

Disciplinary Board Reporter

Volume 7

January 1, 1993 to December 31, 1993

Report of Cases
Decided by the Disciplinary Board
of the Oregon State Bar
and
Supreme Court Attorney Discipline Cases for 1993

Donna J. Richardson
Editor

Jennifer Lillie-Cannon
Production Assistant



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DISCIPLINARY BOARD REPORTER

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Preface

This Reporter contains final decisions of the Oregon State Bar Disciplinary Board. The Disciplinary Board Reporter should be cited as 7 DB Rptr 1 (1993).

A decision of the Disciplinary Board is final if the charges against the accused are dismissed, a public reprimand is imposed, or the accused is suspended from practice for up to sixty (60) days and neither the Bar nor the accused have sought review by the Supreme Court. See Title 10 of the Oregon State Bar Rules of Procedure, p. 256 of the 1994 Membership Directory, and ORS 9.536.

It should be noted that the decisions printed herein have been placed in what has been determined to be an appropriate format, taking care not to modify in any substantive way the decision of the Trial Panel in each case. Those interested in a verbatim copy of an opinion should contact me at 620-0222 or 1-800-452-8260, extension 404. Final decisions of the Disciplinary Board issued on or after January 1, 1994 are also available from me at the Oregon State Bar upon request. Please note that the statutes, disciplinary rules and rules of procedure cited in the opinions were those in existence at the time the opinions were issued. The statutes and rules may have since been changed or renumbered. Care should be taken to locate the current language of a statute or rule sought to be relied on concerning a new matter.

A new section has been added to the back of this publication. It contains 1993 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. The cases are included in the Subject Matter Index, the Table of Disciplinary Rules and Statutes, Table of Cases and the Table of Rules of Procedure, indicated by an "@".

Questions concerning this reporter or the bar's disciplinary process in general may be directed to the undersigned. We hope this publication proves helpful to those interested in or affected by the bar's disciplinary procedures.

Donna J. Richardson
Executive Services Administrator
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TABLE OF CONTENTS

References are to Pages

	<u>Page</u>
Supreme Court, Board of Governors, State Professional Responsibility Board	iv
Disciplinary Board	
1993	v
1994	vii
Table of Opinions	ix
Table of Cases	xiii
Table of Disciplinary Rules and Statutes	xix
Table of Rules of Procedure	xxviii
Table of Trial Panel/Disciplinary Board Members	xxxi
Decisions	1-278
Subject Matter Index	279

Justices of the Supreme Court

Wallace P. Carson, Jr., Chief Justice
Robert D. Durham, Jr., Associate Justice
Edward Fadeley, Associate Justice
W. Michael Gillette, Associate Justice
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TABLE OF OPINIONS

Volume 7 DB Rptr

appearing in this volume

(includes Supreme Court decisions
as they appear in Advance Sheets
[indicated by @])

Page

A

In re Albrecht 1

Violation of DR 1-102(A)(3) and DR 5-104(A). Public reprimand.

B

In re Baker 145

Violation of DR 1-102(A)(4); DR 5-103(B) and DR 6-101(B). Public reprimand.

In re Belcher 37

Violation of DR 1-102(A)(3) and (4) and ORS 9.527(4). Forty-five day suspension.

In re Benson@ 257

Violation of DR 7-102(A)(7). Six month suspension.

In re Bourcier 115

Violation of DR 2-110(A)(1) and (2); DR 6-101(A) and (B) and DR 7-101(A)(1).
Sixty-day suspension.

In re Busby@ 265

Violation of DR 1-102(A)(3) and ORS 9.527(4). Four month suspension.

C

In re Clark 69

Violation of DR 5-105(C). Public reprimand.

In re Cohen@ 249

Violation of DR 5-105(E). Public reprimand.

D

In re Devers@ 271

Violation of DR 1-102(A)(1) and (4); DR 1-103(C); DR 2-106(A); DR 2-110(A)(2); DR 6-101(A) and (B) and DR 9-101(B)(4). Six month suspension.

G

In re Gastineau@ 211

Violation of DR 1-103(C); DR 2-106(A) and DR 6-101(B). Twelve month suspension.

H

In re Harrington 61

Violation of DR 6-101(B). Public reprimand.

K

In re Kengla 153

Violation of DR 5-105(C) and (E) and DR 6-101(B). Thirty-day suspension.

In re Kretzmeier 15

Violation of DR 1-102(A)(3) and (4) and DR 6-101(B). Thirty-day suspension.

In re Kuhns 53

Violation of DR 1-102(A)(4). Thirty days which shall be stayed pending 18 months probation.

L

In re Lemery 125

Violation of DR 7-104(A)(1) and DR 5-109(B). Public reprimand.

In re Lombard 27

Violation of DR 1-102(A)(3) and DR 6-101(A) and (B). Sixty-day suspension.

M

In re McKee@ 189

Violation of DR 1-102(A)(3) and (4); DR 5-105(A) to (D); DR 6-101(B); DR 7-101(A)(2) and DR 7-102(A)(5). Eighteen month suspension.

In re Miller 87

Violation of DR 6-101(B) and DR 7-101(A)(2). Public reprimand.

O

In re Oliver 107

Violation of DR 1-103(C) and DR 6-101(B). Sixty-day suspension.

S

In re Schmechel 95

Violation of DR 1-102(A)(3) and (4) and DR 6-101(A). Public reprimand.

In re Corey B. Smith@ 173

Violation of DR 1-102(A)(3). Four month suspension.

In re Darrell Duane Smith@ 225

Violation of DR 7-104(A)(1). Public reprimand.

In re Raymond R. Smith 135

Violation of DR 5-105(C) and (E) and DR 7-104(A)(1). Sixty-day suspension.

In re Rex Q. Smith@ 181

Violation of DR 1-102(A)(4). Thirty five-day suspension.

In re Spies@ 237

Violation of DR 1-102(A)(3), (4) and (5); DR 1-103(F); DR 2-106(A); DR 6-101(A) and (B); DR 7-104(A)(1) and (2); DR 9-101(A)(2); DR 9-101(B)(4); ORS 9.460(2) and ORS 9.527. Disbarred.

T

In re Taub 77

Violation of DR 5-105(E). Public reprimand.

In re Taylor@ 233

Violation of DR 1-102(A)(2) and (3); DR 1-103(C) and DR 9-101(B)(3). Disbarred.

V

In re Van Zeipel 161

Violation of DR 6-101(B). Sixty-day suspension.

TABLE OF CASES
CITED IN OPINIONS

References are to Pages

	<u>Page</u>
<u>In re Arbuckle</u> , 308 Or 135, 138, 775 P2d 832 (1989)	
Spies@	241
<u>In re Boardman</u> , 312 Or 452, 822 P2d 709 (1991)	
Belcher	46
McKee@	199
<u>Boddie v. Connecticut</u> , 401 US 371, 378, 91 S Ct 780, 28 L Ed 2d 113 (1971)	
Devers@	273
<u>In re Boivin</u> , 271 Or 419, 424, 533 P2d 171 (1975)	
McKee@	202
<u>In re Boland</u> , 288 Or 133, 137, 602 P2d 1078 (1979)	
McKee@	201
<u>In re Boothe</u> , 303 Or 643, 740 P2d 785 (1987)	
Smith, Rex@	186
<u>In re Brandsness</u> , 299 Or 420, 702 P2d 1098 (1985)	
McKee@	203, 204
<u>In re Bridges</u> , 302 Or 250, 728 P2d 863 (1986)	
Belcher	47
<u>In re Brown</u> , 298 Or 285, 692 P2d 107 (1984)	
Smith, Darrell@	230
<u>In re Busby</u> , 317 Or 213, 217, 855 P2d 156 (1993)	
Smith, Darrell@	231
<u>In re Chambers</u> , 292 Or 670, 678, 642 P2d 286 (1982)	
Gastineau@	219

<u>In re Chandler</u> , 306 Or 422, 760 P2d 243 (1988)	
Spies@	243
<u>In re Clark</u> , 1 DB Rptr. 217 (1986)	
Clark	73
<u>In re Dinerman</u> , 314 Or 308, 317 840 P2d 50 (1992)	
Smith, Corey@	176
Benson@	261, 262
<u>In re Dixson</u> , 305 Or 83, 750 P2d 157 (1988)	
McKee@	199
<u>Emerald PUD v. PP&L</u> , 302 Or 256, 269, 729 P2d 552 (1986)	
Smith, Darrell@	229
<u>In re Fuller</u> , 284 Or 273, 586 P2d 1111 (1978)	
Belcher	46
Busby@	269
Smith, Corey@	178
<u>In re Glass</u> , 309 Or 218, 223, 784 P2d 1094 (1990)	
Smith, Darrell@	230
<u>In re Greene</u> , 290 Or 291, 620 P2d 1379 (1980)	
Belcher	46
<u>In re Harrington</u> , 301 Or 18, 718 P2d 725 (1986)	
Harrington	64
<u>In re Hawkins</u> , 305 Or 319, 751 P2d 780 (1988)	
Spies@	247
<u>In re Haws</u> , 310 Or 741, 801 P2d 818 (1990)	
Belcher	47, 49
McKee@	200
Smith, Rex@	183, 184
<u>In re Haws</u> , 310 Or 744, 751, 801 P2d 818 (1990)	
Gastineau@	223

<u>In re Hedrick</u> , 312 Or 442, 822 P2d 1187 (1991)	
Belcher	46
Benson@	262
McKee@	200
Smith, Darrell@	231
Spies@	242
<u>In re Hereford</u> , 306 Or 69, 74, 756 P2d 30 (1988)	
Smith, Darrell@	229
<u>In re Hiller</u> , 298 Or 526, 694 P2d 540 (1985)	
Belcher	46, 49
Benson@	261
Busby@	269
Smith, Corey@	179
<u>In re Hockett</u> , 303 Or 150, 160-62, 734 P2d 877 (1987)	
Benson@	260, 261, 262
<u>In re Hopp</u> , 291 Or 697, 702, 634 P2d 238 (1981)	
Busby@	270
<u>In re Jaffee</u> , 311 Or 159, 164, 806 P2d 685 (1991)	
Taylor@	234
<u>In re Jans</u> , 295 Or 289, 666 P2d 830 (1983)	
McKee@	204, 208
<u>In re Johnson</u> , 300 Or 52, 55, 707 P2d 573 (1985)	
Cohen@	250
McKee@	190
<u>In re Jones</u> , 312 Or 611, 614, 825 P2d 1365 (1991)	
McKee@	201
<u>In re Kissling</u> , 303 Or 638, 640, 740 P2d 179 (1987)	
McKee@	201
<u>In re Lewelling</u> , 296 Or 702, 678 P2d 1229 (1984)	
Smith, Darrell@	231
<u>In re Magar</u> , 312 Or 139, 817 P2d 289 (1991)	
Smith, Corey@	178
Busby@	269, 270

In re McCaffrey, 275 Or 23, 28, 549 P2d 666 (1976)
 Smith, Darrell@ 231

In re McKee, 229 Or 67, 365 P2d 1063 (1961)
 McKee@ 205

In re McKee, 316 Or 114, 134, 849 P2d 509 (1993)
 Cohen@ 253

In re Mettler, 305 Or 12, 748 P2d 1010 (1988)
 Smith, Darrell@ 230

In re Miller, 303 Or 253, 257, 735 P2d 591 (1987)
 Gastineau@ 216

In re Morrow, 297 Or 808, 688 P2d 820 (1984)
 Albrecht 7
 Belcher 48

Oregon Business Planning Council v. LCDC, 290 Or 741, 749, 626 P2d 350 (1981)
 Smith, Darrell@ 229

In Re Odman, 297 Or 744, 750, 687 P2d 153 (1984)
 Gastineau@ 219

PGE v. Bureau of Labor and Industries, 317 Or 606, 610, _____ P2d _____ (1993)
 Smith, Darrell@ 227, 228

In re Paauwe, 294 Or 171, 654 P2d 1117 (1982)
 Belcher 49
 Smith, Rex@ 184

In re Pennington, 220 Or 343, 347, 348 P2d 774 (1960)
 Smith, Corey@ 178

In re People v. Franks, 791 P2d 1 (Colo 1990)
 Gastineau@ 215

In re Peter A. Schwabe, Sr., 242 Or 169, 175-76, 408 P2d 922 (1965)
 Smith, Darrell@ 231

In re Potts/Trammel/Hannon, 301 Or 57, 73-74, 718 P2d 1363 (1986)
 Gastineau@ 216, 223

Ramstead v. Morgan, 219 Or 383, 347 P2d 594 (1959)
 Smith, Rex@ 185

<u>In re Recker</u> , 309 Or 633, 789 P2d 633 (1990)	
McKee@	199, 204
<u>In re Reinmiller</u> , 213 Or 680, 325 P2d 773, 785 (1958)	
Belcher	51
<u>In re Complaint Oren R. Richards</u> , 202 Or 262, 264, 274 P2d 797 (1954)	
Gastineau@	215
<u>In re Rudie</u> , 290 Or 471, 622 P2d 1098 (1981)	
Gastineau@	219
<u>In re Sassor</u> , 299 Or 570, 577, 704 P2d 506 (1985)	
Gastineau@	223
<u>In re Smith</u> , 316 Or 55, 60, ___ P2d ___ (1993)	
McKee@	200
<u>In re Smith</u> , 315 Or 260, 843 P2d 449 (1992)	
Busby@	268, 269, 270
Spies@	247
<u>In re Spies</u> , 316 Or 530, 534, 852 P2d 831 (1993)	
Gastineau@	218, 219
<u>In re Taylor</u> , 316 Or 413, 435, 851 P2d 1138 (1983)	
Busby@	268
<u>In re Thies</u> , 305 Or 104, 110, 750 P2d 490 (1988)	
McKee@	201, 202
<u>In re Thomas</u> , 294 Or 505, 526, 659 P2d 960 (1983)	
Gastineau@	216
<u>In re Trukositz</u> , 312 Or 621, 625-28, 825 P2d 1369 (1992)	
McKee@	204
<u>In re Eugene C. Venn</u> , 235 Or 73, 74, 383 P2d 774 (1963)	
Smith, Darrell@	231
<u>In re Walker</u> , 293 Or 297, 647 P2d 468 (1982)	
Gastineau@	219
McKee@	199
<u>In re White</u> , 311 Or 573, 815 P2d 1257 (1991)	
Cohen@	254
Smith, Rex@	184, 186

In re Willer, 303 Or 241, 735 P2d 594 (1987)
Benson@ 262

Windsor v. McVeigh, 93 US 274, 278, 23 L Ed 914 (1876)
Devers@ 273

TABLE OF DISCIPLINARY RULES AND STATUTES

appearing in this volume

References are to Opinions and Pages

	<u>Page</u>
<u>DR 1-102(A)(1)</u>	
In re Devers@	275
 <u>DR 1-102(A)(2)</u>	
In re Lombard	29
In re Taylor@	234, 235
 <u>DR 1-102(A)(3)</u>	
In re Albrecht	9-11
In re Belcher	39, 45, 46, 49
In re Benson@	260
In re Busby@	266, 268, 269
In re Kretzmeier	15, 16-19, 25
In re Lombard	27, 30, 35
In re McKee@	190, 196, 199, 200
In re Schmechel	95, 96, 97, 98, 105
In re Smith, Corey@	174, 176, 178
In re Spies@	240, 242, 245
In re Taylor@	235
 <u>DR 1-102(A)(4)</u>	
In re Baker	145, 148, 150
In re Belcher	37, 45, 46
In re Devers@	275
In re Kretzmeier	15, 16-19, 25
In re Kuhns	53, 55, 56
In re McKee@	196, 198, 199, 200
In re Schmechel	95, 96, 97, 98, 105
In re Smith, Rex@	182, 183, 184, 186
In re Spies@	245

DR 1-103(C)

In re Benson@	260
In re Devers@	275
In re Gastineau@	212, 221
In re Oliver	107, 109-111
In re Taylor@	235
In re Van Zeipel	164

DR 1-103(F)

In re Spies@	243
--------------	-----

DR 2-101(A)(4)

In re Smith, Raymond	143
----------------------	-----

DR 2-106

In re Gastineau@	215
------------------	-----

DR 2-106(A)

In re Albrecht	8, 9
In re Devers@	275
In re Gastineau@	212, 215, 216, 217
In re Spies@	242
In re Taub	80, 86

DR 2-106(B)(1-8)

In re Gastineau@	213, 216
------------------	----------

DR 2-110

In re Gastineau@	218
In re McKee@	197

DR 2-110(A)(1)

In re Bourcier	115, 117-119, 123
----------------	-------------------

DR 2-110(A)(2)

In re Bourcier	118, 119, 123
In re Devers@	274, 275
In re Van Zeipel	164

DR 4-101

In re McKee@	204, 208
--------------	----------

DR 4-101(A)

In re McKee@	198
--------------	-----

DR 5-101

In re McKee@	204, 208
--------------	----------

<u>DR 5-101(A)</u>	
In re Harrington	64
<u>DR 5-102</u>	
In re Gastineau@	218
In re McKee@	197
<u>DR 5-103(B)</u>	
In re Baker	145, 149, 150
<u>DR 5-104</u>	
In re McKee@	204, 208
<u>DR 5-104(A)</u>	
In re Harrington	64
In re Albrecht	1, 5, 7
<u>DR 5-105</u>	
In re Gastineau@	218
In re McKee@	197, 202, 203, 204, 208
<u>DR 5-105(A)</u>	
In re Cohen@	250, 253
In re Harrington	64
In re McKee@	197, 202
<u>DR 5-105(A) to (F)</u>	
In re McKee@	203
<u>DR 5-105(A)(1)</u>	
In re Cohen@	254
In re McKee@	209
<u>DR 5-105(A)(2)</u>	
In re Cohen@	253
In re McKee@	208
<u>DR 5-105(B)</u>	
In re Harrington	64
In re McKee@	197, 203
<u>DR 5-105(C)</u>	
In re Clark	69, 70-72, 76
In re Kengla	153, 155, 157
In re McKee@	197, 198, 202, 203
In re Smith, Raymond	135, 136, 140

<u>DR 5-105(C)(1)</u>	
In re McKee@	203
<u>DR 5-105(D)</u>	
In re McKee@	197, 203
<u>DR 5-105(E)</u>	
In re Cohen	250, 253, 254
In re Kengla	153, 155, 156, 157
In re McKee@	198, 207
In re Smith, Raymond	136, 140, 141
In re Taub	77, 78, 79, 80, 84
<u>DR 5-105(F)</u>	
In re Cohen@	250, 253
In re McKee@	198, 207, 208
<u>DR 5-107</u>	
In re McKee@	204, 208
<u>DR 5-109</u>	
In re McKee@	204, 208
<u>DR 5-109(B)</u>	
In re Lemery	125-129, 130, 132, 133
<u>DR 6.8.3 [sic]</u>	
In re Albrecht	6
<u>DR 6-101(A)</u>	
In re Bourcier	115, 117-119, 123
In re Devers@	274, 275
In re Gastineau@	212, 213, 218, 219, 220
In re Lombard	27, 29, 30, 34
In re McKee@	196, 198
In Re Schmechel	96, 97, 98, 105
In re Spies@	240, 244
<u>DR 6-101(A)(3)</u>	
In re Clark	73
<u>DR 6-101(B)</u>	
In re Baker	
In re Bourcier	115, 118, 119, 123
In re Devers@	274, 275
In re Gastineau@	212, 220
In re Harrington	61, 63, 64, 68

DR 6-101(B) (cont'd)

In re Kengla 153, 156, 157
In re Kretzmeier 15, 16-19, 25
In re Lombard 27, 29, 30, 34
In re McKee@ 196, 201
In re Miller 87, 88, 90, 91
In re Oliver 107, 110, 111
In re Spies@ 240, 244
In re Van Zeipel 161, 163, 164, 171

DR 7-101(A)

In re Van Zeipel 164

DR 7-101(A)(1)

In re Bourcier 115, 117-119, 123
In re McKee@ 196, 198
In re Spies 244

DR 7-101(A)(2)

In re Gastineau@ 212, 218
In re McKee@ 196, 197, 201, 202
In re Miller 87, 88, 90, 91
In re Spies@ 244
In re Taub 80, 86

DR 7-101(B)

In re McKee@ 197

DR 7-102

In re Smith, Darrell@ 230
In re Spies@ 246

DR 7-102(A)(1)

In re McKee@ 197, 198

DR 7-102(A)(2)

In re McKee@ 196

DR 7-102(A)(3)

In re Kretzmeier 18, 20, 25

DR 7-102(A)(5)

In re Benson@ 260
In re Kretzmeier 18, 20, 25
In re McKee@ 196, 198, 200
In re Spies@ 246

<u>DR 7-102(A)(7)</u>	
In re Benson	260, 261
<u>DR 7-103(B)</u>	
In re Lemery	127
<u>DR 7-104</u>	
In re Smith, Darrell	230
<u>DR 7-104(A)</u>	
In re Smith, Raymond	141
<u>DR 7-104(A)(1)</u>	
In re Lemery	125-129, 130, 133
In re Smith, Darrell@	226, 227, 230, 231
In re Smith, Raymond	134, 135, 136, 139, 143
In re Spies@	242
<u>DR 9-101(A)</u>	
In re Spies@	241
<u>DR 9-101(A)(2)</u>	
In re Spies@	242
<u>DR 9-101(B)(3)</u>	
In re Taylor@	235
In re Smith, Raymond	143
<u>DR 9-101(B)(4)</u>	
In re Devers@	274, 275
In re Spies@	241
In re Taub	80, 86
<u>DR 10-101(B)</u>	
In re Cohen@	250, 253
In re McKee@	204, 208, 209
<u>ORS 9.160</u>	
In re Smith, Darrell@	228
<u>ORS 9.180</u>	
In re Smith, Darrell@	228, 229
<u>ORS 9.191(3)</u>	
In re Smith, Darrell@	228

<u>ORS 9.200(1) and (2)</u>	
In re Smith, Darrell@	228
<u>ORS 9.210</u>	
In re Smith, Darrell@	228
<u>ORS 9.261(1)</u>	
In re Smith, Darrell@	229
<u>ORS 9.320</u>	
In re Smith, Darrell@	230
<u>ORS 9.460</u>	
In re Spies@	246
<u>ORS 9.460(2)</u>	
In re Benson@	260
In re Spies@	246
<u>ORS 9.460(4) {current 9.460(2)}</u>	
In re McKee@	190
<u>ORS 9.490</u>	
In re Smith, Darrell@	227, 228, 229
<u>ORS 9.527</u>	
In re Smith, Darrell@	227, 228, 229
In re Spies	246
<u>ORS 9.527(2)</u>	
In re Taylor@	234
<u>ORS 9.527(4)</u>	
In re Belcher	37, 45, 49
In re Busby@	266, 268
<u>ORS 9.527(7)</u>	
In re Smith, Darrell@	227
<u>ORS 9.536</u>	
In re Gastineau@	212
In re McKee@	190
In re Smith, Corey@	174
In re Spies@	238

<u>ORS 9.536(1)</u>	
In re Cohen@	250
In re Smith, Rex@	182
<u>ORS 9.536(2)</u>	
In re McKee@	190
In re Taylor@	234
<u>ORS 9.536(3)</u>	
In re Cohen@	250
In re Benson@	258
In re Busby@	266
In re Gastineau@	212
In re Smith, Darrell@	226
In re Smith, Rex@	182
In re Taylor@	234
<u>ORS 46.415(4)</u>	
In re Gastineau@	220
<u>ORS 46.455(2)(c)</u>	
In re Gastineau@	220
<u>ORS 46.461</u>	
In re Gastineau@	220
<u>ORS 107.095</u>	
In re McKee@	209
<u>ORS 107.105(1)(d),(f)</u>	
In re McKee@	209
<u>ORS 107.115(1)</u>	
In re Smith, Raymond	138
<u>ORS 116.083</u>	
In re Kengla	156
<u>ORS 162.285</u>	
In re Smith, Rex@	185
<u>ORS 656.325</u>	
In re Smith, Rex@	185
<u>ORS 656.260 to 656.390</u>	
In re Smith, Rex@	185

TABLE OF RULES OF PROCEDURE (BR)

appearing in this volume

References are to Opinions and Pages

	<u>Page</u>
<u>BR 2.5</u>	
In re Albrecht	2
<u>BR 3.4(d)</u>	
In re Taylor@	234
<u>BR 3.5</u>	
In Re Devers@	272
<u>BR 3.5(a)</u>	
In re Devers@	272
<u>BR 3.5(b)</u>	
In re Devers@	273
<u>BR 3.5(c)</u>	
In re Devers@	272
<u>BR 3.5(c)(1) and (2)</u>	
In re Devers@	274
<u>BR 3.5(e)</u>	
In re Devers@	274
<u>BR 3.6</u>	
In re Baker	151
In re Bourcier	119
In re Clark	70
In re Harrington	65
In re Kretzmeier	21
In re Kuhns	58
In re Lemery	130
In re Lombard	30
In re Miller	92
In re Oliver	112

<u>OAR 436-10-100(1)</u>	
In re Smith, Rex@	185
<u>ORAP 8.10(5)</u>	
In re Bourcier	123
<u>ORAP 11.25(3)(B)</u>	
In re Taylor@	234
<u>21 USC §§ 841(a)(1) and 846</u>	
In re Taylor@	234
<u>26 USC § 7201</u>	
In re Taylor@	234

BR 3.6 (cont'd)

In re Schmechel	100
In re Taub	81
In re Van Zeipel	167

BR 3.6(c)

In re Baker	147
In re Bourcier	117
In re Harrington	63
In re Kretzmeier	18
In re Kuhns	55
In re Lemery	127
In re Lombard	29
In re Miller	89
In re Oliver	109
In re Schmechel	97
In re Taub	79
In re Van Zeipel	163

BR 3.6(c)(ii)

In re Miller	91
------------------------	----

BR 3.6(c)(iii)

In re Bourcier	119
In re Kuhns	56

BR 3.6(c)(3)(iii)

In re Kretzmeier	20
----------------------------	----

BR 3.6(e)

In re Clark	73
In re Kretzmeier	16

BR 3.6(h)

In re Baker	147
In re Clark	72
In re Harrington	63
In re Kretzmeier	18
In re Lombard	29
In re Miller	89
In re Oliver	109
In re Schmechel	97
In re Taub	79
In re Van Zeipel	163

<u>BR 4.1(b)</u>	
In re Albrecht	2
<u>BR 4.4</u>	
In re Albrecht	2
<u>BR 5.2</u>	
In re Busby@	266
In re Cohen@	250
In re McKee@	190
In re Smith, Rex@	182
<u>BR 5.4</u>	
In re Albrecht	2
<u>BR 6.1(a)(iii)</u>	
In re Smith, Corey@	177
<u>BR 6.2(d)</u>	
In re Kuhns	58
In re Van Zeipel	167
<u>BR 8.1</u>	
In re Oliver	108, 112
<u>BR 10.1</u>	
In re Cohen@	250
In re McKee@	190
In re Smith, Corey@	174
In re Smith, Rex @	182
<u>BR 10.3</u>	
In re Cohen@	250
In re Smith, Rex@	182
<u>BR 10.6</u>	
In re Benson@	258
In re Busby@	266
In re Gastineau@	212
In re McKee@	190
In re Spies@	238

TABLE OF TRIAL PANEL/DISCIPLINARY BOARD MEMBERS

appearing in this volume

References are to Opinions

	<u>Page</u>
<u>Fred E. Avera</u>	
In re Lemery	125
<u>Anthony A. Buccino</u>	
In re Kretzmeier	15
<u>Walter L. Cauble</u>	
In re Smith, Raymond	135
<u>LaSelle Coles</u>	
In re Belcher	37
<u>Donald K. Denman</u>	
In re Baker	145
In re Bourcier	115
In re Clark	69
In re Harrington	61
In re Kuhns	53
In re Lemery	125
In re Lombard	27
In re Miller	87
In re Oliver	107
In re Schmechel	95
In re Smith, Raymond	135
In re Taub	77
In re Van Zeipel	161
<u>Ann K. Fisher</u>	
In re Albrecht	1

<u>Sidney A. Galton</u>	
In re Baker	145
In re Bourcier	115
In re Harrington	61
In re Oliver	107
In re Van Zeipel	161
<u>James M. Gleeson</u>	
In re Kretzmeier	15
<u>W. Eugene Hallman</u>	
In re Belcher	37
In re Clark	69
<u>Blair M. Henderson</u>	
In re Kengla	153
<u>Max W. Kimmell</u>	
In re Kengla	153
In re Smith, Raymond	135
<u>Karla J. Knieps</u>	
In re Belcher	37
<u>Glenn H. Munsell</u>	
In re Kengla	153
<u>Jeffrey S. Mutnick</u>	
In re Albrecht	1
<u>Kurt Olsen</u>	
In re Albrecht	1
<u>Martha Walters</u>	
In re Kuhns	53
In re Lombard	27
In re Miller	87
In re Schmechel	95
In re Taub	77

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)
)
Complaint as to the Conduct of) Case No. 91-66
)
 NIKOLAUS ALBRECHT,)
)
 Accused.)
_____)

Bar Counsel: Richard C. Baldwin, Esq.

Counsel for the Accused: Roger Tilbury, Esq.

Trial Panel: Jeffrey S. Mutnick, Chairperson; Ann L. Fisher; Kurt Olsen, Public Member

Disposition: Violation of DR 1-102(A)(3) and DR 5-104(A). Public reprimand.

Effective Date of Opinion: January 27, 1993

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of	)	Case No. 91-66
)	
NIKOLAUS ALBRECHT,	)	OPINION OF THE
	)	TRIAL PANEL
Accused.)	

Pursuant to BR 2.5 this matter was investigated by the Multnomah County SPRC [sic] and referred for review by the SPRB. Bar counsel prepared and filed a formal complaint which pursuant to BR 4.4 was subsequently amended with the consent of the trial panel chairperson on August 28, 1992. BR 4.1(b).

During the pendency of this matter several procedural and substantive issues were raised by the accused which were subject of rulings by trial panel chairperson, David Green, and by trial panel chairperson, Jeffrey Mutnick. These rulings, incorporated within the record of this matter, are adopted.

This matter was scheduled for hearing on two previous occasions and pursuant to Rule 5.4 continuances were granted. The hearing convened on Sunday, November 8, 1992 at approximately 12:20 p.m. in the offices of Pozzi, Wilson, Atchison, O'Leary & Conboy. Appearing on behalf of the Oregon State Bar were Richard Baldwin and Susan Cournoyer and appearing on behalf of the accused was Roger Tilbury. The accused was present throughout the proceedings.

The testimony of Rodney Baxter was taken commencing on November 8, 1992 and further testimony was taken from Ms. Joyce Farrow, Mr. Donn Yost, Ms. Judith Berzagi, Mr. Robert C. McPhearson, Mr. Robin Haeder and Mr. Nikolaus Albrecht on November 10, 1992; November 11, 1992 and November 12, 1992.

Exhibits were offered and received during the course of the panel proceeding numbered 1 through 61 and A through E.

The amended formal complaint of the Oregon State Bar filed on August 28, 1992 alleges three causes of complaint, each cause of complaint setting forth numerous specifications. These allegations are predicated upon the accused[']s representation of Donn Yost in regard to the Last Will and Testament of his father, Lowell Yost. The accused, Nikolaus Albrecht, began his representation of Donn Yost in 1983 at which time the accused suggested that Donn Yost, his sister, Joy Farrow, and the children of the third sibling, deceased, join together in a Will contest in the State of Texas. Donn Yost spoke to his sister, who lived in Texas, and the others, who agreed to jointly contest the Will and requested that the accused recommend a Texas attorney to prosecute the case. The accused consulted Martindale-Hubbell and, on the basis of his review of the available counsel in the El Paso, Texas area, recommended the firm of Hardie, Hallmark, Sergent and Hardie agreed to represent the parties on a contingent fee basis. (Exhibits 1, 2). The parties each executed separate attorney/client employment contracts with the Hardie firm with the contract of Donn Yost having a separate addendum authorizing the Hardie firm to withhold an additional 5% of Donn Yost's share of the gross recovery as a referral fee to Nikolaus Albrecht. (Exhibit 4, page 4). In January 1987 settlement negotiations were begun in earnest. (Exhibit 10). By April 1987 a tentative agreement had been reached to settle the Will contest. (Exhibits 15, 16). The settlement required the defendant to transfer a promissory note and title to a parcel of real estate to the Will contestants. The face value of the note was \$37,900. The lawyer responsible for representing the Will contestants in Texas was Rodney Baxter, a member of the Hardie firm. Baxter and the plaintiffs decided that rather than receiving the monthly payments due on the promissory note, the note should be liquidated for a discounted value. Mr. Baxter was directed to find a purchaser who would purchase the note. He responded with his opinion that the value of the note on a discounted basis was \$18,250. Mr. Baxter communicated with Mr. Albrecht on October 26, 1987 advising him of certain terms pertaining to the promissory note indicating to him that if he wished to do so, he should attempt to secure a greater amount for the purchase of the note. (Exhibit 19). Mr. Albrecht advised Mr. Baxter through correspondence of November 6, 1987 and

November 16, 1987 of his willingness to purchase the note for \$18,700. The purchase price also included a waiver of Mr. Albrecht's 5% fee from Donn Yost's recovery as well as a waiver of Mr. Albrecht's interest in a parcel of property in South Dakota to which Mr. Albrecht contended he was entitled as a result of his having secured a reduction in the fee to be charged by the Hardie firm. Throughout these proceedings Mr. Albrecht contended that he was entitled to one-sixth of the value of the South Dakota property. The Bar contended that Mr. Albrecht, if entitled to any portion of the South Dakota property, was only entitled to a portion of Donn Yost's share of the South Dakota property. There was no dispute, however, that Mr. Albrecht's offer to purchase the note for \$18,700 did include a waiver of any interest he may have in the South Dakota property as well as a waiver of any interest to which he was entitled from the share of Donn Yost's proceeds pursuant to the original fee agreement. (Exhibit 20.)

There is no evidence from which the panel can conclude when either the Will contestants, Baxter, or the accused were aware of the term of the note. The remaining term of the note was relatively short and had the accused, Baxter, or the Will contestants been aware of the precise term of the note, it is likely that the value of the note on a discounted basis would have been greater than that determined by Baxter, \$18,250, or that offered by the accused. The accused did not disclose in writing that his representation of Yost was terminated to enable him to pursue his own financial interest with respect to the note. There is no evidence that the accused provided Yost or the other plaintiffs with a written "disclosure" indicating that his interest was adverse to the Will contestants in regard to the purchase of the note. At the time of the transaction, the disciplinary rules did not require that such a disclosure be provided in written form.

Donn Yost and Joy Farrow testified that they believed that the Texas attorney, Baxter, was representing their interest in negotiating with the accused for the purchase of the promissory note, in part because Baxter's contingent fee agreement gave him a financial incentive to assure that the plaintiffs received as much as possible on the sale of the note and in part because he had represented the interests of the

Will contestants in the Will contest and its settlement. The evidence is uncontroverted that the accused played no role in negotiating the settlement of the Will contest or in advising the Will contestants as to nature and terms of the settlement. On November 16, 1987 Mr. Baxter, on behalf of the Will contestants, agreed to accept the offer of the accused to purchase the note for \$18,700 and a waiver of all other interests. (Exhibits 21, 22, 23).

Having agreed to purchase the note, the accused proceeded to seek financing to pay his obligations to the Will contestants. The accused had conversations with and made application to Consolidated Mortgage Company (CMC) for a loan. (Exhibit 25). Difficulty was encountered in obtaining information regarding the promissory note and an appropriate transfer of deed to the property, a prerequisite to the purchase of the note by the accused. Rather than consummating the transaction promptly, as was the intention of the parties, these obstacles resulted in a delay from November 1987 through June 1988. Sometime during this period the accused became aware of the brief term of the promissory note (the balloon). On approximately June 5, 1988 the debtor on the promissory note unexpectedly prepaid the note in the approximate amount of \$33,268.22 to which was added \$2,550.66 which had been retained in escrow, all of which was paid to the accused. The accused did not disclose the prepayment to the Will contestants but rather utilized the funds to make payment on June 5, 1987 in the remaining amount of \$18,100. (Exhibit 49A, B). The Will contestants became aware of the Will prepayment and consulted Mr. Baxter. Baxter then made demand upon the accused. (Exhibit 50). The Will contestants retained the Lindstedt firm to represent them in regards to a civil action and a representative of that firm brought this complaint.

The first cause of complaint alleged by the Oregon Stat Bar is predicated upon the allegation that the accused violated DR 5-104(A) of the Code of Professional Responsibility. The Bar characterizes this allegation in its trial memorandum as a "dishonesty charge" based upon the premise that the accused owed a duty to his clients to reveal material information. DR 5-104(A) specifically provides that:

"A lawyer shall not enter into a business transaction with a client if they have different interests therein and if the client expects the lawyer to exercise the lawyer's professional judgment therein for the protection of the client, unless the client has consented after full disclosure." (Emphasis added.)

The Bar alleges and the trial panel finds that Donn Yost was a client when the accused negotiated to purchase the note. The testimonial evidence as well as the documentary evidence supports the Bar's allegation that the accused was representing the interest of Donn Yost at the time the accused agreed to purchase the note. The testimony of Donn Yost and the accused established a longstanding attorney/client relationship. The accused represented Mr. Yost in this matter as well as in other matters. The accused contended that Donn Yost was aware that the accused would not purchase the note were he not planning to make a "profit". On February 2, 1988 the accused wrote to Danny Carrasco, stating in his correspondence "I represent Donn Yost in regards to collecting the settlement proceeds arising from a Will contest with the estate of Lowell Allen Yost, the deceased." (Exhibit 33). On February 23, 1988 Mr. Albrecht wrote to Mr. Baxter expressing Mr. Yost's concern regarding the status of the settlement. (Exhibit 36.)

The evidence establishes that the accused represented Mr. Yost at the time the purchase was agreed upon in November 1987 as well as thereafter. (Exhibits 33, 36).

DR 6.8.3 provides in pertinent part:

"An accused lawyer is entitled to the presumption of innocence in a state bar disciplinary proceeding...The state bar has the burden of proof to establish its charges by clear and convincing evidence ..."

Clear and convincing evidence means that the truth of the fact asserted is highly probable. Where the trial panel is not able to conclude that the evidence presented establishes that the truth of the facts asserted is highly probable, the trial panel cannot find the fact be established. In re Morrow, 297 Or 808, 688 P2d 820 (1984). Whether the accused violated DR 5-104(A) is not to be determined by whether the accused was representing the interest of Don[n] Yost, the accused was representing Donn Yost, nor can it be determined by whether the accused's interests were different from that of Donn Yost, clearly their interests were different. In this context, for the accused to have violated DR 5-104(a)[(A)] the client must also have expected the lawyer to exercise his professional judgment for the protection of the client's interest. The trial panel concludes that there is not clear and convincing evidence to conclude that Donn Yost or any of the other Will contestants expected Nikolaus Albrecht to exercise his professional judgment for their protection. The evidence, both documentary and testimonial, reflects that Rodney Baxter was counsel of record in this matter and provided the Will contestants with legal advice as to both the nature of the settlement and the discounted value of the sale of the promissory note. Donn Yost and Joy Farrow both testified that they relied upon Mr. Baxter's judgment in regards to the sale of the promissory note. The trial panel also concludes that there is not clear and convincing evidence that the accused failed to disclose to Donn Yost that the accused's interests were different from those of Mr. Yost and/or the other Will contestants. The nature of the relationship between Mr. Yost and Mr. Albrecht as well as Mr. Yost's signature on Exhibit 24, an Option Agreement

presented to the Consolidated Mortgage Company, conflict with the Bar's contention that Mr. Yost was unaware of Mr. Albrecht's intention to "make a profit" by purchasing the note. Where the evidence does not allow the trial panel to conclude the truth of the facts asserted is highly probable, the facts alleged cannot be said to have been established and the party bearing the burden of proof, in this instance the Bar, cannot be said to have carried its burden. The trial panel concludes that in regards to the first cause of complaint, the Bar has failed to carry its burden of proof.

For second cause of complaint, the Oregon State Bar alleges that the accused violated DR 2-106(A) of the Code of Professional Responsibility. DR 2-106(A) provides in pertinent part:

"A lawyer shall not enter[ed] into an agreement for, charge or collect an illegal or clearly excessive fee."

This allegation is predicated upon the contention of the Oregon State Bar that the difference between that amount actually paid for the note and the value of the note, \$33,000, constituted a fee to the accused.

As noted above, the accused's fee was limited by agreement to 5% of the recovery of Donn Yost's. A subsequent agreement allegedly provided the accused with a share of the South Dakota property, the value of which is in dispute. The only fees to which the accused was entitled are those set forth above. The accused has contended in the alternative that the value of the services provided was of such significance that the amount of "profit" which he realized in the purchase of the note can be justified by viewing this profit as a "fee". There is no legal basis upon which

the accused can contend that he was entitled to a fee in that amount. It is not necessary for the trial panel to reach the issue of whether this "profit" constitutes an excessive fee because the fees to which the accused was entitled were limited to those agreed upon between the parties as set forth above.

Alternatively, the accused contends that the consideration paid for the note included not only the \$18,700 agreed upon but also the 5% fee to which the accused was entitled pursuant to his retainer agreement with Donn Yost and his share of the South Dakota property, an amount in dispute. Since there is no evidence to support a contention that the accused was entitled to any fee greater than that set forth above, the trial panel concludes that the accused's fees were consideration, in addition to the cash payment, paid for the promissory note. Given the conclusion of the trial panel set forth above in regards to the first cause of complaint, the trial panel concludes that the accused did not violate DR 2-106(a)[(A)] by charging a fee which was clearly excessive. The trial panel concludes that there is not clear and convincing evidence that the profit realized by the accused constituted a fee. The trial panel finds that the accused did not violate DR 2-106(A).

The third cause of complaint alleged by the Bar is predicated upon the accused[']s failure to disclose the prepayment of the note. The Bar alleges that the accused violated DR 1-102(A)(3) by engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. The Bar alleges that the misrepresentation in the present case consisted of the failure to disclose at any time the limited term of the note and nondisclosure of the prepayment of the note by the debtor. The Bar alleges that the

accused had a fiduciary duty to disclose these material facts to the client, Donn Yost. The trial panel finds that the accused was representing Donn Yost during the period November 1987 through June 1988. (Exhibits 33, 36). It was during this period that the accused became aware of the limited term of the note and received the prepayment of the note. He placed the funds in his trust account and made payment of the remaining balance to Mr. Baxter. The Bar alleges that the failure to disclose to Mr. Baxter or Donn Yost the material facts prior to closing the transaction constitutes a misrepresentation within the meaning of DR 1-102(A)(3). The accused contends that the agreement to purchase the note constituted a legally binding contract as of November 1987 and that despite the fact that he had not yet tendered the agreed upon consideration, he was legally entitled to the prepayment and therefore he had no obligation to disclose these facts to Mr. Yost or Mr. Baxter. The limited remaining term of the note, as well as the fact of the prepayment, were material facts of which the client, Donn Yost, was unaware at the time the accused agreed to purchase the note. These facts should have been disclosed to either Donn Yost or Mr. Baxter prior to the consummation of the transaction, especially in light of the longstanding relationship between the accused and Donn Yost and the accused's awareness of the continued reliance by Donn Yost upon the accused for advice and counsel. While disclosure may not have altered the enforceability of the original agreement, the client was entitled to disclosure of these facts in order to, at a minimum, allow the client to seek counsel as to enforceability of the agreement to sell the note. The trial panel

finds that the accused failed to disclose material facts and that the failure to do so constituted a misrepresentation within the meaning of DR 1-102(A)(3).

SANCTIONS

In determining the appropriate sanction to be imposed, the trial panel is obligated to consider a number of factors. The trial panel has concluded, as noted above, that the accused did violate the duty owed to his client, specifically his obligation to disclose to his client the term of the promissory note and the prepayment. It is obvious that the accused "intentionally" failed to disclose the facts set forth above. The trial panel does not find clear and convincing evidence that the accused was aware at the time the transaction was negotiated that the term of the note was limited. The trial panel concludes that the accused was not aware at the time of the agreement that there would be prepayment of the note. The trial panel concludes that the accused's failure to disclose these facts can best be explained by the accused's belief that the transaction had been consummated and that he was entitled to the proceeds of the prepayment of the note.

The injuries sustained by the client have been characterized by the trial panel in its analysis of the third cause of complaint set forth above.

Most significant in the trial panel's consideration of the sanction is the trial panel's concern regarding the standard of conduct imposed upon counsel and the significance of the attorney/client relationship between Mr. Yost and the accused. Mr. Yost's longstanding relationship with the accused was one of trust and reliance. Mr. Yost believed this relationship was such that he could rely upon the accused for full

and complete disclosure of any material fact. In the context of the facts of this case, it is the trial panel's opinion that relationships of this type must be preserved and protected.

Utilizing the ABA standards regarding aggravating and mitigating circumstances, the trial panel does not find dishonest or selfish motive, a pattern of misconduct, multiple offenses, refusal to acknowledge the wrongful nature of the conduct, or indifference to making restitution. The trial panel does find that the nature of the relationship between the accused and Donn Yost was one which placed Mr. Yost in a vulnerable position. The substantial experience in the practice of law of the accused, and his longstanding relationship with Mr. Yost were such that the accused should have appreciated his obligation to make full and complete disclosure of the term and prepayment of the note. It is precisely this type of relationship that imposes upon counsel the obligations and responsibilities necessary to encourage public trust.

The absence of a prior disciplinary record and the accused's full and free disclosure of his files and documents during the disciplinary [disciplinary] process are circumstances mitigating in favor of the accused.

Based upon the foregoing, the trial panel concludes that the appropriate sanction to be imposed in this matter is a public reprimand.

IT IS SO ORDERED.

DATED this 11th day of January, 1993.

/s/ Jeffrey S. Mutnick

Jeffrey S. Mutnick
Chairperson

/s/ Ann L. Fisher

Ann L. Fisher
Trial Panel Member

/s/Kurt Olsen

Kurt Olsen
Trial Panel Member

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of	)	Case No. 91-129
)	
H. WILLIAM KRETZMEIER,)	
)	
Accused.)	
_____)	

Bar Counsel: James M. Finn, Esq.

Counsel for the Accused: Thomas E. Cooney, Esq.

Disciplinary Board: James M. Gleeson, State Chairperson; Anthony E. Buccino, Region 5 Chairperson

Disposition: Violation of DR 1-102(A)(3) and (4) and DR 6-101(B). Disciplinary Board approval of stipulation for discipline. Thirty day suspension.

Effective Date of Opinion: February 23, 1993

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of	)	Case No. 91-129
)	
H. WILLIAM KRETZMEIER,	)	SECOND AMENDED DECISION AND
	)	ORDER
Accused.)	
)	

A Stipulation for Discipline has been presented to the Regional Chairperson and the State Chairperson of the Disciplinary Board for review pursuant to Bar Rule 3.6(e). The Stipulation is intended by the Accused and the Bar to resolve the matters set out in a previously filed Complaint by the Bar against the Accused.

The Stipulation recites that during the pendency of the proceedings, the Bar and the Accused voluntarily agreed to resolution of the proceedings and the Stipulation is a product of those negotiations.

The material allegations of the Stipulation indicate the Accused at all material times, was admitted by the Oregon Supreme Court to practice law in Oregon. He was a member of the Oregon State Bar having his current place of business in the County of Multnomah, State of Oregon.

From a review of the Stipulation, it appears that the Accused engaged in conduct involving neglect of a legal matter and conduct prejudicial to the administration of justice, and that the Accused made certain ambiguous statements to a probate court without intent to mislead, but, to the extent misunderstood by the court, the statements constituted misrepresentations.

The conduct of the Accused described in the Stipulation constitutes conduct in violation of DR 1-102(A)(3), DR 1-102(A)(4) and DR 6-101(B) of the Code of Professional Responsibility.

The Accused admits his violation of DR 1-102(A)(3), DR 1-102(A)(4), and of DR 6-101(B) of the Code of Professional Responsibility as alleged in the Formal Complaint and submits an explanation of his conduct by way of mitigation.

Pursuant to the Stipulation, the Accused agrees to accept the following designated form of discipline in exchange for the herein described stipulations:

(1) The Accused agrees to accept a 30 day suspension for the violations of disciplinary rules cited herein.

From the Stipulation it appears that the Accused has no prior record of reprimands, suspensions or disbarment.

The Regional Chairperson and the State Chairperson, on behalf of the Disciplinary Board, approve the Stipulation and sanction.

IT IS HEREBY ORDERED that the Accused be disciplined as set forth above for violation of DR 1-102(A)(3), DR 1-102(A)(4) and DR 6-101(B) of the Code of Professional Responsibility.

Dated this 23rd day of February, 1993.

/s/ James M. Gleeson
James M. Gleeson
State Chairperson

/s/ Anthony E. Buccino
Anthony E. Buccino
Region 5 Chairperson

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of	)	Case No. 91-129
)	
H. WILLIAM KRETZMEIER,)	
	)	STIPULATION FOR DISCIPLINE
Accused.)	
)	

H. William Kretzmeier, attorney at law, (the Accused) and the Oregon State Bar (the Bar) hereby stipulate to the following matters pursuant to Rule of Procedure 3.6(c).

1.

The Oregon State Bar was created and exists by virtue of the laws of the State of Oregon and is, and at all times mentioned herein was, authorized to carry out the provisions of ORS Chapter 9 relating to the discipline of attorneys.

2.

The Accused is, and at all times mentioned herein was, an attorney at law, duly admitted by the Supreme Court of the State of Oregon to practice law in this state and a member of the Oregon State Bar, having his office and place of business in the county of Multnomah, State of Oregon.

3.

Accused enters into this stipulation freely and voluntarily. This stipulation is made under the restrictions of Rule of Procedure 3.6(h).

4.

On October 5, 1991, the Oregon State Bar State Professional Responsibility Board (hereinafter "SPRB") authorized the filing of a formal complaint against the Accused alleging violations of DR 1-102(A)(3), DR 1-102(A)(4), DR 6-101(B), DR 7-102(A)(3), and DR 7-102(A)(5) of the Code of Professional Responsibility in

connection with his representation of the personal representative of the estate of Jane Madden in Multnomah County Circuit Court Probate Department.

5.

A formal complaint, attached as Exhibit A, was filed against the Accused on May 29, 1992. The Accused filed his answer, attached as Exhibit B, on June 23, 1992.

VIOLATIONS

6.

The Accused admits to those portions of the Formal Complaint which allege that the Accused failed to expeditiously bring about the closure of the Madden Estate and that his conduct in this regard constituted neglect of a legal matter and conduct prejudicial to the administration of justice in violation of DR 6-101(B) and DR 1-102(A)(4).

7.

The Accused denies that he intended to mislead or deceive the probate court by his statements concerning his inability to obtain an income tax release from the Department of Revenue. The Accused admits, however, that his statements to the court concerning the tax release were ambiguous; that they could have been misunderstood or misconstrued by the court; that it was the Accused's responsibility to see that the court was fully advised regarding the progress of the probate administration; and that, to the extent the court misunderstood or misconstrued the Accused's statements regarding the tax release, the statements constituted misrepresentations in violation of DR 1-102(A)(3).

8.

In mitigation, the Accused's violations of the disciplinary rules referred to herein were primarily attributable to a tendency toward excessive procrastination for which the Accused has sought professional counseling and assistance. The estate suffered no injury from the Accused's conduct.

OTHER CHARGES

9.

The Bar hereby dismisses the charges of DR 7-102(A)(3) and DR 7-102(A)(5) in this proceeding.

SANCTION

10.

Pursuant to the terms of this stipulation and BR 3.6(c)(3)(iii), the Accused agrees to accept a 30 day suspension for the violations of the disciplinary rules cited herein.

PRIOR DISCIPLINE

11.

The Accused has no prior disciplinary record of reprimand, suspension or disbarment since his admission to practice law in 1969.

12.

This stipulation is subject to review by the Bar's Disciplinary Counsel and to approval by the SPRB. If the SPRB approves the Stipulation for Discipline, the parties agree that it will be submitted to the Disciplinary Board for consideration pursuant to the terms of BR 3.6.

EXECUTED this 1st day of December, 1992 by the Accused.

/s/ H. William Kretzmeier
H. William Kretzmeier

Executed this 4th day of December, 1992 by the Oregon State Bar.

/s/ Jeffrey D. Sapiro
Jeffrey D. Sapiro
Disciplinary Counsel
Oregon State Bar

I, H. William Kretzmeier, being first duly sworn, say that I am the Accused in the above-entitled proceeding and that I attest that the statements contained in the stipulation are true as I verily believe.

/s/ H. William Kretzmeier
H. William Kretzmeier

Subscribed and sworn to this 1st day of December, 1992.

/s/ Colleen C. Clark
Notary Public for Oregon
My Commission Expires: 2-4-96

I, Jeffrey D. Sapiro, being first duly sworn, say that I am Disciplinary Counsel for the Oregon State Bar and that I attest that I have reviewed the foregoing Stipulation for Discipline and that it was approved by the State Professional Responsibility Board for submission to the Disciplinary Board on the 21st day of November, 1992.

/s/ Jeffrey D. Sapiro

Jeffrey D. Sapiro
Disciplinary Counsel
Oregon State Bar

Subscribed and sworn to this 4th day of December, 1992.

/s/ Susan Parks

Notary Public for Oregon
My Commission Expires: 3-9-96

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of	)	Case No. 91-129
)	
H. WILLIAM KRETZMEIER,)	
	)	FORMAL COMPLAINT
Accused.)	
<hr/>		

The Oregon State Bar alleges as follows:

1.

The Oregon State Bar was created and exists by virtue of the laws of the State of Oregon and is, and at all times mentioned herein was, authorized to carry out the provisions of ORS Chapter 9, relating to the discipline of attorneys.

2.

The Accused, H. William Kretzmeier, is, and at all times mentioned herein was, an attorney at law, duly admitted by the Supreme Court of the State of Oregon to practice law in this state and a member of the Oregon State Bar, having his office and place of business in the County of Multnomah, State of Oregon.

3.

In May, 1987, the estate of Jane Madden was admitted into probate. The Accused began representing the estate in September, 1988, and filed an amended inventory on September 20, 1988. In October, 1988, he asked the Oregon Department of Revenue for a final audit of the decedent's income tax returns. The Department of Revenue requested that he submit an application for Oregon income tax release to the audit division. Mr. Kretzmeier called the audit division in December 1988, and was told that the Department of Revenue would not issue a release to the estate unless fiduciary income tax returns were filed. This created a problem in the Accused's opinion, since the probate estate had not and would not be filing fiduciary

income tax returns because the decedent's spouse was reporting all income and deductions on his individual returns.

4.

The Accused thereafter took no steps to resolve this dilemma and obtain a release from the Department of Revenue until February 20, 1991. On that day, he called the department and explained his dilemma. He was told that the Department might issue a release if a letter explaining the facts accompanied the application.

5.

On four occasions in 1989 and 1990, the Accused appeared in the probate department in the circuit court for Multnomah County and each time represented to the court that the delay in presenting the order approving the final accounting and allowing distribution of the estate assets was due to the Accused's inability to secure a current income tax release from the Oregon Department of Revenue. In fact, at no time prior to any of these court appearances had the Accused submitted an application for such a release or undertaken any other efforts to obtain one.

6.

By informing the court on four separate occasions that he was "unable" to obtain a release from the Department of Revenue without revealing that in fact he had undertaken no efforts to procure one, the Accused misrepresented or knowingly failed to disclose the true state of facts in order to mollify the probate court. Because this was an ex parte probate proceeding, the Accused owed the court a greater duty of candor and full disclosure.

7.

By failing to undertake any efforts to obtain a release from the Department of Revenue between December, 1988 and February 20, 1991, the Accused neglected a legal matter entrusted to him.

8.

By engaging in the acts alleged in paragraphs 6 and 7, supra, the Accused committed conduct prejudicial to the administration of justice.

10.

The aforesaid conduct of the Accused violated the following standards of professional conduct established by law and by the Oregon State Bar:

1. DR 1-102(A)(3) of the Code of Professional Responsibility;
2. DR 7-102(A)(3) of the Code of Professional Responsibility;
3. DR 7-102(A)(5) of the Code of Professional Responsibility;
4. DR 1-102(A)(4) of the Code of Professional Responsibility; and
5. DR 6-101(B) of the Code of Professional Responsibility.

WHEREFORE, the Oregon State Bar demands that the Accused make answer to this complaint; that a hearing be set concerning the charges made herein; that the matters alleged herein be fully, properly and legally determined; and pursuant thereto, such action be taken as may be just and proper under the circumstances.

EXECUTED this 29th day of May, 1992.

OREGON STATE BAR

By: _____

CELENE GREENE
Executive Director

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)
)
Complaint as to the Conduct of) Case No. 91-112
)
KURTIS M. LOMBARD,)
)
Accused.)
_____)

Bar Counsel: Mark D. Donohue, Esq.

Counsel for the Accused: Kurtis M. Lombard, pro se

Disciplinary Board: Donald K. Denman, State Chairperson; Martha L. Walters, Region 2 Chairperson

Disposition: Violation of DR 1-102(A)(3) and DR 6-101(A) and (B). Disciplinary Board approval of stipulation for discipline. Sixty day suspension.

Effective Date of Opinion: April 1, 1993

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of	)	Case No. 91-112
)	
KURTIS M. LOMBARD,	)	ORDER APPROVING STIPULATION
	)	FOR DISCIPLINE
Accused.)	
)	

THIS MATTER coming on to be heard upon the Stipulation for Discipline entered into between the Accused and the Oregon State Bar providing that the Accused would be suspended from the practice of law for a period of sixty (60) days, and this matter having been duly considered by the Disciplinary Board,

IT IS HEREBY ORDERED that the Stipulation of the parties agreeing that the Accused will be suspended from the practice of law for a period of sixty (60) days is approved.

DATED this 16th day of March, 1993.

/s/ Martha L. Walters

Martha L. Walters
Region 2 Chairperson

/s/ Donald K. Denman

Donald K. Denman
State Chairperson

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of	)	Case No. 91-112
)	
KURTIS M. LOMBARD,	)	STIPULATION FOR
	)	DISCIPLINE
Accused.)	
)	

Kurtis M. Lombard, attorney at law, (hereinafter, "the Accused") and the Oregon State Bar hereby stipulate to the following matters pursuant to Oregon State Bar Rule of Procedure 3.6(c).

1.

The Oregon State Bar was created and exists by virtue of the laws of the State of Oregon and is, and at all times mentioned herein was, authorized to carry out the provisions of ORS Chapter 9 relating to the discipline of attorneys.

2.

The Accused, is, and at all times mentioned herein was, an attorney at law, duly admitted by the Oregon Supreme Court of the State of Oregon to practice of law in this state and a member of the Oregon State Bar, maintaining his office and place of business in Lane County, Oregon.

3.

The Accused enters into this Stipulation for Discipline freely and voluntarily. This stipulation is made under the restrictions of Rule of Procedure 3.6(h).

4.

At its December 7, 1991 meeting, the State Professional Responsibility Board of the Oregon State Bar authorized formal disciplinary proceedings against the Accused alleging that he violated DR 1-102(A)(2), DR 6-101(A) and DR 6-101(B).

5.

The Oregon State Bar filed its formal complaint on June 26, 1992, and the formal complaint was served, together with a notice to answer, upon the Accused on July 29, 1992. A copy of the formal complaint is attached hereto as Exhibit 1 and incorporated herein by this reference. The Accused has not filed an answer to the formal complaint.

6.

The Accused hereby stipulates that his conduct violated DR 1-102(A)(3), DR 6-101(A) and DR 6-101(B) as set forth in the formal complaint.

7.

The Accused has no prior record of reprimand, suspension or disbarment.

8.

As a result of the Accused's misconduct, the Accused and the Oregon State Bar agree that the Accused will be suspended from the practice of law for a period of 60 days.

9.

This stipulation has been freely and voluntarily made by the Accused, as is evidenced by his verification below, with the knowledge and understanding that this stipulation is subject to review by the Oregon State Bar's Disciplinary Counsel and to approval by the State Professional Responsibility Board. If the State Professional Responsibility Board approves this stipulation for discipline, the parties agree that it will be submitted to the Disciplinary Board for consideration pursuant to the terms of BR 3.6.

EXECUTED this 28th day of January, 1993.

/s/ Kurtis M. Lombard

Kurtis M. Lombard

/s/ Susan Roedl Cournoyer

Susan Roedl Cournoyer
Assistant Disciplinary Counsel
Oregon State Bar

I, Kurtis M. Lombard, being first duly sworn, say that I am the Accused in the above-entitled proceeding and that I attest that the statements contained in the stipulation are true and correct as I verily believe.

/s/ Kurtis M. Lombard
Kurtis M. Lombard

Subscribed and sworn to before me this 24th day of January, 1993.

/s/ Cynthia L. Bull
Notary Public for Oregon
My commission expires: 1/14/96

I, Susan Roedl Cournoyer, being first duly sworn, say that I am Assistant Disciplinary Counsel for the Oregon State Bar and that I attest that I have reviewed the foregoing Stipulation for Discipline and that it was approved by the SPRB for submission to the Disciplinary Board on the 28th day of January, 1993.

/s/ Susan Roedl Cournoyer
Susan Roedl Cournoyer
Assistant Disciplinary Counsel
Oregon State Bar

Subscribed and sworn to before me this 1st day of February, 1993.

/s/ Susan L. Parks
Notary Public for Oregon
My commission expires: 3/9/96

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of	)	Case No. 91-112
)	
KURTIS M. LOMBARD,	)	FORMAL COMPLAINT
)	
Accused.)	
)	

For its FIRST CAUSE OF COMPLAINT against the Accused, the Oregon State Bar alleges:

1.

The Oregon State Bar was created and exists by virtue of the laws of the State of Oregon and is, and at all times mentioned herein was, authorized to carry out the provisions of ORS Chapter 9, relating to the discipline of attorneys.

2.

The Accused, Kurtis M. Lombard, is, and at all times mentioned herein was, an attorney at law, duly admitted by the Supreme Court of the State of Oregon to practice law in this state and a member of the Oregon State Bar, having his office and place of business in the County of Lane, State of Oregon.

3.

In March 1990, the Accused undertook representation of James and Arzella Wiley ("the Wileys") in their attempt to obtain redress for a defective mobile home.

4.

On or about April 26, 1990, the Accused filed a complaint in Lane County Circuit Court on behalf of the Wileys against Betz Chevrolet-Pontiac-Oldsmobile Co., Inc., ("Betz"), Coachmen Industries, Inc. ("Coachmen") and Ford Motor Company ("Ford"). Service of the summons and complaint were made upon all three defendants.

5.

On July 31, 1990, the Accused received notice from the court that the Wileys' complaint would be dismissed against Betz and Ford unless the Accused required Betz and Ford to appear within 28 days. The Accused did not take any steps to require Betz and Ford to appear and did not seek a default judgment against them. The court dismissed the Wileys' complaint as to Betz and Ford by order dated October 3, 1990.

6.

On or about August 22, 1990, the Lane County Circuit Court allowed Coachmen's motions against the complaint with leave to the Wileys to file an amended complaint. The Accused had not responded to Coachmen's motions.

7.

Despite the court's order allowing Coachmen's motions against the Wileys' complaint, the Accused did not file an amended complaint. The Accused also did not respond to a letter he received on October 2, 1990 from Coachmen's counsel advising that Coachmen would move to dismiss the Wileys' complaint if the Accused did not file an amended complaint by November 15, 1990.

8.

Coachmen moved to dismiss the Wiley's complaint for want of prosecution and served on the motion on the Accused on December 5, 1990. The Wileys' complaint was dismissed for want of prosecution and a judgment of dismissal was filed on January 22, 1991.

9.

The Accused failed to apply the legal knowledge, skill, thoroughness and preparation reasonably necessary to represent the Wileys.

10.

By failing to file an amended complaint and engaging in conduct described in paragraphs 5 through 9 above, the Accused neglected a legal matter entrusted to him and failed to provide competent legal representation.

11.

The aforesaid conduct of the Accused violated the following standards of professional conduct established by law and by the Oregon State Bar:

1. DR 6-101(A) of the Code of Professional Responsibility; and
2. DR 6-101(B) of the Code of Professional Responsibility.

AND, for its SECOND CAUSE OF COMPLAINT against the Accused, the Oregon State Bar alleges:

12.

Incorporates by reference as fully set forth herein, paragraphs 1 through 8 its First Cause of Complaint.

13.

The Accused was aware that the Wileys' complaint had been dismissed as to Betz and Ford as of October 1991, but he did not inform the Wileys of the dismissals.

14.

The Accused was aware that the Wileys' complaint had been dismissed as to Coachmen by late January 1991, and that this dismissal terminated the Wileys' lawsuit. The Accused also received notice in late January 1991 that a cost bill had been entered against the Wileys in favor of Coachmen. The Accused did not inform the Wileys of these developments.

15.

From mid-February through mid-April 1991, the Accused led the Wileys to believe that their lawsuit was still pending and that their case against Betz, Coachmen and Ford would proceed to trial on April 22, 1991.

16.

By failing to inform the Wileys of the dismissals as to each of the defendants in their lawsuit, the termination of their litigation and the cost bill entered against them and by leading them to believe that their lawsuit was still pending and would proceed to trial when he knew that it had been dismissed, the Accused engaged in conduct involving dishonesty, fraud, deceit or misrepresentation.

17.

The aforesaid conduct of the Accused violated the following standard of professional conduct established by law and by the Oregon State Bar:

1. DR 1-102(A)(3) of the Code of Professional Responsibility.

WHEREFORE, the Oregon State Bar demands that the Accused make answer to this complaint; that a hearing be set concerning the charges made herein; that the matters alleged herein be fully, properly and legally determined; and pursuant thereto, such action be taken as may be just and proper under the circumstances.

EXECUTED this 26th day of June, 1992.

OREGON STATE BAR

By: /s/ Celene Greene
CELENE GREENE
Executive Director

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)
)
Complaint as to the Conduct of) Case No. 91-55
)
RICHARD N. BELCHER,)
)
Accused.)
_____)

Bar Counsel: James A. Wallan, Esq.

Counsel for the Accused: Douglas J. Richmond, Esq.

Trial Panel: Karla J. Knieps, Chairperson; W. Eugene Hallman; LaSalle [sic] Coles, Public Member

Disposition: Violation of DR 1-102(A)(3) and (4) and ORS 9.527(4). Forty-five day suspension.

Effective Date of Opinion: May 1, 1993

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:	)	OSB 91-55
)	
Complaint as to the Conduct of	)	SC S40034
)	
RICHARD N. BELCHER,)	
	)	ORDER ALLOWING MOTION
Accused.	)	TO DISMISS APPEAL
)	

The motion of accused-petitioner to dismiss this appeal is allowed.

The petition is dismissed.

Dated this 31st day of March, 1993.

/S/ Wallace P. Carson, Jr.

WALLACE P. CARSON, JR.
CHIEF JUSTICE

c: Douglas J. Richmond
Martha M. Hicks
James A. Wallan

cl

REPLIES SHOULD BE DIRECTED TO THE STATE COURT ADMINISTRATOR, RECORDS SECTION, SUPREME COURT BUILDING, 1163 STATE STREET SALEM, OREGON 97310

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of	)	Case No. 91-55
)	
RICHARD N. BELCHER,	)	MOTION TO DISMISS
	)	APPEAL
Accused.)	
<hr/>		

COMES NOW the petitioner RICHARD N. BELCHER by and through his attorneys Kellington, Krack, Richmond and Blackhurst and hereby moves to dismiss his appeal for the reason that he has agreed to accept the forty-five day suspension commencing on May 1, 1993, as rendered by the trial panel in the above referenced case.

DATED this 24th day of March, 1993.

Kellington, Krack, Richmond
& Blackhurst

By: /s/ Douglas J. Richmond
Douglas J. Richmond, OSB # 76310
Of Attorneys for Accused
Richard N. Belcher

STATE OF OREGON)
 : ss.
County of Jackson)

I hereby certify that the within and foregoing is a true, complete and compared transcript of the original MOTION TO DISMISS APPEAL on file herein and of the whole thereof.

/s/ Douglas J. Richmond
Douglas J. Richmond
Of Attorneys for Accused
Richard N. Belcher

STATE OF OREGON)
 : ss.
County of Jackson)

I hereby certify that I served the within and foregoing _____
the ___ day of _____, 1993, by hand delivering a true copy thereof to:

Of Attorneys for

STATE OF OREGON)
 : ss.
County of Jackson)

I hereby certify that I served the within and foregoing MOTION TO DISMISS APPEAL on the 24th day of March, 1993 by depositing a true copy thereof in the United States Mail at Medford, Oregon, enclosed in a sealed envelope with postage thereon fully prepaid, said envelope containing such true copy being plainly addressed to:

Martha Hicks
Oregon State Bar
P. O. Box 1689
Lake Oswego, OR 97035

Debby Colasont
Frye Reporting Service
3954 Rio Vista
Klamath Falls, OR 97601

DOUGLAS J. RICHMOND
Douglas J. Richmond
Of Attorneys for Accused
Richard N. Belcher

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of	)	No. 91-55
)	
RICHARD N. BELCHER,	)	Trial Panel Decision
)	
Accused.)	
)	

This is a lawyer disciplinary proceeding instituted by the Oregon State Bar (hereinafter Bar") against Richard N. Belcher. The Bar's Amended Formal Complaint alleges three causes of complaint against the Accused. The matter came before the trial panel for hearing on October 22, 1992. The Oregon State Bar appeared by and through Martha M. Hicks, Assistant Disciplinary Counsel, and James A. Wallen [Wallan], Bar Counsel. The Accused appeared personally and was represented by Douglas Richmond. Witnesses testified at the hearing. The Oregon State Bar's Exhibits, numbers 1 through 3 and 6, and Accused's Exhibits, numbers 101 and 102, were received into evidence.¹

SUMMARY OF TESTIMONY

The Accused has been a member of the Oregon State Bar since October of 1984.

On July 3, 1990, the Accused was retained to represent Anna Pena for the proposes of representing her interests in a step-parent adoption. The Accused filed a Petition for Adoption on July 12, 1990. The Notice to Children's Services Division and the Decree of Adoption were prepared contemporaneously with the Petition, which was the standard practice of Accused's law firm.

¹Exhibit "6" was admitted for the limited purpose of showing that a hearing was held to set aside the Decree of Adoption.

At the initial consultation on July 3, 1990, Pena told the Accused she did not know who the father was, nor was the father's name on the birth certificate, but that blood tests were being done on several people. The Accused contacted Children's Services Division and was advised by Mr. Barfield that paternity had not been established. On July 16, 1990, the Accused received a call from Richard Garbutt, another Klamath Falls attorney, who advised the Accused that he represented Dana Jenkins who claimed to be the natural father of the minor child and that Jenkins was seeking visitation rights. The Accused testified he told Garbutt, at that time, he had filed an adoption petition; he asked Garbutt for proof of paternity by Jenkins, and advised Garbutt that when he received such proof, he would go no further with the adoption proceeding.

Garbutt denies the Accused told him an adoption had been filed. Garbutt recalled an initial discussion with the Accused regarding adoption; his recollection was that no adoption petition had yet been filed, nor could an adoption go forward without notice to any putative father, including Jenkins. Garbutt was not concerned about the minor child being adopted at that time, but he would have been if he knew a petition for adoption had been filed, because of certain time constraints on the putative father; and furthermore, if he had been told a petition had been filed, he would have filed an appearance on behalf of Jenkins.

The Accused stated he spoke with Garbutt on July 25, 1990, regarding visitation and support, and again on September 6, 1990. The Accused also testified there were two other occasions: one where he saw Garbutt on the street and they talked about the adoption and that a decree could not be taken without notice to the putative father; and another occasion when he saw Garbutt on the street and the conversation was regarding his client slapping Garbutt's client, but had nothing to do with the adoption.

The Accused prepared a "Stipulation re Child Support and Visitation" (Exhibit "1"), which stated that "Jenkins may be the biological father". The stipulation was signed by Pena on September 10, 1990, and thereafter sent to Garbutt. Jenkins objected to the characterization that he "may be" the biological father, and wanted the

stipulation changed to state that Jenkins "is" the biological father. A second stipulation regarding paternity and visitation was thereafter drafted by Garbutt (Exhibit "2"), which included, inter alia, an acknowledgement that Jenkins was the biological father of the minor child. That stipulation was signed by Jenkins on September 28, 1990. Garbutt never sent the stipulation to the Accused because, at that time, Jenkins was reporting to him that Pena and Jenkins could not reach agreement regarding visitation, and a hearing would be necessary; furthermore, Pena was telling Jenkins that the child had been adopted, but Garbutt did not give that information any credence because he did not believe what Pena was telling Jenkins due to some other events that had occurred. Garbutt did not check the court records at that time because he was relying on the Accused informing him if an adoption Petition was filed. Garbutt did not send blood test results to the Accused because his client was not seeking to formally establish paternity, but rather negotiating for visitation rights.

Following his last letter dated September 17, 1990, to the Accused (respecting the first Stipulation), Garbutt did not recall any further contact with the Accused. Pena had contacted Garbutt and indicated Belcher did not represent her, so Garbutt served Pena directly with a motion and order to show cause on October 18, 1990. Enver Bozgoz, a Klamath Falls attorney, attended the hearing on the motion and advised Garbutt that he was representing Pena's interests, provided the Court a copy of a Decree of Adoption, and moved to dismiss the Show Cause.

It was the normal practice of Accused's office that once the secretary received a waiver of report from the Children's Services Division, the secretary proceeded to file a decree with the court, unless Accused instructed the secretary otherwise. The Accused admits he did not "flag" the file in this case, nor in any other way tell his secretary not to take the decree when the Children's Services Division waiver arrived at his office.

The decree was taken to the court on August 7, 1990. (Exhibit "3"). Judge Isaacson testified that it is the standard practice of the Court that any ex parte or uncontested documents are put in a 'duty basket' and the judge assigned to review such matters that week examines the documents on a daily basis. Adoption matters

are handled in a similar, but more confidential manner. The court relies upon the attorney submitting such matters to the Court to make any information regarding a change in the status of the parties known to the Court. The Judge did not recall signing the Decree in this case but did recall a proceeding to set aside the adoption.

The Accused was not sure of the exact date when the executed Decree arrived at his office, but it was his secretary's normal practice to go to the courthouse each day between 4:00 p.m. and 4:30 p.m. and pick up any papers in his attorney's box at the courthouse. The Accused recalls talking to Pena on August 13, 1990, regarding the visitation and his initial statement was that he was not sure if his client knew about the Decree at that time, but then added that he assumed he talked to her at that time about the Decree since he did not have any contact with his client again until September 25, 1990. The Accused recalls advising Pena that if Jenkins proved to be the father, the Decree could be set aside, and he gave her several options: one of which was that she could tell Jenkins, and Jenkins could move to set aside the Decree; and the other was that she could say nothing at all and Jenkins would probably, eventually, figure it out. The Accused's best recollection is that, at some point, Pena told him to do nothing.

The Accused did recall telling Garbutt he would not take the Decree until Garbutt gave the Accused some indication regarding the paternity of Jenkins, but the Accused never received blood tests or other proof from Garbutt.

The Accused admits he continued to negotiate visitation provision after the Decree was taken. The Accused's justification was that, even if it was proved Jenkins had no rights as a biological father after the Decree had been entered, consensual visitation rights could be arranged. The Accused's last client contact with Pena was on September 25, 1992. The Accused was never served with a copy of the motion and order to show cause. The Accused testified he received a call from Jenkins' new attorney, Douglas Osborne, inquiring as to how the decree had been entered. The Accused recalls offering to testify that the decree was taken inadvertently. The Accused was never contacted by anyone to testify at the show cause hearing.

The Accused felt he did not have a legal duty to advise Garbutt that the Decree had been entered because Garbutt had never provided him blood tests establishing Jenkins' paternity; however, the Accused admitted he probably had an ethical duty to do so; and when Pena told him not to tell Garbutt, he should have withdrawn. The Accused further admitted that his inadvertent failure to "flag" his file to prevent the entry of the decree was "careless". The Accused argues that his actions were inadvertent and in good faith and the appropriate sanction is a reprimand because he had no prior disciplinary record and because his attention was distracted by other pressing business matters.

The Bar alleges that the aforesaid conduct of the Accused violated DR 1-102(A)(3), DR 1-102(A)(4), and ORS 9.527(4).

CONCLUSIONS

1.

In the First Cause of Complaint, the Accused was charged with violating DR 1-102(A)(3) of the Code of Professional Responsibility (conduct involving dishonesty, fraud, deceit, or misrepresentation). The basis of these violations is essentially that the Accused failed to disclose to Garbutt that the Accused had filed a Petition for Adoption; thereafter the Accused allowed his staff to present the Court a proposed decree which was ultimately signed by the Court while the Accused was negotiating visitation with the opposing counsel; and after the Decree of Adoption was entered, failed to (a) advise opposing counsel, and (b) immediately move to have the Decree set aside.

There was a dispute in the testimony as to whether or not Garbutt knew that a Petition for Adoption had been filed. The Trial Panel found Garbutt's testimony more persuasive. Furthermore, the Accused admitted that he had discussed with Garbutt the fact that Jenkins was entitled to and would receive notice before any Decree would be taken, thereby leading Garbutt to believe that, in fact, no Decree would be taken without such notice; and yet, the Accused failed to advise his staff to "flag" the file to prevent a Decree from being taken. Additionally, the Accused continued to

negotiate visitation without notifying Garbutt the Decree had been entered. Despite several opportunities to correct the mistaken belief by Garbutt that no Decree had been taken, the Accused failed to do so, just as he had earlier failed to clearly advise Garbutt that a Petition for Adoption had been filed.

As the Supreme Court stated in In Re Fuller, 284 Or 273, 275 (1978), "...the ethical difference between active misrepresentation and failure to correct a false impression that one has given is of little import". Acts of concealment as well as affirmative misrepresentations constitute violations of DR 1-102(A)(3). In Re Hiller, 298 Or 526, 694 P2d 540 (1985); In Re Greene, 290 Or 291, 620 P2d 1379 (1980); In Re Hedrick, 312 Or 442, ___ P2d ___ (1991); In Re Boardman, 312 Or 452, ___ P2d ___ (1991).

Furthermore, as the Court stated in In Re Hiller, supra, 298 Or at p. 534:

"A person must be able to trust a lawyer's word as the lawyer should expect his word to be understood, without having to search for equivocation, hidden meanings, deliberate half truths or camouflaged escape hatches".

The Accused's representation to Garbutt that no Decree would be taken without notice to his client required the Accused to take the steps necessary to prevent the taking of such a Decree by his staff, and to immediately notify opposing counsel, and seek to have the Decree set aside when the Accused became aware that it was entered.

The Accused is, for the foregoing reasons, found, by clear and convincing evidence to have violated DR 1-102(A)(3).

In the Second Cause for Complaint, the Accused was charged with violating DR 1-102(A)(4) (conduct prejudicial to the administration of justice). The basis of the Bar's argument is that the accused misled Garbutt about the pendency and status of the adoption, and such conduct was prejudicial to the administration of justice under

the holding of In Re Haws, 310 Or 741, 801 P2d 818 (1990). Specifically, the Bar argued that Jenkins' substantive rights were prejudiced in that a decree was entered without his opportunity for appearance which resulted in visitation delays of at least five months and the incurrence by Jenkins of additional legal fees to set aside the Decree, and that the procedural functioning of the system was prejudiced in that two hearings were necessary as a result of the Accused's conduct.

Clearly there was "conduct" since conduct may involve acting or failure to act when one has a duty to act. In Re Bridges, 302 Or 250, 728 P2d 863 (1986). Because the "administration of justice" involves judicial proceedings or matters directly related thereto, that component is also obviously present under these facts, since two hearings were required: a hearing to dismiss the order to show cause for lack of jurisdiction because the adoption Decree had already been entered, and a hearing to set aside the Decree. The most problematic is whether "prejudice" to the administration of justice was involved. Such prejudice, under the Supreme Court's holding of In Re Haws, supra, 310 Or p. 748, may evolve from a single incident which causes substantial harm to the administration of justice or repeated conduct causing some harm.

There is no repeated conduct here. The Bar argues, first of all, Jenkins' substantive rights were prejudiced in that the adjudication of his paternity and visitation rights were delayed for at least five months and he incurred additional legal cost to set aside the Decree. Jenkins did not testify before the trial panel; the panel therefor could make no finding regarding whether he had incurred any additional legal

fees to set aside the Decree. In that effort, Jenkins was represented by Douglas Osborne. Osborné did not testify, so there was no evidence what fee, if any, Osborne charged Jenkins. The Decree was taken on August 7, 1990. Negotiations continued regarding visitation through the end of September, 1990, at which time the negotiations broke down. Garbutt filed a motion and order to show cause on October 18, 1990. There was no evidence presented that the Accused's conduct actually interfered with Jenkins' visitation rights because, due to the testimony regarding the polarization of the parties, it is doubtful that such visitation would have occurred; however, the Panel makes no finding in that regard, but merely notes there is no testimony to indicate that Jenkins' visitation rights were actually interfered with because of the Accused's conduct. Furthermore, the Panel can make no finding that any expenses were incurred by Jenkins, since there was no testimony of any such expenses actually being incurred. The Trial Panel does know, by Garbutt's testimony that there was a show cause hearing, and by Judge Isaacson's testimony and Exhibit "6" that a hearing was held to set aside the Decree; therefore, the administration of justice was impacted in that regard.

The issue before the Panel was, therefor, whether the necessity of conducting two hearings was "substantial harm" to the procedural functioning of the judicial system. Clear and convincing evidence means that the truth of the facts asserted is highly probable. In Re Conduct of Morrow, 297 Or 808, 688 P2d 820 (1984). Had the Bar presented testimony from Jenkins or Jenkins' counsel, that Jenkins' visitation rights had, in fact, been interfered with, or that Jenkins had incurred unnecessary

costs, the Trial Panel would have more easily reached a conclusion of substantial harm as referenced in the In Re Paauwe case cited in In Re Haws, at 310 Or at p. 748. In Re Paauwe involved an attorney subjecting the clients to liability for costs on an unauthorized appeal (294 Or 171, 654 p2d 1117 (1982)). However, the Panel finds that it is highly probable that the Accused's conduct in necessitating two otherwise unnecessary court hearings amounted to substantial harm to the procedural functioning of the system, and therefore constituted conduct prejudicial to the administration of justice.

3.

The Third Cause of Complaint was a violation of ORS 9.527 (willful deceit or misconduct in the profession). The basis of the Bar's complaint is that the Accused's conduct (essentially that conduct upon which the Bar relied in claiming a violation of DR 1-102(A)(3)), was willful in that he intended to forestall Jenkins from asserting his paternity rights upon the request of his client to do so; and additionally, willful in failing to take the actions necessary to set aside the Decree once he knew the Decree had been entered. Based on the Accused's conduct as outlined the first Cause for Complaint, the Trial Panel finds, by clear and convincing evidence, that the Accused's conduct was a violation of ORS 9.527(4).

DISPOSITION

As an officer of the Court, the Accused had a duty, in his dealings with opposing counsel and all others, to "[e]mploy...such means only as [were] consistent with the truth..." ORS 9.460(2); In Re Hiller, supra, 298 Or 526, 531-2. The Accused

had a further duty to maintain the integrity of the profession. The Accused's conduct in this case breached those duties. The Accused's conduct was, in some respects, careless and, in other, willful. It necessitated two unnecessary Court hearings, with at least resulting inconvenience to the Court and those required to attend.

It is the decision of the Trial Panel that the Accused be suspended from the practice of law for a period of forty-five days.

The Panel is mindful that the Accused has no prior disciplinary record; and that he testified that he offered to cooperate in having the decree set aside. Two other members of the Bar, Stanley C. Jones and Neil Buchanan, testified in the Accused's favor as to honesty and reliability. Garbutt admitted that he had other cases with the Accused prior, and subsequent to, this case and nothing similar had occurred.

The Accused's formal answer to the charges states that his conduct was the direct result of instructions from his client. (While Pena was subpoenaed, she did not appear to testify). However, in his testimony before the Trial Panel, the accused admitted he probably should have informed Garbutt when he found out the Decree had been entered; and, that when his client instructed him not to do so, he should have withdrawn.² The Accused made no such admissions, however, prior to the hearing before the Trial Panel. Therefore, the Trial Panel did not find his actions in responding to the charges by the Bar as a mitigating factor. Neither did the Trial Panel find the

²DR 2-110(B)(2) mandates withdrawal when a lawyer knows, or it is obvious, that the lawyer's continued representation will result in the violation of a disciplinary rule.

Accused's argument that he was very busy during that period of time persuasive as a mitigating factor. See In Re Reinmiller, 213 Or 680, 325 P2d 773, 785 (1958).

Dated this 17th day of December, 1992.

/S/ Karla J. Knieps
Karla J. Knieps, Trial Panel Chair

/S/ W. Eugene Hallman
W. Eugene Hallman

/S/ LaSelle E. Coles
LaSalle [sic] Coles

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of	)	Case No. 92-133
)	
DAVID B. KUHNS,)	
)	
Accused.)	
_____)	

Bar Counsel: N/A

Counsel for the Accused: Jon S. Henricksen, Esq.

Disciplinary Board: Donald K. Denman, State Chairperson; Walter A. Barnes, Region 6 Chairperson

Disposition: Violation of DR 1-102(A)(4). Disciplinary Board approval of stipulation for discipline. Thirty days which shall be stayed pending 18 months probation.

Effective Date of Opinion: July 13, 1993

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of	)	Case No. 92-133
)	
DAVID B. KUHNS,	)	ORDER APPROVING STIPULATION
)	
Accused.)	
)	

THIS MATTER coming on to be heard upon the Stipulation of the Accused and the Oregon State Bar providing that the Accused would agree to accept a 60-day suspension, with 30 days of the same stayed pending his completion of 18 months probation as set forth in the Stipulation.

IT IS SO ORDERED that the Stipulation is approved by the Disciplinary Board.
DATED this 13th day of July, 1993.

/s/ Donald K. Denman
Donald K. Denman
State Chairperson

/s/ Walter A. Barnes
Walter A. Barnes
Region 6 Chairperson

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of	)	Case No. 92-133
)	
DAVID B. KUHNS,	)	STIPULATION FOR
	)	DISCIPLINE
Accused.)	
_____)	

David B. Kuhns, attorney at law, (hereinafter, "the Accused"), and the Oregon State Bar (hereinafter, "the Bar"), hereby stipulate to the following matters pursuant to Oregon State Bar Rule of Procedure 3.6(c).

1.

The Bar was created and exists by virtue of the laws of the State of Oregon and is, and at all times mentioned herein was, authorized to carry out the provisions of ORS Chapter 9 relating to the discipline of attorneys.

2.

The Accused, David B. Kuhns, is, and at all times mentioned herein was, an attorney at law duly admitted by the Oregon Supreme Court to the practice of law in this state and a member of the Oregon State Bar having his office and place of business in Marion County, Oregon.

3.

The Accused enters into this Stipulation for Discipline freely and voluntarily.

4.

On March 13, 1993, the State Professional Responsibility Board (hereinafter "the Board") authorized formal disciplinary charges against the Accused alleging that the Accused violated DR 1-102(A)(4).

5.

A formal complaint has not yet been filed, but the conduct that forms the basis for the above-referenced charge is as follows: Beginning in the fall of ~~1990~~ [1989 DBK, MMH], and continuing for approximately a year thereafter, the Accused harassed Marion County Courthouse personnel by asking them for nude photographs of themselves or photographs of them wearing lingerie, commenting about their bodies, especially their breasts, and making sexually degrading comments about female courthouse personnel and other women.

6.

The Accused's explanation of the reasons for his conduct described and in paragraph 5 above is attached hereto and incorporated by reference herein as Exhibit 1. The Accused acknowledges that his explanation in no way justifies his conduct and is not a defense to the charge that he violated the ethical rule specified herein.

7.

The Accused admits the conduct alleged in paragraph 5, that this conduct was prejudicial to the administration of justice and that he thereby violated DR 1-102(A)(4) of the Code of Professional Responsibility.

8.

Pursuant to the above admissions and BR 3.6(c)(iii), the Accused agrees to accept a 60 day suspension for his violation of DR 1-102(A)(4). Thirty days of this suspension shall be stayed pending the Accused's completion of 18 months of probation which shall begin on the first day after the Accused returns to active practice after serving the imposed portion of the suspension. The period of suspension shall begin within 14 days after the date this stipulation is approved by the Disciplinary Board of the Oregon State Bar.

9.

During the 18 month term of probation, the Accused will meet the following terms and conditions:

- A. During the period of the suspension and probation, the Accused shall undergo and cooperate in counselling and treatment by a psychologist,

psychiatrist, or MSW, acceptable to Disciplinary Counsel, for sexual issues, depression, low self-esteem, anxiety, stress, immaturity, poor judgment and any other matters deemed appropriate by the treating mental health professional. The Accused shall commence treatment not later than 21 days after the period of suspension begins and shall continue such treatment for the duration of the suspension and probation or until the treating mental health professional deems treatment no longer appropriate. During the period of suspension and probation, the Accused shall not be permitted to terminate the mental health treatment described above until the Bar receives and agrees with a written recommendation from the treating mental health professional that treatment be terminated.

- B. The Accused shall provide the Bar with quarterly written reports from the treating mental health professional. The first report shall be provided 90 days after treatment commences and subsequent reports shall be due each 90 days thereafter.
- C. The Accused shall, upon execution of this agreement, also execute releases of confidential information for all mental health professionals and waives the right to assert any privilege or confidentiality of records or communications relating to the treatment or evaluations required by this agreement during the period of suspension and probation.
- D. The Accused shall be responsible for and shall pay the cost of the treatment required by this agreement.
- E. The Accused shall refrain from all sexually offensive behavior toward Marion County or other court personnel and toward his clients. Should any violation of this condition be reported to the Bar, the Bar may immediately institute proceedings to revoke the Accused's probation and/or seek formal disciplinary charges related to the conduct that violates this condition.

10.

Compliance with the conditions of this agreement will be monitored by Disciplinary Counsel or his designate.

11.

In the event the Accused fails to comply with the terms of this probation, the Bar may institute proceedings to revoke the Accused's probation pursuant to Rule of Procedure 6.2(d) and to impose the remaining term of suspension to which the Accused has stipulated.

12.

The Accused has no record of prior discipline and was admitted to practice law in 1986.

13.

This Stipulation for Discipline is subject to review by Disciplinary Counsel of the Oregon State Bar and to approval by the State Professional Responsibility Board (SPRB). If approved by the SPRB, the parties agree the stipulation is to be submitted to the Disciplinary Board of the Oregon State Bar for consideration pursuant to the terms of BR 3.6.

EXECUTED this 4th day of June, 1993.

/s/ David B. Kuhns

David B. Kuhns

/s/ Martha M. Hicks

Martha M. Hicks

Assistant Disciplinary Counsel

Oregon State Bar

I, David B. Kuhns, being first duly sworn, say that I am the Accused in the above-entitled proceeding and that I attest that the statements contained in the stipulation are true and correct as I verily believe.

/s/ David B. Kuhns

David B. Kuhns

Subscribed and sworn to before me this 4th day of June, 1993.

/s/Walter J. Todd

Notary Public for Oregon

My commission expires: 3/3/94

I, Martha M. Hicks, being first duly sworn, say that I am Assistant Disciplinary Counsel for the Oregon State Bar and that I attest that I have reviewed the foregoing Stipulation for Discipline and that it was approved by the SPRB for submission to the Disciplinary Board of the Oregon State Bar on the ~~28~~ 17 day of June, 1993.

/s/ Martha M. Hicks

Martha M. Hicks

Assistant Disciplinary Counsel

Oregon State Bar

Subscribed and sworn to before me this 28th day of June, 1993.

/s/ Carol A. Krueger

Notary Public for Oregon

My commission expires: 4-15-96

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of	)	Case No. 92-8
)	
FRANCIS E. HARRINGTON,)	
)	
Accused.)	
_____)	

Bar Counsel: John C. Laing, Esq.

Counsel for the Accused: Francis E. Harrington, Pro Se

Disciplinary Board: Donald K. Denman, State Chairperson; Sidney A. Galton, Region 5 Chairperson

Disposition: Violation of DR 6-101(B). Disciplinary Board approval for stipulation for discipline. Public reprimand.

Effective Date of Opinion: July 23, 1993

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of	)	Case No. 92-8
)	
FRANCIS E. HARRINGTON,	)	ORDER APPROVING
	)	STIPULATION
Accused.)	
)	

THIS MATTER coming on to be heard upon the Stipulation of the Accused and the Oregon State Bar, the State Chairperson previously rejected the Stipulation, but after being supplied with further supplemental information from the Accused and the Oregon State Bar and good cause appearing, the State Chairperson does hereby retract his earlier rejection of the Stipulation.

IT IS ORDERED that the Stipulation entered into between the Oregon State Bar and the Accused for the Accused to accept a public reprimand is approved.

DATED this 23rd day of July, 1993.

/s/ Donald K. Denman
Donald K. Denman
State Chairperson

/s/ Sidney A. Galton
Sidney A. Galton
Region 5 Chairperson

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of)	Case No. 92-8
)	
FRANCIS E. HARRINGTON,)	STIPULATION FOR
)	DISCIPLINE
Accused.)	
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Francis E. Harrington, attorney at law, (hereinafter, "the Accused") and the Oregon State Bar (hereinafter, "the Bar"), hereby stipulate to the following matters pursuant to Oregon State Bar Rule of Procedure 3.6(c).

1.

The Bar was created and exists by virtue of the laws of the State of Oregon and is, and at all times mentioned herein was, authorized to carry out the provisions of ORS Chapter 9 relating to the discipline of attorneys.

2.

The Accused was admitted by the Oregon Supreme Court to practice of law in Oregon in April of 1947 and has been a member of the Oregon State Bar continuously since that time, having his office and place of business in Multnomah County, Oregon.

3.

The Accused enters into this Stipulation for Discipline freely and voluntarily. This Stipulation is made under the restrictions of Rule of Procedure 3.6(h).

4.

At its meeting on May 30, 1992, the State Professional Responsibility Board of the Oregon State Bar authorized formal disciplinary proceedings against the Accused, alleging that he violated DR 6-101(B).

5.

The Oregon State Bar filed its formal complaint on March 12, 1993 and the formal complaint was served, together with a notice to answer, upon the Accused on March 24, 1993. A copy of the formal complaint is attached hereto as Exhibit 1 and incorporated herein by this reference.

6.

The Accused filed his answer to the complaint on April 12, 1993. A true and correct copy of the answer is attached hereto as Exhibit 2 and incorporated herein by reference.

7.

The Accused hereby stipulates that his conduct violated DR 6-101(B) as set forth in the formal complaint.

8.

The Accused has two prior instances of formal discipline. In 1986 the Supreme Court held that the Accused violated DR 5-104(A) (for borrowing from his client without making appropriate disclosures); DR 5-101(A) (for arranging a loan from a client to his secretary without making appropriate disclosures); and former DR 5-105(A) and (B) (for representing one client as a lender and other clients as borrowers in the same transaction.) In re Harrington, 301 Or 18, 718 P2d 725 (1986). In 1979 the State Professional Responsibility Board admonished the Accused for accepting gifts from a client without making full disclosures.

9.

As a result of the Accused's misconduct, the Accused and the Oregon State Bar agree that the Accused will be publicly reprimanded.

10.

This Stipulation has been freely and voluntarily made by the Accused, as is evidenced by his verification below, with the knowledge and understanding that this Stipulation is subject to review by the Oregon State Bar's Disciplinary Counsel and to approval by the State Professional Responsibility Board. If the State Professional

Responsibility Board approves the Stipulation for Discipline, the parties agree that it will be submitted to the Disciplinary Board for consideration pursuant to the terms of BR 3.6.

EXECUTED this 8th day of June, 1993.

/s/ Francis E. Harrington

Francis E. Harrington

/s/ Mary A. Cooper

Mary A. Cooper
Assistant Disciplinary Counsel
Oregon State Bar

I, Francis E. Harrington, being first duly sworn, say that I am the Accused in the above-entitled proceeding and that I attest that the statements contained in the stipulation are true and correct as I verily believe.

/s/ Francis E. Harrington

Francis E. Harrington

Subscribed and sworn to before me this 4th day of June, 1993.

/s/ Olivia Brown

Notary Public for Oregon
My commission expires: 6/23/95

I, Mary A. Cooper, being first duly sworn, say that I am Assistant Disciplinary Counsel for the Oregon State Bar and that I attest that I have reviewed the foregoing Stipulation for Discipline and that it was approved by the SPRB for submission to the Disciplinary Board on the 8th day of June, 1993.

/s/ Mary Cooper

Mary A. Cooper
Assistant Disciplinary Counsel
Oregon State Bar

Subscribed and sworn to before me this 8th day of June, 1993.

/s/ Victoria Fichtner

Notary Public for Oregon
My commission expires: 3/26/97

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of	)	Case No. 92-8
)	
FRANCIS E. HARRINGTON,	)	FORMAL COMPLAINT
)	
Accused.)	
<hr/>		

The Oregon State Bar alleges as follows:

1.

The Oregon State Bar was created and exists by virtue of the laws of the State of Oregon and is, and at all times mentioned herein was, authorized to carry out the provisions of ORS, Chapter 9, relating to the discipline of attorneys.

2.

The Accused, Francis E. Harrington, is, and at all times mentioned herein was, an attorney at law, duly admitted by the Supreme Court of the State of Oregon to practice law in this state and a member of the Oregon State Bar, having his office and place of business in the County of Multnomah, State of Oregon.

3.

In April, 1986, the Accused undertook to act as personal representative and attorney for the personal representative of the estate of Sowani Beddow.

4.

As of April 15, 1992, the estate had still not closed, and awaited the filing of tax releases and approval of the personal representative's commission and attorney's fee.

5.

Beginning in late, 1986, two of the three devisees under the will complained to the Accused about the slowness of the probate. In September, 1991, the Accused

sought an order of partial distribution and distributed what he believed would be owing to the devisees on final distribution.

6.

The Accused's handling of the estate involved long, unjustified delays, including the period April, 1987 through February, 1988; March, 1989 through April, 1990, and January through August, 1991. Tax returns were not filed until 1992.

7.

The devisees were inconvenienced during the period 1987 through 1992 by delay and uncertainty about the closing of the estate.

8.

By the conduct alleged in paragraphs 4 through 7, *supra*, the Accused neglected a legal matter entrusted to him.

9.

The aforesaid conduct of the Accused violated the following standard of professional conduct established by law and by the Oregon State Bar: DR 6-101(B) of the Code of Professional Responsibility.

WHEREFORE, the Oregon State Bar demands that the Accused make answer to this complaint; that a hearing be set concerning the charges made herein; that the matters alleged herein be fully, properly and legally determined; and pursuant thereto, such action be taken as may be just and proper under the circumstances.

EXECUTED this 12th day of May, 1993.

OREGON STATE BAR

By: /s/ Celene Greene
CELENE GREENE
Executive Director

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)
)
Complaint as to the Conduct of) Case No. 92-42
)
STANLEY E. CLARK,)
)
Accused.)
_____)

Bar Counsel: Brant M. Medonich, Esq.

Counsel for the Accused: Richard E. Forcum, Esq.

Disciplinary Board: Donald K. Denman, State Chairperson; W. Eugene Hallman, Region 1 Chairperson

Disposition: Violation of DR 5-105(C). Disciplinary Board approval of no contest plea. Public reprimand.

Effective Date of Opinion: August 4, 1993

IN SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of	)	Case No. 92-42
)	
STANLEY E. CLARK,	)	DECISION AND ORDER
)	
Accused.)	
)	

A No Contest Plea has been presented to the Regional Chairperson and the State Chairperson of the Disciplinary Board for review pursuant to Bar Rule 3.6. The No Contest Plea is intended by the Accused and the Bar to resolve the matter set forth in a Complaint previously filed by the Bar against the Accused.

The No Contest Plea recites that during the pendency of the proceedings, the Bar and the Accused voluntarily agreed to resolve the matter short of hearing. The attached No Contest Plea is the product of those negotiations.

The material allegations of the No Contest Plea asserts that the Accused at all material times was admitted by the Oregon Supreme Court to practice law in Oregon, is a member of the Oregon State Bar and has his office and place of business in Deschutes County, Oregon.

The No Contest Plea further asserts that the Accused's representation of Mr. Buddy Pinz in an action against Mr. Dan Ackley, a former client, violated the rule against former client conflicts of interest, DR 5-105(C).

The Accused does not wish to contest these allegations, and pursuant to the No Contest Plea attached hereto and incorporated by reference herein, agrees to accept a public reprimand.

The Accused has previously been the subject of discipline in the form of a 60-day suspension, stayed subject to two-years probation. In 1986 the Accused was found guilty in Case No. 85-111 of having violated *former* DR 6-101(A)(3).

The Regional Chairperson and the State Chairperson, on behalf of the Disciplinary Board, approve the No Contest Plea and sanction.

It is hereby ordered that the Accused be disciplined as set forth for violation of DR 5-105(C) of the Code of Professional Responsibility.

DATED this 4th day of August, 1993.

/s/ Donald K. Denman

Donald K. Denman, State Chairperson
OSB Disciplinary Board

/s/ W. Eugene Hallman

W. Eugene Hallman, Regional Chairperson
Region 1 Disciplinary Board

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of	)	Case No. 92-42
)	
STANLEY E. CLARK,	)	NO CONTEST PLEA
)	
Accused.)	
)	

Stanley E. Clark, attorney at law (the accused), hereby pleads no contest to the following matters pursuant to Rule of Procedure 3.6(b).

1. The Oregon State Bar was created and exists by virtue of the laws of the State of Oregon and is, and at all times mentioned herein was, authorized to carry out the provisions of ORS Chapter 9 relating to the discipline of attorneys.

2. The accused is, and at all times herein mentioned was, an attorney at law, duly admitted by the Supreme Court of the State of Oregon to practice law in this state and a member of the Oregon State Bar, having his office and place of business in the County of Deschutes, State of Oregon.

3. The accused enters into this No Contest Plea freely and voluntarily. This plea is made under the restrictions set forth in Rule of Procedure 3.6(h).

4. At its meeting of July 25, 1992, the State Professional Responsibility Board (SPRB) authorized formal disciplinary proceedings against the accused in Case No. 92-42, alleging that he violated DR 5-105(C) in connection with his representation of Mr. Pinz in a partnership dissolution.

5. A formal complaint was filed by the Oregon State Bar on January 14, 1993, a copy of which is attached hereto as Exhibit 1 and incorporated herein by reference. The accused filed an answer on March 8, 1993, a copy of which is attached hereto as Exhibit 2 and incorporated herein by reference. Subsequent to the

filing of the answer, the accused and the Bar entered into a discussion concerning the resolution of the Bar's charges without a hearing.

6. As a result of those discussions, the accused does not desire to defend against the formal complaint. In exchange for his no contest plea, the accused agrees to accept a public reprimand.

7. The accused has previously been the subject of discipline in the form of a 60-day suspension, stayed subject to two years probation. In 1986, the accused was found guilty in Case No. 85-111 of having violated former DR 6-101(A)(3) (neglect of a legal matter). In re Clark, 1 DB Rptr. 217 (1986).

8. The No Contest Plea was approved by the State Professional Responsibility Board at its meeting on May 15, 1993, and will be submitted to the Disciplinary Board for consideration pursuant to the terms of BR 3.6(e).

Executed this 1st day of June, 1993 by the Accused.

/s/ Stanley E. Clark

Stanley E. Clark

Executed this 4th day of June, 1993 by the Oregon State Bar.

/s/ Mary A. Cooper

Mary A. Cooper
Assistant Disciplinary Counsel
The Oregon State Bar

I, Stanley E. Clark, being first duly sworn, say that I am the accused in the above-entitled proceeding and that I attest that the statements contained in the No Contest Plea are true as I verily believe.

/s/ Stanley E. Clark
Stanley E. Clark

Subscribed and sworn to on this 1st day of June, 1993.

/s/ Rhonda J. Grijalva
Notary Public for the State of Oregon
My Commission Expires: 2/24/97

I, Mary A. Cooper, being first duly sworn, say that I am Assistant Disciplinary Counsel for the Oregon State Bar, and I attest that I have reviewed the foregoing No Contest Plea and that it was approved by the State Professional Responsibility Board for submission to the Disciplinary Board on the 4th day of June, 1993.

/s/ Mary A. Cooper
Mary A. Cooper
Assistant Disciplinary Counsel
The Oregon State Bar

Subscribed and sworn to on this 4th day of June, 1993.

/s/ Susan R. Parks
Notary Public for the State of Oregon
My Commission Expires: 3/9/96

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of	)	Case No. 92-42
)	
STANLEY E. CLARK,	)	FORMAL COMPLAINT
)	
Accused.)	
_____)	

The Oregon State Bar alleges as follows:

1.

The Oregon State Bar was created and exists by virtue of the laws of the State of Oregon and is, and at all times mentioned herein was, authorized to carry out the provisions of ORS Chapter 9, relating to the discipline of attorneys.

2.

The Accused, Stanley E. Clark, is, and at all times mentioned herein was, an attorney at law, duly admitted by the Supreme Court of the State of Oregon to practice law in this state and a member of the Oregon State Bar, having his office and place of business in the County of Deschutes, State of Oregon.

3.

In July and August, 1990, the Accused represented Buddy Pinz and Dan Ackley in connection with their joint purchase of the assets of the CB/Vold Rodeo Company.

4.

In April, 1991, the Accused represented Mr. Pinz in an action against Mr. Ackley to wind up their rodeo company partnership by filing a Complaint in Equity to Aid a Partner in Winding up Partnership.

5.

The April, 1991 partnership dissolution action involved the distribution between Mr. Pinz and Mr. Ackley of the assets acquired from CB/ Vold Rodeo Company in July

and August, 1990. The later partnership dissolution action was "significantly related" to the earlier matter involving the acquisition of assets from CB/Vold Rodeo Company.

6.

Mr. Ackley did not consent to the Accused representing Mr. Pinz in the partnership dissolution action. By his later representation of Mr. Pinz, the Accused thus violated the ethical prohibition against engaging in former client conflicts of interest.

7.

The aforesaid conduct of the Accused violated the following standard of professional conduct established by law and by the Oregon State Bar: DR 5-105(C) of the Code of Professional Responsibility.

WHEREFORE, the Oregon State Bar demands that the Accused make answer to this complaint; that a hearing be set concerning the charges made herein; that the matters alleged herein be fully, properly and legally determined; and pursuant thereto, such action be taken as may be just and proper under the circumstances.

EXECUTED this 14th day of January, 1993.

OREGON STATE BAR

By: /s/ Celene Greene
CELENE GREENE
Executive Director

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)
)
Complaint as to the Conduct of) Case Nos. 91-53; 92-71
)
BARRY L. TAUB,)
)
Accused.)
_____)

Bar Counsel: Martin E. Henner, Esq.

Counsel for the Accused: Barry L. Taub, pro se

Disciplinary Board: Donald K. Denman, State Chairperson; Martha L. Walters, Region 2 Chairperson

Disposition: Violation of DR 5-105(E). Disciplinary Board approval of stipulation for discipline. Public reprimand.

Effective Date of Opinion: August 4, 1993

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of	)	Case Nos. 91-53; 92-71
)	
BARRY L. TAUB,	)	ORDER APPROVING STIPULATION
)	
Accused.)	
)	

THIS MATTER coming on to be heard upon the stipulation of the Accused and the Oregon State Bar providing that the Accused would agree to accept a public reprimand as a result of his violation of DR 5-105(E) as alleged in the First Cause of Complaint of the Amended Formal Complaint (Case No. 91-53). The Bar agrees to dismiss its Second Cause of Complaint of the Amended Formal Complaint (Case No. 92-71) in light of Mr. Taub's refund of funds held in his trust account and the return of client materials arising from that matter.

IT IS SO ORDERED that the stipulation is approved by the Disciplinary Board.

DATED this 4th day of August, 1993.

/s/ Donald K. Denman

Donald K. Denman
State Chairperson

/s/ Martha L. Walters

Martha L. Walters
Region 2 Chairperson

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of	)	Case Nos. 91-53; 92-71
)	
BARRY L. TAUB,	)	STIPULATION FOR
	)	DISCIPLINE
Accused.)	
<hr/>		

BARRY L. TAUB, attorney at law, and the OREGON STATE BAR (hereinafter, "the Bar"), hereby stipulate to the following matters pursuant to Oregon State Bar Rule of Procedure 3.6(c).

1.

The Bar was created and exists by virtue of the laws of the State of Oregon and is, and at all times mentioned herein was, authorized to carry out the provisions of ORS Chapter 9 relating to the discipline of attorneys.

2.

Mr. Taub was admitted by the Oregon Supreme Court of the State of Oregon to practice law in this state and is a member of the Oregon State Bar, having an office and place of business in Lane County.

3.

This Stipulation for Discipline is made under the confidentiality restrictions of Rule of Procedure 3.6(h).

4.

At its August 3, 1991 meeting, the Bar's State Professional Responsibility Board (hereinafter, "the SPRB") authorized formal disciplinary proceedings against Mr. Taub alleging that he violated DR 5-105(E) with respect to Case No. 91-53. The Bar filed its formal complaint on June 8, 1992 and Mr. Taub accepted service of the formal

complaint and a notice to answer on August 3, 1992. Mr. Taub filed an Answer on June 29, 1992.

5.

At its September 19, 1992 meeting, the SPRB authorized formal disciplinary proceedings against Mr. Taub alleging that he violated DR 2-106(A), DR 7-101(A)(2) and DR 9-101(B)(4) with respect to Case No. 92-71. The SPRB also directed that the charges pending in Case Nos. 91-53 and 92-72 be consolidated for prosecution. Accordingly, an Amended Complaint was filed on December 9, 1992 and it was served upon Mr. Taub on or about December 12, 1992. Mr. Taub filed an Amended Answer and Affirmative Defenses on January 19, 1993.

6.

Copies of the Amended Formal Complaint and the Amended Answer and Affirmative Defenses are attached hereto as Exhibits 1 and 2 and incorporated herein by this reference.

7.

Mr. Taub hereby stipulates that his conduct violated DR 5-105(E) as alleged in the first cause of complaint of the Amended Formal Complaint (Case No. 91-53).

8.

As a result of Mr. Taub's violation of DR 5-105(E), he will accept a public reprimand.

9.

The second cause of complaint of the Amended Formal Complaint arises in part from a dispute between Mr. Taub and a former client, George Aurand, regarding \$120 currently held in Mr. Taub's trust account. Mr. Taub agrees that he will promptly return to Mr. Aurand the \$120, plus any interest accrued thereon. Mr. Taub further agrees that he will promptly return to Mr. Aurand any documents or materials Mr. Aurand provided to him in the course of Mr. Taub's representation. The Bar agrees to dismiss its second cause of complaint (Case No. 92-71).

10.

Mr. Taub has no prior record of reprimand, suspension or disbarment.

11.

This stipulation has been freely and voluntarily made by Mr. Taub, as is evidenced by his verification below, with the knowledge and understanding that this stipulation is subject to review by the SPRB. If the SPRB approves this stipulation for discipline, the parties agree that it will be submitted to the Disciplinary Board for consideration pursuant to BR 3.6.

EXECUTED this 7th day of May, 1993.

/s/ Barry L. Taub

Barry L. Taub

EXECUTED this 17th day of May, 1993.

/s/ Susan Roedl Cournoyer

Susan Roedl Cournoyer
Assistant Disciplinary Counsel
Oregon State Bar

I, Barry L. Taub, being first duly sworn, say that I am the Accused in the above-entitled proceeding and that I attest that the statements contained in the stipulation are true and correct as I verily believe.

/s/ Barry L. Taub

Barry L. Taub

Subscribed and sworn to before me this 7th day of May, 1993.

/s/ Mary R. Hansen

Notary Public for Oregon
My commission expires: 5/29/93

I, Susan Roedl Cournoyer, being first duly sworn, say that I am Assistant Disciplinary Counsel for the Oregon State Bar and that I attest that I have reviewed the foregoing Stipulation for Discipline and that it was approved by the SPRB for submission to the Oregon State Bar Disciplinary Board on the 15th day of May, 1993.

/s/ Susan Roedl Cournoyer
Susan Roedl Cournoyer
Assistant Disciplinary Counsel
Oregon State Bar

Subscribed and sworn to before me this 17th day of May, 1993.

/s/ Carol J. Krueger
Notary Public for Oregon
My commission expires: 4/15/96

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of	)	Case Nos. 91-53; 92-71
)	
BARRY L. TAUB,	)	AMENDED FORMAL COMPLAINT
)	
Accused.)	
<hr/>		

For its FIRST CAUSE OF COMPLAINT against the Accused, the Oregon State Bar alleges:

1.

The Oregon State Bar was created and exists by virtue of the laws of the State of Oregon and is, and at all times mentioned herein was, authorized to carry out the provisions of ORS Chapter 9, relating to the discipline of attorneys.

2.

The Accused, Barry L. Taub, is, and at all times mentioned herein was, an attorney at law, duly admitted by the Supreme Court of the State of Oregon to practice law in this state and a member of the Oregon State Bar, having his office and place of business in the County of Lane, State of Oregon.

3.

On or about October 10, 1989, the Accused was retained by Thomas Sisler and Doris Sisler to assist them in obtaining a divorce. At that time, Mr. and Mrs. Sisler's interests were in actual or likely conflict in that they had been married for seventeen years, had four minor children and possessed disparate incomes and earning capacities.

4.

At the time they first consulted with the Accused, Mr. and Mrs. Sisler were in accord with respect to the terms of the divorce decree and related those terms to Mr.

Taub, who incorporated them in a Petition for Dissolution and Motion for a Decree of Dissolution with Supporting Affidavit. The Sislers signed these documents in October, 1989. However, in or about February, 1990, Mrs. Sisler began to have second thoughts about how the divorce was structured. She conveyed these doubts to the Accused. Nevertheless, in March, 1990, the Accused filed the previously signed dissolution documents with the Gilliam County Circuit Court. The Decree of Dissolution was ultimately entered by the court in April, 1990.

5.

The Accused advised the Sislers that he was not performing services for them as an attorney, did not represent them, and was simply providing legal typing services. However, at least one of the Sislers signed an attorney/client fee agreement and all the dissolution documents filed with the court were on the Accused's pleading paper, which identified him as Barry L. Taub, Attorney at Law. The Sislers understood that the Accused was acting as attorney for both of them.

6.

By representing both the Sislers at a time when their interests were in actual or likely conflict, the Accused violated his duties to avoid and/or disclose current client conflicts of interest.

7.

The aforesaid conduct of the Accused violated the following standard of professional conduct established by law and by the Oregon State Bar:

1. DR 5-105(E) of the Code of Professional Responsibility.

AND, for its SECOND CAUSE OF COMPLAINT against the Accused, the Oregon State Bar alleges:

8.

Incorporates by reference as though fully set forth herein, paragraphs 1 and 2 of its FIRST CAUSE OF COMPLAINT.

9.

On or about November 30, 1989, the Accused was retained by George Aurand to file a personal bankruptcy. Mr. Aurand signed an agreement whereby he would pay a flat professional fee (nonrefundable) of \$245. Additionally, Mr. Aurand was to pay a bankruptcy filing fee of \$90.

10.

Mr. Aurand spent several months getting his information together for the bankruptcy. In the meantime, the court filing fee increased from \$90 to \$120. Mr. Aurand paid the Accused a total of \$365 (representing the Accused's professional fee of \$245, plus the \$120 filing fee) in three installments, the final one made on or about August 27, 1991.

11.

A month after the final payment was made, the Accused still had not filed the bankruptcy papers. Mr. Aurand was told that the bankruptcy court had altered its forms and that the Accused's staff was retyping all the documents Mr. Aurand had previously signed. Mr. Aurand signed the new documents on September 11, 1991.

12.

Two weeks later, the Accused had still not filed the bankruptcy petition, and Mr. Aurand fired him. The Accused thereupon refused to refund any of the money Mr. Aurand had paid, and claimed that Mr. Aurand owed him an additional \$125 for the retyping of the bankruptcy forms. The Accused also asserted an attorney's lien over all of Mr. Aurand's property and papers, including \$120 held in the Accused's trust account representing the bankruptcy filing fee.

13.

The Accused had never mentioned and Mr. Aurand had never agreed that Mr. Aurand would pay the Accused \$125 extra for retyping the forms. The Accused's attempt to collect this money therefore constituted an attempt to charge or collect a clearly excessive fee.

14.

By refusing to carry out the contract of employment after Mr. Aurand refused to pay the extra fees unilaterally imposed by the Accused, the Accused intentionally failed to carry out a contract of employment entered into with a client for professional services.

15.

By refusing to return the \$120 in the trust account (which amount represented the unused filing fee), the Accused failed to promptly pay or deliver to the client those funds or other properties in the lawyer's possession which the client was entitled to receive.

16.

The aforesaid conduct of the Accused violated the following standards of professional conduct established by law and by the Oregon State Bar:

1. DR 2-106(A) of the Code of Professional Responsibility;
2. DR 7-101(A)(2) of the Code of Professional Responsibility; and
3. DR 9-101(B)(4) of the Code of Professional Responsibility.

WHEREFORE, the Oregon State Bar demands that the Accused make answer to this complaint; that a hearing be set concerning the charges made herein; that the matters alleged herein be fully, properly and legally determined; and pursuant thereto, such action be taken as may be just and proper under the circumstances.

EXECUTED this 9th day of December, 1992.

OREGON STATE BAR

By: /s/ Celene Greene
CELENE GREENE
Executive Director

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)
)
Complaint as to the Conduct of) Case No. 92-159
)
SARAH SUSANNAH MILLER,)
)
Accused.)
_____)

Bar Counsel: N/A

Counsel for the Accused: Ralph F. Cobb, Esq.

Disciplinary Board: Donald K. Denman, State Chairperson; Martha L. Walters, Region 2 Chairperson

Disposition: Violation of DR 6-101(B) and DR 7-101(A)(2). Disciplinary Board approval of stipulation for discipline. Public reprimand.

Effective Date of Opinion: August 23, 1993

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of	)	Case No. 92-159
)	
SARAH SUSANNAH MILLER,	)	ORDER APPROVING STIPULATION
	)	FOR DISCIPLINE
Accused.)	
_____)	

THIS MATTER coming on to be heard upon the Stipulation for Discipline entered into between the Accused and the Oregon State Bar on July 10, 1993, and the Disciplinary Board having fully considered said Stipulation,

IT IS HEREBY ORDERED that the Stipulation for Discipline providing that the Accused receive a public reprimand for her violation of DR 6-101(B) and DR 7-101(A)(2) is approved.

DATED this 23rd day of August, 1993.

/s/ Donald K. Denman
Donald K. Denman
State Chairperson

/s/ Martha L. Walters
Martha L. Walters
Region 2 Chairperson

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of	)	Case No. 92-159
)	
SARAH SUSANNAH MILLER,	)	STIPULATION FOR
	)	DISCIPLINE
Accused.)	
_____)		

Sarah Susannah Miller, attorney at law, (hereinafter, "the Accused") and the Oregon State Bar (hereinafter, "the Bar"), hereby stipulate to the following matters pursuant to Oregon State Bar Rule of Procedure 3.6(c).

1.

The Bar was created and exists by virtue of the laws of the State of Oregon and is, and at all times mentioned herein was, authorized to carry out the provisions of ORS Chapter 9 relating to the discipline of attorneys.

2.

The Accused, Sarah Susannah Miller, is, and at all times mentioned herein was, an attorney at law duly admitted by the Oregon Supreme Court to practice law in this state and a member of the Oregon State Bar, having her office and place of business in Lane County, Oregon.

3.

The Accused enters into this Stipulation for Discipline freely and voluntarily. This Stipulation is made under the restrictions of Rule of Procedure 3.6(h).

4.

On March 13, 1993, the State Professional Responsibility Board (hereinafter "the Board") authorized the filing of a formal complaint against the Accused alleging that the Accused violated DR 6-101(B) and DR 7-101(A)(2) of the Code of Professional Responsibility.

5.

The Accused represented Phyllis Arlene Poore in a dissolution of marriage. In May, 1988, the dissolution decree was signed and the Accused agreed to prepare a qualified domestic relations order (QDRO) to protect Poore's rights to her former husband's pension. Between May, 1988 and February, 1992, the Accused neglected to prepare the order. The Accused finally presented the order to the court in March, 1992.

6.

As of the time the Poore decree was entered, the Accused had not yet obtained discovery about Poore's husband's pension plan and never made formal discovery requests for this information. After approximately a year of unexplained activity with respect to the QDRO, the Accused filed an order to show cause on behalf of Poore requesting that the court order Poore's former husband to cooperate in preparing it.

7.

In late December, 1989, the Accused received what she believed was sufficient information to prepare the QDRO. In January, 1990, she suffered neck and back injuries in an automobile accident as a result of which she reduced the volume of her legal practice until July, 1990. In July 1990, the Accused drafted the QDRO but her secretary failed to type it. The Accused did not make sure that her secretary attended to this matter until February, 1992.

8.

Poore was eligible to receive benefits from her former husband's pension in August, 1991. Upon learning from her client that her former husband retired, the Accused promptly prepared and filed the QDRO. As a result of the Accused's delays in preparing the qualified domestic relations order, Poore was deprived of these benefits for six months. Poore deducted the amount of these lost benefits from the balance she owed to the Accused for legal fees and was thus not greatly harmed by the Accused's neglect.

9.

The Accused has met with Carol Wilson of the Professional Liability Fund about her office systems and has made changes in her office staff. ~~[The Accused has also hired a lawyer to review her other files to confirm that no other matters have been overlooked. SM]~~ Finally, she has hired a bookkeeper to ensure that her trust account records are in order.

10.

The Accused admits that her conduct described in paragraph 5 herein is neglect of a legal matter and failure to carry out a contract of employment for professional services in violation of DR 6-101(B) and DR 7-101(A)(2).

11.

Pursuant to the above admissions and BR 3.6(c)(ii), the Accused agrees to accept a public reprimand for her violation of DR 6-101(B) and DR 7-101(A)(2).

12.

The Accused has no prior record of reprimand, suspension or disbarment.

13.

This Stipulation for Discipline is subject to review by Disciplinary Counsel of the Oregon State Bar and to approval by the State Professional Responsibility Board (SPRB). If approved by the SPRB, the parties agree the stipulation is to be submitted to the Disciplinary Board of the Oregon State Bar for consideration pursuant to the terms of BR 3.6.

EXECUTED this 10th day of July, 1993.

/s/ Sarah Susannah Miller

Sarah Susannah Miller

/s/ Martha M. Hicks

Martha M. Hicks

Assistant Disciplinary Counsel

Oregon State Bar

I, Sarah Susannah Miller, being first duly sworn, say that I am the Accused in the above-entitled proceeding and that I attest that the statements contained in the stipulation are true and correct as I verily believe.

/s/ Sarah Susannah Miller

Sarah Susannah Miller

Subscribed and sworn to before me this 10th day of July, 1993.

/s/ Tessa O'Ryan Pierce

Notary Public for Oregon

My commission expires: 5/18/97

I, Martha M. Hicks, being first duly sworn, say that I am Assistant Disciplinary Counsel for the Oregon State Bar and that I attest that I have reviewed the foregoing Stipulation for Discipline and that it was approved by the SPRB for submission to the Disciplinary Board on the 17th day of July, 1993.

/s/ Martha M. Hicks

Martha M. Hicks
Assistant Disciplinary Counsel
Oregon State Bar

Subscribed and sworn to before me this 28th day of July, 1993.

/s/ Carol A. Krueger

Notary Public for Oregon
My commission expires: 4/15/96

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)
)
Complaint as to the Conduct of) Case No. 92-51
)
MARJORIE A. SCHMECHEL,)
)
Accused.)
_____)

Bar Counsel: Louis L. Kurtz, Esq.

Counsel for the Accused: Terence J. Hammons, Esq.

Disciplinary Board: Donald K. Denman, State Chairperson; Martha L. Walters, Region 2 Chairperson

Disposition: Violation of DR 1-102(A)(3) and (4) and DR 6-101(A). Disciplinary Board approval of stipulation for discipline. Public reprimand.

Effective Date of Opinion: August 30, 1993

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of	)	Case No. 92-51
)	
MARJORIE A. SCHMECHEL,	)	ORDER APPROVING STIPULATION
	)	FOR DISCIPLINE
Accused.)	
)	

THIS MATTER coming on to be heard upon the Stipulation for Discipline entered into between the Accused and the Oregon State Bar on August 4, 1993, and the Disciplinary Board having fully considered said Stipulation,

IT IS HEREBY ORDERED that the Stipulation for Discipline providing that the Accused receive a public reprimand for her violation of DR 1-102(A)(3), DR 1-102(A)(4) and DR 6-101(A) is approved.

DATED this 30th day of August, 1993.

/s/ Donald K. Denman

Donald K. Denman
State Chairperson

/s/ Martha L. Walters

Martha L. Walters
Region 2 Chairperson

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of	)	Case No. 92-51
)	
MARJORIE A. SCHMECHEL,	)	STIPULATION FOR
	)	DISCIPLINE
Accused.)	
_____)		

Marjorie A. Schmechel, attorney at law, (hereinafter, "the Accused") and the Oregon State Bar (hereinafter, "the Bar"), hereby stipulate to the following matters pursuant to Oregon State Bar Rule of Procedure 3.6(c).

1.

The Bar was created and exists by virtue of the laws of the State of Oregon and is, and at all times mentioned herein was, authorized to carry out the provisions of ORS Chapter 9 relating to the discipline of attorneys.

2.

The Accused, Marjorie A. Schmechel, was admitted by the Oregon Supreme Court to the practice of law in Oregon on September 19, 1986, and has been a member of the Oregon State Bar continuously since that time, having her office and place of business in Lane County, Oregon.

3.

The Accused enters into this Stipulation for Discipline freely and voluntarily. This Stipulation is made under the restrictions set forth in Rule of Procedure 3.6(h).

4.

Pursuant to the authority of the State Professional Responsibility Board of the Bar, which authorized formal disciplinary proceedings against the Accused alleging that she violated DR 1-102(A)(3), DR 1-102(A)(4) and DR 6-101(A), the Bar filed its Formal Complaint on February 9, 1993 and the Accused accepted service of the

Formal Complaint and Notice to Answer on February 19, 1993. A copy of the Formal Complaint is attached hereto as Exhibit 1 and incorporated by reference herein. On or about March 2, 1993, the Accused filed an Answer, a copy of which is attached hereto as Exhibit 2 and incorporated by reference herein.

5.

The Formal Complaint alleged that, with respect to her representation of Kimberlee Lynn Todd, personal representative of the estate of Mary Jo Ann Kendall, the Accused violated DR 1-102(A)(3), DR 1-102(A)(4) and DR 6-101(A). While the Accused, with her Answer, denied that her conduct, as alleged, violated the above-referenced disciplinary rules, for purposes of this stipulation, the Accused admits to the factual allegations in the Formal Complaint and stipulates that her conduct violated all disciplinary rules as set forth in the Formal Complaint.

6.

The Accused has no prior record of reprimand, suspension or disbarment.

7.

Although not a defense to the charges, mitigating circumstances were as follows: The Kendall estate was the Accused's first probate. She was assigned the case by her employer, Charles Spinner, who, during the time the Accused was handling the case, was often not in the office and available to provide supervision to the Accused due to the death of his father and other personal commitments.

The Accused did seek assistance from Lane County Probate Commissioner Ardys Matthews. With Probate Commissioner Matthews' assistance, the Accused completed the legal matter. Prior to final review by the court, Probate Commissioner Matthews discovered that the Amended Final Account and several previously rejected submissions of that document contained photocopied or traced-over photocopied signatures of the personal representative and/or devisees. In submitting the accounts with the photocopied or traced-over photocopied signatures to the court, the Accused knew that the personal representative and devisees had not reviewed or approved the submitted accounts, but that the signatures represented that they had consented to the accounts' contents. Prior to submitting the accounts, the Accused conferred with

the personal representative and the devisee trustee, but not with the devisee Self-Realization Fellowship Church because she believed its bequest to have no value (that bequest was a judgment against a bankrupt corporation).

In submitting the photocopied and traced-over photocopied signatures the Accused did not intend to deceive the court or her client. Rather, she failed to understand the necessity of obtaining original signatures from all signatories each time she submitted an Amended Final Account. This misunderstanding was in part due to a misinterpretation of a phone conversation with Probate Commissioner Matthews which left the Accused with the belief that the only original signature which she needed to secure to finalize the document was that of the trustee.

From August 1991 until February 1992, the period of time in which the Accused was submitting the above-referenced accounts for approval, the estate was not charged additional fees. While the Accused's conduct did contribute to a six month delay in the distribution of the estate, neither the estate nor the beneficiaries suffered actual injury.

In response to this disciplinary matter, the Accused has attended three continuing legal education seminars concerning probate and has purchased the Oregon Probate System Manual and Administering Oregon Estates to more fully assist her in handling probates in the future. The Accused cooperated fully in the Bar's investigation.

8.

As a result of the Accused's misconduct, the Accused and the Oregon State Bar agree that the Accused will receive a public reprimand.

9.

This Stipulation has been freely and voluntarily made by the Accused, as is evidenced by her verification below, with the knowledge and understanding that this Stipulation is subject to review by the Disciplinary Board and to approval by the State Professional Responsibility Board. If the State Professional Responsibility Board

approves this Stipulation for Discipline, the parties agree that it will be submitted to the Disciplinary Board for consideration pursuant to the terms of BR 3.6.

EXECUTED this 4th day of August, 1993.

/s/ Marjorie A. Schmechel

Marjorie A. Schmechel

/s/ Lia Saroyan

Lia Saroyan

Assistant Disciplinary Counsel

Oregon State Bar

I, Marjorie A. Schmechel, being first duly sworn, say that I am the Accused in the above-entitled proceeding and that I attest that the statements contained in the stipulation are true and correct as I verily believe.

/s/ Marjorie A. Schmechel

Marjorie A. Schmechel

Subscribed and sworn to before me this 9th day of August, 1993.

/s/ April Hatcher

Notary Public for Oregon

My commission expires: 11/28/96

I, Lia Saroyan, being first duly sworn, say that I am Assistant Disciplinary Counsel for the Oregon State Bar and that I attest that I have reviewed the foregoing Stipulation for Discipline and that it was approved by the SPRB for submission to the Disciplinary Board on the 17th day of July, 1993.

/s/ Lia Saroyan

Lia Saroyan

Assistant Disciplinary Counsel

Oregon State Bar

Subscribed and sworn to before me this 23rd day of July, 1993.

/s/ Susan R. Parks

Notary Public for Oregon

My commission expires: 3/9/96

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of	)	Case No. 92
)	
MARJORIE A. SCHMECHEL,	)	FORMAL COMPLAINT
)	
Accused.)	
)	

For its **FIRST AND ONLY CAUSE OF COMPLAINT** against the Accused, the Oregon State Bar alleges:

1.

The Oregon State Bar was created and exists by virtue of the laws of the State of Oregon and is and at all times mentioned herein was authorized to carry out the provisions of ORS Chapter 9 relating to the discipline of attorneys.

2.

The Accused, Marjorie A. Schmechel, is and at all times mentioned herein was an attorney at law, duly admitted by the Supreme Court of the State of Oregon to practice law in this state and a member of the Oregon State Bar, having her office and place of business in the County of Lane, State of Oregon.

3.

At all times mentioned herein, the Accused represented Kimberlee Lynn Todd, personal representative of the decedent's estate of Mary Jo Anne Kendall, in connection with probate proceedings pending in Lane County Circuit Court.

4.

The decedent's last will and testament ("the will") made a specific bequest to the Self Realization Fellowship Center of Los Angeles of the decedent's interest (up to \$10,000) in a promissory note. Under the will, the residue of the estate was to be placed in a trust (established in the will) for the benefit of the decedent's three children.

5.

On or about August 29, 1991, the Accused filed a Final Account and Petition for Decree, signed by the personal representative ("Account I"). The proposed distribution set forth in Account I was not in accordance with the provisions of the will. The Lane County Probate Commissioner requested that the Accused file an amended account complying with the will's provisions.

6.

On or about November 4, 1991, the Accused filed an Amended Final Account and Petition for Decree ("Account II"). Accompanying Account II was a document purporting to be a Waiver of Notice by the three trust beneficiaries. The beneficiaries had not signed the waiver filed with Account II; their signatures had been photocopied from another document.

7.

Account II stated that the devise to the Self Realization Fellowship Center had already been made and that the residue of the estate had already been transferred to the trust. The probate commissioner requested that the Accused file another decree that addressed the distribution of estate assets prior to court order and other matters set forth in Account II.

8.

At the probate commissioner's request, the Accused filed a second Amended Final Account and Petition for Decree ("Account III") on November 26, 1991. The personal representative had not signed Account III; instead, the Accused submitted a traced-over photocopy of the personal representative's signature from Account II. Accompanying Account III was a document purporting to be a Waiver of Notice by Uma Mata, a representative of the Self Realization Fellowship Center. Uma Mata had not signed the waiver filed with Account III; the signature had been photocopied from another document.

9.

Account III stated that the devise to the Self Realization Fellowship Center had already been made and that the residue of the state had already been transferred to the trust. The probate commissioner requested that the Accused file another decree that addressed the distribution of estate assets prior to court order and other matters set forth in Account III.

10.

At the request of the probate commissioner, the Accused filed a third Amended Final Account and Petition for Decree on December 5, 1991 ("Account IV"). The personal representative had not signed Account IV; instead, the Accused submitted a traced-over photocopy of the personal representative's signature from Account II. Accompanying Account IV was a document purporting to be a waiver of notice by Uma Mata, representative of the Self Realization Fellowship Center. Uma Mata had not signed the waiver filed with Account IV; instead, the Accused had submitted a traced-over photocopy of the signature from another document.

11.

On or about February 14, 1992, the Accused filed a fourth Amended Account and Petition for Decree ("Account V"). Account V was identical to Account IV in all respects except that the personal representative signed Account V.

12.

By filing multiple final accountings that were not in accordance with the provisions of the will and by failing to file a final accounting that adequately described the partial distributions of estate assets prior to court order as described in paragraphs 5 through 11 above, the Accused failed to apply the legal knowledge, skill, thoroughness and preparation reasonably necessary for representation of the personal representative.

13.

By submitting photocopied signatures and traced-over photocopied signatures with Accounts II, III, and IV, the Accused engaged in conduct involving dishonesty,

fraud, deceit or misrepresentation and engaged in conduct that is prejudicial to the administration of justice.

14.

The aforesaid conduct of the Accused violated the following standards of professional conduct established by law and by the Oregon State Bar:

1. DR 1-102(A)(3) of the Code of Professional Responsibility;
2. DR 1-102(A)(4) of the Code of Professional Responsibility; and
3. DR 6-101(A) of the Code of Professional Responsibility.

WHEREFORE, the Oregon State Bar demands that the Accused make answer to this complaint; that a hearing be set concerning the charges made herein; that the matters alleged herein be fully, properly and legally determined; and pursuant thereto, such action be taken as may be just and proper under the circumstances.

EXECUTED this 19th day of February, 1993.

OREGON STATE BAR

By: /s/ Celene Greene
CELENE GREENE
Executive Director

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of	)	Case Nos. 92-153; 92-175; 93-60
)	
ELAINE B. OLIVER,)	
)	
Accused.)	
_____)	

Bar Counsel: N/A

Counsel for the Accused: Elaine B. Oliver, pro se

Disciplinary Board: Donald K. Denman, State Chairperson; Sidney A. Galton, Region 5 Chairperson

Disposition: Violation of DR 1-103(C) and DR 6-101(B). Disciplinary Board approval of stipulation for discipline. Sixty-day suspension.

Effective Date of Opinion: October 4, 1993

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of	)	Case Nos. 92-153; 92-175; 93-60
)	
ELAINE B. OLIVER,	)	ORDER APPROVING STIPULATION
	)	FOR DISCIPLINE
Accused.)	
)	

THIS MATTER coming on to be heard upon the Stipulation for Discipline entered into between the Accused and the Oregon State Bar on September 14, 1993, and the Disciplinary Board having fully considered said Stipulation,

IT IS HEREBY ORDERED that the Stipulation for Discipline providing that the Accused be suspended from the practice of law for sixty (60) days is approved, and

IT IS FURTHER ORDERED that the Accused shall be required to submit a formal application for reinstatement, pursuant to BR 8.1, and to demonstrate the requisite character and fitness under that rule, upon expiration of her suspension or whenever the Accused desires to return to the practice of law.

Dated this 4th day of October, 1993.

/s/ Donald K. Denman

Donald K. Denman, OSB# 62023
State Chairperson

/s/ Sidney A. Galton

Sidney A. Galton, OSB# 72093
Region 5 Chair

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of	)	Case Nos. 92-153; 92-175; 93-60
)	
ELAINE B. OLIVER,	)	STIPULATION FOR
	)	DISCIPLINE
Accused.)	
_____)		

Elaine B. Oliver, attorney at law, (hereinafter, "the Accused") and the Oregon State Bar (hereinafter, "the Bar"), hereby stipulate to the following matters pursuant to Oregon State Bar Rule of Procedure 3.6(c).

1.

The Bar was created and exists by virtue of the laws of the State of Oregon and is, and at all times mentioned herein was, authorized to carry out the provisions of ORS Chapter 9 relating to the discipline of attorneys.

2.

The Accused, Elaine B. Oliver, was admitted by the Oregon Supreme Court to the practice of law in Oregon on April 14, 1989. Prior to July 11, 1992, when the Accused was suspended for failure to pay her malpractice insurance, the Accused had her office and place of business in Marion County, Oregon.

3.

The Accused enters into this Stipulation for Discipline freely and voluntarily. This stipulation is made under the restrictions of Rules of Procedure 3.6(h).

4.

At its May 15, 1993 meeting, the State Professional Responsibility Board (SPRB) authorized the filing of a formal complaint alleging that the Accused violated DR 1-103(C) of the Code of Professional Responsibility in connection with her failure to respond to a complaint filed with the Oregon State Bar by Deborah Hoffmeister

("Hoffmeister"). The SPRB also authorized an allegation that the Accused violated DR 6-101(B) of the Code of Professional Responsibility in connection with her representation of Stanley Everist ("Everist") and DR 1-103(C) for failing to respond to Disciplinary Counsel's requests relative to Everist's complaint. The SPRB also authorized an allegation that the Accused violated DR 6-101(B) of the Code of Professional Responsibility in connection with her representation of Jeffrey Raysor ("Raysor"). Finally, the SPRB authorized consolidating all three matters.

5.

The circumstances giving rise to the allegation relative to the Hoffmeister matter were the following: On August 26, 1992, the Bar received a complaint from Hoffmeister. On October 2, 1992, Hoffmeister's complaint was forwarded to the Accused for a response on or before October 23, 1992. No response was tendered, nor was a request for extension requested by October 23, 1993. On October 27, 1992, the Bar sent a follow-up letter, giving the Accused an additional week to tender a response. Thereafter, no response was tendered and Hoffmeister's complaint was referred to the Clackamas/Linn/Marion County LPRC for an investigation. While the Accused cooperated once the matter was referred to the LPRC, she admits that she failed to cooperate with Disciplinary Counsel's earlier requests.

6.

The circumstances giving rise to the allegations relative to the Everist matter were the following:

A. Sometime in 1991, the Accused was appointed to represent Everist relative to an appeal of a circuit court denial of Everist's post-conviction relief petition. The Accused filed a timely notice of appeal with the Oregon Court of Appeals. The Accused failed to file a brief on Everist's behalf and then abandoned Everist's legal matter. Further, the Accused did not return Everist's phone calls or respond to his correspondence. Ultimately, the Accused was removed from Everist's case and another attorney was appointed who succeeded in reinstating Everist's appeal.

B. On November 2, 1992, Everist filed a complaint with the Bar. On November 3, 1992, Everist's complaint was forwarded to the Accused for a response on or before November 24, 1992. No response was tendered, nor was a request for extension requested by November 24, 1992. On December 2, 1992, the Bar sent a follow-up letter, giving the Accused an additional week to tender a response. Thereafter, no response was tendered and Everist's complaint was referred to the Clackamas/Linn/Marion County LPRC for an investigation. While the Accused cooperated once the matter was referred to the LPRC, she admits that she failed to cooperate with Disciplinary Counsel's earlier requests.

7.

The circumstances giving rise to the allegations relative to the Raysor matter were the following: In December 1991, the Accused was appointed to represent Raysor in a post-conviction relief proceeding. The Accused filed a timely answer to the State's motion to dismiss. On June 4, 1992, the trial judge granted the State's motion, resulting in the dismissal of Raysor's petition. The Accused neglected to inform Raysor of the court's decision.

8.

The Accused admits that by failing to comply with the reasonable requests of Disciplinary Counsel's Office in connection with the Hoffmeister and Everist complaints, she violated DR 1-103(C). The Accused admits that by failing to file a timely appeal on behalf of Everist, she neglected a legal matter entrusted to her in violation of DR 6-101(B). The Accused also admits that by failing to notify Raysor that the court had dismissed his post-conviction petition, she neglected a legal matter entrusted to her in violation of DR 6-101(B).

9.

In mitigation, the Accused's violations of the disciplinary rules referred to herein occurred shortly after the Accused commenced a solo practice specializing in court-appointed criminal defense work. Almost immediately, the Accused experienced financial difficulties due to undercapitalization and delays in payment from the court.

In conjunction with these financial difficulties, the Accused began to experience high blood pressure, various pre-menopausal symptoms and increased her alcohol consumption. Due to her precarious financial situation, the Accused did not seek professional medical assistance for these problems and by June of 1992 she was incapable of performing her legal duties. Since July 1992, the Accused has been suspended for failing to pay her PLF assessment and is currently employed in a non-legal position, with no immediate plans to return to the legal profession.

10.

The Accused has no prior disciplinary record.

11.

In light of the violations admitted herein, the Accused agrees to accept a 60 day suspension from the practice of law. The Accused also agrees she shall be required to submit a formal application for reinstatement, pursuant to BR 8.1, and to demonstrate the requisite character and fitness under that rule, upon expiration of her suspension or whenever the Accused desires to return to the practice of law.

12.

This Stipulation for Discipline is subject to review by Disciplinary Counsel of the Oregon State Bar and to approval by the State Professional Responsibility Board (SPRB). If approved by the SPRB, the parties agree the stipulation is to be submitted to the Disciplinary Board for consideration pursuant to the terms of BR 3.6.

EXECUTED this 14th day of September, 1993.

/s/ Elaine Oliver

Elaine Oliver

/s/ Lia Saroyan

Lia Saroyan
Assistant Disciplinary Counsel
Oregon State Bar

I, Elaine Oliver, being first duly sworn, say that I am the Accused in the above-entitled proceeding and that I attest that the statements contained in the stipulation are true and correct as I verily believe.

/s/ Elaine Oliver

Elaine Oliver

Subscribed and sworn to before me this 14th day of September, 1993.

/s/ Susan R. Parks

Notary Public for Oregon

My commission expires: 3/9/96

I, Lia Saroyan, being first duly sworn, say that I am Assistant Disciplinary Counsel for the Oregon State Bar and that I attest that I have reviewed the foregoing Stipulation for Discipline and that it was approved by the SPRB for submission to the Disciplinary Board on the 18th day of September, 1993.

/s/ Lia Saroyan

Lia Saroyan

Assistant Disciplinary Counsel

Oregon State Bar

Subscribed and sworn to before me this 21st day of September, 1993.

/s/ Susan R. Parks

Notary Public for Oregon

My commission expires: 3/9/96

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of	)	Case No. 92-32
)	
JOHN BOURCIER,)	
)	
Accused.)	
_____)	

Bar Counsel: N/A

Counsel for the Accused: John Bourcier, pro se

Disciplinary Board: Donald K. Denman, State Chairperson; Sidney A. Galton, Region 5 Chairperson

Disposition: Violation of DR 2-110(A)(1) and (2); DR 6-101(A) and (B) and DR 7-101(A)(1). Disciplinary Board approval of stipulation for discipline. Sixty-day suspension.

Effective Date of Opinion: October 10, 1993

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
	)	Case No. 92-32
Complaint as to the Conduct of)	
)	
JOHN BOURCIER,	)	ORDER APPROVING STIPULATION
	)	FOR DISCIPLINE
Accused.)	
)	

THIS MATTER coming on to be heard upon the Stipulation for Discipline entered into between the Accused and the Oregon State Bar on August 20, 1993, and the Disciplinary Board having fully considered said Stipulation,

IT IS HEREBY ORDERED that the Stipulation for Discipline providing that the Accused be suspended from the practice of law for sixty (60) days is approved, said suspension to begin ten (10) days after the date of the Order.

DATED this 30th day of September, 1993.

/s/ Donald K. Denman
Donald K. Denman, OSB# 62023
State Chair

/s/ Sidney A. Galton
Sidney A. Galton, OSB# 72093
Region 5 Chair

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of	)	Case No. 92-32
)	
JOHN BOURCIER,	)	STIPULATION FOR
	)	DISCIPLINE
Accused.)	
_____)	

John Bourcier, attorney at law, (hereinafter, "the Accused") and the Oregon State Bar (hereinafter, "the Bar"), hereby stipulate to the following matters pursuant to Oregon State Bar Rule of Procedure 3.6(c).

1.

The Bar was created and exists by virtue of the laws of the State of Oregon and is, and at all times mentioned herein was, authorized to carry out the provisions of ORS Chapter 9 relating to the discipline of attorneys.

2.

The Accused, John Bourcier, is, and at all times mentioned herein was, an attorney at law duly admitted by the Oregon Supreme Court to practice of law in this state and a member of the Oregon State Bar having his office and place of business in Multnomah County, Oregon.

3.

The Accused enters into this Stipulation for Discipline freely and voluntarily and after having been given the opportunity to consult with counsel.

4.

On July 25, 1992, the State Professional Responsibility Board (hereinafter "the Board") authorized formal disciplinary charges against the Accused and on May 5, 1993, the Bar filed a formal complaint alleging that the Accused violated DR 2-110(A)(1) and (2); DR 6-101(A) and (B); and DR 7-101(A)(1).

5.

On or about March 27, 1991, the Accused was appointed to represent Frank Lewis in an appeal of a criminal conviction to the Court of Appeals. When the Accused concluded that the Lewis appeal had no merit, he took no further action and allowed the court to dismiss it. The Accused did not respond to inquiries from the court or Lewis about the status of the appeal nor did he familiarize himself with applicable law which required him to file a brief or a detailed letter or to withdraw from representing Lewis. By taking no action on Lewis' appeal, the Accused withdrew from representing him without the permission of the court and without taking steps to avoid foreseeable prejudice to Lewis.

6.

A copy of the Bar's formal complaint is attached hereto and incorporated by reference herein as Exhibit 1.

7.

The Accused admits that he violated DR 6-101(B) and DR 7-101(A)(1) of the Code of Professional Responsibility by failing to perfect the Lewis appeal by means reasonably available to him. The Accused further admits that he lacked the competence to represent Lewis on appeal in violation of DR 6-101(A) in that he failed to acquire the legal knowledge about the requirements for briefs in arguably meritless appeals.

8.

The Accused further admits that by failing to take any action to perfect the Lewis appeal, he withdrew from representing him. The Accused admits that he violated DR 2-110(A)(2) of the Code of Professional Responsibility by taking no steps to avoid prejudice to Lewis' rights and that he violated DR 2-110(A)(1) of the Code of Professional Responsibility by failing to obtain the court's permission for his withdrawal from representing Lewis.

9.

Lewis suffered injury as a result of the Accused's conduct in that his appeal was dismissed.

10.

Pursuant to the above admissions and BR 3.6(c)(iii), the Accused agrees to accept a 60 day suspension for his violations of DR 2-110(A)(1) and (2); DR 6-101(A) and (B) and DR 7-101(A)(1). The suspension shall begin 10 days after the date on which this stipulation is approved by the Disciplinary Board of the Oregon State Bar.

11.

The Accused has no record of prior discipline and was admitted to practice law in 1982.

12.

This Stipulation for Discipline is subject to review by Disciplinary Counsel of the Oregon State Bar and to approval by the State Professional Responsibility Board (SPRB). If approved by the SPRB, the parties agree the stipulation is to be submitted to the Disciplinary Board of the Oregon State Bar for consideration pursuant to the terms of BR 3.6.

EXECUTED this 20TH day of August, 1993.

/s/ John Bourcier

John Bourcier

/s/ Martha M. Hicks

Martha M. Hicks

Assistant Disciplinary Counsel

Oregon State Bar

I, John Bourcier, being first duly sworn, say that I am the Accused in the above-entitled proceeding and that I attest that the statements contained in the stipulation are true and correct as I verily believe.

/s/ John Bourcier
John Bourcier

Subscribed and sworn to before me this 20th day of August, 1993.

/s/ Helen L. Casey
Notary Public for Washington
My commission expires: 12/24/94
Tonasket, WA

I, Martha M. Hicks, being first duly sworn, say that I am Assistant Disciplinary Counsel for the Oregon State Bar and that I attest that I have reviewed the foregoing Stipulation for Discipline and that it was approved by the SPRB for submission to the Disciplinary Board of the Oregon State Bar on the 18th day of September, 1993.

/s/ Martha M. Hicks
Martha M. Hicks
Assistant Disciplinary Counsel
Oregon State Bar

Subscribed and sworn to before me this 21st day of September, 1993.

/s/ Victoria Fichtner
Notary Public for Oregon
My commission expires: 3/26/97

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of	)	Case No. 92-32
)	
JOHN BOURCIER,	)	FORMAL COMPLAINT
)	
Accused.)	
)	

For its FIRST CAUSE OF COMPLAINT against the Accused, the Oregon State Bar alleges:

1.

The Oregon State Bar was created and exists by virtue of the laws of the State of Oregon and is, and at all times mentioned herein was, authorized to carry out the provisions of ORS Chapter 9, relating to the discipline of attorneys.

2.

The Accused, John Bourcier, is, and at all times mentioned herein was, an attorney at law duly admitted by the Supreme Court of the State of Oregon to practice law in this state and a member of the Oregon State Bar, having his office and place of business in the County of Multnomah, State of Oregon.

3.

On or about March 27, 1991, the Accused was appointed by the court to represent Frank Lewis (hereinafter "Lewis") in the appeal of a criminal case to the Oregon Court of Appeals. The Accused accepted the appointment.

4.

After the Accused spoke with Lewis and Lewis' trial counsel and reviewed the trial court file, the Accused decided that the appeal of Lewis' conviction had no merit.

5.

The brief in Lewis' appeal was due May 14, 1991, but the Accused did not file a brief because he believed the appeal had no merit. On or about June 14, 1991, the Oregon Court of Appeals dismissed the Lewis appeal after notice to the Accused.

6.

Between March 27, 1991 and June 14, 1991, the Accused failed to respond to Lewis' attempts to contact him and the Court of Appeals, failed to inform Lewis that he believed the appeal had no merit and that he would not file a brief and failed to respond to the Court of Appeals order to show cause why the appeal should not be dismissed.

7.

After June 14, 1991, the Accused failed to respond to inquiries from the Court of Appeals and Lewis about the status of the appeal. On August 5, 1991, Lewis was informed by his counsel on another matter that his appeal had been dismissed.

8.

At the time of the Accused's conduct alleged herein, applicable law required that a lawyer file a brief, a detailed letter or a motion to withdraw when he or she represents a person whose criminal appeal in the lawyer's opinion lacks merit. The Accused was unaware of this requirement and believed the proper procedure was to allow the appeal to be dismissed without further action or appearance.

9.

The Accused made no attempt to learn the law relating to meritless appeals and intentionally allowed Lewis' appeal to be dismissed without further action by the Accused.

10.

The aforementioned conduct of the Accused constituted a failure to provide competent representation to Lewis, neglect of a legal matter and intentional failure to seek Lewis' lawful objectives by reasonably available means permitted by law in violation of the following standards of professional conduct established by law and by the Oregon State Bar:

1. DR 6-101(A) of the Code of Professional Responsibility;
2. DR 6-101(B) of the Code of Professional Responsibility; and
3. DR 7-101(A)(1) of the Code of Professional Responsibility.

For its SECOND CAUSE OF COMPLAINT against the Accused, the Oregon State Bar alleges:

11.

Incorporates by reference as fully set forth herein paragraphs 1-7 of the First Cause of Complaint.

12.

ORAP 8.10(5) provides that court-appointed counsel may not withdraw from an appeal unless he or she files a motion to withdraw with the trial or appellate court.

13.

By failing to file a brief or take any other action to perfect Lewis' appeal, the Accused withdrew from employment by Lewis.

14.

The Accused failed to file a motion to withdraw as counsel and did not otherwise obtain the permission of the court to withdraw from representing Lewis. The Accused took no steps to avoid foreseeable prejudice to Lewis upon his withdrawal from employment.

15.

The aforementioned conduct of the Accused violated the following standards of professional conduct established by law and by the Oregon State Bar:

1. DR 2-110(A)(1) of the Code of Professional Responsibility; and
2. DR 2-110(A)(2) of the Code of Professional Responsibility.

WHEREFORE, the Oregon State Bar demands that the Accused make answer to this Complaint; that a hearing be set concerning the charges made herein; that the

matters alleged herein be fully, properly and legally determined; and pursuant thereto, such action be taken as may be just and proper under the circumstances.

Executed this 5th day of May, 1993.

OREGON STATE BAR

By: /s/ George Riemer
GEORGE RIEMER
Acting Executive Director

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of	)	Case Nos. 92-89; 92-97
)	
NEAL C. LEMERY,)	
)	
Accused.)	
_____)	

Bar Counsel: George W. Goodman, Esq.

Counsel for the Accused: Neal C. Lemery, pro se

Disciplinary Board: Donald K. Denman, State Chairperson; Fred E. Avera, Region 4 Chairperson

Disposition: Violation of DR 7-104(A)(1) and DR 5-109(B). Disciplinary Board approval of stipulation for discipline. Public reprimand.

Effective Date of Opinion: October 22, 1993

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of	)	Case Nos. 92-89; 92-97
)	
NEAL C. LEMERY,	)	ORDER APPROVING STIPULATION
	)	FOR DISCIPLINE
Accused.)	
)	

THIS MATTER coming on to be heard upon the Stipulation of the Accused and the Oregon State Bar, and good and sufficient cause appearing,

IT IS ORDERED that the Stipulation entered into between the Oregon State Bar and the Accused for the Accused to accept a public reprimand for violation of DR 7-104(A)(1) and DR 5-109(B) is approved.

DATED this 22nd day of October, 1993.

/s/ Donald K. Denman
Donald K. Denman
State Chairperson

/s/ Fred E. Avera
Fred E. Avera
Region 4 Chairperson

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of	)	Case Nos. 92-89; 92-97
)	
NEAL C. LEMERY,	)	STIPULATION FOR
	)	DISCIPLINE
Accused.)	
_____)	

Neal C. Lemery, attorney at law, (hereinafter, "the Accused") and the Oregon State Bar (hereinafter, "the Bar"), hereby stipulate to the following matters pursuant to Oregon State Bar Rule of Procedure 3.6(c).

1.

The Bar was created and exists by virtue of the laws of the State of Oregon and is, and at all times mentioned herein was, authorized to carry out the provisions of ORS Chapter 9 relating to the discipline of attorneys.

2.

The Accused is, and at all times mentioned herein was, an attorney at law duly admitted by the Supreme Court of the State of Oregon to practice law in this state and a member of the Oregon State Bar, having his office and place of business in the County of Tillamook, State of Oregon.

3.

The Accused enters into this Stipulation for Discipline freely and voluntarily and after the opportunity to consult with counsel.

4.

On November 21, 1992, the State Professional Responsibility Board (hereinafter "SPRB") authorized formal disciplinary charges against the Accused alleging that the Accused violated DR 5-109(B); DR 7-103(B) and DR 7-104(A)(1).

5.

Pursuant to the Board's authorization, a formal complaint was filed against the Accused on April 9, 1993. On April 27, 1993, the Accused filed his answer and on September 22, 1993, the Oregon State Bar filed an amended formal complaint against the Accused alleging that the Accused violated DR 5-109(B) and DR 7-104(A)(1). A copy of the Bar's amended formal complaint is attached hereto and incorporated by reference herein as Exhibit 1. The Accused admits the allegations set forth in the amended formal complaint.

6.

The Accused admits he violated DR 5-109(B) and DR 7-104(A)(1) of the Code of Professional Responsibility. The Accused admits that on November 22, 1989, he represented the State of Oregon as Tillamook County District Attorney in the criminal prosecution of Jacque Consenz (hereinafter "Consenz") for the crime of Assault I and Attempted Murder, Tillamook County Case No. 89-1144. On November 22, 1989, Consenz was represented in this criminal matter by counsel, William D. Falls. The Accused admits that on November 22, 1989, he knew Consenz was represented by counsel but nonetheless he spoke to him about the criminal prosecution. The Accused did not obtain Mr. Falls' consent before speaking with Consenz and the Accused was not authorized by law to contact Consenz.

7.

The Accused encountered Consenz on the street after Consenz' entry of plea hearing at which Consenz had expressed fear that he and his family were in danger from the victim of the crime for which he had pled guilty. Consenz believed the victim was a drug dealer and was armed. After the hearing, Consenz continued to be fearful of repercussions from the victim. The Accused spoke to Consenz out of compassion for Consenz' concerns and a belief that as an elected official he should be polite and friendly to his constituents. The Accused acknowledges that these concerns conflicted with his ethical obligations and took steps to remove himself from further involvement with the Consenz case immediately after his encounter with Consenz.

8.

The Accused admits that during the time he was the District Attorney for Tillamook County he undertook a support collection matter on behalf of the State of Oregon wherein the State sought to enforce Debbie Sandusky Mason's (hereinafter "Mason") support judgment against her former husband, David Sandusky (hereinafter "Sandusky"). In the course of this support enforcement proceeding, the Accused reviewed Mason's file, her correspondence with Sandusky and her support decree. Upon review of the evidence supplied by Mason, the Accused decided she had lost the right to receive spousal support payments and decided that the matter should not be pursued further. On January 10, 1991, the Accused's term as Tillamook County District Attorney ended and he returned to the private practice of law. After January 10, 1991, the Accused represented Sandusky in further support enforcement proceedings brought by the State of Oregon on behalf of Mason without first having obtained the consent of the State of Oregon after full disclosure.

9.

The Accused mistakenly believed that the matters in which he represented the State of Oregon and Sandusky were not significantly related by subject matter because they involved different issues relating to support. The matter in which the Accused represented the State involved spousal support and the matter in which the Accused represented Sandusky involved child support. The Accused concedes that the two cases are in fact significantly related by subject matter and that he should have obtained the consent of the State of Oregon to represent Sandusky.

10.

The Accused admits that he engaged in the conduct described in paragraphs 6 to 9 herein and that [that] conduct constituted communication with a represented party on the subject matter of the representation and a conflict of interest in public employment in violation of DR 7-104(A)(1) and DR 5-109(B).

11.

The Accused admits that Consenz was exposed to potential harm but experienced no actual harm from his communication with the Accused.

12.

The Accused was admitted to practice in 1980 and has no previous record of disciplinary violations. The Accused is of good character and has a good reputation in his community.

13.

The Accused stipulates to a public reprimand for violation of DR 7-104(A)(1) and DR 5-109(B).

14.

This Stipulation for Discipline is subject to review by Disciplinary Counsel of the Oregon State Bar and to approval by the State Professional Responsibility Board (SPRB). If approved by the SPRB, the parties agree the stipulation is to be submitted to the Disciplinary Board for consideration pursuant to the terms of BR 3.6.

EXECUTED this 30th day of September, 1993.

/s/ Neal C. Lemery

Neal C. Lemery

/s/ Martha M. Hicks

Martha M. Hicks

Assistant Disciplinary Counsel

Oregon State Bar

I, Neal C. Lemery, being first duly sworn, say that I am the Accused in the above-entitled proceeding and that I attest that the statements contained in the stipulation are true and correct as I verily believe.

/s/ Neal C. Lemery

Neal C. Lemery

Subscribed and sworn to before me this 30th day of September, 1993.

/s/ Sandra Smith

Notary Public for Oregon

My commission expires: 6/7/96

I, Martha M. Hicks, being first duly sworn, say that I am Assistant Disciplinary Counsel for the Oregon State Bar and that I attest that I have reviewed the foregoing Stipulation for Discipline and that it was approved by the SPRB for submission to the Disciplinary Board on the 18th day of September, 1993.

/s/ Martha M. Hicks

Martha M. Hicks

Assistant Disciplinary Counsel

Oregon State Bar

Subscribed and sworn to before me this 14th day of October, 1993.

/s/ Victoria Fichtner

Notary Public for Oregon

My commission expires: 3/26/97

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of	)	Case Nos. 92-89; 92-97
)	
NEAL C. LEMERY,	)	AMENDED FORMAL COMPLAINT
)	
Accused.)	
)	

Case No. 92-89

DR 5-109(B)

FOR ITS FIRST CAUSE OF COMPLAINT against the Accused, the Oregon State Bar alleges:

1.

The Oregon State Bar was created and exists by virtue of the laws of the State of Oregon and is, and at all times mentioned herein was, authorized to carry out the provisions of ORS Chapter 9, relating to the discipline of attorneys.

2.

The Accused, Neal C. Lemery, is, and at all times mentioned herein was, an attorney at law duly admitted by the Supreme Court of the State of Oregon to practice law in this state and a member of the Oregon State Bar, having his office and place of business in the County of Tillamook, State of Oregon.

3.

Before January 10, 1991, the Accused was the District Attorney for Tillamook County and was acting in his capacity as a public prosecutor.

4.

During the time the Accused was Tillamook County District Attorney, he undertook a support collection matter on behalf of the State of Oregon wherein he

sought to enforce Debbie Sandusky Mason's (hereinafter "Mason") support judgment against her former husband, David Sandusky (hereinafter "Sandusky").

5.

In the course of the Mason/Sandusky support enforcement proceeding, the Accused reviewed Mason's file, her correspondence with Sandusky and her support decree. Upon review of the evidence supplied by Mason, the Accused decided she had lost the right to receive support payments and decided not to pursue the matter further.

6.

On January 10, 1991, the Accused's term as Tillamook County District Attorney ended and he returned to the private practice of law.

7.

After January 10, 1991, the Accused undertook to represent Sandusky in the support enforcement proceedings described above without first having obtained the consent of the State of Oregon after full disclosure.

8.

The aforesaid conduct by the Accused constituted the representation of a private party in connection with a matter in which the Accused participated personally and substantially as a public officer without appropriate government consent after full disclosure in violation of the following standard of professional conduct established by law and by the Oregon State Bar:

1. DR 5-109(B) of the Code of Professional Responsibility.

Case No. 92-97

DR 7-104(A)(1)

FOR ITS SECOND CAUSE OF COMPLAINT against the Accused, the Oregon State Bar alleges:

9.

Incorporates by reference as fully set forth herein paragraphs 1 through 3 of the First Cause of Complaint.

10.

In the fall of 1989, the Accused represented the State of Oregon in its criminal prosecution of Jacque Consenz (hereinafter "Consenz"), Tillamook County Case No. 89-1144 for the crime of Assault I and Attempted Murder.

11.

On November 22 1989, the Accused encountered Consenz on the street and spoke to him about the criminal prosecution described in paragraph 10.

12.

On November 22, 1989, Consenz was represented by counsel, David Falls, in the above-described criminal prosecution. The Accused knew that Consenz was represented by counsel and did not obtain Mr. Falls' consent before speaking with Consenz. The Accused was not authorized by law to contact Consenz.

13.

The aforesaid conduct of the Accused was a communication with a represented party on the subject of the representation in violation of the following standard of professional conduct established by law and by the Oregon State Bar:

1. DR 7-104(A)(1) of the Code of Professional Responsibility.

WHEREFORE, the Oregon State Bar demands that the Accused make answer to this Complaint; that a hearing be set concerning the charges made herein; that the matters alleged herein be fully, properly and legally determined; and pursuant thereto, such action be taken as may be just and proper under the circumstances.

EXECUTED this 22nd day of September, 1993.

OREGON STATE BAR

By: /s/ Celene Greene
CELENE GREENE
Executive Director

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of	)	Case Nos. 91-161; 91-162
)	
RAYMOND R. SMITH,)	
)	
Accused.)	
_____)	

Bar Counsel: Richard D. Adams, Esq.

Counsel for the Accused: Jon W. Paauwe, Esq.

Trial Panel: Walter L. Cauble, Chairperson; Donald K. Denman; Max W. Kimmell, Public Member

Disposition: Violation of DR 5-105(C) and (E) and DR 7-104(A)(1). Sixty-day suspension.

Effective Date of Opinion: November 2, 1993

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of	)	Case Nos. 91-161; 91-162
)	
RAYMOND R. SMITH,	)	OPINION OF TRIAL PANEL
)	
Accused.)	
)	

THIS MATTER came before the Trial Panel for hearing on July 19, 1993. The transcript was prepared and furnished to the parties on August 14, 1993. There were no requests for correction to the transcript.

The Accused appeared in person and through his attorney, Jon H. Paaúwe. The Oregon State Bar appeared through Richard Adams and Martha M. Hicks, Assistant Disciplinary Counsel.

The First Count in the Formal Complaint alleged that the Accused violated former DR 7-104(A)(1) [current DR 7-104(A)(1)] of the Code of Professional Responsibility by communicating with a person he knew to be represented by a lawyer on the subject of the representation without the lawyer's prior consent. The Second Count alleged violation of former DR 5-105(C) [current DR 5-105(C)] of the Code of Professional Responsibility and DR 5-105(E) of the Code of Professional Responsibility by the Accused's multiple representation of clients without full written disclosure in a fact situation constituting a likely conflict of interest between current clients and an actual or likely conflict between a former and a current client.

FIRST CAUSE OF COMPLAINT

The First Cause of Complaint relates to the Accused, in the course of the representation of a Petitioner in a dissolution proceeding, mailing a letter and Deed to Attorney Thad Guyer's client, Lisa Twitchell, Respondent, without Guyer's prior consent.

FINDINGS OF FACT

A Decree of Dissolution was entered in the Jackson County Circuit Court on May 1, 1991. The Decree was prepared by Mr. Guyer and submitted to the Accused for review. The Accused objected to some default language and Guyer revised the Decree and submitted it to the Court for signing. The Decree provided, among other things, the following provision as to attorney responsibility:

"Each attorney of record in this proceeding is allowed to withdraw, and absent a subsequent entry of appearance by counsel, neither party is represented by the present counsel of record in any appeal or in any proceedings subsequent to the date this Decree shall become final."

The provisions of the Decree provided that the marriage of the parties would be terminated on the 1st day of June, 1991 and further provided that:

"... every other provision of this Decree shall be effective immediately, unless a different effective date is specifically stated herein regarding said provision."

The only issue during the dissolution trial was the award of the home real property. The Decree awarded the home real property to Lisa Twitchell, who was to be responsible for the mortgage payments. The Decree provided that if she defaulted on the mortgage payments, she was required to transfer the property to Petitioner. The mortgage was apparently in default at the time of the dissolution hearing. On May 7, 1991, six (6) days after the Decree was signed, either the Accused or someone in the Accused's office, called Mr. Guyer and verified that the Decree had been signed. On May 7, 1991, the Accused mailed a letter and Deed to Lisa Twitchell without Mr. Guyer's consent and without sending Mr. Guyer a copy of the same. Said letter has been admitted as Petitioner's Exhibit 2. The Accused's letter told Ms. Twitchell that she must sign the Deed in front of a notary public and:

"If I do not receive the documents back executed within five days of your receipt of them I will petition the court to order the transfer of the property and award attorney fees against you in so doing."

On May 9, 1991, Ms. Twitchell left a note in Mr. Guyer's office, together with a copy of the letter from the Accused, asking him whether she should sign the Deed. Mr. Guyer talked to her about it and advised her not to sign it. Mr. Guyer testified that the mortgage was not in default at the time of the Accused's letter. The Accused, as an Affirmative Response, pleaded that the language of ORS 107.115(1) would be interpreted to provide that Mr. Guyer had been withdrawn as attorney of record as of the entry of the Decree. The Accused testified that he considered that as of the date of the Decree that neither he nor Mr. Guyer represented either party, and that the Accused was rehired by Petitioner to write the letter to Ms. Twitchell. The Accused testified that he personally typed the letter to Ms. Twitchell, and testified that his standard practice would have been to have sent a courtesy copy of the letter to Mr. Guyer, even though he did not consider Mr. Guyer to be representing Ms. Twitchell. The Accused testified that he had read the proposed Decree but did not pay much attention to it.

Conclusion

The Trial Panel finds that Ms. Twitchell was represented by Mr. Guyer on May 7, 1991 by virtue of the language of the Decree of Dissolution. The Accused, by calling Mr. Guyer's office on the same day that the letter was written to Ms. Twitchell, tacitly recognized that Mr. Guyer was still representing Ms. Twitchell. His mailing of the letter to Ms. Twitchell, without Guyer's prior consent, was intentionally

done rather than negligently done. By clear and convincing evidence, it is found that the Accused violated DR 7-104(A)(1).

SECOND CAUSE OF COMPLAINT

The Second Cause of Complaint relates to the Accused representing two criminal defendants charged with shoplifting arising out of the same incident, without making a full and complete disclosure in writing to them. The defendants were sisters (Sutton and Arnette).

FINDINGS OF FACT

After the defendants entered guilty pleas and before sentencing, Sutton claimed Arnette had intimidated her and tricked her into committing the crime. The Accused withdrew from representing Sutton, but continued to represent Arnette, without full disclosure and consent from Sutton. The Accused testified that he did not know that a written disclosure needed to be made. In an Affirmative Response, the Accused pleaded that in Southern Oregon, the representation of criminal co-defendants where consent exists is not considered unethical and that he complied with the ethical standards prevailing in Southern Oregon at the time of the representation. There was no testimony supporting this proposition.

Sutton testified that the Accused stated at their first meeting in October of 1990, "As long as you both are in this, I can represent you both." She further testified that the Accused did not then explain the nature of conflict of interest to her or to her sister. Sutton testified that it was only immediately before the pre-sentence

portion of the Accused's representation that he gave her a very brief oral description of the nature of a conflict of interest.

Conclusion

It is found that the Accused failed to make full disclosure to the criminal co-defendants prior to obtaining their consent to the multiple representation, either orally or in writing. It is found that after Ms. Sutton claimed that her sister had duped her into admitting the shoplifting acts, the Accused then withdrew from representing Sutton only and continued to represent Arnette without Sutton's consent to the representation and without full disclosure. The type of representation and without full disclosure. The type of representation was the same or significantly related. The Accused's representation of Ms. Arnette would likely inflict injury or damage upon Ms. Sutton in the matter in which the Accused had previously represented her. His representation of Sutton provided him with confidential information, the use of which would, or would have been likely to, inflict injury or damage upon Ms. Sutton in her sentencing. Nothing in the Accused's Affirmative Response mitigates a finding of guilty of the violation of DR 5-105(C) and DR 5-105(E) by clear and convincing evidence.

SANCTIONS

In determining sanctions, the Supreme Court has adopted the analysis set forth in Standards for Imp[s]osing Lawyer Sanctions published by the American Bar

Association in 1986. The Standards propose four factors to be considered in determining appropriate sanctions for professional misconduct:

1. THE TYPE OF DUTY VIOLATED BY THE ATTORNEY.

By communicating directly with a represented party (DR 7-104(A)), whether it be negligently or intentionally, the Accused violated his duty to the legal system (Standards 6.0). By violating DR 5-105 (E), the Accused violated his duty to both of his clients (Standards 4.0).

2. MENTAL STATE AT TIME OF VIOLATION.

The Panel has found that the Accused knowingly and intentionally communicated directly with Lisa Twitchell in violation of DR 7-104(A). The Accused knew Ms. Twitchell had been represented by Mr. Guyer during the dissolution proceedings. He consulted with Mr. Guyer after the dissolution proceeding and objected to some of the terms in the Decree prepared by Mr. Guyer. He called, or caused to be called, Mr. Guyer's office on May 7, 1991, the date that he mailed his letter to Ms. Twitchell to inquire as to whether the Decree had been signed. His letter to Ms. Twitchell was less than one week after the Decree had been entered and more than three weeks before it was to become final. The Accused acted knowingly in trying to take advantage of Ms. Twitchell.

When the Accused was retained by both of the criminal co-defendants, he was aware of the possibility that their interests might be adverse at that time or that they could become adverse during the course of his representation of them. He admitted that their interests did ultimately diverge, but he continued to represent one of the

defendants without full disclosure in writing and without consent of the other co-defendant. His knowledge of the circumstances creating the conflicts of interest made his violation of the Disciplinary Rule one made with knowledge.

3. EXTENT OF ACTUAL OR POTENTIAL INJURY.

The potential injury to Lisa Twitchell is obvious. If she had signed the Deed to her home over to her former husband, she would have lost the only asset of any consequence received in the dissolution proceedings. The potential injury did not become actual because she sought legal advice from Mr. Guyer after receiving the letter.

The potential injury to Ms. Sutton is also apparent. By virtue of his representation of both parties, the Accused could have disclosed admissions that Ms. Sutton made to him in exchange for obtaining more preferred treatment and minimizing Ms. Arnette's sentence. Disclosure by the Accused of the earlier admissions made by Ms. Sutton to him would have the potential effect of lessening the credibility of Ms. Sutton's later attempt to withdraw her plea of guilty by claiming that Ms. Arnette had intimidated her to such an extent that she was going along with the shoplifting crimes. Obviously, such a claim could very likely, and apparently did, affect her sentence and her loss of credibility could have meant a heavier sentence for her.

4. THE EXISTENCE OF ANY AGGRAVATING OR MITIGATING CIRCUMSTANCES.

Mitigating factors present are the absence of a dishonest or selfish motive and full and free disclosure to the Disciplinary Board during the proceedings. These factors

may be considered in mitigation of sanctions for ethical misconduct. (Standards 9.32).

Standards 9.22 details aggravating factors which may justify an increase in the degree of discipline to be imposed. The Accused has had several prior disciplinary offenses, all within the past ten years. On December 23, 1983, he was admonished by the Bar for violation of DR 2-101(A)(4). On August 26, 1985, he was admonished by the Bar for communicating with a person he knew to be represented by a lawyer, which is the very Disciplinary Rule violation involved here in the Oregon State Bar's First Cause of Complaint. On August 31, 1987, he was publicly reprimanded for violation of DR 9-101(B)(3). Another aggravating factor is the fact that the Accused is an experienced attorney, having been admitted to the Bar in 1979, and he has committed multiple offenses. It is found that the aggravating factors far outweigh the mitigating factors. The Accused's prior disciplinary offenses, including DR 7-104(A)(1), and the fact that it has been found that the Accused intentionally violated that Disciplinary Rule, bear heavily upon our decision that suspension is appropriate in this case, in order to protect the public, the integrity of the legal system, and to insure the administration of justice.

It is the decision of the Trial Panel that the Accused be suspended from the practice of law for a period of sixty (60) days.

DATED this 27th day of September, 1993.

/s/ Walter L. Cauble

Walter L. Cauble, Chair
OSB# 67018

/s/ Donald K. Denman

Donald K. Denman, OSB# 62023

/s/ Max W. Kimmell

Max W. Kimmell

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of	)	Case No. 91-142
)	
KENNETH LEE BAKER,)	
)	
Accused.)	
)	

Bar Counsel: Steven W. Seymour, Esq.

Counsel for the Accused: David C. Landis, Esq.

Disciplinary Board: Donald K. Denman, State Chairperson; Sidney A. Galton, Region 5 Chairperson

Disposition: Violation of DR 1-102(A)(4), DR 5-103(B) and DR 6-101(B). Disciplinary Board approval of stipulation for discipline. Public reprimand.

Effective Date of Opinion: November 17, 1993

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of	)	Case No. 91-142
)	
KENNETH LEE BAKER,	)	ORDER APPROVING STIPULATION
	)	FOR DISCIPLINE
Accused.)	
)	

THIS MATTER coming on to be heard upon the Stipulation for Discipline of the Accused and the Oregon State Bar, and good cause appearing,

IT IS HEREBY ORDERED that the Stipulation entered into between the Oregon State Bar and the Accused to accept a public reprimand is approved.

DATED this 17th day of November, 1993.

/s/ Donald K. Denman

Donald K. Denman
State Chairperson

/s/ Sidney A. Galton

Sidney A. Galton
Region 5 Chairperson

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of	)	Case No. 91-142
)	
KENNETH L. BAKER,	)	STIPULATION FOR
	)	DISCIPLINE
Accused.)	
<hr/>		

Kenneth L. Baker, attorney at law, (hereinafter, "the Accused") and the Oregon State Bar (hereinafter, "the Bar"), hereby stipulate to the following matters pursuant to Oregon State Bar Rule of Procedure 3.6(c).

1.

The Bar was created and exists by virtue of the laws of the State of Oregon and is, and at all times mentioned herein was, authorized to carry out the provisions of ORS Chapter 9 relating to the discipline of attorneys.

2.

The Accused, Kenneth L. Baker, was admitted by the Oregon Supreme Court to the practice of law in Oregon on September 26, 1977, and has been a member of the Bar continuously since that time, having his office and place of business in Clackamas County, Oregon.

3.

The Accused enters into this Stipulation for Discipline freely and voluntarily. This Stipulation is made under the restrictions set forth in Rule of Procedure 3.6(h).

4.

At its April 4, 1992 meeting, the State Professional Responsibility Board (SPRB) authorized a formal disciplinary proceeding against the Accused in connection with his representation of Joseph and Lelia Martins in a bankruptcy. At its meeting of September 18, 1993, shortly before trial in this matter, the SPRB took further action

regarding additional authorized charges and a proposed resolution in this proceeding. With this stipulation, the parties intend to resolve all pending charges against the Accused.

5.

The Accused admits the following facts:

DR 1-102(A)(4)

- A. The Accused was retained in March 1991 to represent Joseph and Lelia Martin in a Chapter 7 bankruptcy.
- B. On or about April 5, 1991, the Accused filed a bankruptcy petition on the Martins behalf in United States Bankruptcy Court. Included with the petition was an "Affidavit and Disclosure of Compensation", signed by the Accused.
- C. The "Affidavit and Disclosure of Compensation" represented that as of April 4, 1991, the Accused had received \$480 in compensation from the Martins for services rendered. The "Affidavit and Disclosure of Compensation" also represented that the Accused would receive an additional \$270 from the Martins for services in connection with the bankruptcy.
- D. At the time the Accused made the above representation to the court, the Accused had in actuality been paid \$775 in connection with the Martin bankruptcy.

DR 6-101(B)

- E. On or about July 3, 1991, one of the Martins creditors filed a summons and complaint challenging the dischargeability of one debt scheduled to be discharged. The summons established a pre-trial conference for September 9, 1991 at 2:00 p.m. The Accused received a copy of the summons and complaint.
- F. On or about August 13, 1991, the above-referenced creditor filed a Motion for Summary Judgment. By letter dated August 15, 1991, Judge Sullivan scheduled a hearing on the motion for September 9, 1991 at

2:00 p.m. The Accused received a copy of Judge Sullivan's letter. On August 21, 1991, the Accused, on behalf of the Martins, filed a response to the creditor's motion.

- G. The Accused inadvertently failed to place the hearing date on his calendar. On September 9, 1991, the scheduled date of the hearing, the Accused traveled to Roseburg, Oregon, to prepare for a trial which was set to begin the following day. That morning, Joseph Martin placed a telephone call to the Accused to confirm that the scheduled hearing would proceed and to arrange for a time and place to meet with the Accused. An employee of the Accused discovered the failure to calendar at that time.
- H. The employee of the Accused contacted him by cellular telephone. The Accused instructed the employee to attempt to arrange for a continuance. The employee placed a telephone call to opposing counsel, and advised him that the Accused was unable to attend the hearing. Opposing counsel suggested that the employee call Judge Sullivan. The employee called Judge Sullivan's secretary, who advised the employee that the hearing would proceed.
- I. Opposing counsel then called Judge Sullivan's secretary. She advised him that the hearing would proceed and he said that he was ready to proceed.
- J. The employee contacted Mr. Martin and suggested that he attend the hearing and ask Judge Sullivan to grant a continuance. The Martins attended the hearing, requested a continuance, and the court refused to grant it. Opposing counsel presented oral argument in support of the motion for summary judgment and the creditor's motion for summary judgment was allowed.

DR 5-103(B)

- K. In November 1991, a second creditor who had also filed a dischargeability action against the Martins agreed to settle its claim for

\$2000. The Accused advised the Martins to accept the settlement. The Martins lacked the money to pay the creditor. To effectuate the settlement, the Accused loaned the Martins \$1500. The loan was conditioned upon repayment and the Martins repaid the loan. At the time of the loan and the repayment, aspects of the Martins' bankruptcy were still pending.

6.

The Accused admits that by engaging in the above-described conduct, he violated DR 1-102(A)(4), DR 5-103(B) and DR 6-101(B).

7.

Although not a defense to the charges, the Accused offers and the Bar stipulates to the following in mitigation:

- A. With respect to the inaccuracies contained in the affidavit, the Accused concedes that it was his responsibility to ensure that documents filed with the court were completely accurate. However, at the time he submitted the affidavit, he believed that it accurately represented the remuneration received and to be received in conjunction with the Martins' bankruptcy. Further, the affidavit was not submitted with the intent to mislead or deceive either the court or any of the Martins' creditors.
- B. With respect to the loan, the Accused concedes that he violated the rule. However, the advance was made to settle rather than to maintain the litigation, thereby minimizing the harm that the rule is designed to prohibit: impairing a lawyer's ability to exercise independent judgment as a result of acquiring a financial interest in a client's legal matter.

8.

For purposes of this stipulation, the Bar agrees to dismiss any charge not specifically referenced herein.

9.

The Accused has no prior record of reprimand, suspension or disbarment.

10.

As a result of the Accused's misconduct, the Accused and the Oregon State Bar agree that the Accused will accept a public reprimand.

11.

This Stipulation for Discipline is subject to review by Disciplinary Counsel of the Oregon State Bar and to approval by the State Professional Responsibility Board (SPRB). If approved by the SPRB, the parties agree the stipulation is to be submitted to the Disciplinary Board for consideration pursuant to the terms of BR 3.6.

EXECUTED this 21st day of October, 1993.

/s/ Kenneth L. Baker

Kenneth L. Baker

/s/ Lia Saroyan

Lia Saroyan

Assistant Disciplinary Counsel

Oregon State Bar

I, Kenneth L. Baker, being first duly sworn, say that I am the Accused in the above-entitled proceeding and that I attest that the statements contained in the stipulation are true and correct as I verily believe.

/s/ Kenneth L. Baker

Kenneth L. Baker

Subscribed and sworn to before me this 20th day of October, 1993.

/s/ Robyn Bauer Thomas

Notary Public for Oregon

My commission expires: 5/30/97

I, Lia Saroyan, being first duly sworn, say that I am Assistant Disciplinary Counsel for the Oregon State Bar and that I attest that I have reviewed the foregoing Stipulation for Discipline and that it was approved by the SPRB for submission to the Disciplinary Board on the 18th day of September, 1993.

/s/ Lia Saroyan

Lia Saroyan
Assistant Disciplinary Counsel
Oregon State Bar

Subscribed and sworn to before me this 21st day of September, 1993.

/s/ Susan R. Parks

Notary Public for Oregon
My commission expires: 3/9/96

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of	)	Case No. 91-123; 92-87
)	
RICHARD V. KENGLA,)	
)	
Accused.)	
_____)	

Bar Counsel: David Orf, Esq.

Counsel for the Accused: Philip Suarez, Esq.

Trial Panel: Glen H. Munsell, Chairperson; Blair M. Henderson; Max Kimmel, Public Member

Disposition: Violation of DR 5-105(C) and (E) and DR 6-101(B). Thirty-day suspension..

Effective Date of Opinion: December 7, 1993

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of	)	Case Nos. 91-123; 92-87
)	
RICHARD KENGLA,	)	OPINION OF TRIAL PANEL
)	
Accused.)	
)	

THIS MATTER came before the Trial Panel for hearing on May 18, 1993. A transcript of testimony was prepared on June 22, 1993, and there were no requests for correction to the transcript. The accused appeared in person and was represented by his attorney, Philip M. Suarez. The Oregon State Bar appeared through David Orf and Martha Hicks, Assistant Disciplinary Counsel.

The Amended Formal Complaint alleges three (3) causes of complaint for violations of the Code of Professional Responsibility in the accused's handling of the representation of three (3) clients, Glenda Hutchison, aka Glenda Sanderson, Michael Hutchison, and Layne C. Henderson. The Answer of the accused admits the jurisdiction matters, but denies the substance of the three (3) allegation of misconduct. The findings and conclusions of the Trial Panel are as follows:

FIRST CAUSE OF COMPLAINT

The First Cause of Complaint relates to the accused's handling of a dissolution proceeding on behalf of Michael Sanderson without having given full disclosure of the accused's prior representation of Glenda Hutchison and of the conflict that would exist in his representation of Michael. Glenda Hutchison agreed with the accused that his representation of Michael Hutchison was with her consent and that the accused's representation of Michael Hutchison would likely inflict damage on her in the course of the dissolution of the marriage. The First Cause of Complaint alleges a violation of

DR 5-105(C) of the Code of Professional Responsibility. Those allegations are set out in paragraphs 6, 7, 8, 9, and 10 of the Amended Formal Complaint.

The Trial Panel finds that the accused had, prior to his meeting with Michael Hutchison, consulted with Glenda Hutchison regarding her marital difficulties and that dissolution of the marriage was a possibility. The accused then undertook to represent Michael Hutchison after having orally advised both Michael Hutchison and Glenda that there was a possible conflict but if all was agreed he could represent Michael (TR 28) but if there were any problems they would each be on their own (TR 29). Thereafter, the accused proceeded to prepare and file the documents for dissolution. Subsequently, various problems arose regarding visitation and medical expenses (TR 93-94). The accused continued working with both Michael and Glenda Hutchison even after there were actual disputes over uninsured medical expenses and the accused, at the direction of Glenda Hutchison, changed the Property Settlement Agreement to include responsibility for non-insured medical coverage without discussing the change with his client. The Trial Panel finds that in his representation of Michael Hutchison in the dissolution of marriage proceeding having previously consulted with or represented Glenda Hutchison regarding the same subject matter, the accused violated DR 5-105(c) [sic].

SECOND CAUSE OF COMPLAINT

The allegations of the Second Cause of Complaint allege that the accused undertook to represent both Michael Hutchison and Glenda Hutchison in a Chapter 7 Bankruptcy filing (Bar's Exb. 2) at the same time he was representing Michael Hutchison in the dissolution proceeding against Glenda Hutchison and as such, constituted a conflict of interest between current clients in violation of DR 105(E) [sic] of the Code of Professional Responsibility. Those allegations are set out in paragraphs 12, 13, and 14 of the Amended Formal Complaint.

The Trial Panel finds that during the course of the accused's representation of Michael Hutchison in the dissolution he was aware that there were matters upon which both parties did not agree. The Trial Panel finds that while the dissolution proceeding was pending, the accused undertook to file a joint Chapter 7 bankruptcy

petition for both Michael Hutchison and Glenda Hutchison (Bar's Exb. 2) (TR 137-140). The accused failed to make a full disclosure to his clients that their interests in the proceeding were adverse.

The Trial Panel finds that the accused violated DR 5-105(E) in his representation of both Michael Hutchison and Glenda Hutchison without having made full written disclosure to his clients and obtained their written consent to such representation.

THIRD CAUSE OF COMPLAINT

The Third Cause of Complaint alleges the accused's neglect of a legal matter in violation of DR 6-101(B) arising out of the accused's representation of Layne C. Ashford, formerly Layne C. Henderson, in an estate proceeding pending in Josephine County, Oregon, as Case No. 87-P-103 (Bar's Exb. 1). The allegations are set out in paragraphs 16, 17, 18, and 19 of the Amended Formal Complaint and in essence charge that the accused failed to file annual accountings from December 8, 1987, to January 28, 1991, when a "First Report of Personal Representation" was filed and from January 28, 1991, up through the date of the Amended Formal Complaint on December 10, 1992, no further accountings had been filed.

The Trial Panel finds that during the period from August of 1987 when the accused first undertook to represent Layne Ashford as Personal Representative of the Estate of Sharon Rose Frizzell, until April 7, 1993, when the estate was finally closed, there was only one purported "First Report of Personal Representative" and an attempted "Waiver of Accounting" filed with the court until the "First and Final Account" was filed with the court until the "First and Final Account" was filed covering the period from December 8, 1987, to and including December 28, 1992, which was filed with the court on April 26, 1993 (Bar's Exb. 1). The Trial Panel finds that this estate had numerous financial transactions that would be reported in an annual accounting as required by ORS 116.083 (TR 69-73). The Trial Panel further finds that the accused failed to respond to notices from the court regarding annual accounts and that the accused requested that his client furnish duplicate financial records to excuse his failure to file accountings (TR 60-64).

The Trial Panel finds that the accused's failure to take the necessary steps to file accountings during the pendency of this probate proceeding was a period of five years, is the neglect of legal matter and that the accused violated DR 6-101(B).

SANCTIONS

Having found that the accused violated DR 5-105(C), DR 5-105(E) and DR 6-101(B) as alleged in the First, Second and Third Causes of the Amended Formal Complaint, it is necessary for the Trial Panel to determine a sanction in the matter. The Trial Panel conducts its analysis in accordance with the American Bar Association's Standards for Imposing Sanctions (hereinafter, "ABA Standards") as having previously been recognized by the Oregon Supreme Court.

ETHICAL DUTY VIOLATIONS

The Trial Panel concludes that in representing his client in a dissolution proceeding when having previously represented the other party to the same proceeding, the accused violated his duty to his clients. The Trial Panel concludes that in representing multiple clients in a bankruptcy filing while representing the same client or clients in a pending dissolution proceeding, when both clients had actual or likely conflicts, the accused violated his duty to his clients. The Trial Panel further concludes that in neglecting a legal matter entrusted to him, the accused violated his duty to his client and to the legal system and to the profession.

MENTAL STATE

The Trial Panel concludes that in each instance the accused acted knowingly as to his representation of multiple clients with an actual or likely conflict and in continuing representation when an actual conflict arose between his clients. Further, the accused knew the requirements of the statutes with regard to accountings and despite notices from the court, intentionally failed to file accountings in the probate matter for five (5) years.

INJURY

The Trial Panel concludes that there was no actual injury shown; however, in each case the potential for actual injury to his clients was great and in the probate matter the potential injury that existed extends to parties other than the accused's

client. In each case the clients of the accused suffered to some extent from emotional stress and inconvenience related to the accused's conduct.

AGGRAVATING AND MITIGATING CIRCUMSTANCES

The factors in this case which evidence aggravation are a pattern of misconduct, multiple offenses, refusal to acknowledge wrongful nature of conduct, substantial experience in the practice of law and three prior disciplinary offenses involving the same or similar conduct for which the accused received letters of admonitions.

The Trial Panel finds there are factors in mitigation in that the accused did not act with a dishonest or selfish motive and that his prior admonitions are remote in time, having occurred in 1973 and 1980.

CONCLUSION

It is the unanimous conclusion of the Trial Panel that the nature of the actions of the accused are serious and that the factors in aggravation warrant a period of suspension.

The Trial Panel finds that the accused has engaged in a pattern of conduct which has been continuous for some period of time. The common pattern being representation of multiple clients with conflicting interests and neglecting legal matters by not filing probate accountings for extended periods of time.

The Trial Panel has not concluded there was serious or lasting injury to a party. Representing multiple clients with conflicting interests and neglecting a legal matter entrusted to him always has the potential for serious and long lasting injury and potentially significant adverse effect in a legal proceeding. The Trial Panel has concluded the accused acted intentionally and failed to take remedial action when he knew he had a serious problem in all of the circumstances described above. In order to protect the public, the integrity of the legal system and to insure the administration of justice, the Trial Panel finds that a significant sanction be imposed. Based upon

the foregoing findings and conclusions, it is the unanimous decision of the Trial Panel that the accused be suspended from the practice of law for a period of thirty (30) days.

DATED this 25th day of August, 1993.

/s/ Glenn H. Munsell

Glenn H. Munsell
Trial Panel Chairperson
OSB #65087

/s/ Blair M. Henderson

Blair M. Henderson
Trial Panel Member
OSB #69074

/s/ Max Kimmel

Max Kimmel
Trial Panel Public Member

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of	)	Case No. 92-169
)	
MARTIN W. VAN ZEIPEL,)	
)	
Accused.)	
_____)	

Bar Counsel: Mark D. Donohue, Esq.

Counsel for the Accused: Stephen R. Moore, Esq.

Disciplinary Board: Donald K. Denman, State Chairperson; Sidney a. Galton, Region 5 Chairperson

Disposition: Violation of DR 6-101(B). Disciplinary Board approval of stipulation for discipline. Sixty-day suspension.

Effective Date of Opinion: December 28, 1993

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of	)	Case No. 92-169
)	
MARTIN W. VAN ZEIPEL,	)	ORDER APPROVING
	)	STIPULATION FOR
Accused.	)	DISCIPLINE
)	

THIS MATTER coming on to be heard upon the Stipulation of the Accused and the Oregon State Bar, and good and sufficient cause appearing,

IT IS ORDERED that the Stipulation entered into between the Oregon State Bar and the Accused for the Accused to be suspended from the practice of law for a period of 60-days, all of which shall be stayed pending a two year probation period commencing on the date of this Order. All of the probationary terms contained in subparagraphs A.- I. on pages 3 - 6 of the Stipulation are approved and are made a part of this Order.

DATED this 28th day of December, 1993.

/s/ Donald K. Denman

State Chairperson

/s/ Sidney A. Galton

Sidney A. Galton
Region 5 Chairperson

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of	)	Case No. 92-169
)	
MARTIN W. VAN ZEIPEL,	)	STIPULATION FOR
	)	DISCIPLINE
Accused.)	
<hr/>		

Martin W. Van Zeipel, attorney at law, (hereinafter, "the Accused") and the Oregon State Bar (hereinafter, "the Bar"), hereby stipulate to the following matters pursuant to Oregon State Bar Rule of Procedure 3.6(c).

1.

The Bar was created and exists by virtue of the laws of the State of Oregon and is, and at all times mentioned herein was, authorized to carry out the provisions of ORS Chapter 9 relating to the discipline of attorneys.

2.

The Accused, Martin W. Van Zeipel, was admitted by the Oregon Supreme Court to the practice of law in Oregon on October 1, 1968, and has been a member of the Oregon State Bar continuously since that time, having his office and place of business in Multnomah County, Oregon.

3.

The Accused enters into this Stipulation for Discipline freely and voluntarily. This stipulation is made under the restrictions of Rule of Procedure 3.6(h).

4.

At its May 15, 1993 meeting, the State Professional Responsibility Board (SPRB) authorized the filing of a formal complaint alleging that the Accused violated DR 6-101(B) in connection with his handling of a criminal appeal.

5.

A Formal Complaint was filed by the Oregon State Bar on September 21, 1993 and is incorporated by reference herein as Exhibit 1.

6.

The Accused hereby stipulates to all allegations of the Formal Complaint. The Accused further stipulates that his conduct described therein constituted neglect of a legal matter in violation of DR 6-101(B).

7.

In mitigation, and acknowledging that this explanation in no way justifies his conduct nor is a defense to the charge that his conduct violated DR 6-101(B), the Accused offers that, during the period of representation of Mr. Wade, the Accused was recovering from back surgery, and also suffered a kidney stone attack, that required hospitalization. He was also ultimately successful in getting his client's appeal reinstated, and filed a brief on his client's behalf.

8.

The Accused was admonished in 1984 for violating DR 6-101(B), DR 7-101(A) and DR 2-110(A)(2) in conjunction with his handling of a post-conviction matter on behalf of a client. In 1987, the Accused was also admonished for violating DR 1-103(C) for failing to respond to or cooperate with a Bar inquiry. In 1992, the Accused received a public reprimand for violating DR 1-103(C) for failing to respond to Bar inquiry.

9.

As a result of the violation set forth herein, and in light of the Accused's prior discipline, the Accused agrees to a 60 day suspension, all of which is stayed, pending a two year probation period commencing the effective date of this stipulation. During the two year probation period, the Accused will meet the following terms:

- A. Comply with all provisions of Oregon's Code of Professional Responsibility and ORS Chapter 9.
- B. Continue to work with Carol Wilson of the Professional Liability Fund with respect to the Accused's current office practices and management

to identify and resolve problem areas. Ms. Wilson has initiated a review and, as part of that review, she will develop a plan to eliminate any and all "system problems" which may be contributing to the Accused's inability to complete his work in a timely fashion. If the plan requires the Accused to seek further advice or to attend seminars or training sessions in the area of office management, the Accused will comply with such requirements and bear all costs. The Accused will adopt all procedures recommended by Ms. Wilson.

- C. Continue to work with Michael Sweeney of the Professional Liability Fund, who shall supervise a course of treatment to ensure that the Accused is able to complete his work in a timely fashion. Mr. Sweeney has evaluated the Accused's current office practices and management. As a result of that evaluation, Mr. Sweeney has recommended and the Accused hereby agrees to commence and continue at his expense participation in several PLF-sponsored support groups addressing difficulties with procrastination, stress/burnout and other problems unique to solo-practitioners. The Accused has also commenced and hereby agrees to continue counseling with Peter Herman, a private therapist, as part of the course of treatment in addressing the above-referenced issues. The Accused agrees to participate in the PLF sponsored support groups and private counselling so long as Mr. Sweeney deems appropriate.
- D. While under Mr. Sweeney's supervision, Mr. Sweeney and the Accused shall submit to Disciplinary Counsel's Office, on a quarterly basis, a notarized affidavit attesting to the Accused's continuing participation in the above-referenced programs. Termination of any program or course of treatment requires the prior written permission of Mr. Sweeney. If Mr. Sweeney consents to the termination of any program or course of treatment prior to the termination of probation, he shall provide written notification to the Bar.

- E. The Accused hereby waives any privilege as may be necessary to permit any and all information pertinent to the treatment programs for procrastination, stress/burnout management, office management and case maintenance to be disclosed to the Oregon State Bar. This waiver applies to those persons who provide evaluation services, counseling, advice or supervision as required by this stipulation.
- F. Attorney Michael Purcell of Portland shall act as the Accused's caseload monitor. Within 30 days of the effective date of this stipulation, Michael Purcell will meet with the Accused and review his existing caseload. At the direction of Michael Purcell, the Accused will remedy or refer out to other counsel all cases in need of immediate attention. The review and referral process shall recur every 90 days throughout the term of this probation.
- G. Within 10 days of each review, the Accused and Michael Purcell will prepare and file with the Oregon State Bar a notarized affidavit signed by the Accused and approved by Michael Purcell which indicates the Accused has:
1. Conducted a complete review of existing cases;
 2. Brought all cases to a current status or referred them out to other counsel;
 3. Complied with all terms of probation since the last report or acknowledged that he has not fully complied and describe the nature of the non-compliance.
- H. Michael Purcell and Michael Sweeney have authority to request that the Accused undertake additional remedial action to protect the Accused's clients beyond the steps expressly required by this stipulation. The Accused agrees to cooperate with all reasonable requests of Michael Purcell and Michael Sweeney provided that the requests are designed to

achieve the purpose of the probation. In addition, the Accused acknowledges that both Michael Sweeney and Michael Purcell are required to immediately report to the Oregon State Bar any non-compliance by the Accused with the terms of this probation.

- I. In the event the Accused fails to comply with the terms of this probation, the Bar may initiate proceedings to revoke the Accused's probation pursuant to Rule of Procedure 6.2(d) and impose the suspension to which the Accused has stipulated herein.

10.

This Stipulation for Discipline is subject to review by Disciplinary Counsel of the Oregon State Bar and to approval by the State Professional Responsibility Board (SPRB). If approved by the SPRB, the parties agree the stipulation is to be submitted to the Disciplinary Board for consideration pursuant to the terms of BR 3.6.

EXECUTED this 16th day of December, 1993.

/s/ Martin W. Van Zeipel

Martin W. Van Zeipel

/s/ Lia Saroyan

Lia Saroyan
Assistant Disciplinary Counsel
Oregon State Bar

I, Martin W. Van Zeipel, being first duly sworn, say that I am the Accused in the above-entitled proceeding and that I attest that the statements contained in the stipulation are true and correct as I verily believe.

/s/ Martin W. Van Zeipel

Martin W. Van Zeipel

Subscribed and sworn to before me this 18th day of December, 1993.

/s/ Jan Louise Spencer

Notary Public for Oregon

My commission expires: 5/26/97

I, Lia Saroyan, being first duly sworn, say that I am Assistant Disciplinary Counsel for the Oregon State Bar and that I attest that I have reviewed the foregoing Stipulation for Discipline and that it was approved by the SPRB for submission to the Disciplinary Board on the 20th day of November, 1993.

/s/ Lia Saroyan

Lia Saroyan

Assistant Disciplinary Counsel

Oregon State Bar

Subscribed and sworn to before me this 22nd day of December, 1993.

/s/ Victoria Fichtner

Notary Public for Oregon

My commission expires: 3/26/97

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of	)	Case No. 92-169
)	
MARTIN VAN ZEIPEL,	)	FORMAL COMPLAINT
)	
Accused.)	
)	

The Oregon State Bar alleges as follows:

1.

The Oregon State Bar was created and exists by virtue of the laws of the State of Oregon and is, and at all times mentioned herein was, authorized to carry out the provisions of ORS, Chapter 9, relating to the discipline of attorneys.

2.

The Accused, Martin Van Zeipel, is, and at all times mentioned herein was, an attorney at law, duly admitted by the Supreme Court of the State of Oregon to practice law in this state and a member of the Oregon State Bar, having his office and place of business in the County of Multnomah, State of Oregon.

3.

On or about May 3, 1991, the Accused was appointed to represent Steven O'Neal Wade on appeal from a criminal conviction. The trial transcripts were filed on June 12, 1991 and an order settling the transcripts was filed on June 27, 1991.

4.

The Accused obtained and reviewed the trial transcripts and communicated with trial counsel and the trial court in an effort to determine whether any non-frivolous appealable issues could be found. He concluded that such did not exist, and conveyed this to Mr. Wade during the summer of 1991.

5.

Mr. Wade informed the Accused that he nevertheless wished to pursue an appeal.

6.

The Accused sought and obtained an extension of time for filing the appellate brief from August 15, 1991, to October 3, 1991. The Accused thereafter failed to file a brief or to obtain a second extension of time, and the appeal was dismissed on November 8, 1991.

7.

On December 11, 1991, the Accused filed a motion to reinstate the appeal and for extension of time and the court granted said motion. On or about January 3, 1992, the Accused sought an additional extension of time, which was granted with a new due date set for April 15, 1992.

8.

The Accused again failed to file a brief or obtain an extension of time, resulting in the appeal being dismissed again on May 20, 1992.

9.

The Accused did not communicate with Mr. Wade about the appeal between September, 1991 and April, 1992.

10.

A second motion to reinstate the appeal was filed on September 21, 1992, and granted on November 5, 1992. The opening brief was ultimately filed by the Accused on December 3, 1992.

11.

In all their communications, Mr. Wade informed the Accused that he wanted to pursue the appeal.

12.

By repeatedly postponing his handling of the appeal, resulting in two dismissals of the appeal and a one and one-half year delay in filing the appellate brief, and by

failing to communicate with Mr. Wade regarding the progress of the appeal including its dismissal, the Accused neglected a legal matter entrusted to him.

13.

The aforesaid conduct of the Accused violated the following standards of professional conduct established by law and by the Oregon State Bar:

1. DR 6-101(B) of the Code of Professional Responsibility.

WHEREFORE, the Oregon State Bar demands that the Accused make answer to this complaint; that a hearing be set concerning the charges made herein; that the matters alleged herein be fully, properly and legally determined; and pursuant thereto, such action be taken as may be just and proper under the circumstances.

EXECUTED this 21st day of September, 1993.

OREGON STATE BAR

By: /s/ Celene Greene
CELENE GREENE
Executive Director

IN THE SUPREME COURT OF THE
STATE OF OREGON

In re Complaint as to the Conduct of
Corey B. SMITH,
Accused.

(OSB 89-62; SC S38714)

In Banc

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

Argued and submitted September 3, 1992.

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

Christopher R. Hardman, of Holmes, Folawn & Rickles,
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 four months commencing on the effective date of
this decision.

PER CURIAM

A trial panel of the Disciplinary Board concluded that the accused violated Disciplinary Rule (DR) 1-102(A)(3)¹ (conduct involving dishonesty, fraud, deceit, or misrepresentation). The accused does not challenge that conclusion. The trial panel suspended the accused from the practice of law for 30 days but ordered that the suspension be stayed pending a probationary period of not more than 18 months during which the accused was required to complete a law school ethics course. The Oregon State Bar seeks this court's *de novo* review of the recommended sanction under ORS 9.536² and Rules of Procedure (BR) 10.1,³ requesting a suspension of at least four months.

We accept, on *de novo* review, the facts found by the trial panel. The accused was an employee associate of the Salem law firm of Gatti, Gatti, Maier, Smith & Associates (GGMS) from 1984 until March 1988, at which time he left to open a new Salem law firm, Garlock, Smith & Associates (GSA), with another lawyer. Both firms handled workers' compensation and personal injury matters.

¹ DR 1-102 provides, in part:

“(A) It is professional misconduct for a lawyer to:

“* * * * *

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

² ORS 9.536 provides, in part:

“(1) Upon the conclusion of a hearing, the disciplinary board shall file with the State Court Administrator a written decision in the matter. If the decision of the disciplinary board * * * determines that the accused attorney should be disciplined by way of reprimand or suspension from the practice of law up to a period of 60 days, the bar * * * may seek review by the Supreme Court. Such review shall be a matter of right upon the request of either party.

“* * * * *

“(3) When a matter is before the Supreme Court for review, the court shall consider the matter *de novo* and may adopt, modify or reject the decision of the disciplinary board in whole or in part and thereupon enter an appropriate order.”

³ BR 10.1 provides, in part:

“Upon the conclusion of a disciplinary hearing, the trial panel * * * shall file its written opinion * * *. If the decision of the trial panel * * * determines that the accused shall be disciplined by reprimand or suspension from the practice of law not to exceed 60 days, the Bar or the accused may seek review of the matter by the Supreme Court.”

During the two and one-half months preceding his departure from GGMS, the accused met 31 clients in his office and had them sign individual retainer agreements.⁴ Following an earlier attempt by the accused to make such personal fee arrangements, GGMS partners had warned the accused to use only retainer agreements providing for representation by the GGMS firm. The accused did not open GGMS files for any of the 31 new clients, although he did mail form letters to the clients on GGMS letterhead.

When the accused left GGMS, he took with him the files relating to the 31 new clients as well as files relating to 50 to 75 other cases.⁵ The accused's secretary left GGMS with the accused. She opened GSA files for the 31 clients immediately after the new firm opened.

The accused thereupon sent a letter to the 31 clients, the text of which follows:

"We are pleased to announce the opening of our new law offices under the name Garlock, Smith & Associates.

"We continue to emphasize workers' compensation and personal injury cases and look forward to our continued good relationships.

"For questions and problems please call * * *. As always, my legal assistant, Lisa, will be available to assist you if I am in court when you call.

"I look forward to hearing from you soon."

The accused also sent letters to insurance companies, opposing counsel, medical providers, and workers' compensation referees involved in the 31 matters notifying them of his new address and stating that "we have changed the name and address of our law firm."

GGMS filed several civil actions against the accused and obtained a court restraining order. Only then did the accused send letters to the 31 clients advising them that he had left GGMS and offering them a choice whether to be represented by GGMS or GSA. The trial panel concluded, and

⁴ The agreements provided, "I hereby retain COREY B. SMITH and associates in connection with my [legal matters]."

⁵ The accused testified that he would have taken more client files except that GGMS partners had the locks changed.

we agree, that "before the 31 new clients signed the individual retainer agreements, the Accused anticipated leaving GGMS; that he intended to keep these clients as his own if and when he left GGMS; and that he therefore consciously kept the 31 new clients out of the GGMS file system." That clearly was conduct involving dishonesty, fraud, deceit, or misrepresentation as prohibited by DR 1-102(A)(3). The early letters from the accused to the 31 clients included misrepresentations to the clients. The letters from the accused to opposing counsel, insurance companies, medical providers, and workers' compensation referees included misrepresentations to the public. The surreptitious handling of the client files was dishonest and deceitful toward GGMS.

As a guideline for determining an appropriate sanction for the accused's misconduct, we consider the American Bar Association's Standards for Imposing Lawyer Sanctions (1986) (ABA Standards). *In re Dinerman*, 314 Or 308, 317, ___ P2d ___ (1992). Factors to be weighed in imposing a sanction include: "(a) the duty violated; (b) the lawyer's mental state; (c) the potential or actual injury caused by the lawyer's misconduct; and (d) the existence of aggravating or mitigating factors." ABA Standard 3.0.

In this case, the accused's dishonesty, deceit, and misrepresentation violated a duty to his clients, as well as a duty to the public and to his former firm. He acknowledges that his conduct was intentional. Although there was no actual injury to his clients or to the public, the potential for injury was great. His months-long failure to set up client files could have harmed his clients; it could well have resulted in missed deadlines or lost documents. His clients also could have been harmed by the limitation upon their opportunity to decide whether to stay with the GGMS law firm, to go with the accused to his new law firm, or to make another choice. Partners of the GGMS firm also were exposed to potential harm by the failure of the accused to let the firm know whom he was representing while he practiced there; they could have been exposed to professional liability claims for errors of the accused in matters about which they had no knowledge.

In the absence of aggravating or mitigating circumstances, the ABA Standards recommend suspension in a case in which "a lawyer knowingly deceives a client, and causes

injury or potential injury to the client.” ABA Standard 4.62. The ABA Standards also recommend suspension when a lawyer knowingly violates a duty owed to the profession, as the accused has done, and “causes injury or potential injury to a client, the public, or the legal system.” ABA Standard 7.2. Finally, the ABA Standards recommend a reprimand in cases in which a lawyer’s personal integrity is compromised by knowing “conduct that involves dishonesty, fraud, deceit, or misrepresentation and that adversely reflects on the lawyer’s fitness to practice law.” ABA Standard 5.13.

Using the foregoing ABA Standards as guidelines, we conclude, first, that the accused should be suspended from the practice of law. We next consider the effect of aggravating and mitigating factors to determine the appropriate length of suspension. See BR 6.1(a)(iii) (authorizing suspensions for periods from 30 days to three years).

Mitigating factors we apply are that the accused has a reputation for good character, ABA Standard 9.32(g), and that he has no prior disciplinary record, ABA Standard 9.32(a). We do not find sufficient evidence in the record to support application of two additional mitigating factors urged by the accused, namely, remorse and cooperation in disciplinary proceedings.

Aggravating factors applicable to this case include a dishonest or selfish motive, a pattern of misconduct, and substantial experience (more than five years) in the practice of law. ABA Standard 9.22(b), (c), and (i).

The public rightfully expects lawyers to conduct their daily affairs with integrity. The conduct of the accused fell far short of that expectation. He plotted to take for himself the economic fruits of legal business that he knew belonged to his employer. His scheme exposed his clients and his firm to substantial risks. His arrogant and selfish conduct dishonors the profession and engenders public disdain. As this court noted in this regard many years ago:

“No one who is admitted into the legal profession may be permitted to sully or destroy the right and need of the public to impose absolute confidence in the integrity of a lawyer. Literally thousands of personal and business transactions of unknowing people must be and are entrusted to the hands of

some lawyer. Money, property and matters of personal confidence are daily entrusted to the integrity of the individual lawyer. In almost all such instances no bond or security, other than integrity, is required to assure the protection or performance of the trust. No member of the Bar need consider long wherein his duty lies. True, the rules of professional conduct may fill many pages; the opinions interpreting some of the rules, many volumes. But in the more basic conduct he is called upon to perform, any lawyer knows the simple rules that he must cling to: Simple straightforward honesty and absolute good faith. No less will suffice." *In re Pennington*, 220 Or 343, 347, 348 P2d 774 (1960).

Although there is no explicit rule requiring lawyers to be candid and fair with their partners or employers, such an obligation is implicit in the prohibition of DR 1-102(A)(3) against dishonesty, fraud, deceit, or misrepresentation. Moreover, such conduct is a violation of the duty of loyalty owed by a lawyer to his or her firm based on their contractual or agency relationship.⁶

We believe that the real and potential harm to the public is great when lawyers attempt to take economic rights from their own firms (as did the accused here): A breach of integrity like this one merits a severe sanction. See ABA Standard 1.1 ("The purpose of lawyer discipline proceedings is to protect the public and the administration of justice from lawyers who have not discharged * * * their professional duties to clients, the public, the legal system, and the legal profession.").

In other cases where lawyers have violated DR 1-102(A)(3) as part of an intentional scheme, this court has imposed suspensions of up to four months' duration. In the recent case of *In re Magar*, 312 Or 139, 817 P2d 289 (1991), this court suspended a lawyer from the practice of law for 60 days when he endorsed a draft with another's name despite his knowledge that the person whose name he signed did not wish him to do so. In *In re Fuller*, 284 Or 273, 586 P2d 1111 (1978), this court imposed a 60-day suspension when a lawyer failed to correct false impressions that his clients had about

⁶ See OSB Legal Ethics Op No 1991-70 and The Ethical Oregon Lawyer (Oregon CLE 1991) § 16.18 for discussions of the duty that a lawyer leaving one law firm for another firm owes to the departed firm regarding clients.

his handling of their case. In *In re Hiller*, 298 Or 526, 694 P2d 540 (1985), this court imposed a four-month suspension when two lawyers attempting to help a client collect on a promissory note arranged to transfer for one dollar the client's interest in certain real property to their secretary in order to trigger a condition in the note requiring payment upon sale of the property.

For the reasons noted above, the misconduct in this case was at least as serious as that in *In re Hiller, supra*. The Bar has recommended at least the same sanction, suspension from the practice of law for a period of four months.

By way of mitigation, the accused points out that nearly five years have passed since the misconduct described herein. See ABA Standard 9.32(i) (delay in disciplinary proceedings is a mitigating factor that may be considered in imposing sanction). There being no evidence of the cause for the delay in disciplinary proceedings, we decline to reduce the penalty because of that delay. However, we do recognize that the delay has given the accused an opportunity to develop an additional record of good conduct, which we do weigh in favor of the accused. We note also that the disciplinary record of the accused was unblemished before the misconduct. Nevertheless, the magnitude of the scheme, the devious methods employed by the accused to execute it, and its potential for harm were sufficiently serious that we agree with the Bar that a four-month suspension is warranted.

The accused is suspended from the practice of law for a period of four months commencing on the effective date of this decision.

IN THE SUPREME COURT OF THE
STATE OF OREGON

In re Complaint as to the Conduct of

Rex Q. SMITH,
Accused.

(OSB 90-42; SC S39426)

In Banc

On review from the Disciplinary Board of the Oregon State
Bar.

Argued and submitted March 1, 1993.

Mary A. Cooper, Assistant Disciplinary Counsel, Lake
Oswego, argued the cause and filed the brief for the Oregon
State Bar. Lia Saroyan, Assistant Disciplinary Counsel, filed
a reply brief.

Rex Q. Smith, Portland, argued the cause and filed a brief
in propria persona.

PER CURIAM

The accused is suspended from the practice of law for 35
days, effective on issuance of the appellate judgment.

PER CURIAM

This is a lawyer disciplinary proceeding. The Oregon State Bar charges that the accused engaged in conduct prejudicial to the administration of justice, in violation of DR 1-102(A)(4).¹ The trial panel found the accused not guilty. The Bar sought review by this court pursuant to BR 10.1, BR 10.3, and ORS 9.536(1). We review the record *de novo*. ORS 9.536(3). 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)(4) and suspend him for 35 days.

FINDINGS OF FACT

The accused was admitted to practice law in Oregon in 1974. A significant part of his practice has consisted of the representation of workers' compensation claimants. In January 1987, the accused undertook to represent Landers, a claimant who was contending that a previous work-related injury had worsened, entitling him to additional benefits.

The employer's workers' compensation insurer scheduled an independent medical examination for Landers at Kaiser Permanente Medical Center, to be conducted by the doctor who had treated Landers' original injury. The doctor was expected to prepare a written report on Landers' current condition, which would be submitted, if necessary, to the Workers' Compensation Board. The accused prepared a letter for Landers to give to the doctor at the examination. The letter stated in pertinent part:

"Landers has been ordered by [the insurer] to undergo a defense medical exam conducted by you.

"I have enclosed [reports from Landers' chiropractor].

"As you will observe, [Landers' chiropractor] has opined that Landers has had a * * * worsening of his injury * * *.

"If you agree with [Landers' chiropractor], fine.

¹ DR 1-102(A)(4) provides:

"It is professional misconduct for a lawyer to:

"* * * * *

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

“If not, you need to be extremely specific and detailed
* * *

“* * * Landers has a simple choice in that he can either have time loss income from [the insurer], or if no time loss income then risk hurting himself worse by trying to work; his other choice is simply to be destitute. Therefore, I just want you to be aware of what the consequences are if you tell [the insurer] that [Landers’ chiropractor] is wrong. If any of your opinions result in Landers getting cut off of time loss and hurting himself by trying to work, then he will sue you and Kaiser.”

At the time of the scheduled examination, Landers gave the letter to the doctor, who conducted a brief examination. Later, the doctor informed the insurer:

“I am withdrawing from this examination for the following reasons. When Mr. Landers came into my office to be examined, he brought with him a letter from his attorney, [the accused]. Specifically, part of the letter states that if my opinion differs from those of his present treating chiropractor then I could be sued. I refuse to put myself in jeopardy or put my Organization in jeopardy by taking this risk.”

The insurer arranged for Landers to be examined by other doctors.

The Disciplinary Board trial panel concluded that, because Landers’ workers’ compensation claim was ultimately adjudicated despite the original doctor’s withdrawal from the case, the Bar failed to show by clear and convincing evidence that the conduct of the accused “prejudiced” the administration of justice in either of the ways described by this court in *In re Haws*, 310 Or 741, 801 P2d 818 (1990). Accordingly, the trial panel found the accused not guilty of violating DR 1-102(A)(4).

DR 1-102(A)(4)

In *In re Haws, supra*, this court established a three-part test for finding a violation of DR 1-102(A)(4), the rule proscribing conduct that is prejudicial to the administration of justice.

First, the accused must have engaged in “conduct,” that is, performed, or failed to perform, some act. *Id.* at 746.

Second, that conduct must have occurred in the context of the “*administration of justice*,” that is, during the course of some judicial proceeding or a matter directly related thereto. *Id.* at 746. The conduct may relate to the “procedural functioning of the proceeding” or to the “substantive interest of a party in the proceeding.” *Id.* at 747.

Third, the conduct must have been “*prejudicial*” in nature — it must have caused, or had the potential to cause, harm or injury. *Id.* at 747. The amount of harm caused, or having the potential to be caused, however, must be more than minimal. *Id.* at 747-48. The court concluded that more than minimal harm can result either from “[r]epeated conduct causing some harm to the administration of justice” or from a “single act causing substantial harm to the administration of justice.” *Id.* at 748.

We apply that test to the facts found here.

First, it is undisputed that the accused prepared, and caused to be delivered to the insurer’s doctor, the letter quoted in part above. The accused thereby engaged in “*conduct*.”

Second, the accused prepared the letter in the course of representing a claimant in a workers’ compensation proceeding, and the letter pertained to a report to be submitted to a party in a workers’ compensation case and potentially to be submitted to the Workers’ Compensation Board in the course of adjudicating the claim. The performance of medical examinations by doctors for the use of parties in workers’ compensation proceedings is part of the process of adjudication. The relevant conduct thus occurred in the context of the “*administration of justice*.” In this case, the conduct affected the “procedural functioning of the proceeding,” by causing the doctor, who was a prospective witness, to withdraw from the process of evaluating Landers’ condition, thereby delaying that process. *See In re White*, 311 Or 573, 815 P2d 1257 (1991) (conduct resulting in waste of time for courts, lawyers, and litigants violated DR 1-102(A)(4)); *In re Paauwe*, 294 Or 171, 174, 654 P2d 1117 (1982) (conduct that caused delays in litigation was prejudicial to the administration of justice). In addition, the conduct affected the substantive interest of a

party to the proceeding, the insurer, by potentially denying that party evidence related to the claim.

Finally, we consider whether the conduct of the accused, although not "repeated," caused, or had the potential to cause, "substantial" harm to the administration of justice. The letter prepared by the accused threatened litigation if the doctor expressed a particular medical opinion in the course of the workers' compensation proceeding. That threat was improper, because what a witness says in a legal proceeding is absolutely privileged. In *Ramstead v. Morgan*, 219 Or 383, 347 P2d 594 (1959), this court held that a lawyer could not maintain an action for libel based on statements in a former client's letter to the chair of a county grievance committee of the Oregon State Bar. The court wrote:

"The absolute immunity attaches to statements made in the course of, or incident to a judicial proceeding. And so, statements made by parties, witnesses, and affiants are included within the privilege.

"The rule of absolute privilege is applicable not only to judicial proceedings but to quasi-judicial proceedings as well.

"Statements made before various administrative boards and commissions have been recognized as absolutely privileged." 219 at 388 (citations omitted).

A workers' compensation proceeding to adjudicate a claim is a quasi-judicial administrative proceeding. See ORS 656.260 to 656.390 (procedure for obtaining compensation and recovering attorney fees). The report of an examining physician is an integral part of that proceeding. See ORS 656.325 (providing for independent medical examinations on request of the insurer); OAR 436-10-100(1) (the insurer may obtain independent medical examinations of the claimant). Therefore, absolute immunity applied to the doctor's report.

The fact that this particular workers' compensation claim was ultimately adjudicated is irrelevant. Improperly threatening a witness in a legal proceeding is substantially harmful to the administration of justice without regard to the timing or outcome of the particular case. See ORS 162.285 (tampering with a witness includes knowingly inducing, or attempting to induce, the witness to withhold testimony in

any official proceeding; witness tampering is a Class C felony). The conduct of the accused was, therefore, "*prejudicial*." See *In re Boothe*, 303 Or 643, 740 P2d 785 (1987) ("an attempt to induce a witness not to testify, even if unsuccessful, is prejudicial to the administration of justice").

We conclude that the accused violated DR 1-102 (A)(4).

SANCTION

In deciding on the appropriate sanction, this court refers for guidance 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 in imposing sanctions: the duty violated, the lawyer's mental state, the actual or potential injury caused by the misconduct, and the existence of aggravating or mitigating factors.

The accused violated his duty to the legal system during his pursuit of Landers' workers' compensation claim by communicating improperly with a witness in a judicial proceeding. ABA Standard 6.3.

The accused acted intentionally. We find that he had the conscious purpose of interfering with the doctor's independent medical judgment, by causing the doctor either to agree with Landers' chiropractor or to withdraw from the case. See ABA Standards at 7 (June 17, 1992) (a lawyer acts intentionally when he or she acts with the conscious purpose to achieve a particular result).

The accused asserts that his purpose in preparing the letter was to fulfill his "ethical duty to zealously represent" Landers and that his conduct was proper in view of Landers' constitutional right under Article I, section 8, of the Oregon Constitution, to express his concern about the consequences of the doctor's examination. Even assuming that Landers was constitutionally privileged to make the same comments and that Landers induced the accused to prepare the letter, the conduct of the accused was not justified. See ABA Standard 9.4(b) (agreeing to a client's demand for improper conduct is neither an aggravating nor a mitigating factor).

Under the ABA Standards, where a lawyer influences or attempts to influence a witness' testimony, the extent of the resulting injury is measured by evaluating the level of interference or potential interference with the administration of justice. See ABA Standards at 8 (stating that principle). In this case, the conduct of the accused potentially interfered with the timely disposition of Landers' claim and potentially interfered with the outcome of the claim, by depriving the insurer of the opinion of the doctor who had originally treated Landers.

The ABA Standards suggest that the appropriate sanction when a lawyer acts intentionally in these circumstances ranges as high as disbarment. See ABA Standard 6.31 (disbarment is appropriate when a lawyer intentionally tampers with a witness and causes serious or potentially serious injury to a party, or causes significant or potentially significant interference with the outcome of the legal proceeding); ABA Standard 6.32 (suspension is appropriate when a lawyer engages in communication with an individual in the legal system and the lawyer knows that such communication is improper, and causes injury or potential injury to a party or causes interference or potential interference with the outcome of the legal proceeding).

We next consider pertinent aggravating and mitigating factors.

As an aggravating factor, the accused had substantial experience in the practice of law. ABA Standard 9.22(i).

In mitigation, the accused has no prior disciplinary record, ABA Standard 9.32(a); he made a full disclosure to the trial panel of the facts and circumstances of his conduct, ABA Standard 9.32(e); and there was a delay in initiating the disciplinary proceedings, ABA Standard 9.32(j).

The mitigating factors outweigh the aggravating factor in this case. We conclude that a suspension of 35 days is the appropriate sanction.

The accused is suspended from the practice of law for 35 days, effective on issuance of the appellate judgment.

IN THE SUPREME COURT OF THE
STATE OF OREGON

In re Complaint as to the Conduct of
Robert L. McKEE,
Accused.

(OSB 89-61, 90-11, 90-135; SC S39378)

In Banc

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

Argued and submitted January 8, 1993.

Dwight L. Schwab, of Schwab, Hilton & Howard, Port-
land, argued the cause and filed the brief for the accused.

Martha M. Hicks, Assistant Disciplinary Counsel, Lake
Oswego, argued the cause for the Oregon State Bar. With her
on the brief was Paul Silver, Bar Counsel, Portland.

PER CURIAM

The accused is suspended from the practice of law for 18
months from the effective date of this decision.

Peterson, J., concurred and filed an opinion in which
Gillette, J., joined.

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) charged the accused in eight causes of complaint with violation of twelve disciplinary rules and one statute. The trial panel found the accused guilty of violating six different disciplinary rules and imposed a sanction of suspension from the practice of law for six months. On review, the accused challenges the trial panel's findings of guilt and its recommended sanction. The Bar challenges the trial panel's findings of not guilty on two disciplinary violations.² The Bar has the burden of establishing the 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 find the accused guilty of several violations and we suspend him from the practice of law for 18 months.

FINDINGS OF FACT

A. *The Morris Complaint*: We find that, in August 1987, Raymond Morris consulted with the accused about what Morris felt was harassment by his neighbor, Foster. The accused wrote Foster a letter, warning him that further harassment would result in legal action against him. Foster's conduct continued. Morris returned to the accused, who for a fee of \$2,000 promised to file an action against Foster. The accused considered that to be a high fee for his services, and he set it at that level to discourage Morris from going forward with litigation. Morris agreed to pay the quoted fee.

Before he filed the action, the accused met with Foster and a number of witnesses who told him their versions of the events; they convinced him that Morris might be at fault. At that time, the accused believed that Morris was potentially dangerous to Foster and he told Foster so.

¹ ORS 9.536(2) provides that, if the decision of the disciplinary board is to suspend the accused lawyer from the practice of law for a period of longer than 60 days, the matter shall be reviewed *de novo* by the Supreme Court.

² In its sixth cause of complaint, the Bar charged the accused with violations of DR 1-102(A)(3) and former ORS 9.460(4) [current ORS 9.460(2)] in his representation of Mark Dickerson. The trial panel found the accused not guilty of those violations. The Bar does not challenge the trial panel's decision, and those charges are not involved in this proceeding.

Although the accused had formed the opinion that Morris was mentally unstable and that Morris' version of the circumstances might not be entirely accurate, the accused did little investigation before filing the action. He only drove by Morris' home and requested a medical evaluation of the effects of Foster's conduct on Morris. The accused did not interview any of the seven witnesses whose names Morris had given him.

In October 1987, the accused filed a complaint for Morris, seeking compensatory and punitive damages from Foster for intentional infliction of severe emotional distress. After filing the complaint, the accused did no further investigation of the facts other than to speak occasionally with people who came into his office on other matters and with another neighbor, who disclaimed any knowledge of the facts of the dispute.

Because the accused did not wish to upset Morris, he made a conscious decision to keep him uninformed about the progress of the litigation. The accused did not tell Morris that opposing counsel had threatened to counterclaim for attorney fees, that the case was dismissed for lack of prosecution in April 1988 and later reinstated, that the defendant had filed motions to dismiss, that the accused had filed an amended complaint, or that opposing counsel had filed an answer that sought penalties and attorney fees and alleged a counterclaim for compensatory and punitive damages. The accused also failed to tell Morris that he had set a pre-trial conference, that a trial had been set for January 18, 1989, or that he was negotiating with opposing counsel for a restraining order. The accused did not return Morris' telephone calls. When Morris visited his office from time to time, the accused would tell him that he had heard nothing about the litigation. The accused even told Morris and his wife to go forward with a trip to California between January 10 and February 5, 1989, without telling them that the trial had been set during that time.

At some point, the accused became convinced that Morris would not prevail at trial. About the time that the answer was filed in November 1988, the accused began discussing settlement with opposing counsel. Counsel discussed the possibility of obtaining mutual restraining orders. The

accused did not tell Morris that he was discussing settlement or that he and opposing counsel were considering mutual restraining orders. This failure to disclose settlement discussions was in keeping with the accused's general policy not to tell any of his clients about settlement discussions. In early 1989, the lawyers agreed to resolve the case by way of restraining orders, and the accused agreed to and did draft a proposed order.

Eventually the trial was set for February 7, 1989. At circuit court call on February 6, the accused reported that the case had been settled. At that time, however, the accused and opposing counsel had agreed only to the possibility that the case could be resolved by a mutual restraining order; they had not agreed to any specific terms of such an order. Moreover, on February 6, Morris had not authorized the accused to dismiss the case or to stipulate to a mutual restraining order. In fact, at the time that the case was called, even the accused had some question about whether he had authority to settle the case.

In January 1989, when the accused became aware of the February 7 trial date, he spoke to Morris, who was still vacationing in California. In a telephone conversation that the accused described as "short and to the point," he told Morris that he would not prevail at trial. Morris, however, told the accused that he did not want to dismiss the case. The accused responded that the matter could be resolved by way of a restraining order, an idea of which, in the accused's words, Morris "seemed to approve." The accused then asked Morris to come to his office when he returned to Portland so that they could discuss the matter further. Morris ended the conversation by saying that he wanted to talk to his wife about the accused's suggestion that the case be dismissed and that he would speak to the accused later. The next day, Morris called the office and told the accused's secretary that he did *not* want the case dismissed.

On February 6, 1989, Morris met with the accused. The accused already had been to circuit court call that morning and had reported that the case was settled. He did not, however, tell this to Morris. At this meeting, the accused discussed obtaining a restraining order against Foster. Morris still wanted his day in court and did not understand

that agreeing to a restraining order would end the litigation. The accused then told Morris that he would draft a restraining order and take him to court when the judge signed it.

On behalf of Morris, the accused signed a stipulated judgment that settled both Morris' claim against Foster and Foster's counterclaim against Morris. The judgment was signed by the court on March 8, 1989. The form of the judgment was the result of negotiations that occurred between the accused and opposing counsel after February 6, 1989, and it restrained both parties from certain conduct. The accused never told Morris that he would be restrained from harassing Foster. Even though Morris was denying any wrongdoing with respect to Foster, the accused did not believe that it was important to discuss this with Morris. Morris did not receive a copy of the stipulated judgment until he and his wife later copied the court file.

B. *The Newby-Crosby Complaint*: We find that in February 1988, Gerry Newby (Newby) and Sharon Newby (now Crosby) met with the accused for the purpose of dissolving their marriage. The accused previously had represented Newby in a paternity matter, a criminal matter, a workers' compensation matter, and a matter involving his trucking business; he previously had represented Crosby in a personal injury matter; he had represented the parties' son in a juvenile court matter; and he had answered the family's legal questions since 1968. In 1984, when Newby and Crosby first contemplated dissolving their marriage, the accused declined to represent only Newby, because he previously had represented both parties.

In 1988, Newby and Crosby had been married for 19 years and had three minor children. They owned several vehicles and real property. Newby was a long-haul trucker, who owned his own tractor and trailer and earned a gross annual income of \$145,000 (a net income of \$35,000 to \$45,000). Crosby's separate income was about \$1,100 monthly.

When Newby and Crosby met with the accused in 1988, they had not reached agreement on the property, custody, and support issues of their dissolution. They disagreed about those issues in the accused's presence during

two or three appointments at the accused's office. Despite the fact that he had represented Newby and Crosby on several matters previously, the accused did not disclose to them at the first appointment, or at any time, that there was a potential conflict of interest; he did not advise them to seek separate counsel. He merely told them that, if they could not agree, he would be unable to represent either of them. Moreover, the accused did not recognize any area of potential conflict between the parties during the initial consultations. When Newby and Crosby disagreed about property and custody issues in his presence, the accused merely went on to another issue and told them that they would have to settle their disagreements elsewhere.

The property settlement agreement that the accused drafted awarded Crosby one-quarter of the household furnishings, one automobile, and \$5,000 for her equity in the family home. Newby was awarded all of the remaining assets of the parties and was obligated to pay all of the family indebtedness, except two department store bills and a loan for the purchase of Crosby's car. Custody of the children was awarded to Newby. No child or spousal support was awarded. The accused never addressed the issue of spousal support with either client.

Although the parties believed that the equity in the family home was \$30,000, Crosby accepted \$5,000 as her share because she was afraid of her husband. Up to the time she signed the property settlement agreement, Crosby believed that the dissolution judgment would provide for joint custody and would require Newby to provide medical insurance for the children. It did not. Crosby signed the agreement to avoid further arguments with her husband.

After the dissolution judgment was entered, Crosby contacted the accused on a number of occasions. He advised her about her rights with respect to threats by Newby to request child support from her and to demand the return of her automobile. Some time later, Newby failed to pay his share of the family debts, and Crosby began to receive telephone calls from creditors. She then telephoned the accused to ask him what she should do. The accused responded that the family debts were Newby's responsibility. He declined to represent Crosby further, reminding her that he had told her

earlier that he could not represent either party if problems arose out of the dissolution.

To protect herself against the demands of creditors, Crosby then filed a construction lien against the family home. She knew that she had no valid basis for a lien. When Newby discovered the lien, he contacted the accused. When Crosby refused to release the lien, Newby asked the accused to file an action against her, and the accused agreed. Crosby, too, contacted the accused about Newby's failure to pay the family debts. The accused, however, told her to release her lien or "we're going to sue you."

The accused thereafter filed a slander of title action against Crosby, without checking the status of the title to the family home. In fact, when the accused filed the action, Newby no longer held title to the property. Rather, the title company had held back funds to cover the amount of Crosby's lien and had transferred title to Newby's buyer.

The accused filed the action on behalf of Newby, despite the fact that Crosby's new lawyer had advised the accused that such an action could not be maintained because Newby no longer had title to the family home, and had reminded the accused of his ethical obligations to Crosby. Moreover, at no time before or during his representation of Newby in the slander of title action did the accused advise either Newby or Crosby about his potential conflict of interest. Similarly, he did not obtain Crosby's consent to his representation of her former husband after full disclosure. In his answer to the Bar's complaint, the accused admits that he represented Newby in a matter significantly related to the parties' dissolution proceeding when their interests were in actual or likely conflict, but he denied that he filed an action, asserted a position, or took other action on Newby's behalf when he knew or should have known that such action would serve merely to harass or maliciously injure Crosby.

THE BAR'S COMPLAINT

A. *The Morris Complaint*: In its complaint, the Bar alleged that the accused falsely represented to the circuit court that Morris' case against Foster had been settled and that later he agreed to a settlement and signed a stipulated judgment on behalf of Morris that settled both Morris' claim

against Foster and Foster's counterclaim against Morris without Morris' knowledge, consent, or authority. The Bar further alleged that the accused failed to disclose to Morris:

1. that the litigation had been dismissed by the court on April 20, 1988;
2. that Foster had filed a counterclaim against Morris;
3. the nature of the counterclaim;
4. that the trial was set for January 19, 1989;
5. that the litigation was dismissed by the court a second time on January 18, 1989;
6. that the trial was reset to February 7, 1989;
7. the effect of a restraining order;
8. that the accused was engaged in settlement negotiations; and
9. the terms of the settlement and stipulated judgment.

The Bar alleged that the accused's conduct in the Morris case violated DR 1-102(A)(3);³ DR 1-102(A)(4);⁴ DR 7-102(A)(5);⁵ DR 6-101(A);⁶ DR 6-101(B);⁷ DR 7-101(A)(1);⁸ and DR 7-101(A)(2).⁹

³ DR 1-102(A)(3) provides in part:

"It is professional misconduct for a lawyer to:

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

⁴ DR 1-102(A)(4) provides:

"It is professional misconduct for a lawyer to:

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

⁵ DR 7-102(A)(5) provides:

"In the lawyer's representation of a client or in representing the lawyer's own interests, a lawyer shall not:

"Knowingly make a false statement of law or fact."

⁶ DR 6-101(A) provides:

"A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

⁷ DR 6-101(B) provides:

"A lawyer shall not neglect a legal matter entrusted to the lawyer."

⁸ DR 7-101(A)(1) provides:

"A lawyer shall not intentionally:

B. *The Newby-Crosby Complaint*: The Bar further alleged that the accused represented Newby and Crosby as co-petitioners in their dissolution of marriage without the required consent and without full disclosure of the possible effect of joint representation, when the exercise of his independent professional judgment on behalf of each was or was likely to be adversely affected by his representation of the other. The Bar charged that this conduct violated *former* DR 5-105(A) and (B).¹⁰ The Bar's complaint further alleged that, when the accused accepted employment from Newby for the purpose of compelling Crosby to release her lien and, on behalf of Newby, brought an action against Crosby for slander of title, the accused violated DR 5-105(C)¹¹ and DR 7-102(A)(1).¹²

"Fail to seek the lawful objectives of the lawyer's client through reasonably available means permitted by law and these disciplinary rules except as provided by DR 7-101(B). A lawyer does not violate this Disciplinary Rule, however, by acceding to reasonable requests of opposing counsel which do not prejudice the right of the lawyer's client, by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process."

⁹ DR 7-101(A)(2) provides:

"A lawyer shall not intentionally:

"* * * * *

"Fail to carry out a contract of employment entered into with a client for professional services but the lawyer may withdraw as permitted under DR 2-110, DR 5-102 and DR 5-105."

¹⁰ *Former* DR 5-105 provided in part:

"(A) A lawyer shall decline proffered employment if the exercise of the lawyer's independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, except to the extent permitted under DR 5-105(C).

"(B) A lawyer shall not continue employment if the exercise of the lawyer's independent professional judgment in behalf of a client will be or is likely to be adversely affected by the lawyer's representation of another client, except to the extent provided under DR 5-105(C).

"(C) In situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that the lawyer can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of the lawyer's independent professional judgment on behalf of each."

¹¹ *Current* DR 5-105 provides in part:

"(C) Except as permitted in DR 5-105(D), a lawyer who has represented a client in a matter shall not subsequently represent another client in the same or a significantly related matter when the interests of the current and former clients are in actual or likely conflict. Matters are significantly related if either:

The case was heard by a trial panel, which found, regarding the Morris complaint and the Newby/Crosby complaint, that the accused had not violated DR 1-102(A)(4), 7-102(A)(5), 6-101(A), or 7-101(A)(1), but had violated the other disciplinary rules cited in the Bar's complaint. The trial panel imposed a sanction of suspension from the practice of law for six months.

ANALYSIS

In this court, the accused argues that this court should find him not guilty of violating any disciplinary rule or statute. He further argues that, if any discipline is justified, a public reprimand is sufficient. The Bar argues that the accused is guilty of the violations found by the trial panel and that, additionally, the accused's conduct in the Morris case also violated DR 1-102(A)(4) and DR 7-102(A)(5). The Bar argues that the proper sanction should be no less than the six-month suspension imposed by the trial panel.

"(1) Representation of the present client in the subsequent matter would, or would likely, inflict injury or damage upon the former client in connection with any proceeding, claim, controversy, transaction, investigation, charge, accusation, arrest or other particular matter in which the lawyer previously represented the former client; or

"(2) Representation of the former client provided the lawyer with confidences or secrets as defined in DR 4-101(A), the use of which would, or would likely, inflict injury or damage upon the former client in the course of the subsequent matter.

"(D) A lawyer may represent a client in instances otherwise prohibited by DR 5-105(C) when both the current client and the former client consent to the representation after full disclosure.

"(E) Except as provided in DR 5-105(F), a lawyer shall not represent multiple current clients in any matters when such representation would result in an actual or likely conflict.

"(F) A lawyer may represent multiple current clients in instances otherwise prohibited by DR 5-105(E) when such representation would not result in an actual conflict and when each client consents to the multiple representation after full disclosure."

See note 15, *infra* (defining "full disclosure").

¹² DR 7-102(A)(1) provides:

"In the lawyer's representation of a client or in representing the lawyer's own interests, a lawyer shall not:

"File a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of the lawyer's client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another."

A. *The Morris Complaint*: DR 1-102(A)(3) provides that it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. The trial panel found the accused guilty of violating this rule for representing to the circuit court that the Morris case had settled and for settling that case without authority from his client. The accused contends that he believed that he had authority to settle the case, and that he had negotiated an agreement with Foster's lawyer at the time he informed the court that the case had been settled. It is undisputed that at that time the actual terms of a restraining order had not been agreed upon; moreover, when the accused made this representation to the court, no mutual restraining order had been approved by Morris.

Perhaps, at the time the representation was made to the court, the accused believed that Morris would agree to the order; nevertheless, the accused's representation indicated that an agreement already had been reached, and that was not so. It appears that the accused believed that Morris would not prevail on the merits at trial and that settlement was the preferable option. He may have felt he was acting in his client's best interest. An improper motive, however, is not required to find that a misrepresentation has been made. See *In re Boardman*, 312 Or 452, 456, 822 P2d 709 (1991) (no harm need be intended by misrepresentation). Moreover, the misrepresentation was made to a court and resulted in the dismissal of Morris' case contrary to his express instruction to the accused. A misrepresentation made with the best of intentions is nonetheless a misrepresentation.

This court does not take lightly any misrepresentation made to a court by a lawyer. See *In re Recker*, 309 Or 633, 789 P2d 663 (1990) (lawyer violated DR 1-102(A)(3) by informing court that client had failed to maintain contact, when it was lawyer who had failed to maintain contact); *In re Dixson*, 305 Or 83, 750 P2d 157 (1988) (lawyer violated former DR 1-102(A)(4) by filing false affidavit with court); *In re Walker*, 293 Or 297, 647 P2d 468 (1982) (lawyer violated former DR 1-102(A)(4) by falsely representing to probate court that taxes had been paid). We conclude that the accused's conduct violated DR 1-102(A)(3).

The Bar contends that the trial panel erred in finding the accused did not violate DR 1-102(A)(4) by engaging in conduct prejudicial to the administration of justice when he represented to the court that the Morris case had settled. In *In re Haws*, 310 Or 741, 801 P2d 818 (1990), this court analyzed DR 1-102(A)(4), concluding that “conduct” could mean doing something one should not do or not doing something one should do, 310 Or at 746; that “administration” may refer either to procedural functions or to the substantive interest of a party, *id.* at 747; and that, within the context of that rule, “prejudice” requires either “(1) Repeated conduct causing some harm to the administration of justice; or (2) A single act causing substantial harm to the administration of justice,” *id.* at 748 (emphasis in original). In this case, the accused did something that he should not have done, and it did affect Morris’ substantive interest. Although the conduct was not repeated, we conclude that the intentional misrepresentation to the court, resulting in the dismissal of the Morris case, caused substantial harm to the administration of justice. As noted in *Haws*, a single act causing substantial harm to the administration of justice may support a finding of a violation of DR 1-102(A)(4). See also *In re Smith*, 316 Or 55, 60, ___ P2d ___ (1993) (single instance of threatening a witness violated DR 1-102(A)(4)). We, therefore, agree with the Bar and conclude that the accused violated DR 1-102(A)(4).

The Bar also contends that the trial panel erred in finding the accused not guilty of violating DR 7-102(A)(5). That rule provides that, “[i]n the lawyer’s representation of a client * * *, a lawyer shall not * * * knowingly make a false statement of law or fact.” The Bar argues that the same facts that prove a violation of DR 1-102(A)(3) may also prove a violation of DR 7-102(A)(5). The accused knew that he lacked authority to settle the case. When he intentionally and falsely reported to the circuit court that the Morris case had been settled, he knowingly made a false statement of law or fact in violation of DR 7-102(A)(5). See *In re Hedrick*, 312 Or 442, 447, 822 P2d 1187 (1991) (a knowing misrepresentation in a probate petition was a knowingly false statement of law or fact in violation of DR 7-102(A)(5) as well as conduct involving dishonesty, fraud, deceit, or misrepresentation in violation of DR 1-102(A)(3)). We, therefore, conclude that the accused is guilty of violating DR 7-102(A)(5).

DR 6-101(B) provides that it is professional misconduct for a lawyer to neglect a legal matter. We find the accused guilty of neglect of a legal matter, in violation of DR 6-101(B). The accused agreed to file the action but failed to contact Morris' potential witnesses. See *In re Kissling*, 303 Or 638, 640, 740 P2d 179 (1987) (failure to interview witnesses and investigate claim constituted neglect of a legal matter). The Morris case later was dismissed due to a clerical error in the accused's office. See *In re Jones*, 312 Or 611, 614, 825 P2d 1365 (1991) (failure to appear on behalf of client may constitute violation of DR 6-101(B)); *In re Thies*, 305 Or 104, 110, 750 P2d 490 (1988) (allowing action to pend for one year and ten months and allowing case to be dismissed for lack of prosecution constituted neglect). When the case was reinstated and finally set for trial, the accused made no effort to determine if witnesses would be available. Moreover, throughout the entire course of his representation, the accused failed to keep Morris informed of the progress of the case, including failing to inform him of his potential liability on the counterclaim and for Foster's attorney fees. The accused's conduct violated DR 6-101(B).

DR 7-101(A)(2) provides that a lawyer shall not intentionally fail to carry out a contract of employment entered into with a client for professional services. The accused's handling of this case resulted in several delays in bringing the case to trial. Before his return from California, Morris made it clear to the accused and the accused's secretary that he did not wish his case to be dismissed. By the time Morris returned from California, the actions of the accused had resulted in the dismissal of the case. Although it appears that the accused's actions *were* intended to stop the harassment, it is clear that the accused failed to do what his client asked and what the accused had originally agreed to do.

This case is similar to *In re Boland*, 288 Or 133, 137, 602 P2d 1078 (1979). In that case, this court held that a lawyer's failure to appear, failure to inform the client that the case had been dismissed, failure to withdraw as counsel, and failure to advise the client of his intention not to pursue the case, so as to give the client a chance to obtain another lawyer, constituted intentional failure to carry out an employment contract.

It is clear from the accused's testimony that he decided early in his representation of Morris that the case should not go to trial. Morris, however, wanted his day in court. Throughout much of his representation, the accused and Morris seem to have been working at cross-purposes. The accused's conduct violated DR 7-101(A)(2).

B. *The Crosby Complaint: Former DR 5-105(A) to (C)* set forth the rules regarding conflicts of interest between former, current, and multiple clients. See note 10, *supra*. The rule makes it clear that a lawyer may represent multiple clients only (1) if it is obvious that the lawyer can adequately represent the interest of each; and (2) if each consents, after full disclosure of the possible effect of such representation on the lawyer's judgment.

In the accused's meetings with Newby and Crosby, it was clear that they disagreed about the issues of child custody and property division. The accused points out that he explained to Newby and Crosby that they needed to agree on matters or he could not represent them, and that he intended to act only as a scrivener to prepare the dissolution papers. That disclosure, however, falls far short of that required by former DR 5-105(C), *supra* note 10, which requires a *full* disclosure of the possible effect of multiple representation on the exercise of the lawyer's independent professional judgment on behalf of each client.

The accused did not ensure that the parties had a clear understanding and agreement on the all important questions of child custody and child support. Further, the accused did not disclose that his refusal to render legal advice as to the terms of the settlement had the possible effect of depriving one of the clients of his or her share of the marital assets. See *In re Thies, supra*, 305 Or at 110-11 (failure to inform co-petitioners in dissolution case that pension fund might be marital asset and failure to advise them of conflict of interest violated DR 5-105); *In re Boivin*, 271 Or 419, 424, 533 P2d 171 (1975) (disclosure must explain nature of conflict so clients can understand why it may be desirable for each to have independent counsel with undivided loyalty).

In situations requiring disclosure under former DR 5-105(C), it must be "obvious that the lawyer can adequately

represent the interest of each [client].” In this case, it is obvious that he could represent neither Newby or Crosby. In situations involving dissolution of marriage where the parties have minor children and jointly acquired assets, it may seldom be “obvious that the lawyer can adequately represent the interest of each” in a dissolution proceeding.¹³ The accused’s representation of both Newby and Crosby violated former DR 5-105(A) to (B).

The accused’s actions in representing Newby against Crosby in the slander of title action also constituted a conflict of interest under DR 5-105(C).¹⁴ Under that rule, absent full disclosure to both parties and both parties’ consent, a lawyer may not represent a current client against a former client on a significantly related matter. DR 5-105(C) to (D). The new rules codified this court’s holding in *In re Brandsness*, 299 Or 420, 429-33, 702 P2d 1098 (1985). A matter is “significantly related” if it would injure the former client regarding “any proceeding, claim, controversy, transaction, investigation, charge, accusation, arrest or other particular matter in which the lawyer previously represented the former client.” DR 5-105(C)(1).

In this case, Newby’s slander of title action arose in the context of Crosby’s attempt to enforce the provisions of the dissolution judgment that the accused had drafted, and involved the family home, one of the major assets awarded in that judgment. We conclude that the slander of title action was significantly related to the earlier dissolution proceedings and, therefore, in the absence of full disclosure and

¹³ The conflict of interest disciplinary rules have been significantly amended since this case arose. See current DR 5-105(A) to (F) (defining actual and likely conflicts of interest, and distinguishing former and current client representation).

Oregon Formal Ethics Opinion No. 1991-86 lists ten factors that must be present in order for a lawyer’s joint representation of parties in a marital dissolution to avoid an actual conflict of interest. Some of those factors include: that there be no minor children of the marriage; that the lawyer must independently conclude that the distribution of assets approximates what would probably be awarded at trial; that the lawyer must independently conclude that neither party would be justified in seeking support payments; and that full disclosure be made and consent obtained. Although that opinion is based on the new rules, and we are applying the old rules in the present case, we note that the present case does not appear to fit any of those requirements.

¹⁴ By the time the accused represented Newby in the slander of title case, the former version of DR 5-105 had been replaced. See note 11, *supra*.

Crosby's consent, the accused was prohibited from representing Newby against Crosby in the later action.¹⁵ See also *In re Trukositz*, 312 Or 621, 625-28, 825 P2d 1369 (1992) (under former rule, representation of husband in dissolution proceeding involving custody and paternity issues held improper where lawyer had represented both parties in earlier paternity matter involving child); *In re Brandsness, supra*, 299 Or at 426-27 (under former rule, representation of current client against former client prohibited where lawyer is in position adverse to former client and matter is significantly related to prior representation); *In re Jans*, 295 Or 289, 666 P2d 830 (1983) (under former rule, conflict arose where lawyer drafted agreement on behalf of both parties, and later filed action on behalf of one to enforce the agreement against the other).

SANCTION

We now turn to the question of what sanction is appropriate for the proven ethical misconduct. In that regard, we look to the American Bar Association "Standards for Imposing Lawyer Sanctions" (1986) (ABA Standards) and Oregon case law for guidance. *In re Trukositz, supra*, 312 Or at 633-34; see *In re Recker, supra*, 309 Or at 639 (illustrating the process). As noted, the trial panel imposed a sanction of suspension from the practice of law for six months.

ABA Standard 3.0 sets forth the following factors to be considered:

- "(1) the duty violated;
- "(2) the lawyer's mental state;
- "(3) the actual or potential injury caused by the lawyer's misconduct; and

¹⁵ DR 10-101(B) provides:

"(1) 'Full disclosure' means an explanation sufficient to apprise the recipient of the potential adverse impact on the recipient, of the matter to which the recipient is asked to consent.

"(2) As used in DR 5-101, DR 5-104, DR 5-105, DR 5-107, DR 5-109 or when a conflict of interest may be present in DR 4-101, 'full disclosure' shall also include a recommendation that the recipient seek independent legal advice to determine if consent should be given and shall be contemporaneously confirmed in writing."

The accused does not argue that he made any such disclosure before agreeing to represent Newby against Crosby.

“(4) the existence of aggravating or mitigating factors.”

In the present case, the accused violated duties owed to Morris, Newby, and Crosby, as well as duties owed to the court and the legal system.

The accused's actions caused actual injury to Morris, Newby, and Crosby.

The accused intentionally failed to inform Morris of the progress of his case and intentionally misinformed the court that the case was settled. He knowingly failed to carry out his contract of employment with Morris and was negligent in his handling of the Morris case. He settled Morris' case on terms that Morris did not approve of and did not agree to.

The accused intentionally brought an action against Crosby, knowing that she was a former client and that he had not obtained her consent to do so. Moreover, he failed to advise Newby and Crosby of his potential conflict of interest in representing both of them in their dissolution, and in failing to obtain their consent after full disclosure. Crosby failed to receive any significant legal advice in the dissolution proceeding, which appears to have resulted in an unequal distribution of the marital assets, and eventually led to the situation involving the lien on the house. Crosby's wishes concerning the custody and child support provisions of the dissolution judgment apparently were not respected. There was actual injury to Newby as well, as has been described above.

We next turn to the issue of aggravating and mitigating factors. First, as aggravating factors, we note that the accused has been suspended from the practice of law in the past. See *In re McKee*, 229 Or 67, 365 P2d 1063 (1961) (solicitation of employment). He also has received letters of admonition from the Bar in 1970, for seating an imposter at counsel table and thereby misleading the judge as to the identity of a defendant, and in 1980 for disbursing client trust funds contrary to an agreement with a creditor. ABA Standard 9.22(a). In his representation of Morris, Newby, and Crosby, the accused violated eight disciplinary rules. ABA Standard 9.22(d). The accused has failed to acknowledge the wrongful nature of his conduct in the Morris case, arguing

only that he obtained the best possible result for his client in that case. He also failed to acknowledge the wrongful nature of his conduct toward Crosby, arguing that her behavior, rather than his ethical lapses, caused the problem. ABA Standard 9.22(g). The accused has had substantial experience in the practice of law, having been admitted to practice in Oregon in 1954. ABA Standard 9.22(i).

Mitigating factors include the accused's apparent lack of a dishonest or selfish motive, ABA Standard 9.32(b); his character and reputation,¹⁶ ABA Standard 9.32(g); and the remoteness of the accused's earlier offenses, ABA Standard 9.32(m). Taking those factors into account, we proceed to analyze each of the violations in terms of appropriate sanctions.

ABA Standard 6.11 suggests that, in the absence of mitigating factors, disbarment is generally appropriate when a lawyer makes a willful misrepresentation or knowingly makes false statements in order to deceive a court. Because we find that there are mitigating factors here, we do not find that disbarment is the appropriate sanction for the accused's proven ethical violations.

ABA Standard 4.42 states that "[s]uspension is generally appropriate when (a) a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client, or (b) a lawyer engages in a pattern of neglect and causes injury or potential injury to a client." We find that suspension is an appropriate sanction for the accused's neglect and failure to carry out his contract of employment in the Morris case.

ABA Standard 4.32 states that "[s]uspension is generally appropriate when a lawyer knows of a conflict of interest and does not fully disclose to a client the possible effect of that conflict, and causes injury or potential injury to the client." It is clear that, when the accused knew that Newby and Crosby were not in agreement as to several important terms of their dissolution, he had knowledge of his conflict of interest. He did not disclose the possible effect of that conflict. Crosby and Newby were injured as a result of

¹⁶ More than a dozen judges, lawyers, and business persons either testified or wrote letters on behalf of the accused.

that conflict. ABA Standard 4.31(c) provides that disbarment may be appropriate when a lawyer

“represents a client in a matter substantially related to a matter in which the interests of a present or former client are materially adverse, *and* knowingly uses information relating to the representation of a client with the intent to benefit the lawyer or another, *and* causes serious or potentially serious injury to a client.” (Emphasis added.)

It is arguable that the accused’s conduct in later representing Newby against Crosby meets those criteria. We conclude, however, that, although the matters were substantially related and the interests involved were materially adverse, there is not clear and convincing evidence that the accused knowingly used information gained from Crosby during the dissolution proceedings with the intent to benefit Newby in his later slander of title action.

We conclude that the number and type of ethical violations proven and the aggravating factors presented in this case mandate that the accused be suspended from the practice of law for 18 months.

The accused is suspended from the practice of law for 18 months from the effective date of this decision.

PETERSON, J., concurring.

I agree with the majority opinion but write separately to venture the opinion that rarely, if ever, can a lawyer represent both spouses in a marital dissolution proceeding. DR 5-105(E) and (F) currently provide:

“(E) Except as provided in DR 5-105(F), a lawyer shall not represent multiple current clients in any matters when such representation would result in an actual or likely conflict.

“(F) A lawyer may represent multiple current clients in instances otherwise prohibited by DR 5-105(E) when such representation would not result in an actual conflict and when each client consents to the multiple representation after full disclosure.”¹

¹ The words “actual or” in DR 5-105(E) are surplusage in light of the prohibition of DR 5-105(F) against representing multiple clients with an *actual* conflict, even with “full disclosure.”

DR 10-101(B) defines "full disclosure" as follows:

"(1) 'Full disclosure' means an explanation sufficient to apprise the recipient of the potential adverse impact on the recipient, of the matter to which the recipient is asked to consent.

"(2) As used in DR 5-101, DR 5-104, DR 5-105, DR 5-107, DR 5-109, or when a conflict of interest may be present in DR 4-101, 'full disclosure' shall also include a recommendation that the recipient seek independent legal advice to determine if consent should be given and shall be contemporaneously confirmed in writing."

A "likely conflict," DR 5-105(A)(2), always is present between spouses in a marital dissolution proceeding. One reason, perhaps the main reason, for my concern about joint representation of spouses who want to dissolve their marriage is this: When the spouses meet with the lawyer, it is almost certain that one or the other will have some questions. Who is the lawyer *representing* in answering the question? The operative verb in DR 5-105(F) is "represent." The truth is, the lawyer cannot *represent* either spouse against the other. The lawyer cannot zealously represent either of them. Representation of both really means representation of neither. Multiple representation nearly extinguishes the lawyer's ability to exercise independent judgment.

The law, and the Disciplinary Rules, should be sensitive to the all too common situation in which neither spouse can afford *one* lawyer, much less two. Perhaps allowing the lawyer to "represent" both is preferable to having one spouse go unrepresented because, in most cases, things will go well and both sides will be satisfied with the result. I fear, however, that a compelled consequence of joint representation of both spouses is that neither spouse receives the minimum information necessary to make informed decisions.²

² Further on this subject, see *In re Jans*, 295 Or 289, 295 n 7, 666 P2d 830 (1983) (counseling restraint in representing both sides in amicable dissolution), and Moore, *Conflict of Interest in the Simultaneous Representation of Multiple Clients*, 61 Tex L Rev 211, 245-58, 286-87 (1982) (suggesting that permissibility of joint representation turns on whether lawyer "reasonably believes that each client is capable of giving informed and voluntary consent"). Other articles on this subject include: Crouch, *How to Handle Conflicts of Interest*, 9 Fam Advoc 4 (Winter 1987), and Young and Bienstock, *Every Lawyer's Danger Zone*, 6 Fam Advoc 8 (Fall 1983).

I note Oregon State Bar Formal Opinion No. 1991-86, which states:

Gillette, J., joins in this concurring opinion.

“At a minimum, the following factors must be present before it can be said that the proposed [joint] representation may not result in an actual conflict that would prohibit joint representation:

- “1. Both parties must agree that the marriage be dissolved;
- “2. There must be no minor children born or adopted during the term of the marriage, and the wife must not be pregnant;
- “3. The marital estate must not contain substantial assets of liabilities;
- “4. The parties must have fully agreed upon the disposition of all assets and liabilities prior to consulting the lawyer;
- “5. The lawyer must be in a position to conclude that each party has provided full disclosure of all assets, as is mandated by ORS 107.105(1)(f);
- “6. Based upon the lawyer’s independent professional judgment, the distribution of assets and liabilities agreed upon by the parties must be supported by law and must approximate what would probably be awarded should the parties proceed to trial;
- “7. The parties must agree that neither shall make support payments pursuant to ORS 107.105(1)(d), and the lawyer must independently conclude, after full consideration of relevant case law and the factors set forth in ORS 107.105(1)(d), that neither party would be justified in seeking such an award;
- “8. After a reasonable investigation of the facts, the lawyer must conclude that neither party would be justified in seeking any pendente lite or other interim order under ORS 107.095;
- “9. It must reasonably appear to the lawyer that both spouses are competent to handle their affairs and that neither spouse is acting under duress or undue domination by the other; and
- “10. As required by DR 5-105(A)(1) and Dr 10-101(B); the lawyer must make full disclosure of the potential for conflicts that exist between the spouses, and the spouses must consent.

“If all of the above factors are present, dual representation may be permissible. It should be emphasized, however, that in any particular case, there may also be disputes between the parties on other issues that could lead to the conclusion that dual representation is inappropriate. In addition, a situation in which dual representation is permissible at the outset may turn into one in which dual representation is impermissible.”

IN THE SUPREME COURT OF THE
STATE OF OREGON

In re Complaint as to the Conduct of
Jerry E. GASTINEAU,
Accused.

(OSB 89-35, 89-39, 89-82, 89-83,
90-76, 90-77, 90-126, 91-37;
SC S39713)

In Banc

Review of decision of the Trial Panel of the Disciplinary
Board.

Argued and submitted March 1, 1993.

Jerry E. Gastineau, Medford, argued the cause and filed
briefs *in propria persona*.

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

PER CURIAM

The accused is suspended from the practice of law for a
period of 12 months, commencing on the effective date of this
decision.

PER CURIAM

In this disciplinary proceeding, the accused is charged with collecting excessive fees, Disciplinary Rule (DR) 2-106(A); with incompetent or neglectful representation, DR 6-101(A) and DR 6-101(B); and with failure to carry out a contract of employment, DR 7-101(A)(2). The accused also is charged with failing to respond in a timely manner to the Oregon State Bar's requests for information concerning complaints made to the Bar by two of his former clients, DR 1-103(C).

On appeal, the accused contests the trial panel's findings that he charged or collected excessive fees in five instances. He also contests the trial panel's findings of failure to provide competent representation and of failure to perform a contract of employment.¹ He does not deny that he failed to respond in a timely manner to the Bar's inquiries. The accused seeks a lesser sanction than the one-year suspension assessed by the trial panel majority.² The Bar seeks disbarment. We suspend the accused for 12 months.

The Bar filed nine causes of complaint against the accused, involving eight clients. The complaints fall into four categories as indicated by the headings that follow.

EXCESSIVE FEE CASES

Five clients complained to the Bar that the accused had entered into "nonrefundable" fee contracts with them between August 1988 and September 1989, but that the accused did not complete the work undertaken by him in

¹ This court reviews disciplinary cases *de novo*. ORS 9.536(3); Rule of Procedure (BR) 10.6.

ORS 9.536 in part provides:

"(2) If the decision of the disciplinary board is to suspend *** for *** longer than 60 days or to disbar the accused attorney, the matter shall be reviewed by the Supreme Court.

"(3) *** [T]he court shall consider the matter *de novo* ***."

BR 10.6 is to a similar effect.

² Two members of the trial panel, which found the accused guilty of multiple violations of disciplinary rules, assessed a suspension for one year. The third member recommended that the accused "be suspended for one year *** [but that] all but three months *** be stayed *** [and] be placed on probation for one year *** [on the condition that he] complete professional office practice and management counseling."

return for payment made to him.³ The Bar charged the accused with collecting an excessive fee in all those cases with intentionally failing to carry out a contract of employment in some of them, and failing to provide competent representation in several of them.⁴ A summary of that contract follows.

The form of contract used by the accused in these cases calls for payment in advance and in full of a fixed-fee amount in return for the accused's promise thereafter to perform a stated professional task. The task involved is described only in brief general terms entered in handwriting in the printed form contract. The fee paid clearly is described as "nonrefundable." Under the contract's provisions, only the accused is given the option to terminate the employment contract, which he can do only for nonpayment by the client. In the contract, the "[c]lient agrees that if not paid, attorney may perform no further legal services until paid" and that the accused could "refuse to present any final decree or order" until paid. In none of the cases involved in this proceeding, however, does the accused seek to justify his failure to perform any of the agreed-upon services on the basis of nonpayment.

³ DR 2-106 in part provides:

"(A) A lawyer shall not enter into an agreement for, charge or collect an illegal or clearly excessive fee.

"(B) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:

"(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.

"(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

"(3) The fee customarily charged in the locality for similar legal services.

"(4) The amount involved and the results obtained.

"(5) The time limitations imposed by the client or by the circumstances.

"(6) The nature and length of the professional relationship with the client.

"(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.

"(8) Whether the fee is fixed or contingent."

⁴ DR 6-101(A) provides:

"A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

The printed contract provides that the "fees and costs set forth" in it "do not include representation on any other matters" except those stated in the handwritten parts of the contract. The contract of employment expressly does not apply to "post-trial motions or appeals of this case."

There is some inconsistency among provisions of the contract concerning payment of the "nonrefundable retainer." For example, the contract requires that the fee be paid in full before the accused will "act as attorney for client," but it also states that the retainer will be applied toward the fees and costs to be earned by the accused's performance. As detailed above, the contract contemplates both that the lawyer may terminate the relationship without finishing performance of the specified task if the lawyer is not paid and also that the nonrefundable retainer, specifically tailored to that task, will be paid in full in advance. The contract with each client includes a specific amount of professional time, stated in an exact number of hours, that the nonrefundable fee amount is agreed to cover and provides that the retainer "shall be applied toward the attorney fees and costs," and that hours "in excess of the time for which attorney is hereby retained * * * will be charged to client and billed in addition to the retainer." Billing is to be "monthly."

The last provisions are more common in a *minimum* fee contract covering work to be performed than they are to either a nonrefundable retainer paid as the price for the lawyer's initial acceptance of professional responsibility in the client's case under an agreement that none of the lawyer's services are paid for thereby, or a flat fee for whatever professional services are required with regard to a specific legal problem.⁵ Nonetheless, in all the matters before us involving the form contract, the accused treated the fee amount as a flat fee for the task described. No complaint before us involves a case in which the accused charged by the hour for any time beyond the stated amount that the initial

⁵ No inference should be drawn from the accused's difficulties in this case that these flat fee agreements are *per se* unethical or that any of the variations mentioned may be an impermissible method for establishing a fee. It is clear that the contract (and thus our decision) has nothing to do with contingent fee agreements. See generally Oregon Formal Ethics Opinion No. 1991-54 (relating to contingent fees). This case is only about a flat fee agreement for an individual case.

fee was agreed to cover, nor did the accused keep contemporaneous time records on any of these cases (or on his “nonrefundable contract” cases in general). The clients also treated the contract as one for a flat fee. Thus, the accused and his clients agreed on that interpretation of the contract. The stated fee was for the accused’s efforts — for the process of representation — not any hoped-for result.

Use of disciplinary rules to regulate the amount of lawyers’ fees is a relatively new development. For many years, the standard applied to determine prohibited excessiveness of fees was taken from equitable concepts for contracts. *See In re Complaint Oren R. Richards*, 202 Or 262, 264, 274 P2d 797 (1954) (lawyer disciplined for charging “unconscionable and exorbitant fee”). The American Bar Association promulgated its Model Code of Professional Conduct in 1969. Oregon adopted DR 2-106 from that code in 1970.

The accused first argues that there can be no excessive fee violation under DR 2-106, where the fees were reasonable *at the time that the initial agreements were entered into*. The Bar’s response stresses that the fees *became* clearly excessive due to the accused’s non-performance in the cases. The dispute in this case, then, is over *when* a fee may be viewed as clearly excessive where the accused fails to perform the services for which the fee was paid.⁶ The Bar has the better of that argument.

A close examination of the text and context of the excessive-fee rule demonstrates that a lawyer may violate DR 2-106(A) by failing to refund an unearned fee under certain circumstances even though the initial advance payment was not unreasonable for the task that a lawyer was to perform in the future. DR 2-106(A) provides that “[a] lawyer shall not enter into an agreement for, charge or collect an illegal or clearly excessive fee.” (Emphasis added.) The disjunctive use

⁶ *E.g., Arens v. Committee on Professional Conduct*, 307 Ark 308, 820 SW2d 263 (1991), which holds that a \$60,000 nonrefundable fee, although not unreasonable at the time the agreement was entered, constituted an excessive fee when the lawyers involved failed to carry out the agreement. *See also People v. Franks*, 791 P2d 1 (Colo 1990) (lawyer who charged client nonrefundable fee two weeks before the lawyer intended to move to Ireland and who refused to refund the unearned portion is guilty of charging “a clearly excessive fee”).

of the word "collect" means that the excessiveness of the fee may be determined after the services have been rendered, as well as at the time the employment began. Also telling in the interpretation of the scope of the rule is the fact that one factor for determining the appropriateness of the amount of a fee, stated in DR 2-106(B)(4), requires consideration of "the results obtained." That wording, at least, suggests that the work for which the fee was agreed has been completed.

This interpretation is consistent with *In re Thomas*, 294 Or 505, 526, 659 P2d 960 (1983), where the court stated: "It would appear that any fee that is collected for services that is not earned is clearly excessive regardless of the amount." Moreover, Legal Ethics Opinions No. 509 (1986), which served as a guideline during the period of time that the excessive fee charges against the accused arose, stated:

"Assuming the [nonrefundable] fee fixed by Law Firm [initially] is not clearly excessive, Law Firm does not violate DR 2-106(A) by entering into the agreement. However, DR 2-106(A) also provides that a lawyer shall not 'charge or collect' a clearly excessive fee. Law Firm may therefore have an ethical duty to refund a portion of the fixed fee if it turns out to be clearly excessive *in light of the work actually done.*" (Emphasis added.)⁷

We conclude that a lawyer violates DR 2-106(A) when he or she collects a nonrefundable fee, does not perform or complete the professional representation for which the fee was paid, but fails promptly to remit the unearned portion of the fee. In this case, the accused expected the clients to live up to the letter of the contract whether or not he performed the agreed services that his part of the contract promised. He acted in accordance with that interpretation of the contract. The accused himself set the amount of the fee in relation to the work to be done. The fees, being for work that the accused never performed, were clearly excessive.

⁷ Although none of our cases specifically discuss the question in the context of a nonrefundable fee agreement, this court has decided in other cases that fees were "clearly excessive" under DR 2-106. The violations in those cases, however, were found to be due to dishonesty or padding of the time billed. See *In re Miller*, 303 Or 253, 257, 735 P2d 591 (1987) (DR 2-106(A) violated where lawyer charged for more time than actually spent); *In re Potts/Trammel/Hannon*, 301 Or 57, 73-74, 718 P2d 1363 (1986) (revising bill upward in anticipation of litigation rather than in line with actual time spent violates DR 2-106(A)). There is no claim here that the accused's fees initially were set dishonestly.

In the accused's second argument to support the proposition that his fees were not excessive in the five cases, he states as follows: "The mere fact that the 'nonrefundable' fee *may result* in a fee *in excess* of a reasonable hourly fee does not in itself make them unethical either." (Emphasis added.) We do not disagree, but that argument is nonetheless beside the point. We are not dealing here with the issue whether the amount of the fee initially agreed to was excessive for the future work contemplated. None of the fees in the excessive-fee complaints in this case was clearly and convincingly excessive for the tasks that the accused agreed to perform; they became clearly excessive when he failed to perform as he agreed. Nor are we dealing with a situation where a lawyer agrees to take a number of cases from one source with a flat fee charge per case, although some cases take but a short time to complete, while others may take substantially longer.

The accused further contends that a fee cannot become excessive only because later representation is "incompetent." The accused also points to the good results in one case, albeit results that were obtained, finally, by another lawyer. We do not agree that those arguments have relevance in this case. It was the accused's failure to do the agreed work that created the clear excessiveness of the fee. Although incompetence may be a reason why one fails to do the work, it is the lack of agreed effort that causes the excessive fee violation.

In each of the cases in which the accused set a specific fee for specific work and collected the fee for it, but failed to perform that work, the accused is guilty of violating DR 2-106(A) by "collecting" a clearly excessive fee.

One cause of complaint in this case is a bit different, but still results in a finding of a violation of DR 2-106(A). In that case, which involved access to a driveway, the accused did continue to perform until the clients terminated his services for lack of beneficial results. However, the accused already had been paid a flat fee to secure the driveway access when he exacted a second nonrefundable fee for a court hearing on a temporary restraining order related to that matter. Therefore, the second fee was a clearly excessive fee, because the accused already had been paid for the work and had not, in

any event, expended any time in excess of the time stated in the contract.

INTENTIONAL FAILURE TO PERFORM

There were two causes of complaint based on failure to perform a contract of employment. In the driveway access cause of complaint, the trial panel found the accused not guilty of intentionally failing to carry out a contract of employment, DR 7-101(A)(2).⁸ We agree. Another lawyer in the accused's office appeared at the court hearing when the accused was unavoidably delayed by unseasonably bad weather in Central Oregon. The hearing did not go well, because a piece of documentary evidence that was important to the accused's client lacked a certification thought necessary to its admissibility in evidence. The hearing resulted in a temporary restraining order being entered against the clients. That poor result does not clearly and convincingly prove that the accused intentionally failed to carry out his contract of employment. Although ultimately ineffectual, his efforts were substantial. In any event, poor results alone neither make a fee excessive nor demonstrate an intent not to perform the agreed work. In another case, one to establish a guardianship, the evidence does not clearly convince us of the intentional nature of the failure to complete the guardianship.

INCOMPETENCE AND NEGLIGENCE

The question whether a lawyer has competently represented a client is, of course, a fact-specific inquiry.⁹ A review of this court's cases shows that incompetence often is found where there is a lack of basic knowledge or preparation, or a combination of those factors. *See, e.g., In re Spies*, 316 Or 530, 534, 852 P2d 831 (1993) (accused found incompetent for

⁸ DR 7-101(A)(2) provides:

"A lawyer shall not intentionally:

"* * * * *

"(2) Fail to carry out a contract of employment entered into with a client for professional services but the lawyer may withdraw as permitted under DR 2-110, DR 5-102 and DR 5-105."

⁹ DR 6-101(A), requiring competent representation and listing its components, is set out in note 4, *supra*.

representing a client “in a matter outside her area of expertise without acquiring adequate knowledge or skill”); *In re Odman*, 297 Or 744, 750, 687 P2d 153 (1984) (accused found incompetent where facts showed improper and late filings of estate documents; “accused did not know basic steps in administering and closing decedent’s insolvent estate”); *In re Chambers*, 292 Or 670, 678, 642 P2d 286 (1982) (accused guilty of incompetent representation where record showed accused “tried the criminal case ‘by the seat of his pants’ ”).

In contrast, lawyers have been found not guilty of providing incompetent representation where the lawyers showed experience and professional ability to perform work, *In re Walker*, 293 Or 297, 647 P2d 468 (1982), or where the Bar failed to prove that a position taken by the lawyer was “advanced in pretense or bad faith, or in culpable ignorance,” *In re Rudie*, 290 Or 471, 622 P2d 1098 (1981). In sum, competence or incompetence can best be measured on a case-by-case basis using the standard stated in DR 6-101(A) itself.

In one of the cases of alleged incompetent representation now before us, a client came to the accused seeking a rapid incorporation of a family business so that the business could, as a corporation, bid on a government contract. The client told the accused that there was a deadline in the very near future for making that bid. The accused did not review the proposed articles of incorporation that his staff prepared before the articles were submitted to the proper state official. He did not ensure that the amount of filing and other incorporation and registered agent fees that were required by law accompanied the proposed articles when they were mailed to the state official. The filing was rejected for deficiencies in both the information presented and the amount of filing fee tendered.¹⁰

A violation of the competent representation rule, DR 6-101(A) (set out in note 4, *supra*), was proved in this incorporation matter. *See, e.g., In re Spies, supra*, 316 Or at 534 (previously stated); *In re Odman, supra*, 297 Or at 744 (previously stated).

¹⁰ The record does not make clear whether the client suffered any monetary loss due to these errors by the accused.

In another alleged neglect case, the accused collected no fee for the work that the client expected him to do but that he did not do with respect to a small claims matter.¹¹ We are satisfied by clear and convincing evidence that the accused failed to perform the work expected and that his client suffered a default judgment as a result. The accused violated DR 6-101(B).¹²

Another cause of complaint concerns representing a juvenile charged with first degree manslaughter in juvenile court in October 1988. It is a closer call.

A deputy district attorney who prosecuted the case complained of incompetent and neglectful representation by the accused. There is credible evidence that the accused was not thorough in representing the juvenile, but there is not clear and convincing evidence of neglect or incompetent representation. The trial panel reasoned that the fact that a good result was obtained means that the accused did not neglect a legal matter, under DR 6-101(B), or provide incompetent representation under DR 6-101(A). That factor — the result obtained — is related to whether the amount of a fee is excessive, not necessarily to whether a legal matter has been neglected. If a lawyer does a poor job, but the client fortuitously or through the efforts of others obtains a good result, that does not excuse the lawyer from providing competent representation or justify neglecting the case. However, in this cause of complaint, there is enough evidence that the accused identified the most desirable disposition for his client and deliberately was using the tactic of not getting in the way of a good result to prevent this court's finding by clear and convincing evidence that the accused should have done more. We find the accused not guilty as to that cause of complaint. The accused is guilty of the other charges of neglecting legal matters.

FAILURE TO RESPOND

The accused does not deny that he failed to respond in a timely manner to the Bar's written inquiry about two of

¹¹ ORS 46.415(4) prohibits a lawyer from representing any party in a case before the small claims department of a district court without the consent of the court. A party may remove the case to the regular district or circuit court upon payment of added fees mentioned in ORS 46.455(2)(c) or ORS 46.461.

¹² DR 6-101(B) provides:

“A lawyer shall not neglect a legal matter entrusted to the lawyer.”

the eight client complaints, thereby violating DR 1-103(C).¹³ In both instances, the Bar received no response until many months after the initial inquiry.

The accused is guilty of both charges of failure to respond in a timely manner to the Bar's inquiries.

SANCTION

In imposing a sanction after finding misconduct, this court considers the following factors: the duty violated, the accompanying mental state of the accused, and the potential or actual injury caused. Factors in aggravation or mitigation also are assessed in determining an appropriate sanction.

The accused's failure to complete work and his doing other work that was not suited to achieving the goals for which the clients hired him violated duties of diligence and of employing professional abilities on behalf of his clients. His failure to communicate effectively with clients violates a duty owed to the Bar to uphold the reputation of the profession. His failure to respond promptly to the Bar's inquiries about client complaints also violates that duty, as well as the duty owed to his profession to respond to inquiries about professional conduct.

The accused's state of mind *at the time that he violated* the excessive fee prohibition is debatable. However, at some point, he clearly had "knowledge" that the tasks for which he had been paid were not completed. Additionally, in one failure-to-respond case, we find that the accused intentionally violated DR 1-103(C), because of the length of time from the Bar's request for information about a client complaint until the accused responded.

There was potential for harm to any client who paid for work that was not done. The client against whom the small claims judgment was entered suffered actual harm from the accused's failure to be sure that the small claims case was not lost, even though she did not take steps available to her to mitigate that harm.

¹³ DR 1-103(C) provides in part:

"A lawyer who is the subject of a disciplinary investigation shall respond fully and truthfully to inquiries from * * * authority empowered to investigate or act upon the conduct of lawyers * * *."

The ABA Standards for Imposing Lawyer Sanctions (1991) (ABA Standards) do not speak expressly to choice of sanction level where, as in this case, the most prevalent disciplinary violation occurs by way of a lawyer's collecting fees that have become excessive because of failure to perform the agreed professional work. Whether that category of misconduct is classified with failure to preserve the client's property, ABA Standards 4.1-4.14; with violations of duties owed the profession, ABA Standards 7.1-7.2; or with lack of diligence, ABA Standards 4.4-4.3, suspension is appropriate rather than reprimand or disbarment. We conclude that suspension is appropriate and apply mitigation and aggravation factors to the question of appropriate length of that sanction.

MITIGATION¹⁴

Clients' complaints about the accused's handling of their cases arose from matters that he undertook between August 1988 and the fall of 1989.¹⁵ In only two cases did the accused's failures to act as the clients expected extend beyond that time. He failed to prevent a small claims judgment from being taken by default against a client in January 1990, and an issue concerning unused client funds from 1989 was not initially complained about until January 1991, or fully resolved until April 1991.

During the period of delay in the present disciplinary proceedings, the accused continued to practice, apparently without additional complaints. The trial panel listed other mitigation, appropriately, as follows:

¹⁴ The ABA Standards are used by this court as a guide. ABA Standard 9.32 in part provides that:

"Mitigating factors include:

"* * * * *

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

"(c) personal or emotional problems;

"* * * * *

"(i) delay in disciplinary proceedings;

"(j) interim rehabilitation;

"(k) imposition of other penalties or sanctions."

¹⁵ During that period the accused's staff testified that he had approximately 300 client files open.

“The Trial Panel finds there are factors in mitigation * * * [consisting of] personal or emotional problems, physical disability or impairment and to some extent an apparent attempt at rehabilitation of his office procedures and staffing.”

ABA Standard 9.3, remoteness of prior offenses, applies. In 19 years of practice, the accused's disciplinary record consists of a private admonition, related to the first dissolution case that he handled shortly after entering practice.

AGGRAVATION

The accused persisted in his failure to respond promptly by supplying full information to the Bar about the clients' complaints. The accused contends that his lengthy failure to respond to a Bar request for information about a client's complaint did not prejudice the Bar. That is beside the point. The rule requires compliance, *i.e.*, a response within 21 days. *In re Haws*, 310 Or 744, 751, 801 P2d 818 (1990). Moreover, the Bar was prejudiced. The Bar had to investigate in a more time-consuming way, and the public respect for the Bar was diminished because the Bar could not provide a timely and informed response to the clients' complaints. The accused was an experienced practitioner. ABA Standard 9.22(i). There are multiple offenses, ABA Standard 9.22(c), involving 7 out of the 300 client files that the accused had open during the relevant time period.

The ABA Standards do not speak directly to length of a suspension, where that sanction is appropriate. Our cases on excessive fees include a one-year suspension where there was an excessive fee in violation of a specific statute limiting the amount of fees chargeable in that sort of case, neglect of a legal matter by inadequate preparation, and misrepresentations including the lawyer's improper endorsement of a client's name on a check. *In re Sassor*, 299 Or 570, 577, 704 P2d 506 (1985). On the other end of the scale among our excessive-fee cases is a reprimand of lawyers who violated that rule and one other rule but without any dishonesty or misrepresentations. *In re Potts/Trammel/Hannon, supra*. Given the risks created by the accused's neglect of client interests, the lack of thoroughness and preparation in the

incorporation matter, and the number of excessive-fee violations based on failure to perform the agreed work, a significant suspension is appropriate.

The accused is suspended from the practice of law for a period of 12 months, commencing on the effective date of this decision.

IN THE SUPREME COURT OF THE
STATE OF OREGON

In re Complaint as to the Conduct of
DARRELL DUANE SMITH,
Accused.

(OSB 91-83; SC S39663)

In Banc

Review of decision of the Trial Panel of the Disciplinary
Board.

Argued and submitted August 31, 1993.

Darrell D. Smith, Springfield, argued the cause and filed
the briefs *in propria persona*.

Jeffrey D. Sapiro, Disciplinary Counsel, Lake Oswego,
argued the cause for the Oregon State Bar. Lia Saroyan,
Assistant Disciplinary Counsel, filed the brief.

PER CURIAM

The accused is reprimanded.

PER CURIAM

In this lawyer disciplinary proceeding, the accused is charged with violating DR 7-104(A)(1)¹ by communicating with a person whom the accused knew to be represented by a lawyer (here, the president of a corporation), during the course of litigation between that corporation and the accused. The accused seeks review of the trial panel's conclusion that he, as an inactive member of the Oregon State Bar who was representing himself, is subject to the Code of Professional Responsibility and to Supreme Court disciplinary jurisdiction. The accused also seeks review of the trial panel's finding that the accused violated DR 7-104(A)(1).

We conclude that an inactive member of the Bar representing himself or herself is subject to the Code of Professional Responsibility and to the disciplinary jurisdiction of this court. On *de novo* review, ORS 9.536(3), we find that the accused violated DR 7-104(A)(1) and reprimand the accused.

The material facts are not in dispute. The accused was admitted to practice law in Oregon in 1972. At his request, the accused became an inactive member of the Bar in January 1989. In June 1989, the accused filed an action in the District Court for Lane County against a firm named Custom Micro, Inc. (Custom Micro), asserting claims resulting from his purchase of personal computer equipment from Custom Micro.² Custom Micro was represented by a lawyer throughout the proceeding,

¹ In February 1991, at the time of the conduct giving rise to this proceeding, DR 7-104 provided, in part:

“(A) 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.”

DR 7-104(A)(1) was amended in December 1991 to allow communication with a represented person if a written agreement requires that a written notice or a demand be sent to the represented person, so long as a copy of the notice or demand is sent to the represented person’s lawyer.

² The accused represented himself in that litigation pursuant to ORS 9.320, which provides, in part: “Any action, suit, or proceeding may be prosecuted or defended by a party in person.”

and the accused was aware of the lawyer's representation of Custom Micro. The accused lost the case in the trial court and appealed.

In February 1991, while awaiting the outcome of the appeal, the accused wrote a letter to the President of Custom Micro, urging him to settle the matter. The accused also sent a copy of that letter to Custom Micro's lawyer. The letter said, in part, "I sense you are being directed by an attorney motivated more by an eye to his own financial gain than any reasonable or realistic appraisal of his chances of ultimately prevailing." The letter also said that "you don't have a ghost of a chance of prevailing." The accused ended the letter with the statement, "I am prepared to continue with this farce as long as you are willing to finance [your lawyer]."

As a result of writing the letter to Custom Micro, the accused was charged with communicating with a person whom the accused knew to be represented by a lawyer about the subject of the representation. DR 7-104(A)(1). The accused contends that the Bar and this court do not have jurisdiction to discipline him and that the rules of professional conduct did not apply to him because, as an inactive member of the Bar at the time that he sent the letter, he was ineligible to practice law.

The accused argues that the term "member," as used in ORS 9.527 and 9.490, which are central to the first issue in this case, refers to only an *active* member of the Bar. We disagree. ORS 9.490 makes the rules of professional responsibility binding upon members of the Bar,³ and ORS 9.527 gives this court the authority to discipline Bar members.⁴ In interpreting those statutes, it is this court's task to ascertain what the legislature intended by its use of the word "member." *PGE v. Bureau of Labor and Industries*, 317 Or

³ ORS 9.490 provides:

"The board of governors, with the approval of the state bar given at any regular or special meeting, shall formulate rules of professional conduct, and when such rules are adopted by the Supreme Court, shall have power to enforce the same. Such rules shall be binding upon all members of the bar."

⁴ ORS 9.527(7) provides, in part: "The Supreme Court may disbar, suspend or reprimand a member of the bar whenever * * * it appears to the court that * * * [t]he member has violated any of the provisions of the rules of professional conduct."

606, 610, ___ P2d ___ (1993) (citations omitted) (“In interpreting a statute, the court’s task is to discern the intent of the legislature.”).

In *PGE*, this court held that it would first consider the text and context of a statute in determining legislative intent. 317 Or at 611. “If the legislature’s intent is clear from the [inquiry into text and context], further inquiry is unnecessary.” *Id.* As discussed below, this is a case where the text and context of the statutes at issue, informed by rules of construction that bear on how to interpret the provisions in context, make clear the legislature’s intent and no further inquiry is necessary. The text and context of ORS 9.490 and 9.527 show that the legislature intended the term “member” to include all members of the Bar, active and inactive.

ORS 9.180 creates two classifications of members of the Bar, active members and inactive members. ORS 9.180 provides:

“All persons admitted to practice law in this state thereby shall become active members of the bar. Every member shall be an active member unless, at the member’s request, or for reasons prescribed by statute, the rules of the Supreme Court, or the rules of procedure, the member is enrolled as an inactive member. An inactive member may, on compliance with the rules of the Supreme Court and the rules of procedure and payment of all required fees, again become an active member. Inactive members shall not hold office or vote, but they shall have such other privileges as the board may provide.”

Throughout ORS chapter 9, the legislature expressly distinguishes between active and inactive members of the Bar where necessary. *See* ORS 9.160 (only active members may practice law); ORS 9.191(3) (Board of Governors may consider active or inactive status in setting membership fees); ORS 9.200(1) and (2) (all members who are delinquent in paying membership fees may be suspended; active members who are delinquent in paying fees may not vote); ORS 9.210 (two members of Board of Bar Examiners must not be either active or inactive members). By contrast, ORS 9.490 and 9.527 refer simply to “member” or “members.”

“Ordinarily, when the legislature includes an express provision in one statute but omits such a provision in

another statute, it may be inferred that such an omission was deliberate.' " *Emerald PUD v. PP&L*, 302 Or 256, 269, 729 P2d 552 (1986) (quoting *Oregon Business Planning Council v. LCDC*, 290 Or 741, 749, 626 P2d 350 (1981)) (holding that, if the legislature intended to include charters of municipalities in hydroelectric facility takeover statute, it would have done so expressly as it had on other occasions). In ORS chapter 9, the legislature has made clear when it intends to distinguish between active and inactive members of the Bar; it made no such distinction in ORS 9.527 or 9.490. Those statutes apply to all members of the Bar, active and inactive.

Further, ORS 9.261(1) concerns the resignation of lawyers from the Bar. It provides, in part:

"An attorney may resign from membership in the bar * * *. After acceptance of the resignation by the Supreme Court, the attorney shall not be entitled to the rights *nor subject to the disabilities or prohibitions incident to membership*, except that the attorney is still subject to the power of the court in respect to matters arising prior to the resignation." (Emphasis added.)

ORS 9.261(1) establishes that the Code of Professional Responsibility and other rules of conduct do not apply to the conduct of a lawyer after the lawyer resigns from the Bar. ORS 9.180 makes no similar statement in respect of inactive members of the Bar. The legislature could have exempted inactive members from the "disabilities or prohibitions incident to membership," but it did not. The accused chose to remain a member of the Bar, albeit inactive. With the benefits of membership come the obligations of the Code of Professional Responsibility.

The same proposition is supported by precedent. This court has held that a member of the Bar who has been suspended for violating a disciplinary rule — and who is, therefore, ineligible to practice law — nonetheless is subject to the disciplinary rules and to the disciplinary jurisdiction of the Bar and of this court during the period of suspension. *In re Hereford*, 306 Or 69, 74, 756 P2d 30 (1988). In that case, Hereford was disciplined for, among other things, not cooperating with a Bar investigation after his initial suspension. *Id.* This court held that the disciplinary rule at issue was "applicable to the accused even as to those events occurring after

suspension.” *Id.* We conclude that the accused’s status as an inactive lawyer is analogous to that of a lawyer who temporarily is suspended from practice. As with a suspended lawyer, an inactive member of the Bar is subject to the disciplinary rules and to the jurisdiction of the Bar and this court.

This calculus is not altered by the fact that the accused was representing himself pursuant to ORS 9.320. Although DR 7-104(A)(1) begins with the proviso, “[d]uring the course of the lawyer’s representation of a client,” it expressly provides that the prohibition on communication with a person represented by counsel “includes a lawyer representing the lawyer’s own interests.” The accused does not dispute that he was representing his own interests in the litigation against Custom Micro. Once it is resolved that the disciplinary rules apply to inactive members, DR 7-104(A)(1), on its face, applies to lawyers who are representing themselves.⁵

The accused communicated with Custom Micro, which he knew was represented by a lawyer, about the matter for which Custom Micro was represented. We find by clear and convincing evidence that the accused violated DR 7-104(A)(1).⁶ The only issue remaining is the sanction.

⁵ The accused cites *In re Mettler*, 305 Or 12, 748 P2d 1010 (1988), and *In re Brown*, 298 Or 285, 692 P2d 107 (1984), presumably for the proposition that DR 7-104(A)(1) should not apply to a lawyer representing himself or herself in a proceeding. Those cases are not helpful in the disposition of this case. *In re Mettler* involved a situation in which the lawyer represented neither himself nor a client. 305 Or at 17, 20. This court found that *Mettler* was not representing his own interests, and it pursued its analysis on that basis. *Id.* at 17 n 7.

Neither does *In re Brown* help the accused. The court read the phrase “representation of a client” in DR 7-102 to exclude a lawyer representing his or her own interests. 298 Or at 294-95. However, *In re Brown* no longer is useful in interpreting DR 7-102. See *In re Glass*, 309 Or 218, 223, 784 P2d 1094 (1990) (holding that, under DR 7-102, “representation of a client” included a lawyer representing his own interests). In addition, DR 7-102 was amended effective January 1991, to add the phrase, “or in representing the lawyer’s own interests.” At the time the accused wrote the letter at issue, both DR 7-102 and DR 7-104 expressly applied to the conduct of a lawyer representing the lawyer’s own interests.

⁶ The trial panel found:

“It is clear that the letter directed to the defendant [in the underlying dispute] was sent at a time when the accused was fully aware that the defendant was represented by [a lawyer]. This is a direct violation of the disciplinary rule, if it applies to lawyers on in active [sic] status.”

The accused reminds this court that he sent a copy of the letter to Custom Micro’s lawyer. A lawyer, however, may not avoid responsibility under DR

In determining the appropriate sanction for a violation of the Code of Professional Responsibility, this court uses for guidance the American Bar Association's Standards for Imposing Lawyer Sanctions (1986) (ABA Standards). *In re Busby*, 317 Or 213, 217, 855 P2d 156 (1993). Under the ABA Standards, there are four factors to be considered in imposing sanctions: "(a) the duty violated; (b) the lawyer's mental state; (c) the potential or actual injury caused by the lawyer's misconduct; and (d) the existence of aggravating or mitigating factors." ABA Standard 3.0.

We have considered the ABA Standards and conclude that the trial panel appropriately reprimanded the accused. In addition, it is consonant with precedent to reprimand a lawyer who communicated with a person whom the lawyer knew to be represented. *See, e.g., In re McCaffrey*, 275 Or 23, 28, 549 P2d 666 (1976) (reprimand for violation of DR 7-104(A)(1)); *In re Peter A. Schwabe, Sr.*, 242 Or 169, 175-76, 408 P2d 922 (1965) (reprimand for violation of predecessor to DR 7-104(A)(1)); *In re Eugene C. Venn*, 235 Or 73, 74, 383 P2d 774 (1963) (same).⁷

The accused is reprimanded.

7-104(A)(1) by sending a copy of the impermissible communication to the represented person's lawyer. *In re Hedrick*, 312 Or 442, 449, 822 P2d 1187 (1991). As this court held in *Hedrick*: "A lawyer is not permitted to ignore the plain words of the rule and then escape responsibility * * * because counsel for the party receiving the communication was alerted that it had been made." *Id.*

⁷ This court imposed a 60-day suspension in *In re Lewelling*, 296 Or 702, 678 P2d 1229 (1984), because the accused communicated with a person whom he knew to be represented, and he threatened to bring criminal charges in order to gain an advantage in a civil matter. *Id.* at 707. This court qualified that sanction, however, by saying that, in the circumstances of that case, "[c]ommunicating with a person the lawyer knows to be represented does not involve dishonesty or a breach of trust and if that were the only charge here we would impose only a public reprimand." *Id.*

IN THE SUPREME COURT OF THE
STATE OF OREGON

In re Complaint as to the Conduct of
Rodney Randall TAYLOR,
Accused.

(OSB 89-71; SC S37525)

In Banc

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

Submitted on the record March 5, 1993.

PER CURIAM

The accused is disbarred.

PER CURIAM

A trial panel of the Oregon State Bar Disciplinary Board found the accused guilty of numerous violations of the disciplinary rules governing lawyers and decided that he should be disbarred. This matter is here on *de novo* review, ORS 9.536(2) and (3), and is submitted on the record without briefing or oral argument, pursuant to ORAP 11.25(3)(B).

The Bar's complaint contains six charges of misconduct. Our findings follow.

The first two charges are that the accused has been convicted of several crimes and that he should be disciplined under DR 1-102(A)(2)¹ and ORS 9.527(2).² The accused has been convicted in federal court of two felonies involving drugs: possession with intent to distribute marijuana; and conspiracy to manufacture, possess, and distribute marijuana, 21 USC §§ 841(a)(1) and 846. The accused also has been convicted of violating 26 USC § 7201 ("attempt[ing] to evade or defeat a tax" by not filing an income tax return), a felony.³

Neither drug conviction was simply a conviction for possession of a controlled substance. One conviction was for conspiracy to manufacture, possess, and distribute marijuana. One was for possession with intent to distribute marijuana. Trafficking in controlled substances is a serious crime. See *In re Jaffee*, 311 Or 159, 164, 806 P2d 685 (1991) (out-of-

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 ORS 9.527(2) provides:

"The Supreme Court may disbar, suspend or reprimand a member of the bar whenever, upon proper proceedings for that purpose, it appears to the court that:

"* * * * *

"(2) The member has been convicted in any jurisdiction of an offense which is a misdemeanor involving moral turpitude or a felony under the laws of this state, or is punishable by death or imprisonment under the laws of the United States * * *."

³ The accused was suspended from the practice of law on November 6, 1990, pursuant to BR 3.4(d).

state lawyer who passed Oregon bar examination refused admission because he had been convicted of a felony, manufacturing a controlled substance, marijuana). The failure to file an income tax return was an attempt to evade or defeat a tax by not filing a tax return. The three convictions establish criminal conduct that reflects adversely on the accused's honesty, trustworthiness, and fitness to practice law. DR 1-102(A)(2).

The third, fourth, and fifth charges are that the accused misappropriated funds from several decedents' estates. We find that the accused intentionally took \$3,824 from one estate, \$3,400 from another, and \$8,818 from a third, in violation of DR 1-102(A)(3)⁴ and DR 9-101(B)(3).⁵

The sixth charge is that the accused failed to cooperate in the bar's investigation of his alleged wrongdoing by not signing a power of attorney to allow the Internal Revenue Service to disclose certain information, in violation of DR 1-103(C).⁶ The accused refused to sign a power of attorney. This was necessary to assist the Lane County Local Professional Responsibility Committee in its investigation of the accused's conduct. The accused never asserted any right or privilege to justify his failure to respond to the committee's request for the power of attorney. We find that the accused intentionally violated DR 1-103(C).

⁴ DR 1-102(A)(3) provides:

"It is professional misconduct for a lawyer to:

"* * * * *

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

⁵ DR 9-101(B)(3) provides:

"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."

⁶ 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."

SANCTION

In recent years, we have looked to the American Bar Association Standards for Imposing Lawyer Sanctions (1986) (ABA Standards) in determining what sanction is appropriate in bar disciplinary proceedings. ABA Standard 5.11 states that disbarment generally is appropriate when a lawyer engages in the "sale, distribution or importation of controlled substances." ABA Standard 4.1 states that disbarment generally is appropriate "when a lawyer knowingly converts client property and causes injury or potential injury to a client." The accused's acts were intentional. The estates suffered financial loss.

There is but one mitigating factor, the absence of a prior disciplinary record.

Even apart from his conviction for income tax evasion, it is clear that disbarment is the appropriate sanction.

The accused is disbarred.

IN THE SUPREME COURT OF THE
STATE OF OREGON

In re Complaint as to the Conduct of
Diane W. SPIES,
Accused.

(OSB 89-57; 90-90; 90-117; 90-118;
91-38; 91-176; 91-177; SC S38996)

In Banc

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

Submitted on the record January 26, 1993, without brief-
ing or oral argument.

PER CURIAM

The accused is disbarred.

PER CURIAM

In this disciplinary case, we review *de novo* the decision of a trial panel of the Disciplinary Board to disbar the accused. ORS 9.536;¹ BR 10.6.²

Over a two-year period beginning in the fall of 1989, numerous complaints were filed with the Oregon State Bar regarding the conduct of the accused, an experienced land use lawyer with no prior disciplinary record. Several complaints were lodged by clients, two by judges, one by opposing counsel, and one by the State Lawyers Assistance Committee (SLAC).

The accused repeatedly met the Bar's attempts to investigate the accusations leveled by her clients and colleagues with empty promises of cooperation and elaborate, evasive maneuvers. The SLAC approached the accused about the possibility that the misconduct alleged in the complaints was related to an alcohol abuse problem, but she denied that possibility and consistently resisted evaluation or assistance. Finally, the Bar filed a formal complaint against the accused, eventually charging her with violating 17 different disciplinary rules in seven separate matters. Shortly thereafter, in response to the Bar's petition and without protest by the accused, this court suspended the accused from the practice of law during the pendency of the disciplinary proceedings. BR 3.1.

The accused answered the Bar's first complaint, but, soon thereafter, her lawyers withdrew from representing her and she ceased communicating with representatives of the Bar. The accused did not answer the Bar's amended or second

¹ ORS 9.536 provides, in part:

“(2) If the decision of the disciplinary board is * * * to disbar the accused attorney, the matter shall be reviewed by the Supreme Court. The procedure on review shall be as provided in the rules of procedure.

“(3) When a matter is before the Supreme Court for review, the court shall consider the matter *de novo* and may adopt, modify or reject the decision of the disciplinary board in whole or in part and thereupon enter an appropriate order.”

² Bar Rule of Procedure 10.6 provides, in part:

“The 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.”

amended complaint, nor did she answer the third amended complaint, upon which this proceeding is based. She did not appear for either of two scheduled depositions. She did not appear in person or by counsel at the hearing before the trial panel. Nevertheless, we conclude from facts presented in the record that the accused was timely served and had actual notice of the third amended complaint and of the trial panel proceedings.

After the presentation of evidence, the trial panel found the accused guilty of each charge and determined that the accused should be disbarred. The accused failed to file a petition or brief in this court challenging the trial panel's determination. The Bar waived the right to appear, and the matter was submitted on the record without oral argument. After review of the record, we find the accused guilty as charged.

The misconduct of the accused demonstrates a steady disintegration of integrity and competence, along with an escalation of appallingly poor judgment. The trial panel opinion in this matter was thorough and incisive; it reflected a concerted effort to consider all available mitigating evidence despite the absence of the accused from the proceedings. Our independent review of the evidence supports the trial panel's conclusions.

We turn now to an analysis of each claim of the formal complaint.³

I. ROBY DISSOLUTION MATTER

Although the accused was a land use lawyer with little or no experience in domestic relations practice, she agreed in April 1986 to represent former clients, the Robys, in an uncontested dissolution of marriage. Because of the repeated failure of the accused to file timely, accurate, and complete dissolution documents, the dissolution was delayed for three and one-half years. The accused told her clients that

³ Although we measure the conduct of the accused against disciplinary rules in effect at the time of the alleged misconduct, we refer throughout this opinion to the present version of the disciplinary rules where they do not vary substantially in text from their predecessors.

the court was responsible for the delay. After the wife complained to the Bar and the Bar launched an investigation, the accused lied to and evaded the Bar's investigators.

We agree with the trial panel that this course of conduct involved dishonesty, fraud, deceit, or misrepresentation in violation of DR 1-102(A)(3).⁴ We also agree with the trial panel that the accused violated DR 6-101(B)⁵ in this matter "through repeated failures to respond to client contacts, repeated errors, and unnecessary delays, and by delegating responsibility to assistants whom she failed to supervise adequately." Finally, we agree that the accused violated DR 6-101(A)⁶ by representing a client in a matter outside her area of expertise without acquiring adequate knowledge or skill.

II. COOK MATTER

Cook retained the accused and the then-husband and partner of the accused on a contract matter in 1983. Dissatisfied with the large fee and with the quality of legal representation, Cook complained to the Bar. In response, the accused waived the fee except for costs. Shortly thereafter, in early 1985, Cook asked the accused to send to her the file and its contents. Over the next five years, Cook made several telephone requests for the file, but the accused did not comply with those requests until after Cook complained to the Bar again in 1990. The failure earlier to return the file was inadequately explained.

We agree with the trial panel that the accused's continued failure over a period of several years to return

⁴ DR 1-102 provides, in part:

"(A) It is professional misconduct for a lawyer to:

"* * * * *

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

⁵ DR 6-101(B) provides:

"A lawyer shall not neglect a legal matter entrusted to the lawyer."

⁶ DR 6-101(A) provides:

"A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

Cook's file violated DR 9-101(B)(4).⁷ See *In re Arbuckle*, 308 Or 135, 138, 775 P2d 832 (1989) (unless lawyer is exercising valid lien rights in client's property, client is entitled to return of property upon demand).

III. GOLDSTEIN FEE MATTER

In July 1989, Goldstein asked the accused to represent him in a real estate transaction. They agreed by telephone, in a conversation later memorialized in a letter from Goldstein to the accused, that the fee of the accused would be \$200 per hour, but that the representation would take not more than one hour. Goldstein sent the accused a \$2,000 retainer to cover attorney fees and potential costs of his transaction. The accused billed Goldstein \$1,140, stating that she had worked 5.7 hours on his case and had prepared a written agreement that neither Goldstein, nor the accused's legal assistant, nor the brokers involved could recall or produce.

Although Goldstein disputed the fee and repeatedly asked for itemization, the accused did not respond to her client's letters or telephone calls. She later disbursed funds to herself from the trust account reserved for Goldstein with knowledge that Goldstein had filed a fee arbitration petition with the Bar and that the dispute was pending. Goldstein took the fee dispute matter to small claims court where he won a judgment that the accused promptly paid.

To pay the judgment, the accused wrote a check from her office account to her trust account, then another check from her trust account to the client. Both checks cleared without incident. The trial panel found that the accused failed to preserve the identity of client funds as required by DR 9-101(A).⁸ We agree.

⁷ DR 9-101 provides, in part:

“(B) A lawyer shall:

“* * * * *

“(4) Promptly 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. * * *”

⁸ At the time of the misconduct, DR 9-101(A) provided, in part:

“All funds of clients paid to a lawyer or law firm, including advances for costs and expenses, shall be deposited and maintained in one or more identifiable trust

We also agree with the trial panel that, in the Goldstein matter, the accused violated DR 2-106(A) (charging a clearly excessive fee), DR 1-102(A)(3) (misrepresentation to the Bar about alleged preparation of a written document), and DR 9-101(A)(2) (withdrawal of disputed funds from her trust account).

IV. REPRESENTED PARTY MATTER

The accused represented a plaintiff in a land use case in Klamath Falls. Michael Spencer represented the defendant, Klamath County Board of Commissioners. The accused personally communicated with a county commissioner about the case, after which Spencer warned her that the commissioners were represented and that she should not communicate with them about the litigation. Three months later, Spencer complained to the Bar again. The accused had twice, since his warning, communicated with persons in the offices of the commissioners regarding documents and had relayed questions through one staff member to a commissioner while the accused waited on the telephone.

As Spencer correctly warned the accused, communicating with a represented party about the subject of litigation is forbidden. *See In re Hedrick*, 312 Or 442, 822 P2d 1187 (1991) (lawyer may not escape responsibility for communicating with represented party even if no harm was caused). The accused violated DR 7-104(A)(1).⁹

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 * * *."

There are exceptions to this rule, none of which applies here.

⁹ DR 7-104 provides, in part:

"(A) 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 * * * [.]"

There are exceptions to this rule, none of which applies here.

V. STATE LAWYERS ASSISTANCE COMMITTEE

In early 1990, the State Professional Responsibility Board referred the accused to the SLAC to determine whether the SLAC could help the accused with problems in her practice. The SLAC contacted the accused and asked her to obtain a drug/alcohol abuse evaluation. In April 1990, the accused consulted a doctor, but that doctor could not evaluate her for drug or alcohol abuse because she "avoided any disclosure as to her * * * usage" and was otherwise uncooperative. For six months, SLAC members continued to contact the accused, asking her to obtain a complete outpatient evaluation, sign a release, and meet with a SLAC representative. She finally participated in the first of two phases of an evaluation, but, by the January 15, 1991, deadline, had not completed the evaluation or explained her failure to do so. In February 1991, the SLAC referred the case back to the Bar for noncooperation.

The accused violated DR 1-103(F).¹⁰ *See In re Chandler*, 306 Or 422, 760 P2d 243 (1988) (noncooperation with SLAC is violation of DR 1-103(F)).

VI. STULL TAX MATTER

In a complaint initiated by the judge of the Oregon Tax Court, it came to the attention of the Bar that the accused, in behalf of her client, Stull, negligently caused dismissal of her client's appeal of a property tax matter. The accused had misfiled an appeal, failed to enclose a filing fee and, then, on refiling, missed the appeal deadline. She similarly had failed to pay filing fees or file appropriately an

¹⁰ DR 1-103(F) provides, in part:

"(F) A lawyer who is the subject of a complaint or referral to the State Lawyers Assistance Committee shall, subject to the exercise of any applicable right or privilege, cooperate with the committee and its designees, including:

"* * * * *

"(3) Participating in interviews with the committee or its designees; and

"(4) Participating in and complying with a remedial program established by the committee or its designees."

The accused makes no defense of this charge on the basis of "any applicable right or privilege."

appeal from the Tax Court to the Supreme Court, causing her client's appeal also to be dismissed from this court.

There was more to the story, as the Bar's investigation revealed. Because of a conflicting meeting, the accused asked for a continuance on the day before her client's appeal was scheduled to be heard by the Department of Revenue (DOR). The request was denied by the hearings officer because the accused had had two months' notice of the hearing; the accused then informed the hearings officer that "a man" would be handling the matter. On the day of the hearing, the accused asked her law clerk, a certified law student, to handle the telephone hearing, assuring him that he would need to do no more than ask for a continuance. She did not tell him that she had been denied a continuance or that the hearing would be on the merits. The student, who was not prepared to represent the client, was denied a continuance; the client received an adverse ruling.

As in the Roby dissolution matter, discussed above, the accused violated DR 6-101(A) by failing to provide competent representation. By failing to prepare for the DOR hearing or to comply timely with statutory deadlines, the accused also violated DR 6-101(B) ("A lawyer shall not neglect a legal matter entrusted to the lawyer"). Finally, the accused violated both DR 7-101(A)(1) and (A)(2)¹¹ by failing zealously to pursue the property tax appeal in her client's behalf.

VII. KLAMATH COUNTY CIRCUIT COURT MATTER

Following a complaint by a Klamath County Circuit Court judge, the Bar investigated the conduct of the accused toward the court in the accused's representation of the same land use case discussed above in Part III. The misrepresentations of the accused to the court were so numerous and so egregious that the judge recused himself from the case before filing the Bar complaint.

¹¹ DR 7-101 provides, in part:

"(A) A lawyer shall not intentionally:

"(1) Fail to seek the lawful objectives of the lawyer's client through reasonably available means permitted by law and these disciplinary rules * * *.

"(2) Fail to carry out a contract of employment entered into with a client for professional services * * *."

First, in February 1991, the accused asked for a continuance, because she claimed that the notice she received from the court stated the wrong date. All parties received identical computer-generated notices; the accused never produced the supposedly erroneous notice. Several weeks later, the accused told the judge's judicial assistant that opposing counsel in the case had agreed that the judge should sign a settlement order prepared by the accused. Opposing counsel had not so agreed.

Finally, the accused sent to the court, by facsimile transmission, a motion to dismiss with a certificate stating she had mailed a copy to the opposing lawyer. Neither the court nor the opposing lawyer received a hard copy of the motion, but a telephone hearing on the motion was set nonetheless. Four days before the hearing, the accused told the judge's judicial assistant that she "personally, personally, personally" had just spoken to the opposing lawyer, who had agreed to participate in the hearing. The accused had left word at the opposing lawyer's office but had not spoken to him personally. At the telephone hearing, a transcript of which is part of this record, the judge confronted the accused, who restated her lies.

The accused violated DR 1-102(A)(3)¹² in four instances: (1) by lying to court staff in an attempt to get a continuance; (2) by lying to court staff to get approval of a contested settlement agreement; (3) by falsely certifying that she had mailed the motion to dismiss; and (4) by lying about having discussed the matter with opposing counsel personally.

The described conduct of the accused disrupted a court on each occasion enumerated above and clearly was prejudicial to the administration of justice, in violation of DR 1-102(A)(4).¹³

¹² See note 3, *supra*.

¹³ DR 1-102 provides, in part:

"(A) It is professional misconduct for a lawyer to:

*** **

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

By engaging in wilful deceit in the course of representing a client, the accused also violated DR 7-102(A)(5)¹⁴ and ORS 9.460(2) (“An attorney shall * * * never seek to mislead the court or jury by any artifice or false statement of law or fact”). Finally, the accused violated the obligation of truthfulness in ORS 9.527.¹⁵

SANCTION

The conduct of the accused has become increasingly irresponsible. As the trial panel noted:

“Several former employees testified that the Accused frequently failed to provide much direction or supervision and was frequently out of the office for unknown reasons. At those times her staff were unable to locate her. These absences and lack of direction and the Accused’s other misconduct in these various cases constitute an escalating pattern of wilfully violating the disciplinary rules in utter disregard, if not contempt, for the Accused’s clients, for the judicial system, for the profession, and apparently even for herself and her career.

“We find that the Bar complied with our request to search its files diligently and present all possible exculpatory evidence – most of which consists of similar late and or otherwise inadequate responses and excuses to clients and Bar, often including that her mother was dying or her father was ill or injured, and the Accused’s repeated claims that she had never received letter after letter and phone message after

¹⁴ At the time of the accused’s misconduct, DR 7-102 provided, in part:

“(A) In the lawyer’s representation of a client, a lawyer shall not:

“* * * * *

“(5) Knowingly make a false statement of law or fact.”

DR 7-102(A)(5) has been amended. It now prohibits lawyers from making false statements while representing their own interests, as well.

¹⁵ ORS 9.527 provides, in part:

“The Supreme Court may disbar, suspend or reprimand a member of the bar whenever, upon proper proceedings for that purpose, it appears to the court that:

“* * * * *

“(4) The member is guilty of willful deceit or misconduct in the legal profession;

“(5) The member is guilty of willful violation of any of the provisions of ORS 9.460 * * * [.]”

The pertinent portion of ORS 9.460 is set out in the text above.

phone message. These excuses also follow an escalating pattern, which ends with the Accused effectively dropping out of sight. No one involved in this proceeding has seen or talked with her or been able to serve her since March 1992; she fails to claim mail or return calls. She failed to appear on the Bar's motion to suspend her pending disciplinary proceedings."

In determining proper sanctions to impose on lawyers, we look to the ABA Standards for Imposing Lawyer Sanctions (1986) (ABA Standards). *In re Smith*, 315 Or 260, 843 P2d 449 (1992). Those standards consider four factors: "(a) the duty violated; (b) the lawyer's mental state; (c) the potential or actual injury caused by the lawyer's misconduct; and (d) the existence of aggravating or mitigating factors." ABA Standard 3.0.

In this case, we disbar the accused based on the aggregate conduct described herein. She violated duties to her clients, to the public, to the legal system, and to the legal profession. ABA Standards 5, 6, and 7. She intentionally misled clients, Bar representatives, and court staff for her own purposes. There was actual injury to her clients Roby (delay in ability to remarry) and Goldstein (paying an excessive fee) and, perhaps, to her clients Stull (a bungled tax appeal, the merits of which are unknown) and Cook (lack of access to her file). There also was both actual and potential injury to the public, to the legal system, and to the legal profession in the Klamath County matters.

There are a number of aggravating factors, particularly: dishonest or selfish motive, ABA Standard 9.22(b); a pattern of misconduct, ABA Standard 9.22(c); multiple offenses, ABA Standard 9.22(d); bad faith obstruction of disciplinary proceedings, ABA Standard 9.22(e); refusal to acknowledge wrongful nature of her conduct, ABA Standard 9.22(g); and substantial experience in the practice of law, ABA Standard 9.22(i). The only mitigating factor shown by the record is the lack of any prior disciplinary record, ABA Standard 9.32(a).¹⁶

¹⁶ There are suggestions in this record that the accused suffered from some sort of impairment. The record does not establish any such impairment, however. See *In re Hawkins*, 305 Or 319, 751 P2d 780 (1988) (when accused lawyer failed to defend himself in disciplinary proceeding, court declined to consider mitigating factors he

Accordingly, the accused is disbarred.

might have presented). Moreover, the accused's course of misconduct here is so extensive that, even assuming that some impairment were established, we still would regard disbarment as necessary.

IN THE SUPREME COURT OF THE
STATE OF OREGON

In re Complaint as to the Conduct of
Richard D. COHEN,
Accused.

(OSB 91-138; SC S39908)

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

Argued and submitted May 18, 1993.

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

Marvin S. Nepom, Portland, argued the cause and filed a
response brief for the accused.

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

PER CURIAM

The accused is reprimanded.

PER CURIAM

This is a lawyer disciplinary proceeding. The Oregon State Bar charges that the accused represented two clients whose interests were in likely conflict without making required disclosures and that he continued to represent those clients when their interests were in actual conflict, in violation of DR 5-105(E).¹ The trial panel found the accused not guilty.

The Bar sought review pursuant to BR 10.1, BR 10.3, and ORS 9.536(1). We review the record *de novo*. ORS 9.536(3). The Bar has the burden of establishing ethical misconduct by clear and convincing evidence. BR 5.2. "Clear and convincing evidence" means evidence establishing that the truth of the facts asserted is highly probable. *In re Johnson*, 300 Or 52, 55, 707 P2d 573 (1985). We find the accused guilty of violating DR 5-105(E) and reprimand him.

¹ DR 5-105(A) provides in part:

"A conflict of interest may be actual or likely.

"(1) An 'actual conflict of interest' exists when the lawyer has a duty to contend for something on behalf on one client that the lawyer has a duty to oppose on behalf of another client.

"(2) A 'likely conflict of interest' exists in all other situations in which the objective personal, business or property interests of the clients are adverse. A 'likely conflict of interest' does not include situations in which the only conflict is of a general economic or business nature."

DR 5-105(E) provides:

"Except as provided in DR 5-105(F), a lawyer shall not represent multiple current clients in any matters when such representation would result in an actual or likely conflict."

DR 5-105(F) provides:

"A lawyer may represent multiple current clients in instances otherwise prohibited by DR 5-105(E) when such representation would not result in an actual conflict and when each client consents to the multiple representation after full disclosure."

Former DR 10-101(B) provided:

"'Full disclosure' means an explanation sufficient to apprise the recipient of the potential adverse impact on the recipient, of the matter to which the recipient is asked to consent. Full disclosure shall also include a recommendation that the recipient seek independent legal advice to determine if consent should be given. Full disclosure shall be contemporaneously confirmed in writing."

Current DR 10-101(B) is materially identical to *former* DR 10-101(B).

FINDINGS OF FACT

The accused was admitted to practice law in Oregon in 1979. In late March 1989, Wife telephoned the accused and asked for legal assistance with a juvenile case and a possible criminal case. Both matters arose out of an incident that took place on September 2, 1988, in which Husband beat and injured Wife's nine-year-old daughter from a previous marriage. Husband and Wife also had two children together. A petition had been filed in juvenile court regarding the nine-year-old, and criminal charges were expected to be brought against Husband.

Husband and Wife consulted the accused in person on April 3, 1989. Wife expressed fear that the children might be taken away from her. The accused concluded, however, that "[t]he juvenile proceeding didn't pose a realistic threat after eight months of nonattention of the juvenile system."² With respect to the criminal proceeding, Husband told the accused that he did not want to go to trial; "he was quite contrite, and he wanted help."

The accused concluded that no conflict existed between Husband and Wife as of April 3, 1989, because "[t]hey wanted to keep their family together," although they seemed "aware that the likely result of the criminal proceeding would be that [Husband] would be ordered out of the home." The accused advised Husband and Wife on April 3 that he could not represent them both "unless they were in complete agreement about what they wanted." The accused did not put that advice in writing. He agreed to represent Husband and Wife and opened two files, "Criminal" and "Juvenile."

On April 7, 1989, Husband was indicted for criminal mistreatment in the first degree and released on his own recognizance. On or about June 22, 1989, Wife telephoned the accused to express "a concern about [Husband's] not going regularly to his counseling at the Men's Resource Center

² The quotations in the text are from the accused's testimony. In making our findings of fact, we have relied on the testimony of the accused and on the exhibits. We have not relied on the testimony of Wife, because the trial panel found that she was not credible.

which was anger management counseling.” In that conversation, Wife said that she was “going to call the authorities.” From Wife’s “tone and the way she was saying things,” the accused knew “that her purpose would not be as an ally of her husband in making those phone calls.” The accused knew that Husband was required to attend the counseling as a condition of continued release on recognizance. The accused testified that he told Wife that she “had a right to make her own decision and go her own way” but that he would have to withdraw from representation if Husband and Wife no longer had the same goal. He testified that Wife responded that, “[i]f [Husband] will do what he was supposed to do, we’re still a team.”

In June 1989, before the plea hearing in Husband’s criminal case, the accused received the police report concerning the incident of criminal mistreatment involving the nine-year-old. The police report identified Wife as the person who had contacted the police initially about the incident.

On June 30, 1989, Husband entered a plea of guilty to the charge of criminal mistreatment. Sentencing in the case was set for late September 1989. In late August 1989, the accused received and read a copy of a presentence investigator’s report concerning Husband. The report stated in part:

“[Wife’s] moods and attitudes toward her husband fluctuate on a near daily basis. In talking with her on the phone prior to the interview in the office, she was very upset saying that the Defendant had been abusing her son and that he was refusing to go to anger management classes. * * * [Wife] then called the day after the interview and said that the defendant was threatening the family * * *.”

After reading that report, the accused spoke with Husband and Wife to determine whether they still shared the common goal of keeping Husband out of jail and in the family home. Husband and Wife assured the accused that they did. The accused concluded that there was “[a] unification of interest again,” and he continued to represent both parties thereafter, including representing Husband in sentence negotiations. At the sentencing hearing, the district attorney recommended a suspended sentence with probation and counseling. The court did not accept that recommendation, but sentenced Husband to six months in jail.

LIKELY CONFLICT OF INTEREST

At the outset of the representation of Husband and Wife, there was a likely conflict of interest between them. On April 3, 1989, when the accused first met with Husband and Wife, he was aware of Wife's concern that her children might be taken away from her in juvenile proceedings if Husband remained in the home. That is, Wife had expressed a concern that was inimical to Husband's interests, even while stating that she and Husband had a common goal in seeking legal representation. Moreover, Wife's "objective personal * * * interests," DR 5-105(A)(2), as mother and guardian of her children, were adverse to Husband's objective personal interest in seeking to minimize the consequences of his past criminal behavior within the home.³

In the face of that likely conflict of interest, the accused failed to make a full disclosure, as required by DR 5-105(F) and as defined by *former* DR 10-101(B). The accused's explanation to the parties at the outset of the representation, as depicted in his testimony, was inadequate to apprise Husband and Wife of the potential adverse impact of joint representation. In addition, the disclosure was not confirmed contemporaneously in writing. Full disclosure was, in fact, never made at any time during the representation. As a result of that conduct, the accused violated DR 5-105(E).

ACTUAL CONFLICT OF INTEREST

When the accused received the presentence report, he was made aware of an actual conflict of interest. Indeed, the accused testified:

"Q. Did you at that time consider that you possibly had a conflict of interest?

"A. Oh, yeah.

"Q. An actual conflict of interest?

"A. If those statements were statements that she was asserting were true, I had an actual conflict of interest."

³ Cf. *In re McKee*, 316 Or 114, 134, 849 P2d 509 (1993) (Peterson, J., concurring) (under DR 5-105(A), (E), and (F), "[a] 'likely conflict' * * * is present between spouses in a marital dissolution proceeding").

As noted above, the accused also testified that he concluded that there was “[a] unification of interest *again*,” after discussing the presentence report with Husband and Wife. (Emphasis added.) That testimony reflects the accused’s understanding from reading the report that Husband and Wife did not have a consistent “unification of interest.”

The presentence report informed the accused that one of his clients, Wife, was taking active steps against his other client, Husband, which could — and later apparently did — have a prejudicial impact on Husband’s legal interests. The accused knew, on reading the report in late August 1989, that he would be called on to contend for opposing resolutions of the pending matters on behalf of Husband and Wife. That was an actual conflict as defined in DR 5-105(A)(1). Nonetheless, the accused continued thereafter to represent Husband in the criminal case and Wife in the juvenile proceedings. In doing so, he violated DR 5-105(E).

SANCTION

In deciding on the appropriate sanction, this court refers for guidance to the American Bar Association Standards for Imposing Lawyer Sanctions (ABA Standards). *In re White*, 311 Or 573, 591, 815 P2d 1257 (1991). ABA Standard 3.0 sets out the factors to consider in imposing sanctions: the duty violated, the lawyer’s mental state, the actual or potential injury caused by the lawyer’s misconduct, and the existence of aggravating or mitigating factors.

The accused violated the duty owed to his clients to avoid conflicts of interest. ABA Standard 4.3.

The accused acted negligently in failing to provide full disclosure at the outset of the representation. *See* ABA Standards (June 17, 1992) at 7-8 (a lawyer acts negligently when the lawyer fails to heed a substantial risk that a circumstance exists or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation). The accused acted knowingly when he continued to represent both Husband and Wife after an actual conflict of interest came to his attention. *See id.* at 7 (a lawyer acts knowingly when the lawyer acts with conscious awareness of the nature or attendant circumstances of the

conduct but without the conscious objective or purpose to cause a particular result).

The accused caused a potential injury to Wife, whose interest in maintaining custody of her children was not being fully protected. There was no actual injury to either Husband or Wife.

The ABA Standards provide that suspension is generally appropriate when the lawyer knows of a conflict of interest and fails to disclose fully to a client the possible effect of that conflict, causing injury or potential injury to a client. ABA Standard 4.32. A reprimand is generally appropriate when a lawyer is negligent in determining whether the representation of a client will adversely affect another client, causing injury or potential injury to a client. ABA Standard 4.33.

We next consider pertinent aggravating and mitigating factors.

There are two aggravating factors. At the time of the hearing, the accused had a prior disciplinary offense, ABA Standard 9.22(a), in that he received an admonition in 1990 for neglecting a legal matter, and he had substantial experience in the practice of law, ABA Standard 9.22(i).

In mitigation, the accused had no dishonest or selfish motive, ABA Standard 9.32(b), cooperated fully in the disciplinary proceedings, ABA Standard 9.32(e), expressed remorse, ABA Standard 9.32(l), and has a good reputation within his area of practice, ABA Standard 9.32(g).

The mitigating factors outweigh the aggravating factors in this case, and the accused's clients were not actually injured. We conclude that a reprimand is the appropriate sanction.

The accused is reprimanded.

IN THE SUPREME COURT OF THE
STATE OF OREGON

In re Complaint as to the Conduct of
Steven E. BENSON,
Accused.

(OSB 90-95; SC S39237)

In Banc

Review of decision of a Trial Panel of the Disciplinary
Board.

Argued and submitted March 5, 1993.

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

Stephen R. Moore, Portland, argued the cause and filed
the briefs for the accused.

PER CURIAM

The accused is suspended from the practice of law for a
period of six months commencing on the effective date of this
decision.

PER CURIAM

This is a lawyer discipline case. The principal charge involves the preparation by the accused for a client of two promissory notes secured by trust deeds to real properties owned by the client. The notes and security were recorded. The loan transactions referred to in those documents had not, in fact, occurred. A trial panel found the accused guilty of violating four disciplinary rules, including counseling or assisting a client in conduct that the accused knew to be fraudulent, in connection with the document preparation and a subsequent investigation of the case. The trial panel recommended that the accused be suspended from the practice of law for 120 days. The accused appeals to this court, challenging only the finding of guilt on the fraud charge and the sanction. (He agrees that, if the finding as to fraud is sustained, then the sanction is justified.) The Oregon State Bar cross-appeals, seeking a greater sanction.¹ On *de novo* review, ORS 9.536(3); BR 10.6, we find the accused guilty and impose a six-month suspension from the practice of law.

The essential facts are not disputed, although their legal significance is. In January 1986, police executed a search warrant at property owned by Duane Millspaugh in Portland. Millspaugh was not present at the time, but became aware of the raid soon thereafter. The next morning, Millspaugh called the accused, who had represented Millspaugh successfully in a previous criminal case in which Multnomah County had sought forfeiture of Millspaugh's automobile. Millspaugh was concerned about the possibility that he might be charged with a criminal offense and that something uncovered in the search of his real property might lead Multnomah County to seek forfeiture of that property.

The accused and Millspaugh met at the accused's office. Millspaugh told the accused that he wanted to be notified before any forfeiture action was commenced by Multnomah County, so that he could remove personal property from the premises. Millspaugh owned the Multnomah property outright, free of encumbrances. He also owned a parcel in

¹ The parties have briefed and argued an evidentiary question concerning the admissibility of a transcript. Because we conclude that we would reach the same disposition in this case whether or not the transcript was considered, we do not consider it.

Clackamas County that was also unencumbered. The parties conceived of a possible way of obtaining advance warning: They would create and record encumbrances on the two parcels. If that were done, there would be at least a possibility that someone interested in pursuing forfeiture of either of the parcels would check first with the putative secured party, in order to determine the status of the security interests in the property.

The accused prepared two demand notes, together with two trust deeds as security for the notes, for Millspaugh to sign. The note on the Clackamas County property was for \$50,000; the note on the Multnomah County property was for \$40,000. The dates on the two notes were picked at random. Both dates preceded the raid on Millspaugh's Multnomah County property. The notes were demand notes payable to, and the trust deeds were for the benefit of, Millspaugh's brother Ronald. Although the documents stated that consideration had been paid for the notes and trust deeds, none in fact had been paid. The documents were recorded in the pertinent county records.

The accused testified that he thought that recording the trust deeds would indicate to anyone investigating the records that there were security interests in the property. Such an investigator would, the accused thought, contact Ronald Millspaugh to learn what the status of the security interest was. Ronald would then notify his brother of the inquiry, and Duane Millspaugh would be able to remove various items of personalty from the premises. The accused also testified that he believed that any forfeiture proceeding actually would be effective as of the date of any crime that had been committed on the premises, so the trust deeds — even if they generated the hoped-for inquiry — ultimately could not prevent forfeiture of the property. The accused further testified that he believed that the fact that the beneficiary of the trust deeds had the same last name as the property owner (Millspaugh) would be a tip-off to any investigator as to the nature of the underlying transactions.

In fact, no forfeiture proceeding ever occurred. Multnomah County officials testified that they considered proceeding against the property, but ultimately chose not to. The officials were aware of the notes and trust deeds. Those

documents played some role in the decision not to try to forfeit the properties, although it is not possible to quantify the exact weight that the existence of the notes and trust deeds was given in that calculation. The matter of the documents instead eventually came to court in another, somewhat ironic, way: Duane Millspaugh found it necessary to bring an action to force his brother to remove the cloud on Duane's title to the properties. The accused testified in that case. The trial judge then informed the Bar of the pertinent facts.

The Bar charged the accused with, *inter alia*, violations of DR 1-102(A)(3) (conduct involving dishonesty, fraud, deceit, or misrepresentation); DR 7-102(A)(5) (knowingly making a false statement of law or fact); DR 7-102(A)(7) (counseling or assisting a client in conduct that the lawyer knows is illegal or fraudulent); and DR 1-103(C) (failure to cooperate in an investigation by the Bar).² The trial panel found the accused guilty of those four charges, and the present appeal followed.

The accused challenges the trial panel's ruling that the accused violated DR 7-102(A)(7), which provides: "In the lawyer's representation of a client * * *, a lawyer shall not: * * * Counsel or assist the lawyer's client in conduct that the lawyer knows to be illegal or fraudulent." The accused argues that the trial panel cannot have found him guilty of counseling "illegal" conduct, because the acts that he admits committing were not shown to have violated any criminal or other statute. *See In re Hockett*, 303 Or 150, 160-62, 734 P2d 877 (1987) ("illegal conduct" includes both criminal conduct and other conduct forbidden by statute). Therefore, the accused reasons, the trial panel must have found him guilty of counseling "fraud." The accused then concludes that, although his conduct undoubtedly involved misrepresentations, it did not involve fraud, because he did not intend his conduct to mislead, nor did it in fact mislead, anyone.

² The accused was charged with two other violations of the disciplinary rules, but the trial panel found him not guilty of those charges. The Bar has appealed the finding of not guilty as to one of those charges, violation of ORS 9.460(2) (a lawyer shall "[e]mploy, for the purposes of maintaining the causes confided to the [lawyer], such means only as are consistent with truth"). Because our ruling on that question would not affect our choice of sanction in this case, we see no need to discuss it further in this opinion.

We disagree with the accused's analysis. First, it is inescapable that the accused hoped and intended that his misrepresentations be acted on — there was no point in going through the exercise unless it was going to produce a result. The accused also intended that his misrepresentation go undiscovered, at least long enough to permit Millspaugh to accomplish the purpose of the plan. The accused, in other words, assisted a client in committing fraud within the meaning of DR 7-102(A)(7). See *In re Dinerman*, 314 Or 308, 317, 840 P2d 50 (1992) (assisting client in obtaining loan beyond bank's loan limits).

Neither is the accused on firm footing as to the meaning of the rule. In *In re Hiller*, 298 Or 526, 533, 694 P2d 540 (1985), this court distinguished the concepts of "misrepresentation," "deceit," and "fraud" as follows: "A misrepresentation becomes fraud or deceit when it is intended to be acted upon without being discovered." The court later stated that the concepts of fraud and deceit in the disciplinary rules "refer to fraud and deceit that are actionable in Oregon[, requiring,] among other things, a false representation to another, with the intent that the other act upon the false representation to his or her damage." *In re Hockett, supra*, 303 Or at 157-58. Success of the scheme is not an element. It is enough that the accused tried to mislead. The foregoing concept of fraud fits precisely what the accused did here.

We find from the record that the representations created a real potential for damage. Not only was it possible that law enforcement authorities (in this case, Multnomah County) would be discouraged from seeking to forfeit Millspaugh's real property, it also was possible that Millspaugh would be able to remove certain personal property *that was itself forfeitable*.³ (In fact, the accused acknowledged in his testimony that Millspaugh later was required to forfeit certain personal property in an unrelated proceeding.) As did the trial panel, we find the accused guilty of violating DR 7-102(A)(7).

As noted, the accused does not dispute his guilt with respect to the other three charged violations. The sole

³ Both the accused and Millspaugh knew that personal property was forfeitable, because the accused had represented Millspaugh in an earlier forfeiture case.

remaining question is the sanction to be imposed. The accused is a lawyer with over 18 years of experience, much of it relating to criminal defense. He has had one prior disciplinary offense, which resulted in an admonition. The parties agree that, given the accused's status and the nature of his disciplinary rule violations, some period of suspension is appropriate. The accused states that he will accept that imposed by the trial panel — suspension for 120 days. The Bar, however, argues for a longer period of suspension.

The substantive charges against the accused are very serious.⁴ The accused's acts placed a potential and wholly illegitimate roadblock in the way of Multnomah County's right to seek forfeiture of property used in the commission of a crime, as well as creating a way by which a potential criminal defendant could have a "leg up" in concealing personal property that also might be subject to forfeiture. The acts also required a separate legal action to clear them up.

In addition, the potential impact of the accused's conduct on the criminal justice system was not trivial. There can be no doubt that the accused created a barrier to forfeiture of both Millspaugh's real and personal property. That was a significant and ongoing potential for harm to the criminal justice system.

Each party relies on several cases that are asserted to be analogous to the present one. The range of sanctions encompassed by those cases is large. Compare, e.g., *In re Hockett, supra* (fraudulent transfers from husbands to wives; 63-day suspension) and *In re Dinerman, supra* (knowingly making false statements to assist client in obtaining loan from bank; 63-day suspension) with, e.g., *In re Willer*, 303 Or 241, 735 P2d 594 (1987) (false reports to client; 30-month suspension); *In re Hedrick*, 312 Or 442, 822 P2d 1187 (1991) (false statement in will petition; two-year suspension). We do not believe that this is the case in which to try to harmonize

⁴ The accused's failure to cooperate with the Bar's investigation involved delay in answering the Bar's initial inquiry. Once engaged in the process, however, the accused was cooperative and forthcoming. The failure to cooperate does not appear to have been extensive or aggravated, and the accused offers a plausible explanation (although not an excuse) for the delay. Given the relative seriousness of the accused's other violations of the disciplinary rules, we do not find that the accused's failure to cooperate requires a separate sanction. We therefore do not discuss it further.

the sanction imposed in every case even arguably analogous to the present one.

When all the foregoing considerations are taken into account, we conclude that the suspension warranted by the accused's conduct is six months. It is so ordered.

The accused is suspended from the practice of law for a period of six months commencing on the effective date of this decision.

IN THE SUPREME COURT OF THE
STATE OF OREGON

In re Complaint as to the Conduct of
Richard H. BUSBY,
Accused.

(OSB 90-53; SC S39712)

In Banc

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

Argued and submitted May 6, 1993.

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

Thomas E. Cooney, of Cooney & Crew, P.C., Portland,
argued the cause and filed the brief on behalf of the accused.

PER CURIAM

The accused is suspended from the practice of law for a
period of four months commencing on the effective date of
this decision.

PER CURIAM

In this lawyer disciplinary proceeding, the Oregon State Bar (Bar) charged the accused with violating Disciplinary Rule (DR) 1-102(A)(3) (conduct involving dishonesty, fraud, deceit, or misrepresentation)¹ and ORS 9.527(4) (willful deceit or misconduct in the legal profession).² A trial panel of the Disciplinary Board found that the accused violated DR 1-102(A)(3), but made no finding on the ORS 9.527(4) charge. The trial panel imposed a public reprimand. The Bar petitioned for review, arguing that the accused's conduct also violated ORS 9.527(4) and that a greater sanction is warranted. We review *de novo*. ORS 9.536(3);³ Bar Rule of Procedure (BR) 10.6.⁴ The Bar has the burden of establishing disciplinary violations by clear and convincing evidence. BR 5.2.

The material facts are almost all undisputed. On January 30, 1986, the accused entered into an "of counsel" agreement with Green & Thompson, P.C. (G&T), a firm that specializes in tax matters. The accused was to provide litigation services for G&T's clients, as well as representing clients of his own. G&T was to provide the accused with office space, equipment, support staff, and billing services. The agreement required the accused to pay G&T a minimum monthly amount or a percentage of his monthly revenue, whichever was greater.

¹ DR 1-102(A)(3) provides:

"It is professional misconduct for a lawyer to * * * [e]ngage in conduct involving dishonesty, fraud, deceit or misrepresentation[.]"

² ORS 9.527(4) provides:

"The Supreme Court may disbar, suspend or reprimand a member of the bar whenever, upon proper proceedings for that purpose, it appears to the court that * * * [t]he member is guilty of willful deceit or misconduct in the legal profession * * *"

³ ORS 9.536(3) provides:

"When a matter is before the Supreme Court for review, the court shall consider the matter *de novo* and may adopt, modify or reject the decision of the disciplinary board in whole or in part and thereupon enter an appropriate order."

⁴ BR 10.6 provides in part:

"The 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."

The accused soon became dissatisfied with what he perceived to be G&T's failure to collect the firm's outstanding bills aggressively enough, thereby depriving the accused of fees due him from G&T clients. The accused also was dissatisfied with the quality of the secretarial support that he received from G&T. For two months in late 1986, due to problems with a computer billing system, none of the accused's bills went out.

At trial, the accused testified that he "decided that [he] was going to accumulate some funds so that [he] could transition into a sole practice." To accomplish that goal, the accused underreported to G&T fees paid directly to him by one of his clients, Gibraltar Savings (Gibraltar). The accused arranged for Gibraltar to mail its payments to his home address. The underreporting continued for a period of several months. At the same time, however, the accused reported to G&T the amount of time that he billed to Gibraltar. When asked by G&T's office administrator about the increasing balance apparently unpaid by Gibraltar, the accused answered that he would talk to the client. He did not talk to Gibraltar, however, because he knew that Gibraltar's payments actually were current. Later, Gibraltar contacted the accused to inquire about the increasing amount shown as past due on its account. The accused told Gibraltar that G&T's billing system was "screwed up" and that Gibraltar needed to pay only the amount shown as current.

Eventually, G&T's office administrator contacted Gibraltar about its apparent delinquency. Gibraltar responded that it had been making all payments in a timely manner. When confronted by G&T, the accused admitted that he had been underreporting payments received from Gibraltar. In a settlement between G&T and the accused in June 1987, the accused agreed to pay G&T \$11,049.34, the amount that they agreed was G&T's share of those payments by Gibraltar that the accused underreported to G&T.

At the hearing before the trial panel, the accused testified that he never intended to deprive G&T of its share of any fees received from Gibraltar permanently and that he intended to use the money in bargaining with G&T to end the "of counsel" agreement. He testified that his goal was "to offset the amount that [G&T] had not been collecting on the

clients of [G&T] that [he] did work for and the amount that [he] had withheld and reach some sort of settlement with those circumstances." The accused also testified that he suffered during this period from alcoholism, for which he had subsequently received treatment.

As did the trial panel, we find that the accused engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation, in violation of DR 1-102(A)(3). As this court stated recently in *In re Smith*, 315 Or 260, 266, 843 P2d 449 (1992):

"Although there is no explicit rule requiring lawyers to be candid and fair with their partners or employers, such an obligation is implicit in the prohibition of DR 1-102(A)(3) against dishonesty, fraud, deceit, or misrepresentation. Moreover, such conduct is a violation of the duty of loyalty owed by a lawyer to his or her firm based on their contractual or agency relationship."

We conclude that the accused is also guilty of "willful deceit or misconduct in the legal profession," in violation of ORS 9.527(4). Not only did the accused make affirmative misrepresentations to G&T's office administrator and to Gibraltar related to the income that he was withholding from G&T, but the withholding of the income was itself dishonest and deceitful conduct.

In determining the appropriate sanction, this court looks to the American Bar Association's Standards for Imposing Lawyer Sanctions (1986) (ABA Standards). *See, e.g., In re Taylor*, 316 Or 431, 435, 851 P2d 1138 (1993) (using ABA Standards for guidance in determining sanction). Under those standards, factors to be considered in imposing a sanction include: "(a) the duty violated; (b) the lawyer's mental state; (c) the actual or potential injury caused by the lawyer's misconduct; and (d) the existence of aggravating or mitigating factors." ABA Standard 3.0.

In this case, by his dishonest conduct and deceitful misrepresentations, the accused violated duties owed to G&T, to his client, Gibraltar, and to the public. The accused's conduct was intentional. Although Gibraltar suffered no actual injury, the accused acknowledges that his conduct created a potential for injury to his client. There was the potential that G&T would initiate action against Gibraltar

based on G&T's understanding that Gibraltar was seriously delinquent in its payments due G&T.

Apart from aggravating or mitigating circumstances, the ABA Standards indicate that "[s]uspension is generally appropriate when a lawyer knowingly deceives a client, and causes injury or potential injury to the client." ABA Standard 4.62. Likewise, the ABA Standards recommend suspension "when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional, and causes injury or potential injury to a client, the public, or the legal system." ABA Standard 7.2. On the other hand, the ABA Standards suggest a reprimand when a lawyer knowingly engages in conduct "that involves dishonesty, fraud, deceit, or misrepresentation and that adversely reflects on the lawyer's fitness to practice law." ABA Standard 5.13.

Aggravating factors present in this case include: (1) a dishonest or selfish motive; (2) a pattern of misconduct; and (3) substantial experience in the practice of law. ABA Standard 9.22(b), (c), and (i). Mitigating factors include: (1) absence of a prior disciplinary record; (2) personal or emotional problems; (3) full and free disclosure to Disciplinary Board and a cooperative attitude toward proceedings; (4) a good reputation; (5) physical or mental disability or impairment; and (6) interim rehabilitation. ABA Standard 9.32(a), (c), (e), (g), (h) and (j).

In the recent case of *In re Smith, supra*, 315 Or at 266-67, this court reviewed the sanctions imposed in several prior cases involving violations of DR 1-102(A)(3):

"In other cases where lawyers have violated DR 1-102(A)(3) as part of an intentional scheme, this court has imposed suspensions of up to four months' duration. In the recent case of *In re Magar*, 312 Or 139, 817 P2d 289 (1991), this court suspended a lawyer from the practice of law for 60 days when he endorsed a draft with another's name despite his knowledge that the person whose name he signed did not wish him to do so. In *In re Fuller*, 284 Or 273, 586 P2d 1111 (1978), this court imposed a 60-day suspension when a lawyer failed to correct false impressions that his clients had about his handling of their case. In *In re Hiller*, 298 Or 526, 694 P2d 540 (1985), this court imposed a four-month suspension when two lawyers attempting to help a client collect on a promissory note arranged to transfer for one dollar the

client's interest in certain real property to their secretary in order to trigger a condition in the note requiring payment upon sale of the property."

In *In re Smith, supra*, this court imposed a four-month suspension when a lawyer plotted to take 31 clients away from his employer, exposing his clients and his firm to substantial risks. *Id.* at 267.

In this case, the misconduct was as serious as the misconduct in the foregoing cases. The accused attempts to minimize the seriousness of his misconduct by characterizing the entire matter as a "business dispute." The accused's dissatisfaction with G&T's performance of its obligations under the "of counsel" agreement, however, did not justify his dishonest behavior. As this court stated in *In re Magar, supra*, 312 Or at 142:

"Even when dealing for him or herself, and not for any client, a lawyer is one of those 'who profess the law, [and thereby] profess honest and dispassionate resolution of conflicts.' *In re Hopp*, 291 Or 697, 702, 634 P2d 238 (1981). Self-help of this kind was utterly inconsistent with those professions." (Brackets in original.)

As in *In re Smith, supra*, we conclude that a four-month suspension is the appropriate sanction.

The accused is suspended from the practice of law for a period of four months commencing on the effective date of this decision.

IN THE SUPREME COURT OF THE
STATE OF OREGON

In re the Matter of
Reciprocal Discipline of
John J. DEVERS,
Accused.

(OSB 89445; SC S39997)

In Banc

On review of the recommendation of the State Professional Responsibility Board.

Submitted on the record and briefs June 15, 1993.

John J. Devers, Portland, filed an answer *in propria persona*.

Susan Roedl Cournoyer, Assistant Disciplinary Counsel, Oregon State Bar, Lake Oswego, filed a reply brief.

PER CURIAM

The accused is suspended from the practice of law for six months commencing on the effective date of this decision.

PER CURIAM

This is a lawyer discipline proceeding involving “reciprocal discipline” under Bar Rule of Procedure (BR) 3.5. The accused is a lawyer who was licensed to practice law in both Oregon and Michigan during the years relevant to this proceeding. He presently lives in Oregon. In 1992, the accused was suspended from the practice of law in Michigan for four months for unethical conduct in three matters, which we discuss more fully below. Pursuant to BR 3.5, the State Professional Responsibility Board has recommended that the accused be suspended from the practice of law in Oregon for his unethical conduct as a lawyer in Michigan. We suspend the accused from the practice of law for six months.

When the Oregon State Bar files a decision of another jurisdiction with this court,¹ accompanied by a recommendation for discipline “based on the discipline in the [other] jurisdiction,” BR 3.5(a), the accused lawyer may file an answer. BR 3.5(c) provides that the answer may “discuss[] the following issues:

“(1) Was the procedure in the jurisdiction which disciplined the attorney lacking in notice or opportunity to be heard?

“(2) Should the attorney be disciplined by the court?”

The accused filed an answer discussing both of those points. Accordingly, we will consider each question.

We begin with the procedural question. The Michigan proceedings began with the filing of formal complaints. Each complaint described the alleged misconduct in detail, and each complaint was served on the accused by mail. The applicable procedural rules gave the accused 21 days within which to answer and provided for a hearing. The accused failed to respond to all but one of the complaints and failed to appear at the scheduled hearings, of which he had notice. The hearings proceeded in his absence.

The Michigan trial panels concluded that the accused had violated several sections of the Michigan Rules of Professional Conduct. The trial panels noted that the accused had a

¹ The accused does not challenge the authenticity of the Michigan decisions that imposed discipline.

prior disciplinary history consisting of an admonishment in 1979 and orders of reprimand in 1987 and 1988. The trial panels also found that the accused exhibited an "evidently blatant disregard for the disciplinary system." After considering those factors, Michigan imposed a 121-day suspension for one matter and a 90-day suspension for the other two matters together. The suspensions ran concurrently, effective December 9, 1992.

The accused concedes that he received notice of the charged misconduct when he received the formal complaints and that he received notice of the scheduled hearings. He also agrees that the Michigan rules, in the abstract, provided him with an opportunity to be heard. His contention is that he did not in fact have an opportunity to be heard. The accused asserts that the Michigan trial panels violated the applicable rules by deciding to proceed without him when he did not appear at the scheduled hearings or answer the Michigan Bar's complaints.

The existence of a procedure for default, in cases of failure to respond after adequate notice, does not offend due process. *Boddie v. Connecticut*, 401 US 371, 378, 91 S Ct 780, 28 L Ed 2d 113 (1971); *Windsor v. McVeigh*, 93 US 274, 278, 23 L Ed 914 (1876). Our review of the record satisfies us that the Michigan procedural rules meet the requirements of due process and that the Michigan trial panels complied with all applicable procedural rules. Indeed, the accused was accommodated repeatedly. For example, in one case, a default order that had been entered properly was set aside, and two continuances were granted at the accused's request. The accused received constitutionally sufficient notice and opportunity to be heard in the Michigan disciplinary proceedings. He simply failed to take advantage of the opportunity.

We turn next to the question whether the accused should be disciplined. BR 3.5(b) provides that the decision of another jurisdiction "shall be sufficient evidence" that the accused lawyer "committed the misconduct described therein." That is, in a reciprocal discipline proceeding, the accused has no opportunity to challenge in Oregon the

underlying factual findings of the other jurisdiction.² In that respect, a proceeding under BR 3.5 differs from other contested disciplinary proceedings. The facts described below are summarized from the findings of the Michigan trial panels.

A further word is in order about the analytical framework that we use. In the usual reciprocal discipline case, the acts of an accused violate the disciplinary rules of both jurisdictions. In determining an appropriate sanction, however, this court focuses on the accused's misconduct under the Oregon disciplinary rules. We do so because our choice of a sanction vindicates the judicial authority of this jurisdiction, not of the one in which the earlier discipline occurred.

Accordingly, we consider whether the conduct of the accused violated disciplinary rules in this state. In his answer, the accused does not dispute that his conduct violated Oregon disciplinary rules. We agree that his conduct violated Oregon disciplinary rules, as follows.

(1) *Kologek Matter*

Mr. and Mrs. Kologek retained the accused to assist in resolving a partnership matter for the husband and a pension matter for the wife. He failed to take appropriate actions to pursue those matters, failed to return the Kologeks' files when asked, and failed to respond to the Michigan Bar's investigation.

By failing to take appropriate actions to pursue the matters entrusted to him, the accused violated DR 6-101(A) and (B) (a lawyer must provide competent and diligent representation). By failing to return the files when asked, the accused violated DR 2-110(A)(2) (a lawyer shall not withdraw from employment without delivering to client all papers to which client is entitled) and DR 9-101(B)(4) (a lawyer must deliver client's property in lawyer's possession if client asks and is entitled to property). By failing to respond to the Michigan Bar's investigation, the accused violated DR

² BR 3.5(e) provides that this court, in its discretion, may refer a reciprocal discipline matter to the Disciplinary Board "for the purpose of taking testimony on the issues set forth in BR 3.5(c)(1) and (2)." Neither the accused nor the Bar has asked us to exercise that discretion, and our review of the record does not suggest that we should do so.

1-103(C) (a lawyer who is the subject of a disciplinary investigation must cooperate with the investigation).

(2) *Fenn Matter*

The accused initiated a probate proceeding in the Fenn estate. He failed to file a timely inventory, resulting in the suspension of the temporary personal representative. He then filed two defective inventories, failed to give notice to the heirs of the first and final account, and failed to take appropriate steps to close the estate. The accused also collected a \$2,775 fee from the heirs but did not disclose the fee to the probate court. The Michigan disciplinary body concluded that the fee was illegal and clearly excessive. Again, the accused failed to respond to the Michigan Bar's investigation.

By filing late and defective inventories, the accused violated DR 6-101(A) and (B). By failing to disclose the fee to the probate court, the accused violated DR 1-102(A)(4) (a lawyer shall not engage in conduct that is prejudicial to the administration of justice). By charging an illegal and clearly excessive fee, the accused violated DR 2-106(A) (a lawyer shall not charge an illegal or clearly excessive fee). By failing to respond to the Michigan Bar's investigation, the accused violated DR 1-103(C).

(3) *Beeker Matter*

Mrs. Beeker retained the accused to draft a will and quitclaim deed and paid him \$50. The accused failed to return Mrs. Beeker's file and deed when she asked for them and failed to respond to her telephone calls and letters for about a year and a half. The accused also failed to respond to the Michigan Bar's investigation.

By failing to return the client's file and deed, the accused violated DR 2-110(A)(2) and DR 9-101(B)(4). By failing to return the client's telephone calls and letters, the accused violated DR 6-101(B). By failing to respond to the Michigan Bar's investigation, the accused violated DR 1-103(C).

In each matter, the accused also violated DR 1-102(A)(1) (it is professional misconduct for a lawyer to violate the disciplinary rules in the Oregon Code of Professional Responsibility).

Finally, we address the sanction. The accused asserts that his conduct does not warrant a suspension. We disagree.

In deciding on an appropriate sanction, in a reciprocal discipline case as in any other, we consider the American Bar Association "Standards for Imposing Lawyer Sanctions" (1986, amended 1992) (ABA Standards). ABA Standard 3.0 sets forth four factors to be considered in determining the appropriate sanction: the ethical duty violated, the lawyer's mental state, the actual or potential injury caused by the lawyer's misconduct, and the existence of aggravating or mitigating factors.

The accused violated duties owed to his clients, the legal system, and the profession.

The accused acted at least knowingly, that is, with a "conscious awareness of the nature or attendant circumstances of [his] conduct." ABA Standards at 7. The accused was aware of his responsibility in representing his clients, of the fees paid for his services, of his failures to take appropriate legal actions for his clients, and of his clients' attempts to contact him and gain possession of their files. He also was aware of, but disregarded, the Michigan Bar's requests for cooperation in investigating those matters.

The accused caused injuries to his clients. His failure to cooperate with the Michigan Bar also injured the administration of the discipline process of that state.

Aggravating factors are a prior record of discipline, ABA Standard 9.22(a), a pattern of misconduct and multiple offenses, ABA Standard 9.22(c) and (d), and substantial experience in the practice of law, ABA Standard 9.22(i).

There is one mitigating factor, imposition of another penalty or sanction. ABA Standard 9.32(k). Michigan imposed a four-month suspension from the practice of law for the same conduct that we consider here.³

The ABA Standards call for suspension when a lawyer knowingly fails to perform services for a client and causes injury or potential injury, or when a lawyer engages in a

³ It is not clear from the record whether the accused was practicing law or residing in Michigan during that period of suspension.

pattern of neglect and causes injury or potential injury. ABA Standard 4.42(a) and (b). Suspension also is appropriate when a lawyer knowingly engages in conduct that violates a duty owed to the profession and thereby causes injury or potential injury. ABA Standard 7.2.

We conclude that a six-month suspension is the proper sanction to apply in this case.

The accused is suspended from the practice of law for six months commencing on the effective date of this decision.

SUBJECT MATTER INDEX

References are to Opinions

	<u>Page</u>
<u>ACQUISITION OF INTEREST IN LITIGATION</u>	
In re Baker	145
<u>COMMUNICATION WITH A PERSON REPRESENTED BY COUNSEL</u>	
In re Lemery	125
In re Smith, Darrell@	225
In re Smith, Raymond	135
In re Spies@	237
<u>COMPETENCE</u>	
<u>PROFESSIONAL</u>	
In re Spies@	237
<u>CONDUCT INVOLVING A CRIMINAL ACT</u>	
In re Taylor@	233
<u>CONDUCT INVOLVING DISHONESTY, FRAUD, DECEIT OR MISREPRESENTATION</u>	
In re Albrecht	1
In re Belcher	37
In re Busby@	265
In re Devers@	271
In re Kretzmeier	15
In re Lombard	27
In re McKee@	189
In re Schmechel	95
In re Smith, Corey@	173
In re Spies@	237
In re Taylor@	233
<u>CONDUCT KNOWN TO BE ILLEGAL OR FRAUDULENT</u>	
In re Benson@	257

CONDUCT PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE

In re Baker	145
In re Belcher	37
In re Devers@	271
In re Kretzmeier	15
In re Kuhns	53
In re McKee@	189
In re Schmechel	95
In re Smith, Rex@	181
In re Spies@	237

CONFLICT OF INTERESTBUSINESS TRANSACTIONS WITH A CLIENT

In re Albrecht	1
--------------------------	---

CURRENT CLIENTS

In re McKee@	189
In re Taub	77
In re Smith, Raymond	135
In re Kengla	153

FORMER CLIENTS

In re Clark	69
In re Kengla	153
In re McKee@	189
In re Smith, Raymond	135

MULTIPLE CLIENTS

In re Cohen@	249
------------------------	-----

PERSONAL INTERESTS

In re Spies@	237
------------------------	-----

PRIVATE CLIENT

In re Lemery	125
------------------------	-----

DECEIVING OR MISLEADING COURT

In re Spies@	237
------------------------	-----

FAILURE TO CARRY OUT EMPLOYMENT

In re McKee@	189
In re Miller	87

FAILURE TO CARRY OUT LAWFUL OBJECTIVE OR PROTECT CLIENT'S INTEREST

In re Bourcier	115
--------------------------	-----

FAILURE TO PROVIDE COMPETENT REPRESENTATION

In re Bourcier	115
In re Devers@	271
In re Lombard	27
In re Schmechel	95

FEESEXCESSIVE

In re Devers@	271
In re Gastineau@	211
In re Spies@	237

FRAUD AND MISREPRESENTATION

In re McKee@	189
------------------------	-----

FUNDS AND PROPERTY OF A CLIENTFAILURE TO MAINTAIN COMPLETE RECORDS

In re Taylor@	233
-------------------------	-----

FAILURE TO PAY AND DELIVER

In re Devers@	271
In re Spies@	237

TRUST ACCOUNTS

In re Spies@	237
------------------------	-----

NEGLECT OF A LEGAL MATTER

In re Baker	145
In re Bourcier	115
In re Devers@	271
In re Harrington	61
In re Kengla	153
In re Kretzmeier	15
In re Lombard	27
In re McKee@	189
In re Miller	87
In re Oliver	107
In re Spies@	237
In re Van Zeipel	161

NON-COOPERATION

In re Devers@	271
In re Gastineau@	211
In re Oliver	107
In re Spies@	237
In re Taylor@	233

WITHDRAWAL FROM EMPLOYMENT

In re Bourcier	115
In re Devers@	271