he was violating the criminal law, and for personal gratification.

We also have found that the girl and her parents suffered actual harm from the accused's acts. Those acts carried the potential for even greater harm.

The pertinent ABA Standards suggest that suspension is the appropriate sanction in this kind of situation. *See* ABA Standard 4.32 (conflict of interest between lawyer and client); ABA Standard 5.12 (criminal conduct that seriously adversely reflects on lawyer's fitness to practice). In considering the length of suspension, we next consider pertinent aggravating and mitigating factors.

There are several aggravating factors. First, the accused acted from a selfish motive, ABA Standard 9.22(b), in this instance, the motive of sexual gratification. Second, his conduct involved a victim who was vulnerable. ABA Standard 9.22(h). Third, he had substantial experience in the practice of law at the time of the events in question. ABA Standard 9.22(i). Fourth, the accused committed multiple offenses, ABA Standard 9.22(d), although they all arose out of the same incident.

A fifth aggravating factor is lack of candor during the disciplinary process. ABA Standard 9.22(f). The accused testified that he thought that the age of consent for sexual intercourse was 16 rather than 18. We disbelieve that testimony, for two reasons. First, the accused acknowledged that he knew the age of consent in Oklahoma and Michigan, where he was reared, even before he became a lawyer. Second, the accused is an experienced criminal defense lawyer and former prosecutor in Oregon and has handled cases involving sexual crimes.

A sixth aggravating factor, refusal to acknowledge the wrongful nature of the conduct, ABA Standard 9.22(g), requires some discussion. The tenor of the accused's testimony was that *he* was the victim of a vindictive district attorney and Bar. He testified, for example, that he should not have been prosecuted for crimes, because the family did not want him to be, and that he should not have been disciplined by the Bar: "I think the State Bar should have shown more sensitivity." The accused testified that he did not believe that his conduct was unethical or that it injured the girl, because she was mature and sexually experienced and because she seduced him. The accused's testimony reveals that his most central thoughts were for himself, both at the time of the incident and afterward. With respect to his mental state at the time of the incident, he testified:

> "Q. Did you think it could have hurt her parents?
>
> "A. I don't think it crossed my mind.
>
> "Q. Did you think it could hurt her?
>
> "A. Did I think it could hurt her? No.
>
> "Q. Did you think it could hurt you?
>
> "A. I think that may have crossed my mind, but I don't know if I thought about it."

The accused further testified that he went to a bar immediately after the incident:

> "Q. * * * [Y]ou walked into [the bar]. You walked in with a smile on your face and bragged about having sex in the back of a limousine?
>
> "* * * * *

> "A. I don't know about bragged. I told [a friend] what had occurred. I was quite frankly in a fairly good mood about it. I had made the largest fee of my professional career and I'd had sex in the back of a limo with somebody who I liked and found very sensual. So I was not sad. So maybe brag is correct."

Although the accused paid lip service to feeling remorse later, his testimony demonstrates to us that he regrets the consequences of his conduct primarily because of their impact on him, his own family, and their interests.

In short, the accused still does not recognize fully the impact of his misconduct on his clients, the public, and the legal system. We note that, under the ABA Standards, the failure of an injured client to complain, or the claim of a lawyer that the client induced the wrongful conduct, is not mitigating. ABA Standard 9.4(b) & (f) and Commentary.

There also are, however, some mitigating factors. First, the accused has received no prior formal discipline. ABA Standard 9.32(a). Second, there was some delay in completing the disciplinary proceedings. ABA Standard 9.32(i). Third, the accused attempted to rectify the consequences of his misconduct, ABA Standard 9.32(d), by obtaining substitute counsel for the family and by fully informing his existing and potential clients of the pending charges. Fourth, the accused undertook rehabilitation efforts in the interim. ABA Standard 9.32(j).

The trial panel imposed a three-year suspension, but concluded that the last two years should be stayed if certain probationary terms (requiring therapy and drug counseling) were met. The accused, the Bar, and we agree that the record does not support those probationary terms. *See In re Haws*, 310 Or 741, 752, 801 P2d 818 (1990) (conditions of probation must relate to the charges).

Before this court, the Bar calls for a three-year suspension, without probation or stay, relying on assertedly similar cases from other jurisdictions. *See People v. Grenemyer*, 745 P2d 1027 (Colo 1987) (lawyer convicted of sexual assault of a minor was disbarred); *Matter of Wells*, 572 NE2d 1290 (Ind 1991) (three-year suspension for unsolicited touching of young men during course of professional relationship);

Matter of Christie, 574 A2d 845 (Del Sup Ct 1990) (three-year suspension for misconduct involving alcohol and masturbation with teenage non-clients); *Matter of Disciplinary Proceedings Against Woodmansee*, 147 Wis 2d 837, 434 NW2d 94 (1989) (three-year suspension for fourth degree sexual assault on client). The accused argues that a reprimand is the appropriate sanction.

The accused, in his testimony, revealed an astonishing lack of appreciation for the nature and extent of his professional obligations and for the potential and actual harm to his clients from his conduct. His principal focus has been on himself, his family, and their social and financial interests. Nonetheless, egocentrism is not a violation of the disciplinary rules, and the aggravating factors are counterbalanced to some extent by the mitigating factors.

We conclude that an 18-month suspension, without probation or stay, is the appropriate sanction in this case.

The accused is suspended from the practice of law for a period of 18 months, effective on issuance of the appellate judgment. The Oregon State Bar is awarded its actual and necessary costs and disbursements. ORS 9.536(4).

IN THE SUPREME COURT OF THE
STATE OF OREGON

In re Complaint as to the Conduct of
Robert L. KIRKMAN,
Accused.
(OSB 90-81; SC S38143)

On review of the recommendation of the Trial Panel of the Oregon State Bar Disciplinary Board.

Argued and submitted November 7, 1991.

Garr M. King, of Kennedy, King & Zimmer, Portland, argued the cause and filed the briefs for the accused.

Mary A. Cooper, Assistant Disciplinary Counsel, argued the cause and filed the brief for the Oregon State Bar.

Before Carson, Chief Justice, and Peterson, Gillette, Fadeley, Unis, and Graber, Justices.

PER CURIAM

The accused is disbarred.

PER CURIAM

This is a lawyer disciplinary proceeding involving Robert L. Kirkman (the accused). The Disciplinary Board Trial Panel recommended that the accused be disbarred. Based on our findings on *de novo* review, we order that the accused be disbarred.

The accused was admitted to practice law in Oregon in 1968. After meritorious service in the armed forces, the accused entered the private practice of law in Portland in 1972. He had a good reputation as a lawyer.

The accused married Susan Kirkman in 1967. They had four children. During the marriage, the accused became intimately involved with another woman, Jane. A daughter was born to the accused and Jane on January 19, 1984.

Jane exerted pressure on the accused to get a divorce so that he could marry her. In about November 1984, the accused prepared and presented to Jane a judgment of dissolution purportedly from a Clackamas County Circuit Court case entitled "In the Matter of the Marriage of Robert L. Kirkman, petitioner, and Susan C. Kirkman, respondent, case number 83-2-307." The accused signed or caused another to sign Judge Dale Jacobs' name to the purported dissolution judgment. The accused represented to Jane that this judgment was a final dissolution of his marriage to Susan Kirkman. He knew that the judgment was not valid. He knew that no such judgment had been entered in any court. The accused delivered the dissolution judgment to Jane with the intent to deceive her so that he could continue his relationship with her.

The accused was appointed a Multnomah County District Judge in December 1984.

In March 1987, while still married to Susan Kirkman, the accused applied for a license to marry Jane. On the application, the accused declared that he was divorced. On April 4, 1987, while he was still married to Susan Kirkman, the accused married Jane in a civil ceremony. He told Jane, both before and after the April 4, 1987, ceremony, that he was divorced from Susan Kirkman. Jane later learned that the accused was not divorced from Susan Kirkman. Thereafter,

the accused and Jane, as co-petitioners, filed a suit to annul their marriage. That marriage was annulled in the fall of 1987.

The marriage between the accused and Susan Kirkman was dissolved in December 1987. In January 1988, the accused and Jane were married. That marriage was dissolved on July 23, 1990.

A complaint was filed with the Commission on Judicial Fitness and Disability. On October 22, 1990, following a hearing, that Commission recommended to the Supreme Court that the accused be removed from office as a district court judge. ORS 1.425. While the judicial fitness proceeding was pending in the Supreme Court, the accused resigned as district court judge, effective January 31, 1991.

DR 1-102(A)(3) provides:

"It is professional misconduct for a lawyer to:

"* * * * *

"(3) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation[.]"

We find that the accused violated DR 1-102(A)(3).

DR 1-102(A)(2) provides:

"It is professional misconduct for a lawyer to:

"* * * * *

"Commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness to practice law[.]"

Even though the accused was not convicted of any crime,[1] we find that he committed three crimes. He committed forgery by intentionally preparing the falsified judgment of dissolution. ORS 165.013.[2] He violated ORS 162.085 by

[1] The record shows that the accused was not prosecuted criminally because his conduct was not reported to law enforcement authorities until after the relevant statutes of limitation had run.

[2] ORS 165.013 provides in part:

"(1) A person commits the crime of forgery in the first degree if the person violates ORS 165.007 and the written instrument is or purports to be any of the following:

"* * * * *

knowingly falsely declaring himself to be divorced in his application for a marriage license in March 1987.[3] In addition, the accused committed the crime of bigamy, ORS 163.515,[4] when he knowingly married or purported to marry Jane on April 4, 1987, when he knew that he was still married to Susan Kirkman.

These criminal acts reflect adversely on the accused's honesty, trustworthiness, and fitness to practice law. DR 1-102(A)(2). These were not "victimless" crimes. The accused's duplicity existed over a period of years, causing injury and humiliation to both of his families. The publicity

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"(c) A * * * document which does or may evidence, create, * * * alter, * * * or otherwise affect a legal right, * * * or status;

"(d) A public record.

"(2) Forgery in the first degree is a Class C felony."

ORS 165.007 provides in part:

"(1) A person commits the crime of forgery in the second degree if, with intent to injure or defraud, the person:

"* * * * *

"(b) Utters a written instrument which the person knows to be forged.

"(2) Forgery in the second degree is a Class A misdemeanor."

"Written instrument" is defined in ORS 165.002, which provides in part:

"As used in ORS 165.002 to 165.022, and 165.032 to 165.070, unless the context requires otherwise:

"(1) 'Written instrument' means any paper, document, instrument or article containing written or printed matter or the equivalent thereof, whether complete or incomplete, used for the purpose of reciting, embodying, conveying or recording information or constituting a symbol or evidence of value, right, privilege or identification, which is capable of being used to the advantage or disadvantage of some person.

"* * * * *

"(7) To 'utter' means to issue, deliver, publish, circulate, disseminate, transfer or tender a written instrument or other object to another."

[3] ORS 162.085 provides:

"(1) A person commits the crime of unsworn falsification if the person knowingly makes any false written statement to a public servant in connection with an application for any benefit.

"(2) Unsworn falsification is a Class B. misdemeanor."

[4] ORS 163.315 provides:

"(1) A person commits the crime of bigamy if the person knowingly marries or purports to marry another person at a time when either is lawfully married.

"(2) Bigamy is a Class C felony."

surrounding these criminal acts was extensive. We also find that his misconduct caused serious injury to the legal system. His conduct brought contempt upon the legal profession and upon the courts, undermining public confidence in bench and bar alike.[5]

We turn to the question of sanction. In other cases, we have relied on the American Bar Association Standards for Imposing Lawyer Sanctions. *See, e.g., In re Wolf*, 312 Or 655, 662, 826 P2d 628 (1992); *In re Hedrick*, 312 Or 442, 449, 822 P2d 1187 (1991). We do so in this case, as well. ABA Standard 5.11 provides:

> "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
>
> "(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."

Personal honesty and integrity are essential characteristics of lawyers. Intentional misrepresentation is totally incompatible with a lawyer's obligations. Adherence to the law is a lawyer's sworn duty. Concerning the criminal misconduct, whether or not a charge is brought largely is irrelevant. The accused is guilty of serious criminal misconduct, *viz.*, one felony and two misdemeanors, as well as misconduct involving misrepresentation that "seriously adversely reflects on [his] fitness to practice" law. The misconduct of which we have found the accused guilty is so serious that, in the absence of compelling mitigating circumstances, disbarment is the only appropriate sanction.

ABA Standard 9.32 lists mitigating factors.

"Mitigating factors include:

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[5] By way of mitigation, the accused's brief states that

"he has had to sustain himself through the humiliating media coverage and has made substantial efforts to protect his family from publicity. The media coverage has made the public and the Bar well aware of [the accused's] problems and the adverse effect on him will continue for some time."

"(a) absence of a prior disciplinary record;

"(b) absence of a dishonest or selfish motive;

"(c) personal or emotional problems;

"(d) timely good faith effort to make restitution or to rectify consequences of misconduct;

"(e) full and free disclosure to disciplinary board or cooperative attitude toward proceedings;

"(f) inexperience in the practice of law;

"(g) character or reputation;

"(h) physical or mental disability or impairment;

"(i) delay in disciplinary proceedings;

"(j) interim rehabilitation;

"(k) imposition of other penalties or sanctions;

"(l) remorse;

"(m) remoteness of prior offenses."

The record establishes some of the mitigating factors. The accused has no prior disciplinary record (factor (a)). He had personal and emotional problems (factor (b)). He made full disclosure (factor (e)). He had a good reputation, both as a lawyer and as a judge (factor (g)). Concerning factor (k), the accused states: "As to other sanctions imposed in this particular case, [the accused] has been sanctioned by losing his judicial position." True, the accused has lost his judicial position, a substantial consequence, judged by any standard. But the obligations of a lawyer and of a judge, congruent though many of them are, are not governed by one disciplinary process, and for good reason.

At risk in the judicial fitness proceeding was the accused's public office. At issue here is whether the accused's misconduct is serious enough to require the loss, temporarily or permanently, of his license to practice law. The accused's conduct as a judge is measured by the Code of Judicial Conduct and statutes. That measure was made by the Commission on Judicial Fitness and Disability, and it found that the accused should be removed from office. He resigned before this court could act on the Commission's recommendation. Today, the accused's conduct is measured by rules that determine whether lawyers can continue to practice law.

In evaluating the misconduct, we also examine aggravating factors. ABA Standard 9.22, which lists 10 aggravating factors, provides:

"Aggravating factors include:

"(a) prior disciplinary offenses;

"(b) dishonest or selfish motive;

"(c) a pattern of misconduct;

"(d) multiple offenses;

"(e) bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency;

"(f) submission of false evidence, false statements, or other deceptive practices during the disciplinary process;

"(g) refusal to acknowledge wrongful nature of conduct;

"(h) vulnerability of victim;

"(i) substantial experience in the practice of law;

"(j) indifference to making restitution."

We find that the accused acted from a dishonest or selfish motive (factor (b)); there was a pattern of misconduct and multiple offenses (factors (c) and (d)); and there were vulnerable victims (factor (h)). The mitigating factors are, in a substantial way, balanced by the aggravating factors. None of the mitigating factors are so compelling as to convince us that a sanction less than disbarment is appropriate.

Because the accused's misconduct is so great, because the nature of the misconduct is so destructive of truth and honesty, because public confidence in the integrity of the legal profession is so important, and because appropriate discipline deters unethical conduct, we conclude that the accused must be disbarred.

The accused is disbarred.

IN THE SUPREME COURT OF THE
STATE OF OREGON

In re Complaint as to the Conduct of
William J. HEDGES,
Accused
(OSB 89-54; SC S37893)

In Banc

Review of decision of the Trial Panel of the Oregon State Bar Disciplinary Board.

Argued and submitted November 6, 1991.

Arthur B. Knauss, Milwaukie, argued the cause and filed the petition for the accused.

Lia Saroyan, Assistant Disciplinary Counsel, Lake Oswego, argued the cause and filed the response for the Oregon State Bar.

PER CURIAM

The accused is suspended from the practice of law for 63 days from the effective date of this decision. Costs to the Oregon State Bar.

PER CURIAM

This is an automatic and *de novo* review of a lawyer disciplinary proceeding. ORS 9.536(1); BR 10.1; BR 10.6. The Oregon State Bar (Bar) has charged the accused with violations of five sections of the Code of Professional Responsibility: DR 6-101(B), neglect of a legal matter; DR 1-102(A)(3), misrepresentation; DR 9-101(B)(3) and (4), failure to maintain complete records of client funds and failure to pay funds in a lawyer's possession which the client is entitled to receive; and DR 1-103(C), failure to cooperate in an official investigation.

The trial panel found the accused guilty of all charges and recommended that he be suspended from the practice of law for 63 days. On review, the accused challenges the trial panel's findings of guilt in relation to the violations of DR 6-101(B) and DR 9-101(B)(3) and (4) and its recommended sanction. The Bar argues that the accused is guilty of all charged violations and argues for a longer suspension. The Bar has the burden of establishing ethical misconduct by clear and convincing evidence. BR 5.2. "Clear and convincing" means highly probable. *In re Johnson*, 300 Or 52, 55, 707 P2d 573 (1985). We affirm the trial panel's findings of guilt and impose a suspension of 63 days.

On August 15, 1988, Trudy and Michael Harmon retained the accused to represent them in a dispute with two individuals named Hayes and Potter, to whom the Harmons had sold a mobile home under contract. The Harmons also sought damages for any harm done to the mobile home. Hayes and Potter apparently had defaulted on the contract and were causing waste to the mobile home. The Harmons gave the accused $750 for his representation of them. The accused filed a complaint on the Harmons' behalf in the district court, naming as defendants Hayes, Potter and Richardson, the owner of the property where the mobile home was located. Thereafter, the accused effected service of process on the defendants.

During October and November of 1988, the accused negotiated with Richardson's lawyer. The accused agreed to dismiss the action against Richardson in return for Richardson's promise to waive a lien that he had on the mobile

ome and for his permission to remove the mobile home from is property. Because it was a condition of the settlement, Richardson's lawyer asked the accused to file an order removng Richardson as a defendant. The accused never did.

On January 29, 1989, the district court issued a Notice and Judgment dismissing the Harmons' complaint for want of prosecution. The accused took no action thereafter to reinstate the complaint.

Between November 22, 1988, and March 3, 1989, the accused had no contact with the Harmons. On several occaions, both before and after the dismissal of the Harmons' complaint, Mrs. Harmon tried to contact the accused by telephone. He failed to return her calls.

On March 3, Mrs. Harmon contacted the accused and inquired as to the status of the case. He told her that he was unable to get in touch with Richardson's lawyer, and that Richardson had not responded to their settlement offer, and that nothing was happening in the case. The accused did not tell the Harmons that the complaint had been dismissed nor did he mention the circumstances of the dismissal. In fact, they learned of that fact only after the Bar commenced its investigation of their complaint against the accused. At the end of their March 3 conversation, Mrs. Harmon dismissed the accused as the Harmons' lawyer.

Also during their March 3 conversation, Mrs. Harmon requested an accounting of the fee that the Harmons had given to the accused. On March 13, she reiterated that request to the accused in writing. The accused did not comply with those requests at that time or ever. On March 15, 1989, the Harmons complained to the Bar about the accused's representation of them in the matter described. Their complaint forms the basis of this case.

It was not until 14 months after the Harmons filed their complaint with the Bar that the accused reimbursed the Harmons for the $750 that they had given him, plus an additional $100. Thereafter, the Harmons dealt directly with Richardson and were able to regain possession of their mobile home.

During the Bar's investigation of the Harmons' complaint, the Disciplinary Counsel's office sent four letters to the accused (dated March 28, 1989, April 19, 1989, May 22, 1989, and June 5, 1989), requesting information about the Harmons' complaint. On May 4, 1989, the accused contacted the Bar and requested a three-day extension to respond. The Bar granted that request. The accused nonetheless failed to respond to the Bar's requests for information.

The Bar thereafter filed its complaint against the accused. At the trial panel's hearing, the accused admitted most of the Bar's allegations. He testified that the Harmons' case was a matter that he had just put aside and could not bring himself to attend to. He testified, however, that he never considered the dismissal of the complaint as significant because the statute of limitations had not run and he could refile the complaint. The trial panel found the accused guilty of all charges and recommended a sanction of suspension from the practice of law for 63 days. Because the suspension is over 60 days, review in this court is automatic. ORS 9.536(1); BR 10.1.

Neglect of a Legal Matter — DR 6-101(B)

DR 6-101(B) provides: "A lawyer shall not neglect a legal matter entrusted to the lawyer."

The accused concedes that he neglected a legal matter entrusted to him in violation of DR 6-101(B). He argues, however, that his neglect caused the Harmons no harm and that, in fact, they benefited from his representation, because they were able to get their mobile home back primarily as a result of his negotiation with Richardson's lawyer. His argument, he states, is "submitted more in mitigation than in denial of the allegation of neglect." We find that the accused violated DR 6-101(B).

Failure to Maintain Complete Records of Client Funds and Failure to Pay Funds in a Lawyer's Possession which the Client is Entitled to Receive — DR 9-101(B)(3) and (4)

DR 9-101(B) provides in part:

"A lawyer shall:

"* * * * *

"(3) Maintain complete records of all funds, securities and other properties of a client coming into the possession of the lawyer and render appropriate accounts to the lawyer's client regarding them.

"(4) Promptly pay or deliver to a client as requested by the client the funds * * * in the possession of the lawyer which the client is entitled to receive."

Both rules impose obligations on lawyers regarding *client* funds. *In re Howard*, 304 Or 193, 203-04, 743 P2d 719 (1987). Thus, as a threshold question in determining whether those rules were violated, it must be determined that the money given by the client to the lawyer belonged to the client and not to the lawyer. *Id.*

Here, the accused argues that there is not clear and convincing evidence that the money paid to him by the Harmons was not a non-refundable fixed fee. His argument, we infer, is that if the Harmons' payment was a non-refundable fixed fee, then he had no duty to account for those funds and no duty to return them. As with the previous violation, he states that his argument is "[i]n mitigation more than direct claim of error."

The record shows that the accused and the Harmons' oral agreement was that the accused required "a fee up front of $750 to be used towards doing all of this," *i.e.*, pursuing the action against Hayes and Potter. That type of agreement is a classic advance fee agreement where ownership of the money is unquestionably with the client until it is earned by the lawyer. Opinion of Committee on Legal Ethics, No. 509, (*citing* C. Wolfram, Modern Legal Ethics 506 (1986)).[1] After the accused received the $750 from the Harmons, he placed it in his client trust account. He admitted that, had it been a non-refundable fixed fee, he would have placed the money in his office account. There was no written agreement here that this fee would be a non-refundable fixed fee, and where such a fee arrangement is used "the designation of the fee as non-

[1] Legal Ethics Opinion No. 509 was approved by the Board of Governors in 1986. In 1991, a new book, *Oregon Formal Ethics Opinions* (Oregon CLE 1991), with new formal ethics opinions was published. At the same time, all prior formal opinions, published in the Oregon State Bar Professional Responsibility Manual, were withdrawn. A companion book, *The Ethical Oregon Lawyer* (Oregon CLE 1991) also was published in 1991. That book reviews the principal issues of legal ethics and professionalism likely to be of significance to Oregon lawyers.

refundable must be made by a clear and specific written agreement between client and lawyer." Opinion of Committee on Legal Ethics, No. 509, *supra*. We find that the $750 were *client* funds such that the accused's ethical obligations under DR 9-101(B)(3) and (4) were invoked.

There is no dispute that the Harmons requested an accounting of their funds, that the accused promised to provide one, and that he failed to. A lawyer who fails to render appropriate accounts to the lawyer's client regarding the client's funds in the lawyer's possession violates DR 9-101(B)(3). *In re Boothe*, 303 Or 643, 649, 740 P2d 785 (1987); *In re Bridges*, 302 Or 250, 253, 728 P2d 863 (1986). We find that the accused violated DR 9-101(B)(3).

The accused eventually did refund the Harmons' money. DR 9-101(B)(4), however, expressly requires that such an action, when appropriate, be done "promptly." The accused took 14 months to make the refund. That is not prompt. *See In re Chandler*, 303 Or 290, 295, 735 P2d 1220 (1987) (disciplining a lawyer under DR 9-101(B)(4) for taking just over 11 months to make a refund). We find that the accused violated DR 9-101(B)(4).

Other Ethical Violations

On review, the accused does not argue that he did not violate DR 1-102(A)(3), misrepresentation,[2] and DR 1-103(C), failure to cooperate.[3] We have reviewed the entire record and we find that the accused violated those rules.

Sanction

We turn now to the question of the appropriate sanction for the proven ethical misconduct. In that regard, we

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[2] DR 1-102 provides in part:

"It is professional misconduct for a lawyer to:

"* * * * *

"(3) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation[.]"

[3] DR 1-103(C) provides:

"A lawyer who is the subject of a disciplinary investigation shall respond fully and truthfully to inquiries from and comply with reasonable requests of a tribunal or other authority empowered to investigate or act upon the conduct of lawyers, subject only to the exercise of any applicable right or privilege."

look to the American Bar Association Standards for Imposing Lawyer Sanctions (1986) (ABA Standards) and prior precedent of this court for guidance. *In re Trukositz*, 312 Or 621, 634, 825 P2d 1369 (1992).

Under the ABA Standards, in determining the appropriate level of discipline, *e.g.*, admonishment, reprimand, suspension, or disbarment, we apply four factors: the ethical duty violated, the lawyer's mental state at the time of the violation, the harm incurred as a result of the lawyer's misconduct, and the existence of aggravating or mitigating factors. *In re Willer*, 303 Or 241, 250, 735 P2d 594 (1987).

The accused violated four duties that he owed to his clients: the duty to handle their legal matter diligently, the duty of candor, the duty to render them an accounting of his time, and the duty to refund promptly any unearned money from the clients' advance fee. *See* ABA Standards, *supra*, at 5 (identifying duties owed to clients). Moreover, he violated a duty he owed to the legal profession: the duty to cooperate with the Bar's investigation. *See* ABA Standards, *supra*, at 5-6 (identifying duties owed to the legal profession).

The record reflects that the accused knowingly committed the charged disciplinary rule violations. The accused testified before the trial panel that "I knew what I was doing the whole time," that he knew that he should have informed the Harmons of the dismissal of their complaint, that he knew that he needed to provide the Harmons with an accounting, and that he knew that he needed to cooperate with the Bar. He testified: "[F]or some reason I set the file on my desk and stared at it on a daily basis and just did nothing. * * * [A]nd the same thing happened with the Bar complaint too."

As a result of the accused's misconduct, the Harmons suffered a loss of rental income from their mobile home and they were put to considerable inconvenience.

In mitigation, the accused, a member of the Oregon State Bar since 1981, has had no other complaints or charges against him. He presented credible evidence of general good character and good professional reputation in the local area in which he practices. He also offered his *pro bono* work as evidence of his good character.

In aggravation, the misconduct in this case occurred over a long period of time, beginning with the accused's failure to follow through on the negotiation with Richardson's lawyer and continuing until the trial panel's hearing, when it appears the accused finally cooperated in resolving the Harmons' complaint.

Oregon case law does not offer any precedent that deals with precisely the same charges that the accused faces in this matter. Some cases, however, are helpful. In *In re Kissling*, 303 Or 638, 740 P2d 179 (1987), this court imposed a 63-day suspension on a lawyer who violated DR 1-102(A)(3), DR 6-101(B), DR 7-101(A)(2) (intentional failure to carry out a contract of employment), and DR 7-102(A)(5) (making a false statement of law or fact). In *Kissling*, as in this case, the lawyer had no prior disciplinary record. *See also In re Dugger*, 299 Or 21, 697 P2d 973 (1985) (63-day suspension for violations of *former* DR 1-102(A)(4) (misrepresentation), DR 1-103(C), and *former* DR 6-101(A)(3) (neglect of a legal matter).

Considering all the ABA factors and this court's case law, we conclude that the trial panel's recommendation of a 63-day suspension is appropriate.

The accused is suspended from the practice of law for 63 days from the effective date of this decision. Costs to the Oregon State Bar.[4]

[4] This is the type of case in which this court may in the future consider following the procedure for affirmance described in BR 10.6. BR 10.6 provides that the Supreme Court shall consider each matter *de novo* upon the record and may adopt, modify, or reject the decision of the trial panel in whole or in part and thereupon enter an appropriate order. If this court's order adopts the decision of the trial panel without opinion, the opinion of the trial panel shall stand as a statement of the decision of this court in the matter but not as the opinion of this court.

IN THE SUPREME COURT OF THE STATE OF OREGON

In re Complaint as to the Conduct of
David DINERMAN,
Accused.
(OSB 87-58; SC S37986)

In Banc

Review of decision of the Trial Panel of the Oregon State Bar Disciplinary Board.

Argued and submitted January 9, 1992.

Martha M. Hicks, Assistant Disciplinary Counsel, Oregon State Bar, Lake Oswego, argued the cause and filed the briefs for the Oregon State Bar.

Norman Sepenuk, Portland, argued the cause and filed the brief for the accused.

PER CURIAM

The accused is suspended from the practice of law for a period of 63 days commencing on the effective date of this decision. The Oregon State Bar is awarded its actual and necessary costs and disbursements. ORS 9.536(4).

PER CURIAM

This is a disciplinary proceeding instituted by the Oregon State Bar, charging in two causes of complaint that the accused engaged in conduct that violated standards of professional conduct. The Bar's first cause of complaint charges the accused with violating *former* DR 1-102(A)(3)[1] (now DR 1-102(A)(2)) (illegal conduct involving moral turpitude), *former* DR 1-102(A)(4)[2] (now DR 1-102(A)(3)) (conduct involving dishonesty, fraud, deceit, or misrepresentation), and DR 7-102(A)(7)[3] (conduct involving counseling or assisting the lawyer's client in conduct that the lawyer knows to be illegal or fraudulent). The Bar's second cause of complaint charges the accused with violating *former* DR 1-102(A)(4)[4] (now DR 1-102(A)(3)) (illegal conduct involving moral turpitude) and DR 7-102(A)(7)[5] (conduct involving counseling or assisting the lawyer's client in conduct that the lawyer knows to be illegal or fraudulent).

The trial panel found the accused guilty of violating all three disciplinary rules with respect to the first cause of complaint and not guilty of violating either disciplinary rule with respect to the second cause of complaint. The panel imposed a reprimand. The Bar seeks review of the sanction, arguing that a four-month suspension would be appropriate. The Bar does not seek review of the trial panel's findings with

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[1] *Former* DR 1-102(A)(3) provided:

"A lawyer shall not:

"* * * * *

"(3) Engage in illegal conduct involving moral turpitude."

[2] *Former* DR 1-104(A)(4) provided:

"A lawyer shall not:

"* * * * *

"(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation."

[3] DR 7-102(A)(7) provides:

"In his representation of a client, a lawyer shall not:

"* * * * *

"(7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent."

[4] *See supra*, note 2.

[5] *See supra*, note 3.

respect to the second cause of complaint. The accused did not seek review, but argues in response to the Bar's petition that the accused did not violate disciplinary rules and that, should a violation be found, the sanction should be at the lowest level possible.

We review *de novo*. ORS 9.536(3); BR 10.6. The Bar has the burden of establishing a violation of disciplinary rules by clear and convincing evidence. BR 5.2; *In re Anson*, 302 Or 446, 453, 730 P2d 1229 (1986). We find the accused guilty of violating *former* DR 1-102(A)(3), *former* DR 1-102(A)(4), and DR 7-102(A)(7), and suspend him from the practice of law for a period of 63 days.

FINDINGS OF FACT

We adopt the trial panel's findings of fact as clarified by the material in brackets (citations to the record omitted):

> "1. At all time[s] relevant hereto[,] the Accused * * * was an attorney at law licensed to practice in the State of Oregon, having his office and principal place of business in Lane County.
>
> "2. The Accused was employed by Gregory Harsch, a real estate developer who operated through several organizations: The Empire Financial Service, Inc., First Mark Real Estate Investors, Inc., and the Harsch Construction and Development Company (HCDC). Mr. Harsch and these entities will be referred to as Harsch. From September[,] 1980[,] until June, 1982, and again beginning in June, 1983, the Accused was employed as in-house counsel by Harsch.
>
> "3. In the course of his real estate development business, Harsch borrowed money from the Emerald Empire Bank (Bank).
>
> "4. In June, 1982, the Bank had reached or was approaching its lending limits to Harsch. These lending limits prohibit the Bank from placing too many loans with any one borrower. To avoid these lending limitations, the [President of the] Bank and Harsch devised a scheme whereby the Bank would make loans to other persons for the benefit of Harsch. These are so-called straw loans. Both the [President of the] Bank and Harsch were aware of the nature of these loans.
>
> "5. In June, 1982, the Accused signed a promissory note, a security agreement and a nominee agreement. The

terms of the promissory note were that the Accused borrowed, and agreed to repay the sum of $10,000 from and to the Bank. In the security agreement the Accused stated that he was the owner of a Minolta Copier and pledged the copier as security for the loan. In fact, the Accused was not the owner of the copier. Harsch was the owner of the copier and the [President of the] Bank knew this. In the nominee agreement the Accused agreed with Harsch that he was taking out the loan as agent for Harsch and for the benefit of Harsch. Harsch agreed that he would either repay the loan directly to the Bank or would reimburse the Accused if he were required to make payment to the Bank.

"6. In 1985 the Bank sued the Accused on the note. The Accused defended and pleaded as an affirmative defense that the loan was made for the purpose of complying with, or circumventing lending limits. The Accused was found liable, judgment was entered, and the Accused has satisfied the judgment.

"7. To finance his real estate development, Harsch used what has been labelled the LOB/LOT financing plan. Under this plan Harsch constructed houses for renters who had options to purchase the property. The renters took out construction loans and signed promissory notes. However, the renters did not receive these loans. The proceeds were paid by the Bank directly to Harsch. The idea was that after the houses were constructed, the construction loans would be replaced by permanent loans and new promissory notes secured by trust deeds would be signed. When the FDIC moved in, many houses were not constructed and the construction borrowers were held liable on the construction notes even though they had not received the benefits of the loans. The Accused did not devise this LOB/LOT financing plan. The extent of participation by the Accused, which was proved, was that he signed earnest money agreements with the construction borrowers on behalf of Harsch pursuant to a general power of attorney. When the FDIC sought to hold the construction borrowers liable, the Accused advised them they might be able to avoid liability because the loans were made to avoid [] the lending limitations on the Bank. The Accused states, and there was no evidence to the contrary, that he did not learn of these limitations or that these limitations had been exceeded until after any participation he had in the plan. The Accused did not know at the time he signed the earnest money agreements that sales or loans were being made in violation of lending limitations. The

Accused counseled his mother to become involved in the plan, as a construction borrower, and she was held liable on a construction loan."

DISCIPLINARY RULES VIOLATED

A. *Former* DR 1-102(A)(3)

Former DR 1-102(A)(3) provided that a lawyer shall not engage in illegal conduct involving moral turpitude. Conviction of a crime is not a prerequisite for violation of *former* DR 1-102(A)(3). *In re Anson, supra*, 302 Or at 453. The Bar argues, and the trial panel found, that the accused violated 18 USC § 1014[6] and 18 USC § 656,[7] either directly or by aiding, abetting, or conspiring with others to violate 18 USC § 656.

It is unlawful knowingly to make any false statement for the purpose of influencing in any way the action of a bank insured by the FDIC on any application, commitment, or loan, or on any change or extension by renewal of the application, commitment, or loan. 18 USC § 1014. The accused denies making a false statement for the purpose of influencing the bank.

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[6] 18 USC § 1014 (1988) (which had not been amended in any way relevant to this case since 1982) provided in part:

"Whoever knowingly makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of * * * any bank the deposits of which are insured by the Federal Deposit Insurance Corporation, [or] any member of * * * the Federal Deposit Insurance Corporation * * * upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan, or any change or extension of any of the same, by renewal, deferment of action or otherwise, or the acceptance, release, or substitution of security therefor, shall be fined not more than $5,000 or imprisoned not more than two years, or both."

[7] 18 USC § 656 (1988) (which had not been amended since its enactment in 1948) provided in part:

"Whoever, being an officer, director, agent or employee of, or connected in any capacity with any Federal Reserve bank, member bank, national bank or insured bank, or a receiver of a national bank, or any agent or employee of the receiver, or a Federal Reserve Agent, or an agent or employee of a Federal Reserve Agent or of the Board of Governors of the Federal Reserve System, embezzles, abstracts, purloins or willfully misapplies any of the moneys, funds or credits of such bank or any moneys, funds, assets or securities intrusted to the custody or care of such bank, or to the custody or care of any such agent, officer, director, employee or receiver, shall be fined not more than $5,000 or imprisoned not more than five years, or both; but if the amount embezzled, abstracted, purloined or misapplied does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both."

We find that the accused knowingly made false statements in two particulars. First, the accused signed a promissory note for a $10,000 loan, which the accused acknowledges was a straw loan entered into as a way for Harsch to receive more than the bank's lending limits would otherwise allow, by stating in the promissory note that the loan was made to the accused. The accused argues that, notwithstanding his agreement with Harsch and the bank president that Harsch would be looked to first for repayment, the accused was still liable on the note.

The accused knew that the reason for the straw loan was to avoid the bank's lending limits, and the evidence in the record establishes that he believed that he would *not* be personally liable on the note. He entered into a nominee agreement with Harsch, which provided that Harsch was liable for the note that the accused had signed. The accused stated in his deposition that, when he was asked to enter into the arrangement with the bank president and Harsch, he "was told that the bank was using this as a way to avoid their legal lending limits, and that they would not be looking to me for repayment." Further, when the FDIC sought to recover on the note in a civil action against the accused, the accused responded with an affirmative defense, which stated in part:

> "[The note at issue] was prepared and received by [the bank] with the full knowledge and understanding that the document represented the indebtedness of some party other than the [accused]. * * *
>
> "* * * * *
>
> "No debt, or other obligation, was ever entered into between the [accused] and [the bank]. * * *
>
> "The previously described document was requested by [the bank] for the purpose of complying with, or circumventing, the lending limits governing all loan activities engaged in by [the bank]. * * *
>
> "At all material times, [the bank] was aware that the underlying loan obligation represented by the previously described promissory note was not an obligation of the [accused], and the [bank] expressly agreed not to look to the [accused] for repayment of this obligation."

We find that the accused's signature on the promissory note was a knowingly false statement about his intention to be bound by the terms of that note.

Second, in support of the promissory note, the accused signed a security agreement in which the accused stated that he was the owner of a Minolta copier and pledged the copier as security for the loan. The accused acknowledges that he did not own the copier, so that the statement was false, but argues that he was not aware that the security agreement pledged the copier. We do not find to be credible the accused's claim that he was simply negligent in not reviewing the security agreement more closely or that the inclusion of Harsch's copier as an item owned by the accused was a mere scrivener's error.

The purpose of the entire transaction was to avoid the bank's lending limits to Harsch. Listing collateral owned by Harsch under the accused's name in a pledge agreement may have aroused the suspicion of others examining the document. The accused did not intend to be personally liable on the note, and the evidence does not support the accused's claim of simple negligence regarding the security agreement. The accused entered into the transaction carefully and deliberately, even drafting and signing a nominee agreement with Harsch in an attempt to shield the accused from liability. By his own admission, the accused was aware that the bank's documentation of other loans was sometimes poor. It is highly likely, therefore, that the accused reviewed these documents carefully. We find that the accused knew that the security agreement contained a false statement when he signed it.

The accused then argues that he did not violate 18 USC § 1014 because the statements in the promissory note and security agreement were not made to influence the actions of the bank. The record supports the accused's claim that the bank president and Harsch devised this scheme to avoid the bank's lending limits and that they asked the accused to sign the note and the security agreement. The note and the agreement were not in any way the accused's idea, and he was aware that the bank president and Harsch both approved of the plan.

The reality is, however, that the bank would not have entered into another loan with Harsch under Harsch's name and that the conduct of the accused influenced the bank to enter into a loan on Harsch's behalf. The accused's participation in the scheme persuaded the bank to do something that it would not otherwise have done. Further, the accused testified that the arrangement was made because the bank president could not loan Harsch more money without loan committee approval and for the purpose of making the bank books look better. The scheme was intended either to prevent the loan committee from reviewing the transaction or to convince the loan committee or others that the loan was something that it was not. We find that the accused made the false statements in the promissory note and security agreement for the purpose of influencing the action of the bank in violation of 18 USC § 1014.

We further find that the illegal conduct involved moral turpitude. The conduct was intentional and involved false statements and dishonesty. *See In re Chase*, 299 Or 391, 400-402, 702 P2d 1082 (1985) (discussion of moral turpitude). The accused violated *former* DR 1-102(A)(3).[8]

B. *Former* DR 1-102(A)(4)

Former DR 1-102(A)(4) provided that a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. The Bar argues that the accused's conduct involved dishonesty and misrepresentation, and we agree. In determining that the accused violated 18 USC § 1014, we found that the accused made knowingly false statements to influence the actions of the bank. Those statements were dishonest and misrepresented the truth. The fact that the bank president and Harsch requested and approved of the

[8] 18 USC § 656 provides that it is unlawful for a bank officer willfully to misapply the bank's money. *See supra*, note 7. The Bar argues that the accused aided or abetted or conspired with the bank president and Harsch willfully to misapply the bank's money by entering into the straw loan. We have found that the accused knowingly made false statements, but that he did not design or suggest the plan involving the straw loan. Under those circumstances, a violation of 18 USC § 656 would be based entirely on the same conduct that we have found to violate 18 USC § 1014 and would not be more culpable. The accused violated *former* DR 1-102(A)(3) by violating 18 USC § 1014; an additional violation of 18 USC § 656 would not affect the sanction under the circumstances of this case. Therefore, we decline to address whether the accused aided or abetted or conspired with a violation of 18 USC § 656.

false statements does not make the statements any the less false. The disciplinary rules govern the conduct of lawyers; misconduct is not something other than misconduct when it is approved by others. The accused violated *former* DR 1-102(A)(4).

C. DR 7-102(A)(7)

DR 7-102(A)(7) provided that, in a lawyer's representation of a client, a lawyer shall not assist the client in conduct the lawyer knows to be illegal or fraudulent. The accused argues that, although he knew that the promissory note was an attempt to avoid lending limits, he did not know that those lending limits were set by law and either did not think about it or assumed that the limits were imposed by the bank. The accused did testify that it "crossed his mind" that the transaction might be illegal, but there is not clear and convincing evidence that the accused knew that it was illegal.

We find that the accused knew that obtaining a straw loan by having a party who would not be looked to for repayment sign as obligor was fraudulent and that he assisted his client, who was also his employer, in that conduct. *See In re Hockett*, 303 Or 150, 157-58, 734 P2d 877 (1987) (defining fraud in the disciplinary rule as fraud that would be actionable in Oregon in a tortious sense); *Rice v. McAlister*, 268 Or 125, 128, 519 P2d 1263 (1974) (setting forth elements of fraud). The accused violated DR 7-102(A)(7).

SANCTION

In deciding the appropriate sanction, this court refers for assistance to the American Bar Association Standards for Imposing Lawyer Sanctions (ABA Standards). *In re Recker*, 309 Or 633, 639-40, 789 P2d 663 (1990). ABA Standards 3.0 sets out the factors to consider: the duty violated, the lawyer's mental state, the potential or actual injury caused by the misconduct, and the existence of aggravating or mitigating factors. The trial panel in this case issued a reprimand, and the Bar requests that a four-month suspension be imposed.

The accused's conduct represents a failure to maintain personal integrity. ABA Standards 5.1. The accused acted intentionally, the most culpable mental state, ABA

Standards at 6, in making false statements, and he intended the false statements to influence the actions of others.

The potential injury based on the accused's conduct was a $10,000 loss to the bank. The lending limits that the accused helped to circumvent are designed to protect the bank from making bad loans. Security requirements for loans, which the accused helped violate, protect a bank by providing collateral from which the loan can be collected in the event of default. In this case, the accused helped Harsch receive $10,000 over the lending limit without intending to be held personally liable in the event of Harsch's default. The bank eventually failed. In the process, the accused resisted repaying the $10,000, although he ultimately did enter into a settlement to satisfy the judgment against him, which by that time included the $10,000 principal, $5,000 in interest, and $19,000 in legal fees. The accused, of course, is not solely responsible for the bank's failure, but bank failure is one type of injury that the rules violated were intended to prevent. We consider the injury to be serious.

The pertinent ABA Standards suggest that suspension is the appropriate sanction in this situation. *See* ABA Standards 5.12 (criminal conduct that seriously adversely reflects on lawyer's fitness to practice). There are aggravating circumstances. *See* ABA Standards 9.22 (listing aggravating circumstances). The accused's motive was dishonest, although not selfish. In addition, although the accused argues now that he was liable on the promissory note and that he understood at the time of signing the note that he was personally liable, in the interim the accused defended against a civil action to recover on the note by claiming that he was not personally liable.

There are also mitigating factors. *See* ABA Standards 9.32 (listing mitigating circumstances). The absence of a prior disciplinary record is a mitigating factor, although this factor is of limited significance because the accused had recently entered into the practice of law. The record reflects the accused's cooperative attitude toward the proceedings, his evident remorse for the mistakes that he made, and his demonstrated upstanding character and reputation. The remoteness in time from the offenses and the delay in bringing them to disciplinary action is unfortunate, although the

accused's intervening defense against the civil action involving the same conduct appears likely to have been a factor in the delay. The facts that the misconduct occurred ten years ago and that he has practiced law since that time with no disciplinary violations of which we have been made aware reflect positively on his fitness to practice law.

The seriousness of the accused's conduct, taken in the context of the aggravating and mitigating factors, calls for a suspension of 63 days. *See In re Magar*, 312 Or 139, 817 P2d 289 (1991) (60-day suspension imposed for dishonesty in endorsing a draft without authorization); *In re Hiller*, 298 Or 526, 694 P2d 540 (1985) (four-month suspension for failure to disclose to the court that transfer of title to real estate was *pro forma* only).

The accused is suspended from the practice of law for a period of 63 days commencing on the effective date of this decision. The Oregon State Bar is awarded its actual and necessary costs and disbursements. ORS 9.536(4).

IN THE SUPREME COURT OF THE STATE OF OREGON

In re Complaints as to the Conduct of
James E. WILLIAMS,
Accused.
(OSB 89-2; 89-30) (OSB 90-91; 90-92; 90-93)
(SC S38051)
(Consolidated for Opinion)

In Banc

Review of decisions of the Trial Panel of the Oregon State Bar Disciplinary Board.

OSB Nos. 89-2 and 89-30 argued and submitted August 27, 1991; reassigned September 15, 1992.

James E. Williams, Beaverton, argued the cause and filed the brief *in propria persona.*

Susan K. Roedl, Assistant Disciplinary Counsel, Lake Oswego, argued the cause and filed the response brief for the Oregon State Bar.

OSB Nos. 90-91, 90-92, and 90-93 argued and submitted September 3, 1992.

Mary A. Cooper, Assistant Disciplinary Counsel, Lake Oswego, argued the cause and filed the briefs for the Oregon State Bar.

Eric E. Lindenauer, of Garvey, Schubert & Barer, Portland, argued the cause and filed the response for the accused.

PER CURIAM

The accused is suspended from the practice of law for 63 days commencing on the effective date of this decision. The Oregon State Bar is awarded its actual and necessary costs and disbursements. ORS 9.536(4).

Unis, J., filed a dissenting opinion.

PER CURIAM

This opinion involves two separate disciplinary cases filed against the accused, James E. Williams. We have consolidated the two proceedings for this opinion.

A. THE FIRST PROCEEDING

In this disciplinary proceeding, the Oregon State Bar charged the accused with violations of DR 1-102(A)(3) (conduct involving dishonesty, fraud, deceit, or misrepresentation), DR 1-102(A)(4)[1] (conduct prejudicial to the administration of justice), and DR 9-101(A)[2] (failure to maintain client's funds in identifiable trust account). The trial panel of the Oregon State Bar Disciplinary Board found the accused not guilty of violating DR 1-102(A)(4) and guilty of violating DR 1-102(A)(3) and DR 9-101(A), imposing a reprimand for each of the two violations.

The accused seeks review of the trial panel's finding that he violated DR 1-102(A)(3). He does not seek review of the trial panel's finding that he violated DR 9-101(A). We review *de novo*. ORS 9.536(3). The Bar has the burden of establishing disciplinary violations by clear and convincing evidence. BR 5.2.

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[1] DR 1-102(A)(3) and (4) provide:

"It is professional misconduct for a lawyer to:

"* * * * *

"(3) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

"(4) Engage in conduct that is prejudicial to the administration of justice[.]"

[2] DR 9-101(A) provides:

"All funds of clients paid to a lawyer or law firm, including advances for costs and expenses, and escrow and other funds held by a lawyer or law firm for another in the course of work as lawyers, shall be deposited and maintained in one or more identifiable trust accounts in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:

"(1) Funds reasonably sufficient to pay account charges may be deposited therein.

"(2) Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client in which event the disputed portion shall not be withdrawn until the dispute is finally resolved."

The issues presented for review are (1) whether the accused made a misrepresentation, in violation of DR 1-102(A)(3), and, if so, (2) whether that violation, in addition to the violation of DR 9-101(A), warrants that the accused receive more than a reprimand. The Bar argues that the trial panel's finding that the accused committed two disciplinary rule violations is correct, but asks that the court impose a suspension of no less than 30 days for those violations.

Concerning DR 1-102(A)(3), we find: On December 2, 1986, Mr. and Mrs. Durham were landlords. Their tenant was Erin Nugent. On behalf of Nugent, on December 2, 1986, the accused wrote a letter to the Durhams. The letter read as follows:

> "I represent Erin Casey Nugent who is your tenant in the house located at 1910 20th Street, NE, Salem, Marion County, Oregon.
>
> "There are some serious maintenance and repair problems existing in that house, all of which are your responsibility under the Oregon Residential Landlord and Tenant Act (ORLTA). These include:
>
> "1. Repair entire electrical system
> 2. Repair roof leaks
> 3. Repair cooking stove
> 4. Provide adequate heat in all rooms
> 5. Repair or replace waterheater
> 6. Repair bathtub drain
> 7. Repair broken and loose windows
> 8. Weatherize doors and windows
> 9. Clean chimney
>
> "The first five items listed are essential services according to law. If you do not take immediate action to make those repairs and supply those essential services, my client will pursue the remedies available to her including but not limited to, causing the necessary work to be done and deducting the value of that work from her rent, and seeking damages in court.
>
> "Further, until such time as you make arrangements to make *all* the repairs and perform all the maintenance set forth above as required by law, all rent payments will be placed in a trust account to assure your compliance.
>
> "Please contact me immediately to make arrangements to effect these repairs, or if you wish to designate persons to do the work on items 1 through 5.

"All further communications or notices to my client under the ORLTA are to be directed in care of this office."

After receiving that letter, Mrs. Durham talked to the accused on December 3 or 4. Before the trial panel, she testified as follows:

"Q Will you please tell the panel the content of your conversation with Mr. Williams?

"A Oh, you know, we were dumbfounded. I asked him what — you know, about the letter. And he reiterated that he had our rent money, and he said that we had 24 hours to make all the repairs on the list in his letter, or he would have them done —

"Q Okay.

"A — And sue us.

"Q Did you ask him anything?

"A I said what gives you the right to keep our rent money. We know nothing about this. And he says I have it. I can do it.

"Q Was anything else said to you by Mr. Williams at that time?

"A That threat was repeated two to three times. And I hung up on him."

The accused denies making those statements to Mrs. Durham.

On December 10, 1986, the accused again wrote to the Durhams as follows:

"Because you have chosen to ignor [*sic*] written and oral demands that you provide essential services required under the Oregon Residential Landlord and Tenant Act, we will be making arrangements with licensed contractors to make needed repairs to the roof, electrical system, cooking stove and waterheater, and to install space heaters. **The cost of this work will be paid out of the rent payments held in trust, at the rate of $200.00 per month as provided by law.**

"We will not hesitate to invoke the full protection of the law to prevent any further harassment of my client by you, by phone or in person." (Bold emphasis added.)

On December 10, the accused had none of the Durhams' rent money in his trust account. On or about

December 12, Nugent gave the accused a check for $250, which was to be placed in the accused's trust account. The accused did not deposit the $250 in his trust account.

Mr. and Mrs. Durham hired an Albany lawyer named Kent Hickam. Hickam wrote to the accused on December 13, 1986, as follows:

> "I represent Steve and Karolyn Durham regarding the landlord/tenant matter concerning your client, Erin Casey Nugent. Please direct all future communications concerning this matter to me at the above address.
>
> "* * * * *
>
> "You also have no basis to hold the December rental payment in your trust account. We insist that the rent be paid immediately as it is now overdue."

Hickam and Mr. and Mrs. Durham all testified that they understood, from the accused's letters, that he was holding Nugent's rent in his trust account to pay for the cost of repairs. Nugent moved out on or after December 15, 1986. The accused returned the check to Nugent, but he did not advise Hickam or the Durhams that the $250 was not in his trust account. He wrote a letter terminating the tenancy effective January 3, 1987. Not until several years later, when he was ordered to respond, did the accused tell his opponent that he held no funds in his trust account.

In its answering brief, the Bar states:

> "The Bar does not dispute Mr. Williams' assertion that the December 12 [*sic*: December 2] and December 10 statements regarding his intent to hold Ms. Nugent's rent in trust were true when he made them. However, once he and Ms. Nugent altered their plans and he no longer intended to hold her rent in trust, the Durhams' (and their attorneys') reasonable beliefs were no longer true. An attorney's deliberate failure to correct a misimpression he or she has created is a misrepresentation in violation of DR 1-102(A)(3)."

Although this concession is ambiguous (we are unsure whether the Bar is stipulating that the letters of December 2 and 10 contained no misrepresentation, or whether the Bar is stipulating only that the accused "*intended* to hold her rent in trust" (emphasis added)), we give the accused the benefit of the doubt and will limit our discussion to whether the

accused's "deliberate failure to correct a misimpression he or she has created is a misrepresentation in violation of DR 1-102(A)(3)."

The statement that "[t]he cost of this work will be paid out of the rent payments held in trust" was material to the issue whether Nugent had breached the rental agreement. The accused's statement that the rent would be held "in trust" suggested that the tenant was delivering (or had delivered) the rent to the accused, and that the rent money would be held (or was being held) by the accused for the benefit of the landlords, either for repairs or for rent, or both. The statement suggested that the tenant was not, and would not be, behind in her rent payments. Whether the landlords had a right to terminate the rental agreement "after 72 hours' written notice of nonpayment," and to take possession, turned on whether the rent was unpaid. ORS 90.400(2).

Moreover, in an action for possession based on nonpayment of rent, the tenant's right to counterclaim may turn on whether the tenant has deposited the rent into court. ORS 90.370. The accused himself testified that this was one of the reasons that he represented that the rent payments were held in trust. From the point of view of the landlords and their lawyer, the likely availability of rent money was a material consideration affecting the landlords' choice among available courses of action, and the accused intended to affect the landlords' potential choices of action.

Hickam's letter of December 13, 1986, establishes his belief that the rent was in the accused's trust account. It was reasonable for Hickam to so conclude. On December 13, 1986, whether or not the rent was in the trust account was material to the dispute between the Durhams and Nugent. When the accused returned the check to Nugent, he should have advised Hickam that the representation contained in the accused's earlier letters no longer was true.

A misrepresentation can be made by making an assertion that is not in accordance with the truth when made, *Scott v. Francis*, 314 Or 329, ___ P2d ___ (1992), or by failing to correct a representation that, although true when made, is no longer true in the light of information later acquired. *In re Leonard*, 308 Or 560, 784 P2d 95 (1989),

although not precisely in point, is instructive. In *Leonard*, the accused represented potential lessees in a complex transaction involving the leasing of real property. The potential lessors were also represented by their lawyer. There were negotiations concerning whether future adjustment of rent should be indexed to the Consumer Price Index. The accused knew that the potential lessors would not agree to any adjusted figure that fell below the initial floor of $8,850 per month.

Eventually, the lease was drafted to provide that in no event could the rent be reduced below $8,850 per month. The accused later modified the lease by interlineation, the effect of which was to permit the rent to fall below $8,850 per month. The accused did not inform the lessors' lawyer of the interlineation. He told Zeeb, a representative of another party to the complicated transaction, that the handwritten change "merely served to conform" one paragraph with another. 308 Or at 564. Zeeb communicated the information to the lessors, who initialed the lease without consulting with their lawyer. Three years later, the accused proposed to reduce the rent to $4,187.60. The other lawyer then learned, for the first time, of the accused's change to the lease agreement.

The court held that, in unilaterally modifying the lease agreement when the accused knew such modification to be contrary to the intent of the lessors, and in failing to disclose this change, the accused violated DR 1-102(A)(4) (now DR 1-102(A)(3)). The opinion states:

> "Likewise, 'misrepresentation' is a broad term encompassing non-disclosure of material fact; it need not be done with the intent to deceive or commit a fraud." 308 Or at 569.

Similarly, in the instant case, whether the rent money was in the accused's trust account was material in December 1986. The accused knew that the Durhams' lawyer believed that the rent was in the trust account. The accused had an affirmative duty to disclose the truth to the Durhams' lawyer when the accused returned his client's check to her.

We find that the accused made a material misrepresentation in failing to correct the representations contained in his letter of December 10, when he knew that others

believed that he held the rent in his trust account. Thus, the accused violated DR 1-102(A)(3).

B. THE SECOND PROCEEDING

In this proceeding, the complaint contains four charges against the accused. The first charge alleges that the accused violated DR 7-104(A)(1) of the Code of Professional Responsibility (communicating with a person that the lawyer knows to be represented by another lawyer). We find the accused guilty of this charge.

The second charge alleges a violation of DR 2-110(A)(2) ("a lawyer shall not withdraw from employment until the lawyer has taken reasonable steps to avoid foreseeable prejudice to the rights of the lawyer's client"). The trial panel found the accused not guilty of this charge. We also find the accused not guilty of this charge.

The trial panel found the accused not guilty of the third charge, and the Bar has not sought review of that finding.

The fourth charge alleges that the accused violated DR 1-103(C) ("A lawyer who is the subject of a disciplinary investigation shall respond fully and truthfully"). We find the accused guilty of this charge.

Alleged Violation of DR 7-104(A)(1).

A tenant in a mobile home park was involved in a dispute with her landlord. She employed the accused to represent her. On October 2, 1987, the accused wrote to Thomas Rastetter, the landlord's lawyer, advising him that the accused represented the tenant.

ORS 90.600 requires the landlord to give at least 90 days' advance notice of a rent increase and an opportunity to meet with the landlord. In November 1987, after the tenant received a notice of a rent increase, the accused, with his client, met with Ms. Duckworth, the representative of the landlord, at the time and place specified by the landlord to discuss the proposed rent increase. At the meeting, the accused inquired if Mr. Rastetter was going to attend the meeting, and Ms. Duckworth said "no." The accused and his

client then spent about an hour discussing the proposed rent increase with Ms. Duckworth.

DR 7-104(A)(1) provides:

> "During the course of the lawyer's representation of a client, a lawyer shall not:
>
> "(1) Communicate or cause another to communicate on the subject of the representation, or on directly related subjects, with a person the lawyer knows to be represented by a lawyer on that subject, or on directly related subjects, unless the lawyer has the prior consent of the lawyer representing such other person or is authorized by law to do so. This prohibition includes a lawyer representing the lawyer's own interests."

The accused asserts that he "was authorized by law to represent his client at a statutory rent increase meeting even if the landlord chose not to have an attorney attend."

ORS 90.600(1) requires a landlord who is raising the rent at a mobile home park to give each affected tenant an opportunity to meet with the landlord or a representative of the landlord to discuss the rent increase. Nothing in the text of ORS 90.600 suggests that the prohibition of DR 7-104(A)(1) does not apply in this situation.[3] True, a tenant can choose to ask her lawyer to attend the meeting. Here, however, there was an ongoing dispute between the landlord and the tenant, and the accused *knew* that the landlord was represented by a lawyer, Rastetter. The proposed rent increase was the very matter in dispute between the landlord and the tenant. The accused was not "authorized by law" to communicate with Duckworth.[4] We find the accused guilty of violating DR 7-104(A)(1).

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[3] There may be situations – such as statutes that require the giving of a notice, *see, e.g.*, ORS 20.080 – that imply that authorization to make the communication exists, notwithstanding knowledge of the lawyer that the other person is represented by a lawyer. *See also U.S. v. Schwimmer*, 882 F2d 22 (2d Cir 1989) (prosecutor may question a defendant represented by counsel before grand jury under "authorized by law" exception). ORS 90.600 is not such a statute, and this is not such a case.

[4] The accused also argues:

> "If Williams were required to refrain from attending the meeting, then Duckworth, by choosing not to have her attorney attend, could have effectively negated Kimberly Baker's right to representation. The authorized by law exception prevents that result."

Alleged Violation of DR 2-110(1)(2).

The accused was charged with withdrawing from his representation of a client without taking steps to avoid foreseeable prejudice to the client. The trial panel found the accused not guilty of the charge. It would serve no purpose to set forth the facts on this charge. We agree with the trial panel's finding and therefore proceed to the last charge.

Alleged Violation of DR 1-103(C).

The accused was charged with violating DR 1-103(C), which provides:

> "A lawyer who is the subject of a disciplinary investigation shall respond fully and truthfully to inquiries from and comply with reasonable requests of a tribunal or other authority empowered to investigate or act upon the conduct of lawyers, subject only to the exercise of any applicable right or privilege."

A preliminary question must be addressed. This charge was filed after the deposition of the accused was taken on November 4, 1991. The accused refused to answer a number of questions and gave evasive answers to other questions. The accused objected to the admissibility of the deposition on the ground that he had not been given the deposition to examine for correctness. ORCP 39F. The trial panel sustained the accused's objection to introduction of the deposition on the ground that the accused had not had the opportunity to read and sign the deposition.

Depositions taken in Bar proceedings are governed by BR 4.5(b)(2), which provides that "[t]he manner of taking depositions shall conform as nearly as practicable to the procedure set forth in the Oregon Rules of Civil Procedure." ORCP 39F provides:

> "(1) When the testimony [of a witness at deposition] is taken by stenographic means, or is recorded by other than stenographic means as provided in subsection C.(4) of this rule, *and if any party or the witness so requests at the time the deposition is taken*, the recording or transcription shall be submitted to the witness for examination, changes, if any,

Had Rastetter chosen not to attend the meeting, knowing that the accused would attend, a different case would be presented. That case is not before us.

and statement of correctness. With leave of court such request may be made by a party or witness at any time before trial.

"(2) Any changes which the witness desires to make shall be entered upon the transcription or stated in a writing to accompany the recording by the party taking the deposition, together with a statement of reasons given by the witness for making them. Notice of such changes and reasons shall promptly be served upon all parties by the party taking the deposition. The witness shall then state in writing that the transcription or recording is correct subject to the changes, if any, made by the witness, unless the parties waive the statement or the witness is physically unable to make such statement or cannot be found. * * *

"(3) If no examination by the witness is requested, no statement by the witness as to the correctness of the transcription or recording is required." (Emphasis added.)

The accused's depositions were taken on two occasions, on November 4 and 11, 1991. At the time that the first deposition was taken, the accused made no request to read and sign the deposition. The chairman of the trial panel was present during the second deposition in order to rule on objections made by the accused at the first deposition. The only request by the accused that the first deposition be submitted to him for his examination came during preliminary discussions at the second deposition, in which the accused stated, "I would request a copy of [the November 4] transcript so I may review it as is my right under the Oregon Rules of Civil Procedure * * *." The accused did not continue to press his request to examine the first deposition, apparently because Bar counsel forthwith agreed that he could do so. The accused made no further request in this regard, and he was given a copy of the deposition before trial. The accused's reliance on ORCP 39F(1) is without substance.

The accused also objected to admission of the deposition transcript, citing BR 4.5. The accused's position on this claim is:

"Bar Rule 4.5 provides that deposition practice shall conform to the Oregon Rule of Civil Procedure and further provides that:

" '(c) Discovery procedure. *All discovery questions shall be resolved by the trial panel chairperson on motion.*

> Discovery motions, including motions for limitation of discovery shall be in writing. All such motions shall be filed with the trial panel chairperson and a copy mailed to Bar counsel or the accused, and disciplinary counsel.
>
> " '(e) Discovery sanctions. For failure to provide discovery as required under BR 4.5, the trial panel chairperson may make such rulings as are just, including, but not limited to, the following:
>
> " '(1) a ruling that the matters regarding which the ruling was made or any other designated fact shall be taken to be established for the purposes of the proceeding in accordance with the claim of litigant obtaining ruling; or
>
> " '(2) a ruling refusing to allow the disobedient litigant to support or oppose designated claims or defenses, or prohibiting the disobedient litigant from introducing designed matters in evidence.'
>
> "Hence, the proper procedure for the Bar to address any contention that Williams failed to appropriately respond to deposition questions was by motion to the trial panel chairperson. The chairperson was empowered to impose sanctions, up to and including establishment of claims or refusal to allow defenses. The procedure adopted by the Bar in Rule 4.5 is the only sensible approach to depositions in disciplinary proceedings.
>
> "Otherwise, a *pro se* defendant such as Mr. Williams would be chilled from adequately representing himself by the threat of a new disciplinary charge or enhanced sanctions. Any other rule would discriminate against the *pro se* defendant, since presumably the Bar would not bring charges against a lawyer who merely followed an attorney's instructions in refusing to answer questions. A *pro se* defendant facing questioning from Bar counsel in a formal deposition would be placed at an extreme disadvantage if he or she could not make objections or refuse to answer questions while acting in the dual roles of advocate and witness." (Emphasis in original; footnote omitted.)

The trial panel excluded the depositions, noting that "the Bar never asked the trial panel chairman to provide sanctions as permitted under rule 4.5(e) of the Oregon State Bar Rules of Procedure." The availability of sanctions under BR 4.5 does not preclude charging a lawyer with unethical

conduct under DR 1-103(C). We turn then to the depositions to determine whether the accused violated DR 1-103(C).

The Bar's amended complaint contained the following allegations:

"3.

"In or about November, 1988, the Accused attended a meeting between his client, a tenant, and Shirley Duckworth (hereinafter 'Duckworth'), the landlord or landlord's representative. The purpose of the meeting was to discuss a proposed rent increase and other matters which were the subject of a dispute between the Accused's client and Duckworth.

"4.

"At the time of the meeting, the Accused knew that Duckworth was represented by counsel and expected that the attorney would attend the meeting. When Duckworth appeared at the meeting alone, however, the Accused proceeded with the meeting and discussed issues relating to the dispute without first obtaining Duckworth's attorney's permission."

In his answer, the accused denied those allegations.

At the November 4 deposition, the accused was questioned about paragraphs 3 and 4 of the complaint as follows:

"Q Mr. Williams, in November of 1988, did you attend a meeting with your client and a Ms. — I believe it was Shirley Duckworth — regarding your client's tenancy?

"A Do you have my answer?

"Q Yes.

"A Read it.

"Q You deny that you attended the meeting?

"A Gee, that's very good. You can read.

"Q Do you deny that you attended a meeting in November of 1988?

"A Do you have my answer?

"Q Yes.

"A Read it.

"* * * * *

"Q Now, Mr. Williams, you know that the bar will present evidence and testimony that Ms. Baker was tenant of yours — excuse me, a client of yours?

"A That's fine.

"Q You deny that she was a client of yours?

"A I'm not answering the question.

"Q Because it's privileged, in your opinion?

"A Uh-huh.

"Q Do you remember Shirley Duckworth?

"A I couldn't say that I'd recognize her if I saw her.

"Q Do you recall a meeting of November 1988?

"A No, I don't recall a meeting in November of 1988.

"Q Do you deny there was a meeting in November of 1988?

"A No. I don't recall.

"Q Your answer denies it.

"A Then I will stand by my answer.

"Q You're denying that in November of 1988 you attended a meeting?

"A What does my answer say?

"Q It says it denies the allegations set forth in paragraph three.

"A Then I'm denying the — denying the allegations set forth in paragraph three.

"Q The entire allegation?

"A The entire allegation.

"Q You have the complaint. Would you like to review that before you make that statement?

"A I don't need to review it. My answer is accurate. If I wish to change it in my answer I'll let you know.

"Q Now's the time to let me know. You're under oath.

"A I choose to stand by my answer.

"Q I'm going to read this then ask you — and this may be time consuming, but I have to do it this way.

"Mr. Williams, in November of 1988, did you attending a meeting between your client, Kimberly Baker, and Shirley Duckworth and the — and the purpose of the meeting was to

discuss a proposed rent increase as a subject dispute between your client and Ms. Duckworth? Do you admit or deny that?

"A You have my answer. Read it.

"Q It denies it.

"A If that's what it says, I'll stand by my answer.

"Q Mr. Williams, you understand you're under oath right now?

"A Yeah. I understand I'm under oath. And I also know that when I signed my answer, that that was the equivalent of an oath, as well. I'll stand by my answer. I'm not going to repeat my answers here.

"* * * * *

"Q Regarding paragraph four, at the time of the meeting in November of 1988, did you know Ms. Duckworth was represented by counsel?

"A I'm not going to respond to any more questions that I've already answered in the answer.

"Q Your answer was denial. Are you denying that you knew she was represented by counsel?

"A If you don't get on to another subject fairly quickly, I'm going to leave. You're wasting my time. You haven't asked me one substantive question in 40 minutes.

"* * * * *

"Q Did you understand at that meeting that Ms. Duckworth was represented by counsel?

"A No, I didn't."

From our examination of the depositions (and the accused's answer to the Bar's complaint, as well), we are convinced that the accused responded neither fully nor truthfully. Therefore, a violation of DR 1-103(C) has been made out.

We agree with the accused that an accused "facing questioning from Bar counsel in a formal deposition would be placed at an extreme disadvantage if he or she could not make objections or refuse to answer questions while acting in the dual roles of advocate and witness." Disciplinary proceedings before trial panels are adversary proceedings. Our ruling does not intend to foreclose any objection that has a basis in fact or law, actual or theoretical. Here, other objections made by the

accused had some basis, actual or theoretical. We have no doubt, however, that many of the accused's objections had, as their justification, nothing more than the venting of displeasure at the Bar for bringing these proceedings.[5] The portions of the examination set forth above demonstrate that the accused was simply saying to the Bar, "I don't like what you are trying to do to me, and I will refuse to cooperate." That created the foundation for a further charge of a violation of DR 1-103(C).

C. SANCTION

This court frequently looks to the American Bar Association Standards for Imposing Lawyer Sanctions (1986) in considering sanctions for unethical conduct. Those standards call for consideration of four factors.

1. *The Ethical Duty Violated.*

By leading the opposing parties and their lawyer to continue to believe that he held his client's rent payments in trust, when he did not, the accused violated a duty owed to the legal system. ABA Standard 5.

We have also found the accused guilty of communicating with a person known to be represented by a lawyer, DR 7-104(A)(1), and failing to respond fully and truthfully in the course of a disciplinary investigation, DR 1-103(C). In so doing, the accused violated a duty owed to the legal system.

2. *The Lawyer's Mental State.*

"Intentionally" is the most culpable mental state defined by the ABA Standards for Imposing Lawyer Sanctions. An act is "intentional" if it is done with conscious objective or purpose to accomplish a particular result.

The accused acted intentionally when he failed to correct the representation that led the Durhams and their lawyers to believe that his client had entrusted her rent to him. We also find that the accused acted intentionally in

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[5] We note the possible application of DR 7-102(A)(1) and (5), which state that a lawyer, in representing a client, "or in representing the lawyer's own interests," shall not "(1) * * * assert a position, conduct a defense, delay a trial, or take other action * * * when the lawyer knows or when it is obvious that such action would serve merely to harass * * * another" nor "(5) [k]nowingly make a false statement of law or fact."

contacting a represented party and in failing to cooperate with the Bar.

3. *The Extent of Injury, Actual or Potential, Caused by the Misconduct.*

Because the purpose of professional discipline is to protect the public, an injury need not be actual, but only potential, in order to support the imposition of a sanction. The accused's misrepresentations regarding Nugent's December 1986 rent apparently resulted in no injury to his opposing parties or opposing counsel. There was, however, a potential injury, because whether the rent had been "paid" by delivery of the rent to the accused potentially affected the landlords' rights.

In the Duckworth matter, there was the potential that the accused's wrongful communication with Ms. Duckworth might have prejudiced the landlord's interests. The accused's noncooperation with the Bar created injury to the profession and the ability of the Bar to investigate the conduct of lawyers.

4. *Aggravating and Mitigating Factors.*

In the first proceeding, mitigating factors evidenced on the record are interim rehabilitation (ABA Standard 9.32(j)) and the absence of a dishonest or selfish motive (ABA Standard 9.32(b)). There are two aggravating factors, substantial experience in the practice of landlord-tenant law (ABA Standard 9.22(i)) and the accused's refusal to acknowledge the wrongful nature of his conduct (ABA Standard 9.22(g)).

In the second proceeding, aggravating factors include: a pattern of misconduct; refusal to acknowledge the wrongful nature of the conduct; and substantial experience in the practice of law. ABA Standard 9.22(c), (g), and (i).

Misrepresentation is a serious violation of the disciplinary rules. Oregon ethics law contains several cases in which lawyers who have been found guilty of only one charge of dishonesty have received suspensions ranging from two to four months. In *In re Fuller*, 284 Or 273, 586 P2d 1111 (1978), a lawyer was suspended for 60 days for violating DR

1-102(A)(4) (current DR 1-102(A)(3)) and ORS 9.480(4) (current ORS 9.527(4)) (willful deceit or misconduct). In *In re Hiller and Janssen*, 298 Or 526, 694 P2d 540 (1985), the lawyers were suspended for four months for violating DR 1-102(A)(4) (current DR 1-102(A)(3)) and ORS 9.460(2) (failure to employ only those means that are consistent with the truth, and seeking to mislead the court).

Oregon precedent offers another line of cases in which lawyers have received reprimands for single acts of misconduct. In *In re Hubert*, 265 Or 27, 507 P2d 1141 (1973), a lawyer who failed to correct an inadvertent misrepresentation to the court after he discovered the incorrectness of his statement received a reprimand. In *In re Miller*, 287 Or 621, 601 P2d 789 (1989), a lawyer was reprimanded for failing to advise persons depositing bail for his clients that the bail would be returned to the clients and not to the depositors and for further failing to advise these individuals that his fee would be paid from the bail money deposited. In *In re Simms*, 284 Or 37, 584 P2d 766 (1978), a lawyer was reprimanded for signing a client's name and then notarizing the signature.

Considering the violations in both proceedings, given the duties violated and the extent of actual or potential injury, the analysis under the ABA Standards strongly suggests that a suspension is appropriate in this case. The fact that there are multiple charges and aggravating circumstances also suggests that a suspension is appropriate.

For his violations in both proceedings, we order that the accused be suspended from the practice of law for a total of 63 days commencing on the effective date of this decision. The Oregon State Bar is awarded its actual and necessary costs and disbursements. ORS 9.536(4).

UNIS, J., dissenting.

In the first of the two disciplinary proceedings involved in this case (discussed in Parts A and C of the majority opinion), the trial panel found, the Bar does not dispute, and the majority struggles to accept, that the intent of the accused was accurately represented by the letters of December 2 and December 10 at the time that he wrote them, *i.e.*, that at the time the accused wrote the December 2 and 10

letters, he intended to hold Nugent's rent payments in trust.[1] *See* 314 Or at 535. The majority bases its finding of a misrepresentation on the accused's failure to inform landlords several days later that his client's plans had changed and that the accused had been instructed not to hold the rent money in trust because his client intended to terminate the tenancy. The majority concludes that "whether the rent money was in the accused's trust account was material in December 1986." 314 Or at 537.

Although the majority concludes that the alleged misrepresentation was intentional[2] and material, the majority does not define the term "material." Rather, the majority confuses the significance of the facts in light of the landlords' statutory rights. The majority derives the materiality of the alleged misrepresentation from the landlords' rights in ORS 90.400(2) based on the significance of whether "rent was unpaid" and in ORS 90.370 based on the significance of whether "tenant has deposited the rent into court." 314 Or at 536. The answer to both of these questions is totally independent of whether the rent was being held in trust by tenant's lawyer. That is, rent is not paid under ORS 90.400(2) by depositing it in trust with one's lawyer, and rent is not deposited into court under ORS 90.370 by depositing it in trust with one's lawyer. Even if the accused was holding the rent money in trust, the rent was still unpaid and had not been deposited into court.

Although the majority accepts the trial panel's finding, which the Bar does not dispute, that the accused's representations in the December 2 and 10 letters were true when he made them (*i.e.*, that at the time the accused wrote the December 2 and 10 letters, he intended to hold Nugent's rent payments in trust, but was not yet doing so), 314 Or at 535, the majority makes statements contrary to this finding which are significant to the majority's analysis.

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[1] The trial panel found that "[a]t the time the Accused wrote the two letters to the Durhams *the representations contained therein were true*." The Bar in its brief before this court agrees with that finding: "The *Bar does not dispute* [the *accused's*] assertion that the December 12 [*sic*: 2] and December 10 *statements* regarding his intent to hold Ms. Nugent's rent in trust *were true when he made them*." (Emphasis added.)

[2] I disagree with the majority's conclusion, 314 Or at 546, that any misrepresentation was intentional.

The majority states that the accused's statement that "[t]he cost of this work will be paid out of the rent payments held in trust" "suggested that the tenant was not * * * behind in her rent payments." 314 Or at 536. Rent was due on December 1. The majority accepts that the representations in the accused's letters were true when he made them. The majority states as fact (and it is not disputed) that "[o]n December 10, the accused had none of the Durhams' rent money in his trust account." 314 Or at 534. Therefore, it is clear that on December 10 the tenant was behind in her rent payments *and that the majority agrees that the accused did not state to the contrary.* Nevertheless, the majority bases its finding that the accused made a material misrepresentation on the conclusion that the accused's statements "suggested that the tenant was not * * * behind in her rent payments." 314 Or at 536.[3] Thus, the majority is basing its finding of intentional material misrepresentation on representations that even the majority agrees the accused did not make.

The majority suggests that the "tenant's right to counterclaim may turn on whether the tenant has deposited the rent into court. ORS 90.370." 314 Or at 536. In determining why the accused's statements were intentional, material misrepresentations, the majority concludes that "[t]he accused himself testified that this [determination of the right to counterclaim] was one of the reasons that he represented that the rent payments *were held in trust.*" 314 Or at 536 (emphasis added). The trial panel found, the Bar accepts, and the majority accepts that the accused did not represent in his letters that he was holding rent money in trust. Unfortunately, the majority resorts to statements contradicting the very premise it accepts in order to find an intentional, material misrepresentation.

In addition, the majority states that "[t]he accused's statement that the rent would be held 'in trust' suggested

[3] The majority includes in its analysis two other parenthetical statements that contradict its acceptance of the finding that the representations in the December 2 and 10 letters were true when they were made: "The accused's statement that the rent would be held 'in trust' suggested that the tenant was delivering (*or had delivered*) the rent to the accused, and that the rent money would be held (*or was being held*) by the accused for the benefit of the landlords, either for repairs or for rent, or both." 314 Or at 536 (emphasis of majority's statements contradicting majority's premise added).

that the tenant was delivering (or had delivered) the rent to the accused, and that the rent money would be held (or was being held) by the accused for the benefit of the landlords, either for repairs or for rent, or both." 314 Or at 536. By suggesting that money which the accused was holding or would hold in trust was "for the benefit of the landlords," the majority misconstrues the nature of the lawyer's role and implicitly suggests that the accused should have done something which itself would have been a disciplinary violation, even while the majority must strain to conclude that what the accused did was a disciplinary violation. Lawyers are obligated by disciplinary rule to deposit client funds in a "separate interest bearing account for a specific and individual matter for a particular client," DR 9-101(C)(3)(a), unless they are in a pooled account with subaccounting, DR 9-101(C)(3)(b), or are nominal or held for a short period of time, DR 9-101(C)(2). DR 9-101(B)(4) provides that "[a] lawyer shall * * * [p]romptly pay or deliver to a client as requested by the client the funds, securities or other properties in the possession of the lawyer which the client is entitled to receive." The majority's suggestion that money held in trust by the lawyer would be held for the benefit of the landlords rather than for the benefit of the client contravenes the very nature of the attorney/client relationship and the rules of client trust funds.

The majority must strain too hard to establish a disciplinary violation. That is not palatable, particularly when the standard of proof is clear and convincing evidence.

I would hold that the Bar has failed to establish by clear and convincing evidence that the accused violated DR 1-102(A)(3), *i.e.*, that there was a misrepresentation or that, if there was a misrepresentation, it was intentional and material. Notwithstanding the analytical problems in the majority opinion, I would hold that the Bar has failed to establish, as the majority holds, see 314 Or at 537, that it was material for landlords to know whether the rent money was in the accused's trust account in December 1986.[4] I therefore dissent from Part A of the majority opinion. I would impose a

[4] The Bar argues that there were continuing misrepresentations for failure to inform landlords after the termination of the tenancy (*i.e.*, after December) that he was not holding money in trust. In my view, even assuming, *arguendo*, a material misrepresentation in December, the changed circumstance of the termination of the

lesser sanction than the sanction imposed by the majority in Part C consistent with my conclusion that the only violations established are those discussed in Part B, with which I agree.

tenancy meant that there was no continuing misrepresentation after that date. That is, even if the question whether the accused was holding rent in trust was legally significant in December, it was no longer relevant after December, and termination of the tenancy was adequate to apprise landlords of this fact without affirmatively informing landlords that the accused was no longer holding rent money in trust.

If there was a continuous misrepresentation beyond December, the accused's disciplinary rule violation would be more severe. I therefore take the majority's silence on the issue of a misrepresentation continuing after December to imply that no continuous misrepresentation existed. If that is the case, I agree.

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