

Disciplinary Board Reporter

Volume 9

January 1, 1995 to December 31, 1995

*Report of Attorney Discipline Cases
Decided by the Disciplinary Board
and by the
Supreme Court for 1995*

*Donna J. Richardson
Editor*

*Caroline Stein
Production Assistant*



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DISCIPLINARY BOARD REPORTER

REPORT OF CASES

Adjudicated by
the Disciplinary Board
of the Oregon State Bar

and

Supreme Court
Attorney Discipline Cases
for 1995

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Preface

This Reporter contains final decisions of the Disciplinary Board. The Disciplinary Board Reporter should be cited as 9 DB Rptr 1 (1995).

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. 277 of the 1996 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, 1996 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.

Included in this DB Reporter are stipulations by the Supreme Court which do not appear in the Advance Sheets. Also included you will find a summary of 1995 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. All have been included in the subject matter index, the table of Disciplinary Rules and Statutes, Table of Cases and the Table of Rules of Procedure.

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.

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IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of)	Case No. 92-173; 92-174
)	
DENI STARR,)	
)	
Accused.)	
_____)	

Bar Counsel: None

Counsel for the Accused: None

Disciplinary Board: None

Disposition: Violation of DR 1-102(A)(3), DR 1-102(A)(4), DR 5-101(A), DR 7-106(A), DR 7-106(C)(6), ORS 9.460(2) and ORS 9.527(3) and (4).
Stipulation for Discipline. 18 month suspension.

Effective Date of Order: January 1, 1995.

Note: Due to space restrictions, exhibits are not included but may be obtained by calling the Oregon State Bar

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
	)	SC S41967
Complaint as to the Conduct of)	
	)	ORDER ACCEPTING STIPULATION
DENI STARR,	)	FOR DISCIPLINE
)	
Accused.)	
_____)	

The Oregon State Bar and Deni Starr have entered into a stipulation for discipline. The stipulation was signed by the accused on November 18, 1994, and by counsel on behalf of the Bar on December 16, 1994, and was received by the court on December 19, 1994. The Bar and the accused have agreed that the period of suspension should begin on January 1, 1995.

The stipulation for discipline is accepted. The accused is suspended from the practice of law for a period of 18 months effective January 1, 1995.

DATED this 25th day of January, 1995.

/s/ Wallace Carson
WALLACE P. CARSON, JR.
Chief Justice

c: Chris L. Mullman
Deni Starr

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of	)	Case No. 92-173; 92-174
)	
DENI STARR,	)	STIPULATION FOR DISCIPLINE
)	
Accused.)	
<hr/>		

Deni Starr, 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, Deni Starr, was admitted by the Oregon Supreme Court to the practice of law in Oregon in 1983, and has been a member of the Oregon State Bar continuously since that time, having her office and place of business in Multnomah County, Oregon.

3.

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

4.

On April 6, 1994, the Oregon State Bar filed a formal complaint against the Accused alleging violations of DR 1-102(A)(3); DR 1-102(A)(4); DR 5-101(A); DR 7-106(A); DR 7-106(C)(6); ORS 9.460(2); ORS 9.527(3) and ORS 9.527(4). On July 24, 1994 the Accused filed an answer to the complaint. A copy of the complaint and answer are attached hereto and incorporated by this reference herein. The parties stipulate to the following facts, violations and sanctions regarding the allegations in the complaint.

THE GARNISHMENT MATTER

In February of 1992 the Accused was retained to represent Dolly McFadden in her divorce from Richard Leong. During her representation, the Accused learned that Ms. McFadden had not been paid child support for sometime from her previous husband, Arthur McFadden, the father of her children. Ms. McFadden had been awarded custody of the minor children, but at some point the children began living with Mr. McFadden. The prior decree had not been modified to reflect the actual change in custody.

Sometime before May 22, 1992, the Accused garnished Mr. McFadden's checking account for back child support and, as provided by ORS 29.139, a check for \$5,865.00 was sent on May 22, 1992, by Mr. McFadden's bank to the Accused. Contrary to statute, the Accused

did not notify Mr. McFadden of the garnishment. Mr. McFadden was notified of the garnishment by his bank and retained his attorney of record William Schulte (hereinafter "Schulte") to represent him. Schulte contacted the Accused and advised her that he did not think that Ms. McFadden was entitled to back child support since the children had been living with Mr. McFadden, relying on ORS 107.135(6). Schulte and the Accused entered into an agreement that the Accused would hold the garnished funds. By letter dated May 26, 1992, Schulte confirmed that the Accused would hold the funds until the matter was resolved. On that same date, the Accused wrote to Schulte confirming that the funds would be held until June 3, 1992, or until entitlement to them was clarified.

Upon receipt of the Accused's letter that she would disburse the funds on June 3, 1992, Schulte filed a claim of exemption and served it on the Accused on June 1, 1992, together with a motion for temporary restraining order and a letter advising that he intended to appear in court on June 3, 1992, to obtain a temporary restraining order requiring the Accused to hold the funds. The Accused received these documents on June 2, 1992.

The Accused knew that Schulte intended to seek the above order, but on June 2, 1992, she disbursed \$3,365.75 of the garnished funds to Ms. McFadden and the balance of \$2,499.25 to herself towards Ms. McFadden's attorney fee bill in connection with her divorce from Leong and for collection of past child support from Mr. McFadden.

On June 3, 1992 Schulte obtained temporary restraining orders in Multnomah and Washington counties requiring the Accused and Ms. McFadden to hold the funds. The Accused received copies of the orders on June 4, 1992. The Accused did not advise Ms. McFadden of the court orders.

A hearing was set for July 1, 1992, before Multnomah County Circuit Court Judge Stephen B. Herrell on the claim of exemption of the garnishment. The Accused appeared resisting the exemption, claiming she had a right to disburse the funds. The court ordered the Accused and Ms. McFadden to pay the garnished funds into court. Judge Herrell also ordered sanctions against the Accused and Ms. McFadden. Thereafter, the Accused failed to comply with the court's order in that no funds were paid into court.

At the July 1, 1992 hearing, Judge Herrell specifically asked the Accused to whom she had disbursed the garnished funds and the Accused stated "my client," without disclosing the partial disbursement of funds to herself as fees.

6.

The Accused stipulates that the above-described conduct violated the following provisions of the Code of Professional Responsibility and ORS Chapter 9:

1. DR 1-102(A)(3): Engaging in conduct involving misrepresentation;
2. DR 1-102(A)(4): Engaging in conduct prejudicial to the administration of justice;
3. ORS 9.460(2): Duty not to mislead the court; and
4. ORS 9.527(4): Wilful misconduct.

7.

THE LUND MATTER

On July 27, 1992, Washington County Circuit Court Judge Jon Lund heard the matter of support termination and satisfaction and ruled that Mr. McFadden did not have any obligation for back child support. Judge Lund assessed attorney fees against Ms. McFadden. At the hearing, Schulte asked the Accused to whom she had disbursed the garnished funds

and she declined to answer on the ground of relevance, which objection was overruled. The Accused then refused to answer the question of the basis of the attorney-client privilege. Judge Lund ordered her to answer the question ruling that the information was not privileged. The Accused responded that some of the funds were disbursed to Ms. McFadden but continued to refuse to answer with respect to the remainder of the funds.

8.

The Accused stipulates that the above described conduct violated the following standards of professional conduct:

1. DR 1-102(A)(4): Engaging in conduct prejudicial to the administration of justice;
2. DR 7-106(A): Disregard of a ruling of a tribunal made in the course of a proceeding; and
3. ORS 9.527(3): Wilfully disobeying a court order.

9.

THE HERRELL MATTER

On motion made by Schulte, Multnomah County Circuit Court Judge Stephen B. Herrell signed an order August 3, 1992 directing Ms. McFadden and the Accused to show cause why they should not be held in contempt for failing to pay the garnished funds into court. The hearing was scheduled for August 19, 1992. By letter, the court asked the Accused and Schulte to appear for a pre-hearing conference before Judge Herrell on August 6, 1992. The Accused responded in writing asking that Judge Herrell reschedule the August 19th hearing and asking that he recuse himself since she was a party. Judge Herrell responded in writing indicating he would consider rescheduling the August 19, 1992 hearing when he met with Schulte and the Accused on August 6, 1992, at which time the Accused could articulate her argument for the judge's recusal.

The Accused responded with a letter, attached as Exhibit C to the formal complaint, indicating that she would not "appear in front of you where I am a party" and if he had "difficulty with that" the two of them could "discuss it with the Judicial Fitness Commission." At the time of the August 6 conference, the Accused did not appear but was in the hallway outside the court's chambers waiting for another matter to be heard before Judge Herrell immediately after the scheduled conference with the Accused and Schulte. Through his clerk, Judge Herrell twice ordered the Accused to come to his chambers regarding the McFadden matter and twice she refused.

After the Accused refused a second time to participate in the conference, Judge Herrell took the bench to hear other matters set before him, one in which the Accused was appearing on behalf of a party. When the Accused entered the courtroom on the other matter, Judge Herrell began discussing the McFadden matter. The Accused interrupted the court, stating that she refused to discuss the matter with the court, that he had no business being on a case where she was a party, and that she was arranging for other counsel for her client. Judge Herrell then indicated the matter would be heard by Judge Nachtigal.

10.

The Accused stipulates that the above-described conduct violated the following standards of professional conduct:

1. DR 1-102(A)(4): Engaging in conduct prejudicial to the administration of justice;
2. DR 7-106(A): Disregarding a ruling of a tribunal made in the course of a proceeding;

3. DR 7-106(C)(6): Engaging in undignified or discourteous conduct degrading to a tribunal; and

4. ORS 9.527 (3): Wilfully disobeying a court order.

11.

THE CONTEMPT MATTER

On September 24, 1994, Multnomah County Circuit Court Judge Kathleen Nachtigal

found the Accused in contempt of court for failing to pay to the clerk of the court the sums garnished as required by Judge Herrell's order. No sums had been paid to the clerk of the court by either the Accused or her client.

12.

The Accused stipulates the above described conduct violated the following standard of professional conduct:

1. ORS 9.527(3): Wilfully disobeying a court order; and

2. DR 7-106(A): Disregarding a ruling of a tribunal made in the course of a proceeding.

13.

THE CONFLICT MATTER

The Accused received notice on June 2, 1992 that a restraining order was being sought against both herself and her client. She further had sanctions imposed against her on July 1, 1992 by Judge Herrell and received notice that she and her client were under a joint and equal obligation to pay to the clerk of the court the full amount of money garnished from Mr. McFadden's account.

The Accused continued to represent Ms. McFadden when the exercise of her professional judgment on behalf of her client was or reasonably might have been affected by her own financial interests and the Accused did not make a full disclosure of this potential conflict to her client and did not obtain the client's written informed consent to continued representation.

14.

The Accused stipulates the above described conduct violated the following standard of professional conduct:

1. DR 5-101(A): Conflict of interest, lawyer's self interest.

15.

ABA STANDARDS

15.1

DUTY BREACHED

The parties stipulate that the Accused violated the ethical duties a lawyer owes to clients by failing to avoid a conflict of interest (ABA Standards 4.3 and 4.32). The Accused also violated her duty to the public as the public expects a lawyer to be honest and to abide by the law. (ABA Standards 5.0 and 5.1). The Accused also violated her duties to the legal system (ABA Standards 6.0, 6.1 and 6.2).

15.2

MENTAL STATE

The ABA Standards require an analysis of the mental state of the lawyer to determine

if she acted intentionally, knowingly or negligently. See ABA Standards Section III and IV. The parties stipulate that the Accused acted knowingly -- that being the conscious awareness of the attendant circumstances of her conduct but without the conscious objective or purpose to accomplish a particular result. The Accused did not intend the harmful consequences of her conduct, but acted out of a fiercely held belief that zealous advocacy demanded her actions on her client's behalf.

15.3

EXTENT OF INJURY

Section IV of the ABA Standards notes that injury is harm to a client, the public, the legal system, or the profession which results from a lawyer's misconduct and can range from "serious" to "little or no" injury. The parties stipulate that injury to the Accused's client was serious in that a contempt judgment was entered against her. Sanctions, costs and attorney fees have been awarded against the client and the Accused which remain unsatisfied. Thus, Mr. McFadden has been injured as well. The portion of the judgment that remains unsatisfied bears 9 % interest per annum. That judgment may be enforced against Ms. McFadden at any time thus creating the possibility of further harm to the Accused's client.

The injury to the legal system is also serious in that the letter to Judge Herrell and failure to appear as ordered was undignified, discourteous and degrading to the court. False statements to the court or a failure to respond truthfully and completely, despite intentions based on zealous advocacy, is a violation of the duties a lawyer owes to the legal system.

15.4

AGGRAVATING OR MITIGATING CIRCUMSTANCES

Aggravating factors to be considered under Section 9.22 of the ABA Standards include:

a. Prior disciplinary offenses: The Accused received an admonition dated July 19, 1989, based on a demand by the Accused that a complainant retract statements made to the Bar or face a defamation lawsuit in violation of DR 1-102(A)(4).

- c. A pattern of misconduct;
- d. Multiple offenses;

- i. Substantial experience in the practice of law;
- j. Failure to make restitution.

Mitigating factors to consider under Section 9.32 of the ABA Standards include:

- c. Personal or emotional problems (see below);

e. Full and free disclosure to disciplinary counsel and a cooperative attitude toward the disciplinary proceedings;

15.5

The Accused and the Bar agree that at the time of the events described herein, the Accused was emotionally involved with her clients who were mostly abused women or women with little or no financial resources. The Accused felt overly committed to these clients and made errors in judgment over the balance between zealous representation and

other duties of lawyer. Since the filing of this complaint, the Accused has had some counseling, has developed a working relationship with other women lawyers to help her evaluate cases, and has sought assistance from the Oregon Attorney Assistance Program. Further, Disciplinary Counsel's office has received written and oral communications from practicing lawyers and judges to the effect that the Accused's demeanor and attitude has demonstrably changed since 1992.

Section 4.32 of the ABA Standards provides that suspension 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 a client. Suspension is also appropriate under ABA Standards sections 5.0 and 6.0.

16.

CASE LAW

The Accused and the Bar have reviewed case law in determining an appropriate sanction and find that the following cases lend support to the sanction agreed upon in this stipulation:

1. At one extreme involving multiple charges resulting in disbarment are In re Hawkins, 305 Or 319, 751 P2d 780 (1988) and In re Hill, 296 Or 622, 678 P2d 1218 (1984) and at the other extreme warranting only a public reprimand is In re Zumwalt, 296 Or 631, 678 P2d 1207 (1984).

2. In between the extremes are In re White, 311 Or 573, 815 P2d 1257 (1991) three years; In re McKee, 316 Or 114, 849 P2d 509 (1993), 18 months and In re Hiller and Janssen, 298 Or 526, 694 P2d 540 (1985) four months.

17.

SANCTION

Pursuant to the terms of this stipulation and BR 3.6(C)(iii), the Accused agrees to accept an eighteen (18) month suspension from the practice of law for violations of the Disciplinary Rules and statutes cited herein. The Accused and the Bar agree the effective date of the suspension shall be January 1, 1995.

18.

This Stipulation for Discipline is subject to review by the Disciplinary Counsel and to approval by the SPRB. The parties agree that if approved by the Bar, the stipulation is to be submitted to the Supreme Court for consideration pursuant to the terms of BR 3.6. The parties further agree that if approved by the Supreme Court, this stipulation requires the Accused to make formal application for reinstatement under BR 8.1 upon the expiration of the suspension.

EXECUTED this 18 day of November, 1994.

/s/ Deni Starr

Deni Starr

EXECUTED this 16th day of December, 1994.

/s/ Chris Mullmann
Chris L. Mullmann
Assistant Disciplinary Counsel
Oregon State Bar

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)
) No. 93-12
Complaint as to the Conduct of)
)
JAMES C. JAGGER,)
)
)
)
) Accused.)
)
_____)

Bar Counsel: Lawrence E. Thorp, Esq.

Counsel for the Accused: John C. Fisher, Esq.

Disciplinary Board: James W. Spickerman, Chair; Jon Joseph, and Mary M. Burrows,
public member.

Disposition: Violation of DR 1-102(A)(3), DR 7-102(A)(5), DR 1-102(A)(4) and DR 7-
104(A)(1). Public reprimand.

Effective Date of Opinion: February 4, 1995.

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re:)	
	)	Case No. 93-12
Complaint as to the Conduct of)	
)	OPINION OF TRIAL PANEL
JAMES C. JAGGER,)	
)	
Accused.)	
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This matter came on for hearing before a trial panel consisting of Mary M. Burrows, Jon Joseph, and James W. Spickerman on October 24, 1994. The Oregon State Bar was represented by Laurence E. Thorp, Volunteer Counsel, and Lia Saroyan, Assistant Disciplinary Counsel for the Oregon State Bar. The Accused was represented by John C. Fisher. The trial panel has considered all of the evidence and testimony, as well as the legal arguments submitted by counsel for the Accused and the Bar.

INTRODUCTION

This is a consolidated hearing of two causes of Complaint alleging misconduct on the part of James C. Jagger. The first cause alleges that the Accused filed with Lane County Circuit Court a trial memorandum which misrepresented the opinion of an expert witness. The Bar contends that this misrepresentation involved a knowing false statement in violation of DR 1-102(A)(3) and DR 7-102(A)(5) and that the memorandum contained a false statement of fact in violation of DR 1-102(A)(4).

The second cause of complaint alleges that the Accused contacted a party relating to a subject upon which the person was known by the Accused to be represented by counsel and did so without prior consent of the contacted person's counsel in violation of DR 7-104(A)(1).

SUMMARY OF FACTS

On March of 1992, a petition for the appointment of Conrad Brashear as temporary guardian for the minor child, Zachary Bloomfield, was filed in Lane County Circuit Court. Mr. Brashear is Zachary's maternal grandfather. Zachary's father, Michael Bloomfield, contested the petition and filed a cross-petition seeking his own appointment as guardian of the child. The case was set for an expedited hearing on May 28, 1992. Jagger represented Michael Bloomfield at trial.

At a time in April, sometime prior to the hearing, Michael Bloomfield arranged for a professional counselor, Jeanne Koch, to meet with Zachary and with both Bloomfield and Zachary. On May 27, 1992, the day before the hearing, the Accused spoke by telephone concerning the case with Jeanne Koch, dictated his trial memorandum, and later that day spoke in person with Jeanne Koch after she had met with both Michael Bloomfield and Zachary. The trial memorandum was filed at 5:00 on May 27, 1992. Jeanne Koch was subpoenaed for trial by the Accused.

The trial memorandum filed by the Accused makes the following representations: "Jeanne Koch, M.S.W. has been involved with counselling Zachary Bloomfield individually, and also on the morning of May 27, 1992, with both Zachary and Michael Bloomfield. It is her opinion, that it is not in the best interest of Zachary Bloomfield that he leave this area and go with his grandfather to Arizona, but that Zachary Bloomfield immediately commence residing with Michael Bloomfield. It is also Dr. Koch's opinion that this be done with continued counselling through her office. In her opinion, Zachary Bloomfield is ready for this and does not feel that any-further delay in the decision concerning Zachary's living arrangement should be allowed."

The hearing took place May 28, 1992. Jeanne Koch was called as a witness by the Accused. The Bar alleges that the trial memorandum intentionally misrepresented the opinion of Ms. Koch in that it stated it was her opinion it was not in Zachary's best interest to leave the area and go with his grandfather to Arizona, but that Zachary immediately commence residing with his father.

Attorney F. William Honsowetz, who represented Brashear in the guardianship proceeding, filed a complaint with the bar alleging that the Accused misrepresented Koch's anticipated testimony in the Accused's trial memorandum.

At the time [of] the hearing, Jeanne Koch testified that she did tell the Accused prior to the trial that it was in Zachary's best interest to continue counseling, that it would be in the child's best interest to continue counseling with her and that it would be in the child's best interest to resolve issues with his father. She indicated that it would be ideal if the two could be in Eugene and work things through. Ms. Koch's position in the proceeding was that she was an advocate for the child and was not going to express an opinion concerning who should have custody of Zachary and that she had expressed that to Mr. Jagger.

SECOND CAUSE OF COMPLAINT

In September of 1992, the complaint letter pertaining to the above cause was sent to the Oregon State Bar Association and a copy forwarded to the Accused in October of 1992. After receiving a copy of the complaint letter, the Accused contacted Koch to see if she would be willing to write a letter to the Bar on the Accused's behalf. The Accused met with Koch in person and she agreed to write such a letter and it was agreed that the Accused would prepare a draft for her review. When the Accused sent the draft letter to Ms. Koch, Koch contacted attorney Robert Fraser concerning the letter. Robert Fraser wrote the Accused and advised him that Ms. Koch would not be responding to his request for a letter and advised him that all communication regarding the matter should be addressed to Mr. Fraser.

After approximately a year, the Accused became involved with assisting Michael Bloomfield in the adoption of Zachary. In November of 1993, the Accused wrote to Jeanne Koch requesting a copy of Zachary Bloomfield's file as part of the adoption matter. The first paragraph of the letter, however, stated:

"As you (may) or may not be aware of, I am still involved in this situation with Mr. Honsowetz. I have had to obtain a local attorney, John Fisher, in an attempt to resolve this matter. Mr. Fisher may contact you to ask you questions regarding the Bloomfield case. Please feel free to talk to him."

The Accused maintained that he was not consciously aware of Mr. Fraser's representation of Ms. Koch at the time he wrote the letter and that the contact was on other than directly related subject. He maintained the contact was for the purpose of obtaining Zachary Bloomfield's file and not related to the letter he previously had asked Ms. Koch to write pertaining to the Bar proceeding.

DISCUSSION OF FIRST CAUSE OF COMPLAINT

The Bar contends that the trial memorandum filed by the accused constituted a false statement in violation of DR 1-102 (A)(3) and DR 7-102 (A) (5). 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.

DR 1-102(A)(5) provides:

In a lawyer's representation of a client... a lawyer shall not: (5) Knowingly make a false statement of law or fact.

The Bar also contends the memorandum constituted a false statement of fact, therefore, violated DR 1-102(A)(3).

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

It is professional misconduct for a lawyer to: (3) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

The trial panel finds that the trial memorandum prepared by the Accused was in error in stating that the counselor's opinion was that Zachary Bloomfield should immediately commence residing with his father and that he should not go with his grandfather to Arizona. While the trial memorandum overstates to the benefit of his client what the Accused expected the expert to say, the panel does not find clear and convincing evidence that there was intentional or knowing false statements [made] to the court. At worst, the Accused put together Jeanne Koch's statements concerning the preferability of the child continuing counseling and having an opportunity to re-establish relationship with his father to mean that the child should not go with his grandfather back to Arizona, therefore, should remain with the father in Eugene, Oregon. The memorandum was prepared in context of trial preparation at the last minute and without the aid of a written report by the counselor. While an erroneous representation was made negligently, there is not clear and convincing evidence of an intentional or knowing misrepresentation and such a showing must be made to establish violation of DR 1-102(A)(3) and DR 7-102(A)(5).

The trial panel finds the accused not guilty of violation of the disciplinary rules cited in the first cause of the complaint.

DISCUSSION OF THE SECOND CAUSE OF COMPLAINT

The trial panel finds clear and convincing evidence that the Accused contacted a person he knew to be represented and that contact was on a matter related to the subject of the representation.

The contact was on a matter related to the subject of the representation. The letter of contact references the particular case in which the Accused and Ms. Koch were involved at the time of notice of representation and on the very matter of representation. The subject upon which the Accused was not to contact Ms. Koch is addressed in the first paragraph of the letter and was improper.

The trial panel finds that, at the least, there is clear and convincing evidence that the Accused acted negligently in making contact with this represented person.

The trial panel finds that the Accused violated DR 7-104(A)(1).

SANCTION

The trial panel looks to ABA Standards for Imposing Lawyer Sanctions ("ABA Standards"). ABA Standards Part III(C) sets out the factors to be considered in imposing sanctions.

1. The Duty Violated.

In this case, the accused violated his duties owed to the legal system to refrain from improper communications with individuals within the legal system. ABA Standard 6.3.

2. The Lawyer's Mental State.

The trial panel finds that the Accused was negligent in communicating with a person who was represented. The trial panel cannot find clear and convincing evidence that the Accused, at the time of communication, was presently conscious of the representation and chose to make the contact to avoid communicating with Ms. Koch through her attorney.

3. The Actual or Potential Injury Caused by this Conduct.

Injury can be either actual or potential under the ABA Standards. In re Williams, 314 Or 530, 547, 840 P.2d 1280 (1992). There was no actual injury suffered in this case. There was some potential for harm in that Ms. Koch may have understood from the letter that she was required to communicate with the Accused's attorney if he contacted her.

4. The Existence of Aggravating or Mitigating Factors.

By way of aggravation, the Accused has had substantial experience in the practice of law. The other significant aggravating factor is that the Accused was admonished for violating current DR 6-101(B) when it was found that he neglected the client's legal matter in 1983. In 1985, the Accused was publicly reprimanded for violating DR 9-101(B)(4) for failing to provide to a client property belonging to the client. Of particular relevance is that the Accused was admonished in 1986 for violating DR 7-104(A) when he contacted a represented party without consent of that party's attorney.

Standards at 6.33 states that absent aggravating or mitigating circumstances:

"Reprimand is generally appropriate when a lawyer is negligent in determining whether it is proper to engage in communication with an individual in the legal system and causes injury or potential injury to a party or interference or potential interference with the outcome of a legal proceeding." Standards at page 43.

Lawyers who violate DR 7-104(A)(1) alone, whether or not those lawyers have not previously been disciplined, have traditionally received a public reprimand. See In re Lewelling, 296 Or 702, 678 P.2d 1229 (1984); In re Burrows, 291 Or 135, 629 P.2d 820 (1981); In re Hostettler, 291 Or 147, 629 P.2d 827 (1981); In re McCaffrey, 275 Or 23, 549 P.2d 666 (1976); In re Venn, 235 Or 73, 383 P.2d 774 (1963).

While some history of prior discipline, including a private reprimand several years previous for the same infraction, suggests that stronger sanction may be warranted, considering the ABA Standards and previous Oregon decisions, the trial panel finds that public reprimand is the appropriate sanction.

CONCLUSION

This opinion shall stand as a public reprimand of the Accused.

Dated this 13th day of January, 1994.

/s/ James Spickerman

James W. Spickerman

/s/ Jon Joseph

Jon A. Joseph

/s/ Mary Burrows

Mary M. Burrows, Public Member

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
	)	No. 92-115; 93-134; 93-142
Complaint as to the Conduct of	)	93-143; 93-197; 94-175
)	
W. MARK McKNIGHT,)	
)	
Accused.)	
_____)	

Bar Counsel: None

Counsel for the Accused: None

Disciplinary Board: None

Disposition: Violation of DR 2-106(A), DR 2-110(A)(3), DR 9-101(c)(4) [former DR 9-101(B)(4)], and DR 6-101(B).
Stipulation for Discipline. One year suspension.

Effective Date of Order: February 15, 1995.

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:	)	SC S41993
)	
Complaint as to the Conduct of)	
)	
W. MARK McKNIGHT,	)	ORDER ACCEPTING STIPULATION
	)	FOR DISCIPLINE
Accused.)	
)	

The Oregon State Bar and W. Mark McKnight, have entered into a Stipulation for Discipline. The Stipulation for Discipline is accepted. W. Mark McKnight is suspended from the practice of law for a period of one year. The Stipulation for Discipline is effective February 15, 1995.

DATED this 3rd day of February, 1995.

/s/ Wallace Carson
 WALLACE P. CARSON, JR.
 Chief Justice

c: Martha M. Hicks
 Roscoe C. Nelson, II
 Susan D. Isaacs

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
	)	Case Nos. 92-115; 93-134; 93-142;
Complaint as to the Conduct of	)	93-143; 93-197; 94-175
)	
W. MARK MCKNIGHT,	)	STIPULATION FOR
	)	DISCIPLINE
Accused.)	
)	

W. Mark McKnight, 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, W. Mark McKnight, 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 his office and place of business in Multnomah County, Oregon.

3.

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

4.

On or about November 13, 1991, the Accused undertook representation of Joseph DeMonte, who was an inmate at the Federal Corrections Institution in Sheridan, Oregon. Mr. DeMonte was concerned that his anticipated release could be delayed for having failed to pay restitution as ordered. Marie Kuehnel paid the Accused \$4,500, denominated by the Accused as a prepaid non-refundable fee, for representing Mr. DeMonte in his efforts to resolve the issues that could delay his release.

5.

On or about November 16, 1991, Mr. DeMonte retained another attorney to represent him on the questions regarding his impending release from federal prison. On or about Monday, November 18, 1991, Ms. Kuehnel advised the Accused that Mr. DeMonte had terminated the Accused's representation of him.

6.

As of his receipt of the above-described notice from Ms. Kuehnel that Mr. DeMonte had terminated his employment, the Accused had performed a maximum of three hours of legal services on Mr. DeMonte's behalf. The Accused did not expend any costs on behalf of Mr.

DeMonte.

7.

On or about November 19, 1991, Ms. Kuehnel requested that the Accused refund any unearned balance of the \$4,500 she paid to him on November 13, 1991. The Accused refused to refund any portion of the \$4,500 fee even after Ms. Kuehnel was awarded judgment for the fee.

8.

By charging \$4,500 to represent Joseph DeMonte and for the services he rendered to him, the Accused charged a clearly excessive fee.

9.

Upon receipt of notice from Ms. Kuehnel that Mr. DeMonte had terminated his representation, the Accused effectively withdrew from employment.

10.

By refusing Ms. Kuehnel's request for a refund of a portion of the \$4,500 retainer, the Accused failed to promptly pay, upon his withdrawal from employment, any unearned portion of the fee Ms. Kuehnel paid to him in advance.

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 2-106(A); and
2. DR 2-110(A)(3) of the Code of Professional Responsibility.

ERICKSON COMPLAINT

12.

On or about October 10, 1991, the Accused undertook representation of Paul Erickson. Mr. Erickson was the defendant in a civil case filed in Multnomah County Circuit Court (Banta Construction v. Paul Erickson). Mr. Erickson paid the Accused \$5,000, denominated by the Accused as a prepaid non-refundable fee.

13.

The Accused was retained to represent Mr. Erickson individually. On or about December 18, 1991, Mr. Erickson's insurance carrier advised him that it had retained another attorney to defend him in the Banta litigation and that that attorney would represent both Mr. Erickson and his business.

14.

On or about February 6, 1992, Mr. Erickson wrote to the Accused to request that the Accused refund any unearned balance of the \$5,000 Mr. Erickson had paid him. The Accused did not refund any portion of the \$5,000 until June, 1993.

15.

Upon receipt of notice from Mr. Erickson that Mr. Erickson had terminated his representation, the Accused effectively withdrew from employment.

16.

As of February 6, 1992, the Accused had performed a maximum of 19.75 hours of legal services on Mr. Erickson's behalf. The Accused did not expend any costs on behalf of Mr. Erickson.

17.

By failing to comply with Mr. Erickson's request for a refund of a portion of the \$5,000 retainer, the Accused failed to promptly pay, upon his withdrawal from employment, any unearned portion of the fee Mr. Erickson paid to him in advance.

18.

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

1. DR 2-110(A)(3) of the Code of Professional Responsibility.

FORD COMPLAINT

19.

On or about February 14, 1992, the Accused undertook to represent Marilyn Ford. Ms. Ford had received a letter dated January 27, 1992 from her former husband demanding repayment of \$10,800, plus interest, for spousal support payments he had made to her because he had allegedly failed to notify him that she had remarried. Ms. Ford's decree of dissolution of marriage discontinued spousal support payments upon her remarriage. Ms. Ford and the Accused entered into an "Attorney Fee Agreement--Criminal Case" pursuant to which she paid the Accused \$4,500 which was designated as a prepaid, non-refundable fee. Pursuant to this agreement, the Accused agreed to "investigate and research [Ms. Ford's] potential criminal liability arising out of ex-husband's accusations concerning theft by fraud of alimony/support payments and trust receipts."

20.

Ms. Ford was never charged with any crime or threatened with criminal prosecution by a public agency regarding overpayment of spousal support. When Ms. Ford's former husband served her with a civil Order to show cause in Lane County Circuit Court, the Accused declined to represent her in that matter and withdrew from employment by letter dated April 16, 1992. Ms. Ford retained another attorney who resolved the spousal support dispute in December, 1992.

21.

Ms. Ford, through counsel, requested a refund of any unearned balance of the \$4,500 retainer. The Accused refused to refund any portion of the fee and in July 1993, Ms. Ford was awarded a judgment against him by the Multnomah County District Court in the amount of \$6,750. \$4,000 of this judgment was designated by the court as the unearned fees the Accused was obligated to return upon conclusion of his representation of Ms. Ford. The Accused eventually paid Ms. Ford the sum of \$4,500 in December 1993.

22.

Pursuant to the terms of the fee agreement, the Accused was obligated to refund any unearned portion of the \$4,500 he collected from Ms. Ford. The Accused failed to return promptly any unearned portion of the advanced fee upon withdrawal from employment.

23.

By failing to refund any portion of the retainer he charged Ms. Ford until five months after she obtained a judgment against him, the Accused charged and attempted to collect a clearly excessive fee.

24.

By failing to refund the unearned portion of the \$4,500 until five months after Ms. Ford had obtained judgment against him, the Accused failed to promptly pay to a client as requested the client funds in his possession that the client was entitled to receive.

25.

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);
2. DR 2-110(A)(3); and
3. Former DR 9-101(B)(4) [current DR 9-101(C)(4)] of the Code of Professional Responsibility.

COZAD COMPLAINT

26.

On or about September 3, 1992, the Accused undertook representation of Jason Cozad who had been arrested on or about August 28, 1992 on felony charges of intimidation and assault. Mr. Cozad and the Accused entered into an attorney fee agreement that provided as follows:

BASIC FEE

F. I agree and promise to pay Mr. McKnight as follows: Basic Fee for representation in this case is: \$7,500; including a pre-paid advance of legal fees of \$3,750. The balance of the Basic Fee is payable as follows:

- (1) \$3,250 due on or before trial.
- (2) \$500 due on or before by assignment of bail.

I understand and agree that the pre-paid advance on legal fees is a non-refundable charge which is due immediately and which is the fee for accepting my case.

The only exception to the non-refundability of this amount is in the instance that a no-complaint is issued, or the grand jury fails to indict, in which case, Mr. McKnight will refund the amount, minus any amount which Mr. McKnight has earned, as per paragraph "I"; the fee provisions of paragraph 'I' remain in force with respect to the hourly fee provisions of this paragraph regardless of whether paragraph 'T' is independently struck as the controlling fee provision of this contract.

This fee agreement provided that in the case of a refund, the Accused's fee would be calculated at an hourly rate of \$125.

27.

On September 23, 1992, when Mr. Cozad retained the Accused, he had not been indicted on any criminal charges. By letter dated November 26, 1992, Mr. Cozad terminated the Accused's legal services. On that date, Mr. Cozad had not been indicted.

28.

Pursuant to the terms of their fee agreement, the Accused was obligated to refund any unearned portion of the \$3,675 he collected from Mr. Cozad upon termination of his employment by Mr. Cozad.

29.

At the time he terminated the Accused's representation of him, Mr. Cozad requested a refund of the \$ 3,675 the Accused had received in advance fees for his representation. When the Accused failed to refund the \$3,675, Mr. Cozad's new attorney, Verne Davis, repeated the request for a refund of the unearned portion of the \$3,675. In December 1992, the Accused agreed to provide an accounting of the time he had spent on Mr. Cozad's case.

30.

The Accused did not provide Mr. Cozad or his attorney any accounting of his time until December 15, 1993, after he had been contacted by the Multnomah County Local Professional Responsibility Committee in the course of its investigation of Mr. Cozad's complaint to the Oregon State Bar.

31.

At the time Mr. Cozad terminated the Accused's representation of him, the Accused claims he had performed a maximum of 18.5 hours of legal services on Mr. Cozad's behalf at the hourly rate of \$125, for a total fee of \$2,312.50.

32.

The Accused has refused to refund any portion of the \$3,675 he received in advanced legal fees from Mr. Cozad.

33.

By failing to refund any portion of the advanced fee and thereby charging \$3,675 for the services he rendered to Mr. Cozad, the Accused charged a clearly excessive fee.

34.

By refusing Mr. Cozad's request for a refund of a portion of the \$3,675 he received in advanced legal fees, the Accused refused to promptly pay upon his withdrawal from employment any unearned portion of the fee Mr. Cozad paid to him in advance.

35.

By failing to repay Mr. Cozad the unearned portion of the \$3,675 he received in advanced legal fees when Mr. Cozad terminated his employment, the Accused failed to promptly return to his client the funds in his possession that the client was entitled to receive.

36.

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);
2. DR 2-110(A)(3); and
3. Former DR 9-101(B)(4) [current DR 9-101(C)(4)] of the Code of Professional Responsibility.

JOHNSTON COMPLAINT

37.

On or about October 23, 1992, the Accused was retained by Ella Johnston to analyze parole possibilities for her husband, Robert Johnston, who was incarcerated at the Oregon State penitentiary. Ms. Johnston paid the Accused \$500, denominated by the Accused as a pre-paid, nonrefundable fee.

38.

The Accused attempted unsuccessfully on two separate days to meet with Mr. Johnston at the Oregon State Penitentiary. The Accused made no further effort to meet with Mr. Johnston and performed no additional services to analyze the parole possibilities for Mr. Johnston.

39.

By failing to meet with Mr. Johnston or make any further effort to analyze the possibilities that Mr. Johnson could be paroled, the Accused neglected a legal matter entrusted to him.

40.

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

1. DR 6-101(B) of the Code of Professional Responsibility.

RUMPF COMPLAINT

41.

On or about September 23, 1993, the Accused undertook representation of Mary Jean Rumpf in connection with charges of assault and disorderly conduct. Ms. Rumpf and the Accused entered into an attorney fee agreement which required Ms. Rumpf to pay the Accused a non-refundable fee of \$3,000.

42.

On September 28, 1993, Ms. Rumpf terminated the Accused's representation of her and requested the return of the unearned portion of the fee she had paid. The Accused agreed to return the unearned portion of the retainer and subsequently agreed to return the entire \$3,000 to Ms. Rumpf. To date, the Accused has returned no portion of Ms. Rumpf's retainer.

43.

At the time Ms. Rumpf terminated the Accused's representation of her, the Accused had performed a maximum of 5 hours of legal services on Ms. Rumpf's behalf, for a maximum total fee of \$625.00. The Accused expended a maximum of \$80.79 in costs on behalf of Ms. Rumpf.

44.

Upon receipt of notice from Ms. Rumpf that she had terminated his representation, the Accused effectively withdrew from employment.

45.

By failing to refund the unearned portion of the \$3,000 retainer, the Accused charged or collected an excessive fee and failed promptly to pay to a client as requested by the client funds which the client is entitled to receive.

46.

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

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

47.

The Accused and the Bar stipulate to the following additional facts:

- a. The Accused did not refund any portion of the advanced fees he received from Marie Kuelmel and Marilyn Ford because he questioned their entitlement to refunds.
- b. An Oregon State Bar fee arbitration panel adjudicated Ms. Kuehnel's entitlement to a refund from the Accused. On August 12, 1992, the fee arbitration panel ordered the Accused to pay Ms. Kuehnel the sum of \$4,500 together with interest at the rate of 9% from December 1, 1991. The Accused refunded Ms. Kuehnel's money in April, 1993.
- c. Marilyn Ford filed suit in the District Court, Multnomah County, for the return of her \$4,500 fee. The issue of the Accused's entitlement to the entire \$4,500 was litigated before an arbitrator appointed by the court. On July 6, 1993, the arbitrator entered an award in favor of Ms. Ford. Pursuant to that award, judgment was entered against the Accused in the amount of \$6,850.70 which included a refund of \$4,000 plus attorney fees and costs. In December, 1993, the Accused made a payment of \$4,500 on the judgment.
- d. Jason Cozad was ultimately indicted on the criminal charges for which he had retained the Accused to defend.
- e. The Accused agreed to return the entire amount Mary Rumpf had paid him on the condition that she and her husband promise to have no further contact with him. The Accused wrote Ms. Rumpf a check for \$3,000 that was post-dated to allow the Accused to deposit sufficient funds in his account to cover it. The Accused stopped payment on this check when it appeared to him that Ms. Rumpf had attempted to negotiate the check before it was due to be paid. The Accused has returned no portion of Ms. Rumpf's \$3,000.

48.

The Accused and the Bar agree that in fashioning the appropriate sanction in this case, the Supreme Court should consider the ABA Standards For Imposing Lawyer Sanctions and Oregon case law. The ABA Standards require that the Accused's conduct be analyzed by considering the following four factors: the ethical duty violated; the attorney's mental state; the actual or potential injury; and the existence of aggravating and mitigating circumstances.

- a. The Accused violated his duties to his clients. ABA Standards § 4.1 to § 4.14.
- b. With regard to the Accused's state of mind, he intentionally retained fees paid for services he had not rendered to his clients and knowingly failed to return unearned fees promptly after he withdrew or was discharged from employment.
- c. The Accused caused actual injury to Marie Kuehnel, Paul Erickson and Marilyn Ford by retaining unearned fees for substantial periods of time after his employment by these clients terminated. All three of these clients retained new counsel to recover their money and thus incurred additional expenses as a result of the Accused's conduct. Jason Cozad and Mary Rumpf have been deprived of the unearned portions of their retainers. Robert Johnston's legal matter went unattended to by the Accused. ABA Standards at 7.

- d. Aggravating factors to be considered under ABA Standards § 9.22 are:
1. The Accused acted with a selfish motive in retaining and failing to promptly refund unearned fees.
 2. The Accused has displayed a pattern of misconduct that involves six different clients.
 3. The Accused has committed 12 separate disciplinary rule violations.
 4. The Accused has failed to cooperate with the Bar in these proceedings to the extent that the trial panel imposed sanctions for failing to provide discovery materials.
 5. The Accused did not acknowledge the wrongful nature of his conduct and has not reimbursed any of his clients unless they obtained new counsel or filed legal proceedings to recover their money. The Accused has not made refunds to those complainants who have not attempted to compel restitution.
 6. The Accused has substantial experience in the practice of law, having been admitted to the Bar in 1986.
 7. The Accused was admonished in 1989 for failure to cooperate with a Bar investigation in violation of DR 1-103(C).
- E. Mitigating factors to be considered under ABA Standards § 9.32 are:
1. The Accused has no prior major disciplinary record. The Accused's prior offense is remote factually and in time from these current matters.
 2. The Accused had personal financial problems created in part by expanding his law office too quickly when he qualified for federal court appointments only to have to wait for reimbursement for legal fees from the federal government for six months to one year when the CJA panel ran out of money.
 3. The Accused has rehabilitated himself through changing his fee arrangement with clients, by not using a flat fee arrangement whenever possible, and by making every effort to avoid fee disputes with clients.
 4. The Accused is remorseful for the difficulties his clients have experienced due to his conduct described herein.

49.

The ABA Standards do not speak expressly to the choice of sanction level where 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. In re Gastineau, 317 Or 545, 557, 857 P2d 136 (1993). The court in In re Gastineau, *supra* however, concluded that suspension is appropriate under these circumstances and suspended the lawyer for 12 months for disciplinary violations similar in nature and number to this case.

50.

Consistent with the ABA Standards and Oregon case law, the Bar and the Accused agree that the Accused should receive a one-year suspension. The Bar hereby dismisses the pending charge of violation of DR 9-101(A) in Case No. 93-197 (Marilyn Ford complaint).

51.

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 Supreme Court for consideration pursuant to the terms of BR 3.6.

EXECUTED this 6th day of December, 1994.

/s/ Mark McKnight
W. Mark McKnight

EXECUTED this 15th day of December, 1994.

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

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of	)	Case No. 92-109
)	
LORNA GENE DALE,)	
)	
Accused.)	
_____)	

Bar Counsel: Brian J. MacRitchie, Esq.

Counsel for the Accused: None

Disciplinary Board: None

Disposition: Violation of DR 1-102(A)(3), DR 1-103(C), DR 6-101(B) and DR 7-101(A)(2).
Stipulation for Discipline. 30-day suspension.

Effective Date of Order: February 23, 1995

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of	)	No. 92-109
)	
LORNA GENE DALE,	)	ORDER APPROVING STIPULATION
	)	FOR DISCIPLINE
Accused.)	
_____)	

THIS MATTER having come 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 on February 8, 1995 is hereby approved upon the terms set forth therein. The Accused shall be suspended effective thirty (30) days from the date of this Order.

DATED this 23rd day of February, 1995.

/s/ Fred Avera
Fred E. Avera, State
Disciplinary Board Chairperson

/s/ Eugene Hallman
W. Eugene Hallman, Chairperson
Region 1 Disciplinary Board

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of	)	Case No. 94-109
)	
LORNA GENE DALE,	)	STIPULATION FOR
	)	DISCIPLINE
Accused.)	
_____)	

LORNA GENE DALE (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 the practice of law in this state and a member of the Oregon State Bar, maintaining her office and place of business in the County of Deschutes, State of 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 October 20, 1994 meeting, the State Professional Responsibility Board authorized formal disciplinary proceedings against the Accused, alleging violation of DR 1-102(A)(3), DR 1-103(C), DR 6-101(B) and DR 7-101(A)(2).

5.

The Oregon State Bar filed its Formal Complaint, which was served, together with a Notice to Answer upon the Accused. The Bar subsequently filed an Amended Formal Complaint which was served upon the Accused. A copy of the Amended Formal Complaint is attached hereto as Exhibit 1 and by this reference made a part hereof.

6.

The Accused admits the allegations of the Amended Formal Complaint and that her conduct violated DR 1-102(A)(3), DR 1-103(C), DR 6-101(B) and DR 7-101(A)(2).

7.

The Accused and the Bar agree that in fashioning an appropriate sanction in this case, the ABA Standards for Imposing Lawyer Sanctions and Oregon case law should be

considered. The ABA Standards require that the Accused's conduct be analyzed considering the following four factors: (1) the ethical duty violated; (2) the attorney's mental state; (3) the actual or potential injury; and (4) the existence of aggravating and mitigating circumstances.

A. Duty. In violating DR 1-102(A)(3), DR 1-103(C), DR 6-101(B) and DR 7-101(A)(2), [t]he Accused violated duties to her client and to the profession. ABA Standards § 4.4, § 4.6, and § 7.2.

B. State of Mind. The Accused acted with knowledge or the conscious awareness of the nature of the attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result. The Accused's neglect of the client matter was intentional in that she failed to take any action to avoid dismissal of her client's case, or notify her client that the case had been dismissed, and failed to file the Stipulated Decree of Dissolution despite contacts from her client and promises to take required action. The Accused knowingly failed to present a Stipulated Decree for Dissolution to the court.

C. Injury. The Accused caused actual and potential injury to her client by her conduct. The Accused's client paid the Accused to provide representation and advice, to present and file a petition for dissolution and prepare, present and obtain a Decree of Dissolution of her marriage. The Accused caused her client to believe these actions and services to have been performed when they were not. The Accused's failure to perform the services in a timely manner caused the client frustration and stress, and delayed the dissolution of the marriage and resolution of the custody issues of the parties' children. The client had to take action on her own, without the benefit of counsel.

D. Aggravating Factors. Aggravating factors to be considered include (ABA Standards § 9.22):

1. The Accused has substantial experience in the practice of law and family law matters, having been admitted to practice in 1982.
2. This stipulation involves four rule violations arising out of a single client engagement and complaint.
3. The Accused's client and her children were vulnerable in that both had been the subject of abuse by her husband;
4. The Accused has a prior disciplinary record consisting of an admonition imposed in February 1990 for violation of DR 1-103(C); and
5. The Accused knowingly failed to respond to the Bar's request for explanation of the proceedings.

E. Mitigating Factors. Mitigating factors to be considered include (ABA Standards §9.32):

1. The Accused did not act with dishonest or selfish motive;
2. The Accused acknowledges the wrongfulness of her conduct and is sorry for it;
3. During a portion of the time the Accused represented the Complainant of this disciplinary proceeding, the Accused represented Dennis and Diane Nason with regard to dependency and custody proceedings and aspects of a criminal investigation concerning the Nason children. The proceedings against the Nasons included allegations of physical and emotional abuse of their children. According to the

Accused, the Nason case consumed all of her time and resulted in the Accused becoming emotionally involved, upset, and unable to attend to other client matters. During the same time, the Accused had personal family problems, which also caused the Accused to experience emotional upset related to such relationships;

4. The Accused voluntarily sought and has received counselling from Dr. Susan Dragovich, PhD. The Accused plans to continue counselling as may be recommended by Dr. Dragovich; and

5. The Accused has and plans to continue to limit her practice in the future.

8.

The ABA Standards provide that suspension is appropriate where a lawyer knowingly fails to perform services for a client and causes injury, or potential injury, or engages in a pattern of neglect which causes injury or potential injury. Standards at § 4.42(a) and (b). Oregon case law is in accord. In re Morrow, 297 Or 808, 688 P2d 820 (1984), 60-day suspension for violation of DR 6-101(A)(3) [current DR 6-101(B)], DR 7-102(A)(5) and ORS 9.480(4); In re Kisling, 303 Or 633, 740 P2d 179 (1987), lawyer suspended for 63 days for violation of DR 6-101(B), DR 1-102(A)(3), DR 7-101(A)(2), and DR 7-102(A)(5); In re Dugger, 299 Or 21, 697 P2d 973 (1985), 63-day suspension for violation of DR 6-101(A)(3) [current DR 6-101(B)], DR 1-103(C), DR 1-102(A)(4) [current DR 1-102(A)(3)]; and In re Rudie, 294 Or 740, 662 P2d 321 (1983), seven month suspension where a lawyer violated former DR 6-101(A)(2) [current DR 6-101(A)], former DR 6-101(A)(3) [current DR 6-101(B)], and DR 7-101(A)(2), after previously been disciplined for a similar rule violation.

9.

Consistent with the ABA Standards and Oregon case law, the Bar and the Accused agree that the Accused shall be suspended for a period of 60 days, commencing 30 days after the Disciplinary Board approves this Stipulation for Discipline.

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, this Stipulation shall be submitted to the Disciplinary Board for consideration pursuant to the terms of BR 3.6.

EXECUTED this 8th day of February, 1995.

/s/ Lorna Dale

LORNA GENE DALE

/s/ Jane Angus

JANE E. ANGUS

Assistant Disciplinary Counsel

Oregon State Bar

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of	)	Case No. 94-109
)	
LORNA GENE DALE,	)	AMENDED FORMAL COMPLAINT
)	
Accused.)	
_____)	

For its FIRST CAUSE OF COMPLAINT (Case No. 94-109) against LORNA G. DALE, (hereinafter 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, Lorna G. Dale, is, and at all times mentioned herein was, an attorney at law, admitted by the Supreme Court of the State of Oregon to practice law in this state and is a member of the Oregon State Bar, having her office and place of business in the County of Jefferson, State of Oregon.

3.

In or about October 1991, Marty A. Garner ("Garner"), retained the Accused for the purpose of obtaining a dissolution of her marriage. Garner paid Dale a retainer of \$650 to apply toward fees and expenses to be incurred.

4.

On or about December 4, 1991, the Accused filed a Petition for Decree of Unlimited Separation in the Circuit Court of the State of Oregon for the County of Jefferson, Case No. 91-D0-0090-33 ("Court Action"). At the time, Garner's husband was in the active service of the United States Army.

5.

Subsequently, Garner's husband was discharged from the military service, returned to Oregon and hired an attorney to represent his interests in the dissolution of marriage proceeding. The Accused did not then prepare or file a Petition for Dissolution, contrary to Garner's intentions and/or instructions.

6.

On or about December 2, 1992, the Court filed and served on the parties' counsel a Notice of Dismissal of the Court Action for want of prosecution unless good cause be shown on or before December 30, 1992 why the case should not continue as a pending case. The

Accused did not advise Garner of the notice and took no action to avoid dismissal and continue the case. On December 30, 1992, the Court dismissed the Court Action. The Accused did not notify Garner that the Court Action was dismissed.

7.

On or about February 1993, Garner and her husband reached an agreement on all matters of conflict for dissolution of their marriage, including the custody of the parties' children, support, and other issues. The Accused was notified and instructed to take such actions as would be necessary to finalize the dissolution of the parties' marriage. The Accused was also notified that Garner's husband would no longer be represented by an attorney.

8.

In or about March of 1993, the Accused prepared a Stipulated Decree for Dissolution which was signed by Garner on March 30, 1993. The Accused did not prepare a motion for modification of relief in the pending proceedings or present the form of Stipulated Decree to Garner's husband for signature, but placed it in her file. The Accused did not file the Stipulated Decree for Dissolution with the court. Garner contacted the Accused on numerous occasions to determine the status of her case. The Accused made various representations to Garner, including:

1. She did not know and would have to "look into it";
2. She would have her secretary check into the matter and would get back to her;
3. She "would finalize the divorce shortly", and all that needed to be done was for the judge to sign.

9.

The Accused knew that the representations described in Paragraph 8 were false. The Accused knew that the form of Stipulated Decree of Dissolution had not been presented to Garner's husband for signature, or filed or presented to the court for signature, and that Garner had contacted her on earlier occasions and that she had not looked into the status nor reported back to Garner. The Accused's representations to Garner therefore constituted conduct involving dishonesty, fraud, deceit or misrepresentation.

10.

Based on the conduct described in paragraphs 8 and 9, the Accused neglected a legal matter entrusted to her in one or more of the following Particulars:

1. Failing to timely prepare a motion for modification of relief for dissolution;
2. Failing to present the form of Stipulated Decree to Garner's husband for signature or file the Stipulated Decree with the court;
3. Failing to inform and advise Garner of the status of her case;
4. Failing to return telephone calls from Garner; and
5. Failing to advise Garner of the Court's Notice of Dismissal and subsequent dismissal of the Court Action.

11.

Based on the foregoing and between December 1992 and through about April 1994, the Accused intentionally failed to carry out and complete actions necessary for Garner to obtain a dissolution of marriage.

12.

The Oregon State Bar received Garner's complaint concerning the Accused's conduct on or about April 11, 1994. On April 14, 1994, the Disciplinary Counsel's office forwarded a copy of Garner's complaint to the Accused and requested her response on or before May 7, 1994. The Accused did not respond. On June 1, 1994 the Disciplinary Counsel's Office again requested the Accused's response to the complaint on or before June 8, 1994. The Accused did not respond. As a result, the complaint was referred to the Local Professional Responsibility Committee for further investigation.

13.

While the subject of a disciplinary investigation, the Accused failed to respond to inquiries of the Disciplinary Counsel's Office which is empowered to investigate or act upon the conduct of lawyers.

14.

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

1. DR 1-102(A)(3) of the Code of Professional Responsibility;
2. DR 6-101(B) of the Code of Professional Responsibility;
3. DR 7-101(A)(2) of the Code of Professional Responsibility; and
4. DR 1-103(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 properly under the circumstances.

EXECUTED this 25th day of January, 1995.

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. 93-183; 93-187
)	
JAMES D. HUGHES,)	
)	
Accused.)	
_____)	

Bar Counsel: Brian Burton, Esq.

Counsel for the Accused: None

Disciplinary Board: Julie Vacura, Chair; Keith Raines, and Richard Kosterlitz, public member

Disposition: Violation of DR 9-101(C)(4), DR 1-103(C) and DR 6-101(B).
Stipulation for Discipline. 30 day suspension stayed/probation

Effective Date of Order: February 23, 1995

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of	)	No. 93-183; 93-187
)	
JAMES D. HUGHES,	)	ORDER APPROVING STIPULATION
	)	FOR DISCIPLINE
Accused.)	
)	

THIS MATTER is before the Disciplinary Board 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 on January 9, 1995 is hereby approved upon the terms set forth therein.

DATED this 23rd day of February, 1995.

/s/ Fred Avera

Fred E. Avera, State
Disciplinary Board Chairperson

/s/ Ann Fisher

Ann L. Fisher, Regional Chairperson
Region 5, Disciplinary Board

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of	)	Case No. 93-183; 93-187
)	
JAMES D. HUGHES,	)	STIPULATION FOR
	)	DISCIPLINE
Accused.)	
_____)	

James D. Hughes, 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, James D. Hughes, was admitted by the Oregon Supreme Court to the practice of law in Oregon on September 24, 1982, 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.

4.

In May, 1994, the State Professional Responsibility Board of the Oregon State Bar authorized formal disciplinary proceedings against the Accused alleging that he violated DR 1-103(C) and former DR 9-101(B)(4) [current DR 9-101(C)(4)] in connection with the handling of two client matters. At present there is also under investigation at the staff level a complaint that the Accused violated DR 6-101(B) by neglecting a client's legal matter. The Accused and the Bar agree to the following facts, disciplinary rule violations and sanction as a resolution of these matters.

5.

On or about April 23, 1992, the Accused was retained by Diana Hafemann (hereinafter "Hafemann") to transfer title to certain mineral rights from her father's name to hers. Hafemann provided the Accused with numerous original documents for his review and requested that he return them to her promptly, as she did not retain copies. Notwithstanding

several additional requests, as of October 5, 1993, when Hafemann filed a complaint with the Oregon State Bar, the Accused had not returned her documents.

After Hafemann's complaint was forwarded to the Multnomah County Local Professional Responsibility Committee for investigation, the Accused returned the requested documents.

The Accused admits that he failed to promptly deliver to a client, properties in his possession which his client was entitled to receive and that for so doing he violated current DR 9-101(C)(4).

6.

On or about October 6, 1993, Hafemann wrote the Oregon State Bar relative to the Accused's failure to return her documents. Hafemann's letter was forwarded to the Accused on or about October 15, 1993, with a request that he respond to Hafemann's concerns on or about November 5, 1993. When no response was received, a follow-up letter was sent to the Accused seeking a response by November 17, 1993. The Accused failed to tender a response to the Bar's second request, resulting in the forwarding of Hafemann's complaint to the Multnomah County Local Professional Responsibility Committee (hereinafter "LPRC") for an investigation.

In December 1993, LPRC investigator Richard Lane (hereinafter "Lane") wrote the Accused and requested a copy of Hafemann's file by December 30, 1993. The Accused failed to produce the file. Lane made several follow-up telephone calls seeking production of the file and was promised delivery. In spite of the Accused's promises, the file was not tendered to Lane until February 11, 1994, after Lane had subpoenaed the Accused to produce it.

The Accused admits that he failed to comply with the reasonable requests of Bar staff and the LPRC and for so doing he violated DR 1-103(C).

7.

On November 20, 1993, the LPRC was assigned to investigate a complaint against the Accused filed by a former client, Rose VanBlaircum (hereinafter "VanBlaircum"). Lane was assigned the investigation and requested a copy of VanBlaircum's file. The Accused failed to provide the file as requested and Lane was required to serve the Accused with a subpoena in order to obtain the file.

The Accused admits that he failed to comply with the reasonable requests of the LPRC and for so doing he violated DR 1-103(C).

8.

On or about March 1993, the Accused was retained by Mr. and Mrs. Bergio (hereinafter "the Bergios") to prepare their wills. As of the fall of 1993, the Accused had all the necessary information to complete the testamentary documents. Despite repeated requests from the Bergios, the Accused failed to complete their legal matter until June 1994, after they had complained to the Oregon State Bar.

The Accused admits that he neglected the Bergios' legal matter and that for so doing he violated DR 6-101(B).

9.

Although not a defense to the charges, mitigating circumstances include: The Accused has a large volume practice which includes serving a significant number of clients on essentially a pro bono basis. At times he has had difficulty prioritizing his work and affording all clients the attention they desire. He has sought and will again seek assistance from the PLF as specified herein. When the Bar complaints were filed, the Accused, out of embarrassment, froze rather than respond.

10.

The Accused has no prior discipline.

11.

The Accused and the Bar agree that in fashioning the appropriate sanction, the Disciplinary Board should consider the ABA Standards and Oregon Case Law. The Standards require analyzing the Accused's conduct in light of a variety of factors: the ethical duty violated, the attorney's mental state, actual or potential injury and the existence of aggravating or mitigating factors.

- a.
 1. In violating DR 9-101(C)(4), the Accused violated his duty of loyalty to his client. Standards at 5.
 2. In violating DR 1-103(C), the Accused violated the duty owed to the legal system. Standards at 5.
 3. In violating DR 6-101(B), the Accused violated his duty of diligence owed to a client. Standards at 5.
- b. With respect to all violations, the Accused acted knowingly.
- c. Injury.
 1. No monetary injury was suffered by Hafemann due to the Accused's delay in forwarding the sought-after documents.
 2. The Accused's failure to respond to Disciplinary Counsel necessitated the referral to the LPRC. The Accused's failure to respond to investigator Lane's inquiries increased the scope of review required by the LPRC in both cases.
 3. No monetary injury was suffered by the Bergios as the Accused did not charge them for his services.
- d. Aggravating factors to consider:

The Accused has substantial experience in the practice of law. Standards 9.22(i).
- e. Mitigating factors to consider:
 1. The Accused has no prior disciplinary record. Standards 9.32(a).
 2. The Accused had no dishonest or selfish motive. Standards 9.32(b).
 3. The Accused has expressed remorse. Standards 9.32(e).

The Standards provide that a suspension is generally appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client. Standards at 27. A suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed to the profession, and causes injury or potential injury to the legal system. Standards at 46. Finally, a suspension

is generally appropriate when a lawyer knowingly fails to perform services for a client and causes injury or potential injury to the client. Standards at 33.

Given that the Accused violated three disciplinary rules and the DR 1-103(C) violations were aggravated as the LPRC was required to resort to its subpoena power to obtain the Accused's cooperation, Oregon case law also supports the imposition of a suspension. See In re Chandler, 306 Or 422, 760 P2d 243 (1988), In re Hereford, 306 Or 69, 756 P2d 30 (1988), In re Haws, 310 Or 741, 801 P2d 818 (1990).

12.

Consistent with the Standards and Oregon case law, the Bar and the Accused agree to the following sanction: a 30 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. 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 will review and develop, if necessary, a plan to eliminate any and all "system problems" which may be contributing to the Accused's inability to prioritize and 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. Work with Michael Sweeney of the Professional Liability Fund, who shall supervise a course of treatment to ensure that the Accused is able to prioritize and complete his work in a timely fashion. Mr. Sweeney will evaluate the Accused's current office practices and management. The Accused agrees to comply with and bear the cost of any recommendations made by Mr. Sweeney as a result of Mr. Sweeney's review.
- D. Attorney Philip Hornik shall act as the Accused's caseload monitor. Within 30 days of the effective date of this stipulation, Mr. Hornik will meet with the Accused and review his existing caseload. At the direction of Mr. Hornik, 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.
- E. Within 10 days of each review, the Accused and Mr. Hornik shall prepare and file with the Oregon State Bar a notarized affidavit signed by the Accused and approved by Mr. Hornik 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.
- F. Mr. Hornik has the 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 Mr. Hornik provided that the requests are designed to achieve the purpose of the probation. In addition, the Accused acknowledges that Mr. Hornik is required to immediately report to the Oregon State Bar any non-compliance by the Accused with the terms of this probation.
- G. 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.

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 for consideration pursuant to the terms of BR 3.6.

EXECUTED this 9th day of January, 1994.

/s/ James Hughes

James D. Hughes

/s/ Lia Saroyan

Lia Saroyan

Assistant Disciplinary Counsel

Oregon State Bar

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of:	)	No. 93-67 and 94-39
)	
JON H. PAAUWE,)	
)	
Accused.)	
_____)	

Bar Counsel: None

Counsel for the Accused: None

Disciplinary Board: None

Disposition: Violation of DR 6-101(B), DR 1-102(A)(3), DR 2-110(A)(2), DR 9-101(C)(4)
[former DR 9-101(B)(4)], DR 1-103(C), DR 7-101(A)(2).
Stipulation for Discipline. Two year suspension.

Effective Date of Order: February 24, 1995

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:	)	SC S30944
)	
Complaint as to the Conduct of:)	
)	
JON H. PAAUWE,	)	ORDER ACCEPTING STIPULATION
	)	FOR DISCIPLINE
Accused.)	
)	

The Oregon State Bar and John H. Paauwe, have entered into a Stipulation for Discipline. The Stipulation for Discipline is accepted. Jon H. Paauwe is suspended from the practice of law for a period of two years. The Stipulation for Discipline is effective February 24, 1995.

DATED this 7th day of February, 1995.

/s/ Wallace Carson _____
WALLACE P. CARSON, JR.
Chief Justice

c: Mary A. Cooper
Jon H. Paauwe
Thad Guyer

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of:	)	Case Nos. 93-67 and 94-39
)	
JON H. PAAUWE,	)	STIPULATION FOR DISCIPLINE
)	
Accused.)	
_____)	

Jon H. Paauwe, 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, Jon H. Paauwe, was admitted by the Oregon Supreme Court to the practice of law in Oregon on September 15, 1967, and has been a member of the Oregon State Bar continuously since that time, having his office and place of business in Jackson County, Oregon.

3.

The Accused enters into this Stipulation for Discipline freely and voluntarily and under the confidentiality restrictions of BR 3.6(h).

4.

On September 18, 1993, the State Professional Responsibility Board of the Oregon State Bar authorized the filing of formal disciplinary proceedings against the Accused, alleging that he violated DR 6-101(B) and DR 2-110(A)(2) in connection with his representation of Mr. and Mrs. Richard Batsell. This case was designated OSB Case No. 93-67.

5.

On July 23, 1994, the State Professional Responsibility Board assigned another matter concerning the Accused (designated OSB Case No. 94-39), to the Jackson/Josephine County Local Professional Responsibility Committee ("LPRC") for investigation. At that time, the Accused had failed to respond to inquiry from Bar staff concerning a complaint made against him by a former client, Skip Magee. On August 16, 1994, the Jackson/Josephine County LPRC submitted its investigative report.

6.

For purposes of this stipulation, the Accused and the Bar agree to the facts and the disciplinary rule violations described herein.

7.

With respect to OSB Case No. 93-67 (the "Batsell" matter) the Bar filed its formal complaint on February 28, 1994. It alleged that the Accused was retained by Richard Batsell to handle a bankruptcy on behalf of him and his wife. The Accused advised Mr. Batsell that some of the couples' debts were non-dischargeable. SeaFirst Bank filed a complaint in the bankruptcy action, claiming \$4,500 in non-dischargeable debt obligation. The Accused suggested that the Batsells settle this claim; however, settlement negotiations stalled. On August 28, 1992, the Accused was notified by SeaFirst that it intended to take a default against the Batsells. The Accused failed to notify the Batsells of this notice or take any action to prevent a default from being taken. A default judgment was entered in favor of SeaFirst and Mrs. Batsell's wages were garnished. Mr. Batsell thereafter called the Accused and asked for an explanation. The Accused reacted by stating he would no longer represent the Batsells. On or about November 23, 1992, the Batsell's new attorney, Michael Spencer, requested the Batsells' file from the Accused. He did not send it, however, until approximately seven weeks later, after Mr. Batsell had already filed a complaint against him with the Oregon State Bar.

8.

The parties agree that by failing to notify the Batsells of the pending default, failing to take any steps to avoid such default, and failing to forward the clients' files to new counsel promptly upon request, the Accused neglected legal matters entrusted to him in violation of DR 6-101(B). By abruptly terminating his representation of the Batsells without taking steps to protect their interests, including not forwarding the file or otherwise cooperating with new counsel, the Accused withdrew from representation without taking reasonable steps to avoid prejudicing his clients' rights, in violation of DR 2-110(A)(2).

9.

With respect to OSB Case No. 94-39 (the "Magee" matter), the Accused was employed by Skip Magee on November 1, 1991 to collect a debt by foreclosing on certain trust deeds and a lien on equipment. The Accused commenced an action to foreclose the equipment lien and to collect the note secured thereby. The Accused intended to foreclose the trust deeds by advertisement and sale. All actions to collect the debt or foreclose on the properties and equipment were stayed by the debtor filing a Chapter 13 bankruptcy petition in December, 1991. The Chapter 13 bankruptcy was later dismissed, but the Accused failed to resume the trustee's foreclosure sale within the statutory time after the dismissal of the bankruptcy. Mr. Magee asked the Accused on several occasions if the foreclosure sale was proceeding properly. The Accused assured him that it was, although he knew that in fact that it had been dismissed. Mr. Magee watched the newspaper for notice of the trustee's foreclosure sale, and when none appeared after a month he asked the Accused about it. The Accused assured Mr. Magee that he had sent the notice to the newspaper, but when Mr. Magee checked with the paper, he found this to be untrue. Mr. Magee informed the Accused that no notice had been submitted. The Accused thereafter submitted a notice to be published, but the statutory time for resumption of the sale had expired.

The Accused thereafter amended his complaint in the action to foreclose the equipment lien to add a judicial foreclosure of the trust deeds. The defendant in that action raised numerous

defenses. The Accused failed to depose the debtor/defendant or otherwise obtain discovery. Trial was eventually held in July, 1993, after which the court requested post-trial briefs. The Accused failed to submit such briefs. The court handed down its decision on August 18, 1993, and requested that the Accused prepare written findings of fact: The Accused again failed to submit these requested documents. From August to November, 1993, the Accused informed his client that the delay in getting a judgment was due to the opponent's failure to file some documents. In fact, the delay was due to the Accused's own failure to submit findings of fact. On December 18, 1993, Mr. Magee terminated the Accused's representation and asked for the release of his file so that he could hire another attorney. By the end of December, 1993, the Accused had released some, but not all, of Mr. Magee's files. Mr. Magee's new attorney, Patrick Huycke, was unable to assist Mr. Magee without the missing files. On January 4, 1994, Mr. Magee complained to the Bar. Disciplinary counsel thereafter wrote to the Accused and requested a response by February 10, 1994. The Accused failed to respond. Disciplinary counsel again wrote to the Accused, requesting a response by March 2, 1994. The Accused again failed to respond. On March 22, 1994, disciplinary counsel wrote to the Accused informing him that the matter would be turned over to the LPRC.

10.

The conduct described in paragraph 9, supra violated DR 6-101(B), DR 1-102(A)(3), former DR 9-101(B)(4) [current DR 9-101(C)(4)], DR 1-103(C) and DR 7-101(A)(2).

11.

The Accused and the Bar agree that in fashioning the appropriate sanction, the court should refer to the ABA Standards and Oregon case law. The Standards require an analysis of the Accused's conduct in light of four factors: ethical duty violated, attorney's mental state, actual or potential injury, and existence of aggravating or mitigating factors. In this case, the Accused violated his duty to clients to act diligently and promptly and to report fully and truthfully the status of their cases. He violated his duty to the profession by failing to respond fully and truthfully to questions from disciplinary counsel. The Accused's mental state with respect to these violations was negligent or knowing with respect to the interactions with his clients; they were intentional with respect to his failure to cooperate with Bar investigation in the Magee matter. The clients were potentially injured by the Accused's neglect and lack of candor concerning the status of their cases. Aggravating factors include: prior disciplinary offenses (discussed below in paragraph 13); a pattern of misconduct; multiple offenses; failure to cooperate with investigation by disciplinary agency; and substantial experience in the practice of law. There are no mitigating factors in this case.

The Standards provide that suspension is appropriate when a lawyer knowingly fails to perform services for a client and causes injury or potential injury or a lawyer engages in a pattern of neglect and causes injury or potential to a client. Suspension is also appropriate when a lawyer knowingly deceives a client and causes the client to suffer injury or potential injury. Suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of duty owed to the profession and causes injury or potential injury to a client, the public, or the legal system.

Under the ABA Standards a suspension is appropriate.

12.

The following Oregon Supreme Court decisions appear to be on point: In re Chandler 306 Or 422, 760 P2d 243 (1988) [attorney, who had a prior disciplinary record involving two suspensions, was suspended for two years after being found guilty of neglect for failing to communicate with clients for three years; for placing client's active file in storage; and for failing to forward the file to new counsel despite repeated requests that he do so. Attorney also failed to cooperate with Bar investigators and the State Lawyers Assistance Committee]; In re Dixon 305 Or 83, 750 P2d 157 (1988) [attorney was disbarred for failing to file a timely complaint on behalf of client; failing to keep client informed of case progress; causing repeated rescheduling of depositions without notice to opposing counsel; failing to submit a form of judgment to the court for signature after trial and failing to cooperate with Bar investigators. the attorney was also found to have lied to the court]; In re Paauwe 298 Or 215, 691 P2d 97 (1984) [attorney (the Accused in this present case) was suspended for 63 days after being found guilty of neglect for failing to advise his client or respond to client inquiries regarding [the date] the date the client was to report to jail, resulting in client's arrest on a warrant. Accused also failed to cooperate with Bar investigators]; In re Purvis 306 Or 522, 760 P2d 254 (1988) [attorney suspended for six months for misrepresenting to a client that he had taken steps to have child support payments reinstated]; In re Thies 305 Or 104, 750 P2d 490 (1988) [attorney disbarred for neglecting cases and then repeatedly misleading clients regarding their status]; In re Vaile 300 Or 91, 707 P2d 52 (1985) [attorney suspended for 60 days for violating DR 1-103(C) by failing to respond to disciplinary counsel's inquiries, despite later cooperation with LPRC].

13.

The Accused has an extensive prior disciplinary record. In In re Paauwe 298 Or 215, 691 P2d 97 (1984), he was found to have violated former DR 6-101(A)(3) [current DR 6-101(B)] and DR 1-103(C). He was suspended for 63 days, followed by a three year probationary period based on his refraining entirely from the use of alcohol and engaging in rehabilitative efforts. In In re Paauwe 2 DB Rptr. 20 (1988), the Accused was found guilty by the disciplinary board for incorrectly representing to the bankruptcy court that he had not received compensation from any other source. His conduct was found to violate DR 1-102(A)(4) [conduct prejudicial to the administration of justice], but was not found to violate DR 1-102(A)(3) [conduct involving dishonesty]. He was publicly reprimanded by the trial panel. In In re Paauwe 294 Or 17, 654 P2d 1117 (1982), the court found that the Accused neglected a legal matter entrusted to him and engaged in conduct prejudicial to the administration of justice. The Accused was suspended for 30 days.

Additionally, the Accused has been admonished three times. The first occasion was on June 29, 1981, for engaging in a multiple client conflict of interests; the second was on November 7, 1983, again for a conflict of interest; and the third was on February 14, 1989 for attempting to gain a civil advantage by threat of criminal sanction.

14.

Consistent with the Standards and Oregon case law, the Bar and the Accused agree that the Accused should be suspended for a period of two years.

15.

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 Oregon Supreme Court for consideration pursuant to the terms of BR 3.6(F.3.)

EXECUTED this 31 day of December, 1994.

/s/ Jon Paauwe

Jon H. Paauwe

EXECUTED this 2nd day pf December, 1994.

/s/ Mary Cooper

Mary A. Cooper

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)
)
Complaint as to the Conduct of) Case No. 94-114A
)
ERIC SHILLING,)
)
)
Accused.)
_____)

Bar Counsel: None

Counsel for the Accused: William Bloom, Esq.

Trial Panel: None

Disposition: Violation of DR 1-102(A)(3).
Stipulation for Discipline. Public reprimand.

Effective Date of Order: March 3, 1995

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of	)	No. 94-114A
)	
ERIC S. SHILLING,	)	ORDER APPROVING STIPULATION
	)	FOR DISCIPLINE
Accused.)	
)	

THIS MATTER having come 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 on February 21, 1995 is hereby approved upon the terms set forth therein.

DATED this 3rd day of March, 1995.

/s/ Fred Avera _____
Fred E. Avera, State Chairperson
Disciplinary Board

/s/ Ann Fisher _____
Ann L. Fisher, Regional Chair
Region 5, Disciplinary Board

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of	)	Case No. 94-114A
)	
ERIC S. SHILLING,	)	STIPULATION FOR
	)	DISCIPLINE
Accused.)	
_____)	

Eric S. Shilling, 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, Eric S. Shilling, was admitted by the Oregon Supreme Court to the practice of law in Oregon on September 27, 1991, 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.

4.

On November 19, 1994, the State Professional Responsibility Board (hereinafter "the Board") authorized formal disciplinary proceedings against the Accused for alleged violation of DR 1-102(A)(3).

5.

A formal complaint against the Accused has not yet been filed, but the Accused admits the following facts and violations of the Code of Professional Responsibility.

6.

The Accused represented Julie Trachsel, the plaintiff in litigation filed in Marion County Circuit Court. The case was tried to an arbitrator and plaintiff prevailed. Thereafter, the defendant appealed to the circuit court for a trial de novo and filed a motion for summary judgment.

7.

In response to the defendant's motion, the Accused prepared an affidavit for execution

by his client which essentially restated the testimony she had given at the arbitration hearing. After the affidavit was prepared, the Accused was unable to locate the client and consequently gave the affidavit to her father to procure her signature. Trachsel's father returned the affidavit signed, but not notarized, the day before the Accused's response to the summary judgment motion was due. The Accused spoke to Trachsel on the telephone that day and verified that she had signed the affidavit.

8.

The Accused, who had been admitted to the Bar for just over two years, became extremely anxious that because Trachsel's affidavit had not been notarized he would be unable to protect her interests in the summary judgment proceeding. He believed that it would be in his client's best interest to file a defective affidavit and to cure the defect at or before the summary judgment hearing. The Accused intended to withdraw the affidavit if he were unable to cure the defective notary at or before the hearing. Accordingly, he asked David B. Wagner, a lawyer with whom he shared office space, to notarize Trachsel's signature. Mr. Wagner notarized the affidavit on the Accused's assurance that Trachsel had signed it.

9.

The Accused filed the affidavit with the court. When he was later contacted by opposing counsel about the authenticity of the signature on the affidavit, the Accused disclosed the circumstances described above and agreed to withdraw the affidavit from the court's consideration. The Accused withdrew the affidavit at the summary judgment hearing and disclosed to the court the circumstances surrounding the signing of the affidavit.

10.

The Accused admits that the conduct described in paragraphs 6 through 9 constitutes conduct involving a misrepresentation in violation of DR 1-102(A)(3).

11.

The Accused and the Bar agree that in fashioning the appropriate sanction in this case, the Disciplinary Board should consider the ABA Standards for Imposing Lawyer Sanctions and Oregon case law. The ABA Standards require that the Accused's conduct be analyzed by considering the following four factors: the ethical duty violated; the attorney's mental state; the actual or potential injury; and the existence of aggravating and mitigating circumstances.

- a. The Accused violated his duty to the public to maintain his personal integrity. Standards §5.0.
- b. With regard to the Accused's state of mind, he knowingly submitted a falsely notarized affidavit after negligently having concluded that he could later correct the defects in that affidavit.
- c. The Accused caused no actual injury by his conduct. He intended to and did correct any mistaken impression held by opposing counsel and the court that the affidavit had been properly notarized. However, the potential for injury as a result of the Accused's conduct existed in that a false affidavit was submitted to the court. The court and opposing counsel could have but did not rely upon it in the summary judgment proceeding. ABA Standards at 7.
- d. There are no aggravating factors to be considered.

- e. Mitigating factors to be considered:
1. The Accused has no record of prior disciplinary offenses;
 2. The Accused had no dishonest or selfish motive;
 3. This is a single offense and does not display a pattern of misconduct by the Accused;
 4. The Accused has displayed a cooperative attitude towards these proceedings;
 5. The Accused acknowledges the wrongfulness of his conduct and is sorry for it; and
 6. The Accused did not have substantial experience in the practice of law, having been admitted to the Bar in 1991 and having practiced for about a year when the conduct occurred. ABA Standards §9.32.

12.

The ABA Standards provide that a public reprimand is generally appropriate when a lawyer knowingly engages in conduct that involves misrepresentation that adversely reflects on his or her fitness to practice law. Standards §5.13. Oregon case law is in accord. See, In re Sims, 284 Or 37, 584 P2d 766 (1978), where the lawyer signed his client's name to the verification of a response in a domestic relations matter and notarized this signature when he could not locate the client. The lawyer had practiced for just over a year and was uncertain about how to respond to the situation. A more experienced lawyer advised him that he could execute a verification if his client were out of town. Sims did so and was publicly reprimanded by the court.

13.

Consistent with the ABA Standards and Oregon case law, the Bar and the Accused agree that the Accused receive a public reprimand for violation of DR 1-102(A)(3).

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). On November 19, 1994, the SPRB authorized the sanction proposed in this stipulation. 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 February, 1995.

/s/ Eric Shilling
Eric S. Shilling

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

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of	)	Case No. 93-76
)	
ALAN R. VIEWIG,)	
)	
Accused.)	
_____)	

Bar Counsel: Randall L. Duncan, Esq.

Counsel for the Accused: Thomas G. Karter, Esq.

Disciplinary Board: Keith R. Raines, Chair; Morton Winkel and Wilbert H. Randle, Jr.,
public member

Disposition: Violation of DR 1-102(A)(4) and DR 6-101(B).
Stipulation for Discipline. Public reprimand.

Effective Date of Order: March 6, 1995

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of	)	No. 93-76
)	
ALAN R. VIEWIG,	)	ORDER APPROVING STIPULATION
	)	FOR DISCIPLINE
Accused.)	
_____)	

THIS MATTER having come 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 on February 16, 1995 is hereby approved upon the terms set forth therein.

DATED this 6th day of March 1995.

/s/ Fred Avera
Fred E. Avera, State
Disciplinary Board Chairperson

/s/ Ann Fisher
Ann Fisher, Regional Chair
Region 5, Disciplinary Board

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of	)	Case No. 93-76
)	
ALAN R. VIEWIG,	)	STIPULATION FOR
	)	DISCIPLINE
Accused.)	
_____)	

Alan R. Viewig, 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, Alan R. Viewig, was admitted by the Oregon Supreme Court to the practice of law in Oregon on September 24, 1976, 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.

4.

In April 1994, 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)(4) and DR 6-101(B) in connection with the handling of a probate on behalf of a personal representative. The Accused and the Bar agree to the following facts, disciplinary rule violations and sanction as a resolution of this matter.

5.

In March 1990, Michael Blackwell (hereinafter "Blackwell") was appointed personal representative of the estate of Clifford DeJarnette. In that capacity, he hired the Accused to represent him in administering DeJarnette's estate. Throughout that administration, Blackwell lived in Georgia while the estate was administered in Multnomah County, subject to the supervision of the Multnomah County Circuit Court.

By statute, the estate inventory was to be filed in May 1990. The Accused did not file

it on time. In June 1990, the Accused received a delinquency notice from the court requesting one of two things: the filing of the inventory or an explanation why the inventory could not be filed. The Accused did neither and on July 30, 1990, the court sent Blackwell and the Accused an order requiring that both appear in September to show why Blackwell should not be removed as personal representative. The Accused appeared on Blackwell's behalf and filed the inventory.

By statute, the first or final annual account was to be filed on April 14, 1991. The Accused did not file it on time. On April 15, 1991, the court sent the Accused a delinquency notice seeking a filing of the accounting or a reason why it could not be filed. The Accused failed to file an accounting or apprise the court of his failure to do so which resulted in the court sending Blackwell and the Accused an order requiring that both appear in July to show cause why Blackwell should not be removed as personal representative. Prior to the hearing, the Accused submitted the first annual account.

The final annual account was due on April 14, 1992. As in 1990 and 1991, the Accused did not file the account on time and a delinquency notice was sent. After receiving the delinquency notice, the Accused contacted the court and received an extension of time in which to file the final account. The account was submitted in June 1992 and approved by the court on July 31, 1992. However, at the time of its approval the Accused had not submitted the receipts from the beneficiaries acknowledging that the distributions were in conformance with DeJarnette's will. The court advised the Accused that the receipts must be obtained prior to the signing of a closing order.

As of October 1, 1992, the Accused had not submitted the required documentation or a proposed closing order. As in the past, the court sent the Accused a delinquency notice seeking either the documents or a reason why he could not provide them. The Accused failed to respond and a show cause order was issued by the court. On the date set for hearing, the Accused appeared, sought and received an additional 30 days to close the estate. The Accused failed to close the estate within the 30 day period. From December 1992 until April 1993, the court issued three additional show cause orders as a result of the Accused's failure to close the estate or apprise the court of his reasons for being unable to do so. In response to the April 1993 order, the Accused appeared on May 18, 1993 with the requisite documents and the estate was closed.

The Accused admits that he neglected Blackwell's legal matter and engaged in conduct prejudicial to the administration of justice, in violation of DR 1-102(A)(4) and DR 6-101(B).

6.

The Accused has no prior discipline.

7.

The Accused and the Bar agree that in fashioning the appropriate sanction, the Disciplinary Board should consider the ABA Standards and Oregon case law. Those Standards require analyzing the Accused's conduct in light of four factors: ethical duty violated, attorney's mental state, actual or potential injury and the existence of aggravating and mitigating circumstances.

a.

1. In violating DR 6-101(B), the Accused violated his duty of diligence owed

to a client. Standards at 5.

2. In violating DR 1-102(A)(4), the Accused violated the duty owed to the legal profession. Standards at 5.

b. With respect to both violations, while at times the Accused acted negligently, as of late 1992, the Accused acted knowingly.

c. Injury.

1. The beneficiaries apparently suffered no monetary damage, as much, if not all, of the estate assets were distributed timely.

2. Blackwell was upset by being subjected to five separate show cause orders without explanation or assurance from the Accused and was further upset by the length of time the Accused took to complete the matter.

3. The court was injured in that the Accused's failure to comply with the statutory filing requirements impeded the court from performing its supervisory function.

d. Aggravating factors to consider:

1. The Accused has substantial experience in the practice of law. Standards 9.22(i).

e. Mitigating factors to consider:

1. The Accused has no prior disciplinary record. Standards 9.32(a).

2. The Accused had no dishonest or selfish motive. Standards 9.32(b).

3. The Accused has expressed remorse. Standards 9.32(e).

The Standards provide that a reprimand is generally appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client. A suspension is generally appropriate when a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client. Standards at 33.

Similarly, a reprimand is generally appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed to the profession and causes injury or potential injury to the legal system. Standards at 45.

Oregon case law, consistent with the Standards, supports the imposition of a public reprimand. In re Odman, 297 Or 744, 687 P2d 153 (1984), In re Crist, 297 Or 334, 683 P2d 85 (1984), In re Hannam, 8 DB Rptr 9 (1994), In re Harrington, 7 DB Rptr 61 (1993).

8.

Consistent with the Standards and Oregon case law, the Bar and the Accused agree that the Accused will receive a public reprimand and will meet with representatives of the Professional Liability Fund who will evaluate the Accused's office practice and management and, if necessary, will assist the Accused in revising his office practice.

9.

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 8th day of February, 1995.

/s/ Alan Viewig _____

Alan R. Viewig

/s/ Lia Saroyan _____

Lia Saroyan

Assistant Disciplinary Counsel

Oregon State Bar

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of	)	Case No. 94-114B
)	
DAVID B. WAGNER,)	
)	
Accused.)	
_____)	

Bar Counsel: None

Counsel for the Accused: Christopher R. Hardman, Esq.

Trial Panel: None

Disposition: Violation of DR 1-102(A)(3).
Stipulation for Discipline. Public reprimand.

Effective Date of Order: March 6, 1995

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of	)	No. 94-144B
)	
DAVID B. WAGNER,	)	ORDER APPROVING STIPULATION
	)	FOR DISCIPLINE
Accused.)	
)	

THIS MATTER having come 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 on February 15, 1995 is hereby approved upon the terms set forth therein.

DATED this 6th day of March, 1995.

/s/ Fred Avera

Fred E. Avera, State Chairperson
Disciplinary Board

/s/ Ann Fisher

Ann L. Fisher, Regional Chair
Region 5, Disciplinary Board

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of	)	Case No. 94-114B
)	
DAVID B. WAGNER,	)	STIPULATION FOR
	)	DISCIPLINE
Accused.)	
_____)	

David B. Wagner, 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. Wagner, was admitted by the Oregon Supreme Court to the practice of law in Oregon on April 21, 1976, 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.

4.

On September 24, 1994, the State Professional Responsibility Board (hereinafter "the Board") authorized formal disciplinary proceedings against the Accused for alleged violation of DR 1-102(A)(3).

5.

A formal complaint against the Accused has not yet been filed, but the Accused admits the following facts and violations of the Code of Professional Responsibility.

6.

On or about February 17, 1994, the Accused notarized an affidavit purportedly signed by Julie Trachsel. In doing so, the Accused executed a jurat that misrepresented that Julie Trachsel had subscribed and sworn the affidavit to him.

7.

The Accused did not witness Julie Trachsel sign the above-described affidavit and had no personal knowledge that she had in fact signed it.

8.

The Accused admits that the conduct described in paragraphs 6 and 7 violates DR 1-102(A)(3).

9.

The Trachsel affidavit was presented to the Accused for notarization by Eric Shilling, a lawyer with whom he had shared office space for over two years. Mr. Shilling represented to the Accused that Trachsel had signed the affidavit. The Accused had no knowledge of the litigation in which the affidavit was to be used, did not read the affidavit, and believed that the signature was genuine and that Trachsel had signed the affidavit in the presence of Mr. Shilling.

10.

The affidavit was submitted to the court by Mr. Shilling in opposition to a motion for summary judgment with the intent that the affiant would testify at the motion hearing that she had signed it. Mr. Shilling promptly disclosed to the court the circumstances surrounding the signing of the affidavit and the court did not consider it, nor was the court misled as to the genuineness of the signature.

11.

The Accused and the Bar agree that in fashioning the appropriate sanction in this case, the Disciplinary Board should consider the ABA Standards for Imposing Lawyer Sanctions and Oregon case law. The ABA Standards require that the Accused's conduct be analyzed by considering the following four factors: the ethical duty violated; the attorney's mental state; the actual or potential injury; and the existence of aggravating and mitigating circumstances.

- a. The Accused violated his duty to the public to maintain his personal integrity. ABA Standards §5.0.
- b. With regard to the Accused's state of mind, the Accused knowingly notarized an affidavit without having witnessed the affiant's signature and negligently relied upon the assurances of a third person that that signature was genuine.
- c. The Accused caused no actual injury by his conduct. However, the potential for injury as a result of the Accused's conduct existed in that the affidavit was submitted to the court. The court and the opposing party could have relied upon the affidavit as genuine, but did not.
- d. Aggravating factors to be considered are:
 1. The Accused has substantial experience in the practice of law, having been admitted to the Bar in 1976. ABA Standards §9.22.
- e. Mitigating factors to be considered:
 1. The Accused has no record of prior disciplinary offenses;
 2. The Accused had no dishonest or selfish motive;
 3. The Accused has displayed a cooperative attitude towards these proceedings;
 4. By offering to refrain from providing notary services to lawyers with whom he shares space and by offering to relinquish his notary commission, the Accused has made a good faith effort to rectify the consequences of his conduct and to prevent it from recurring; and

5. The Accused acknowledges the wrongfulness of his conduct and is sorry for it. ABA Standards §9.32.

12.

The ABA Standards provide that a public reprimand is generally appropriate when a lawyer knowingly engages in conduct that involves misrepresentation that adversely reflects on his or her fitness to practice law. Standards §5.13. Oregon case law is in accord. See, In re Walter, 247 Or 13, 427 P2d 96 (1967), where a lawyer was publicly reprimanded for wrongfully taking an acknowledgement of a deed at the request of his associate who was the grantee of the deed.

13.

Consistent with the ABA Standards and Oregon case law, the Bar and the Accused agree that the Accused receive a public reprimand.

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). On November 19, 1994, the SPRB authorized the sanction proposed in this stipulation. 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 15th day of February, 1995.

/s/ David Wagner

David B. Wagner

/s/ Martha Hicks

Martha M. Hicks

Assistant Disciplinary Counsel

Oregon State Bar

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of	)	Case No. 92-167
)	
SHARON L. DURBIN,)	
)	
Accused.)	
_____)	

Bar Counsel: Thomas Davis, Esq.

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

Disciplinary Board: Chair: None

Disposition: Violation of DR 5-101(A) and DR 5-105(E).
Stipulation for Discipline. Public reprimand.

Effective Date of Order: March 28, 1995

Note: Due to space restrictions, exhibits are not included but may be obtained by calling the Oregon State Bar.

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of	)	No. 92-167
)	
SHARON L. DURBIN,	)	ORDER APPROVING STIPULATION
	)	FOR DISCIPLINE
Accused.)	
_____)	

THIS MATTER having come 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 on December 16, 1994 is hereby approved upon the terms set forth therein.

DATED this 28th day of March, 1995.

/s/ Fred Avera
Fred E. Avera, State
Disciplinary Board Chairperson

/s/ Douglas Kaufman
Douglas E. Kaufman, Chairperson
Region 4, Disciplinary Board

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of	)	Case No. 92-167
)	
SHARON L. DURBIN,	)	STIPULATION FOR
	)	DISCIPLINE
Accused.)	
_____)	

SHARON L. DURBIN (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, Sharon L. Durbin, was admitted by the Oregon Supreme Court to the practice of law in Oregon on September 27, 1991, and has been a member of the Oregon State Bar continuously since that time.

3.

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

4.

On November 20, 1993, the State Professional Responsibility Board of the Oregon State Bar authorized formal disciplinary proceedings against the Accused for violation of DR 5-101(A) and DR 5-105(E) of the Code of Professional Responsibility. The Oregon State Bar filed its Formal Complaint, which was served together with a Notice to Answer upon the Accused. A copy of the Formal Complaint is attached hereto as Exhibit 1 and by this reference made a part hereof.

5.

The Accused and the Bar agree to the following facts:

A. The Accused was employed full time as Associate Corporate Counsel by Security Benefits, Inc., a corporation in the business of selling revocable living trusts and documents ancillary thereto.

B. As Associate Corporate Counsel for Security Benefits, Inc., the Accused prepared revocable living trust documents and other estate planning documents on behalf of individuals who purchased revocable living trusts. An attorney-client relationship was formed between the

Accused and individuals who purchased the trusts (hereinafter "Revocable Living Trust Clients").

C. As a full-time employee of Security Benefits, Inc., the Accused's own financial, business, property or personal interests did or reasonably may have affected the exercise of her professional judgment on behalf of her Revocable Living Trust Clients.

D. The interests of Security Benefits, Inc. and the Accused's Revocable Living Trust clients were in actual or likely conflict. Although the Accused disclosed to the Revocable Living Trust clients that she was employed by and received compensation from Security Benefits, Inc., to the extent consent was available to cure the conflict, the Accused did not obtain the consent from her Living Trust Clients and Security Benefits, Inc. after full disclosure as defined in DR 10-101. The Accused failed to disclose the potential adverse impact upon her representation of each of them and further failed to recommend that the Revocable Living Trust clients seek independent legal advice to determine whether they should consent to the representation.

E. By representing both Security Benefits, Inc. and the Revocable Living Trust Clients, the Accused represented multiple current clients where such representation would result in either an actual conflict of interest, or a likely conflict of interest, without first obtaining the consent of all clients after full disclosure.

F. The Accused admits the above-described conduct and further admits that the conduct constitutes a violation of DR 5-101(A) and DR 5-105(E) of the Code of Professional Responsibility.

6.

The Accused and the Bar agree that in fashioning an appropriate sanction, the Disciplinary Board should consider the ABA's Standards and Oregon case law. The Standards require the Accused's conduct to be analyzed in light of four factors: the ethical duty violated, the attorney's mental state, the existence of actual or potential injury, and the existence of aggravating or mitigating factors. Standards at 3.0.

A. In violating DR 5-101(A) and DR 5-105(E), the Accused violated a duty owed to clients. Standards at 4.3.

B. State of Mind. The Accused was negligent in that she failed to heed a substantial risk that circumstances exist 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.

C. Injury. By failing to obtain consent of each of the clients after full disclosure, the clients were not permitted the opportunity to determine, with knowledge of the circumstances, whether the Accused should represent or provide legal advice in regard to their interests.

D. Aggravating Factors. The Accused was employed by Security Benefits, Inc. from about January 1992 through September 18, 1992. During the period of the Accused's employment, the Accused prepared approximately four (4) living trust plans per week for Revocable Living Trust Clients. The Accused was admitted to practice law in Arizona in 1982 and practiced in that state until moving to and being admitted to practice in Oregon in 1991.

E. Mitigating Factors. The Accused has no prior disciplinary record; has cooperated in the investigation and prosecution of this disciplinary matter; and is no longer employed by or associated with Security Benefits, Inc., having terminated her employment in or about

September 1992.

7.

The Standards provide that a reprimand is the appropriate sanction when a lawyer is negligent in determining whether the representation of a client may be materially affected by the lawyer's own interests, or whether the representation will adversely affect another client and causes injury or potential injury to a client. In Oregon cases which involve lawyers engaged in similar conduct, a public reprimand is an appropriate sanction. See In re Galton, 289 Or 565, 615 P2d 317 (1980); and In re Bristow, 301 Or 194, 721 P2d 437 (1986); In re Trukowsitz, 312 Or 621, 825 P2d 1369 (1992). Consistent with the Standards and Oregon case law, the Bar and the Accused agree that the Accused receive a public reprimand.

8.

This Stipulation for Discipline is subject to the approval of the State Professional Responsibility Board and by the Disciplinary Board of the Oregon State Bar. If approved by the State Professional Responsibility Board, the Stipulation shall be submitted to the Disciplinary Board for consideration pursuant to the terms of BR 3.6.

EXECUTED this 16th day of December, 1994.

/s/ Sharon Durbin
SHARON L. DURBIN

/s/ Jane Angus
JANE E. ANGUS
Assistant Disciplinary Counsel
Oregon State Bar

320 Or 692 (1995)

IN THE SUPREME COURT

OF THE STATE OF OREGON

In Re:)
)
 Complaint as to the Conduct of)
)
 CHARLES O. PORTER,)
)
 Accused.)
 _____)

(OSB 92-118; SC S41229)

In Banc

On review from a decision of the Trial Panel of the Disciplinary Board.

John Glenn White, Eugene, attorney for the accused.

Jeffrey D. Sapiro, Disciplinary Counsel, attorney for the Oregon State Bar.

PER CURIAM

Violation of DR 1-102(A)(3) and DR 7-106(C)(5).

The accused is suspended from the practice of law for 63 days.

Fadeley, J., concurred and filed an opinion.

Summary:

On March 30, 1995, the Supreme Court rendered an opinion suspending Eugene lawyer Charles O. Porter from the practice of law for 63 days. The suspension became effective May 20, 1995, following denial of Porter's petition for reconsideration.

The bar alleged Porter violated two disciplinary rules, DR 1-102(A)(3) and DR 7-106(C)(5), in connection with his taking a default in a federal court case without giving prior notice to opposing counsel. Porter represented the plaintiffs in a claim against the manufacturer and dealer of a mobile home that plaintiffs purchased and believed to be defective. Before Porter

filed the lawsuit, he and the lawyer for the manufacturer exchanged correspondence in which defense counsel asked if he could assume no default would be taken without advance notice, and Porter responded that: "I anticipate no problem in allowing extra time for your appearance." Porter thereafter filed a lawsuit, effected service and then applied for and obtained a default without notice to defense counsel. The default ultimately was set aside.

In its opinion, the supreme court found that, before Porter wrote to defense counsel indicating that he anticipated "no problem" in allowing a time extension, Porter had discussions with his client during which it was clear that the client wished to seek a default if the defendant did not appear timely. The court concluded that Porter's letter to defense counsel was designed to mask that intent to seek a default and, therefore, was a misrepresentation in violation of DR 1-102(A)(3).

The court chose not to make any finding regarding the second rule alleged by the bar, DR 7-106(C)(5), which provides that a lawyer shall not fail to comply with known local customs of courtesy or practice of the bar without giving notice to opposing counsel of the intent not to comply. The court noted that the sanction imposed in this case would be no different regardless of whether this second rule was also violated by Porter. However, in order to provide guidance to lawyers regarding DR 7-106(C)(5) and its meaning, the court addressed various arguments made concerning its application in this case.

First, the court determined that compliance with all applicable rules of civil procedure does not constitute a valid defense to an alleged violation of the disciplinary rule. The court found that the history, text and context of DR 7-106(C)(5) make clear that customary practices of civility or courtesy are to be followed, despite the absence of a rule of procedure requiring such courtesy. Secondly, the court established a definition for "custom" for future application of the rule. Last, the court held that a lawyer need not have personal knowledge of a custom of courtesy or practice to violate the rule, as long as the custom is known in the community.

As for sanction in this matter, the court noted that Porter's conduct was a blatant violation of his duty as a professional and that Porter has been disciplined before, twice reprimanded by the supreme court and twice admonished by the bar. Accordingly, the supreme court determined that a 63-day suspension was appropriate, increasing the sanction that had been imposed by the trial panel.

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of	)	Case No. 93-188; 93-189
)	
RAYMOND R. SMITH,)	
)	
Accused.)	
_____)	

Bar Counsel: Angie LaNier, Esq.

Counsel for the Accused: William V. Deatherage, Esq.

Disciplinary Board: Chair: Peter Richard, Donald Armstrong and Karen Franke, public member.

Disposition: Violation of DR 2-101(A)(1), DR 2-101(E) and 6-102(A)
Stipulation for Discipline. Public reprimand.

Effective Date of Order: April 5, 1995.

Note: Due to space restrictions, exhibits are not included but may be obtained by calling the Oregon State Bar

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of	)	No. 93-188; 93-189
)	
RAYMOND R. SMITH,	)	ORDER APPROVING STIPULATION
	)	FOR DISCIPLINE
Accused.)	
)	

THIS MATTER having come 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 on April 3, 1995 is hereby approved upon the terms set forth therein.

DATED this 5th day of April, 1995.

/s/ Fred Avera

Fred E. Avera, State
Disciplinary Board Chairperson

/s/ Armina Brown

Armina Brown, Regional Chair
Region 3, Disciplinary Board

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of	)	Case No. 93-188; 93-189
)	
RAYMOND R. SMITH,	)	STIPULATION FOR
	)	DISCIPLINE
Accused.)	
_____)	

RAYMOND R. SMITH, attorney at law, (hereinafter, "the Accused") and the Oregon State Bar (hereinafter, "the Bar"), pursuant to BR 3.6(c) stipulate:

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 the practice of law in Oregon on September 18, 1979, and was an active member of the Oregon State Bar at all times mentioned herein.

3.

The Accused enters into this Stipulation for Discipline freely and voluntarily, and after consulting with legal counsel.

4.

On March 19, 1994, the State Professional Responsibility Board (hereinafter "SPRB") authorized formal proceedings alleging that the Accused violated DR 2-101(A)(1), DR 2-101(E) and DR 6-102(A) of the Code of Professional Responsibility.

5.

Pursuant to the SPRB's authorization, a Formal Complaint was filed. The Accused admits the allegations of the Formal Complaint, a copy of which is attached hereto as Exhibit A.

6.

Since on or about December 8, 1992 until about January 1995, the Accused owned and operated a paralegal service under the assumed business name "Working Man's Lawyer" (hereinafter "WML"). The Accused conducted WML business in the office where the Accused's law practice was located.

7.

In or about March 1993, the Accused published a WML advertisement in the Medford Tribune. A copy of the advertisement is attached to the Formal Complaint as Exhibit 1. The

Accused also published a WML advertisement in the U.S. West Communications Yellow Pages. A copy of the advertisement is attached to the Formal Complaint as Exhibit 2.

8.

During the course of conducting WML business, the Accused required WML clients to sign an agreement which included language which purports to limit the liability of the Accused and WML with respect to the clients' use of documents prepared or reviewed and approved by the Accused. A copy of the form of agreement is attached to the Formal Complaint as Exhibit 3. WML's customers or clients were not represented by independent counsel in making the agreement and such agreements are not permitted by law and DR 6-102(A).

9.

Exhibits 1 and 2 are communications about the Accused or his firm and neither identifies the Accused as the lawyer whose services are offered to the public. Exhibit 2 does not clearly identify the Accused's office address. Neither Exhibit 1 nor Exhibit 2 disclose that WML customers or clients were, in fact, required to retain the services of the Accused. Exhibits 1 and 2 are materially misleading in that they are advertisements for the Accused's legal services, not merely advertisements for services of a paralegal or typing service.

10.

Based on the foregoing, the Accused admits that he engaged in conduct constituting misrepresentation of fact in communications about himself or his firm or omitted facts necessary to make the communication as a whole not materially misleading; that he failed to identify his name and office address in advertisements; and made an agreement prospectively limiting the Accused's liability for malpractice with clients who were not independently represented in making the agreement in violation of DR 2-101(A)(2), DR 2-101(E) and DR 6-102(A) of the Code of Professional Responsibility.

11.

The Accused and the Bar agree that in fashioning an appropriate sanction in this case, the Supreme Court should consider ABA Standards for Imposing Lawyer Sanctions (hereinafter "Standards") and Oregon case law. The Standards require that the Accused's conduct be analyzed considering the following four factors:

1. The ethical duty violated;
2. The attorney's mental state;
3. The actual or potential injury; and
4. The existence of aggravating and mitigating circumstances.

A. Duties Violated.

The Accused violated his duty to the profession and to his clients. Standards § 4.0, §7.0.

B. State of Mind.

The Accused's conduct reflected a failure to heed a substantial risk that circumstances existed or that a result would follow, which failure was a deviation from the standard of care that a reasonable lawyer would exercise in this situation. Standards, p. 7.

C. Injury.

The Accused caused potential injury to clients. The Accused represents that he caused no actual injury to clients. The Bar is not aware of instances of actual injury to clients, caused

by the Accused's conduct. Standards, § 7.3 and § 7.4.

D. Aggravating Factors. (Standards § 9.22);

1. The Accused has a prior record of discipline, including a public reprimand in 1987 for violation of DR 9-101(B)(3) and a 60-day suspension in 1993 for violation of DR 5-105 (C),(E) and 7-104(A)(1). In re Smith, 1 DB Rptr 298 (1987); In re Smith, 7 DB Rptr 135 (1993). Standards, 9.22(a).

2. The stipulation involves three rule violations. Standards § 9.22(d).

3. The Accused has substantial experience in the practice of law, having been admitted to practice in 1979. Standards, § 9.22(i).

4. The Accused's clients were vulnerable in that they relied on documents prepared, reviewed and approved by the Accused. Standards, § 9.22(h).

E. Mitigating Factors. (Standards, § 9.32):

1. The Accused did not act with dishonest motive. Standards, § 9.32(b).

2. The Accused took actions to correct the deficiencies of his 1993 advertisements in all publications except the U.S. West Communications Yellow Pages. Because the U.S. West Communications Yellow Pages are published only once a year, he could not change the 1993 Yellow Page advertisement. The Accused took steps to correct the deficiencies of the WML advertisement appearing in the 1994 U.S. West Communications Yellow Pages. Standards, § 9.32(d).

3. The Accused cooperated with Disciplinary Counsel and the Local Professional Responsibility Committee in the investigation of the complaints and with Disciplinary Counsel in resolving the authorized formal prosecution. Standards, § 9.32(e).

4. The Accused acknowledges the wrongfulness of his conduct and is sorry for it. Standards, § 9.32(l).

5. The Accused no longer conducts business as "Working Man's Lawyer", effective about January 1995.

12.

The Standards provide that reprimand is generally appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed to the profession and causes injury or potential injury to a client, the public or the legal system. Standards, § 7.3.

Oregon case law discloses no cases describing the exact conduct and circumstances detailed in this Stipulation. In In re Sussman and Tanner, 241 Or 246, 405 P2d 355 (1965), the Oregon Supreme Court directed that the accused lawyers discontinue use of the word "associates" employed in their letterhead when the attorneys listed were not employees or associates of the law firm. The use of the word "associates" was determined to be misleading under Rule 30 of the then Code of Professional Responsibility which prohibited lawyers from employing false, misleading assumed trade names. No case has been reported involving DR 6-102(A).

13.

In light of the Standards, the Bar and the Accused agree that the Accused should receive a public reprimand. The Accused also agrees that he shall pay the Bar's costs and disbursements incurred in this disciplinary proceeding in the amount of \$235.10, which shall be paid not later

than thirty (30) days after entry of an order approving this Stipulation for Discipline. BR 3.6(f).
14.

The sanction set forth in this Stipulation has been approved by the State Professional Responsibility Board Chairperson and is subject to the approval of the Disciplinary Board pursuant to BR 3.6(e).

EXECUTED this 3rd day of March, 1995.

/s/ Raymond Smith

Raymond R. Smith

/s/ Jane Angus

Jane E. Angus

OSB No. 73014

Assistant Disciplinary Counsel

Oregon State Bar

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)
)
Complaint as to the Conduct of) Case No. 95-47
)
MARK W. BROWNLEE,)
)
)
Accused.)
_____)

Bar Counsel: None

Counsel for the Accused: None

Disciplinary Board: None

Disposition: Violation of DR 6-101(B); DR 9-101(C)(4).
Stipulation for Discipline. Public reprimand.

Effective Date of Order: June 20, 1995

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of	)	No. 95-47
)	
MARK W. BROWNLEE,	)	ORDER APPROVING STIPULATION
	)	FOR DISCIPLINE
Accused.)	
)	

This matter having come 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 on June 14, 1995 is hereby approved upon the terms set forth therein. The Accused shall be publicly reprimanded for violation of DR 6-101(B) and DR 9-101(C)(4).

DATED this 20th day of June, 1995.

/s/ Fred Avera _____
Fred E. Avera
State Disciplinary Board Chairperson

/s/ Walter Barnes _____
Walter A. Barnes, Region 6,
Disciplinary Board Chairperson

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of	)	Case No. 95-47
)	
MARK W. BROWNLEE,	)	STIPULATION FOR
	)	DISCIPLINE
Accused.)	
_____)	

MARK W. BROWNLEE (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 the practice of law in this state and a member of the Oregon State Bar, maintaining his office and place of business in the County of Marion, State of 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 March 18, 1995 meeting, the State Professional Responsibility Board authorized formal disciplinary proceedings against the Accused, alleging violation of DR 6-101(B) and DR 9-101(C)(4).

5.

The Oregon State Bar filed its Formal Complaint, which was served, together with a Notice to Answer upon the Accused. A copy of the Formal Complaint is attached hereto as Exhibit 1 and by this reference made a part hereof.

6.

The Accused admits the allegations of the Formal Complaint and that his conduct constitutes violations of DR 6-101(B) and DR 9-101(C)(4).

7.

The Accused and the Bar agree that in fashioning an appropriate sanction in this case,

the ABA Standards for Imposing Lawyer Sanctions and Oregon case law should be considered. The ABA Standards require that the Accused's conduct be analyzed considering the following four factors: (1) the ethical duty violated; (2) the attorney's mental state; (3) the actual or potential injury; and (4) the existence of aggravating and mitigating circumstances.

A. Duty. In violating DR 6-101(B) and DR 9-101(C)(4), the Accused violated duties to his client. Standards §§4.1, 4.4.

B. State of Mind. The Accused's conduct demonstrates a failure to heed a substantial risk that circumstances exist 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. Standards, p. 7.

C. Injury. The Accused's conduct resulted in potential injury to his client in failing to keep him apprised of the status of his post conviction case and failing to promptly deliver the court transcripts and other documents to the client. The Accused has delivered the court transcripts to the client.

D. Aggravating Factors. Aggravating factors to be considered include (Standards § 9.22):

1. The Accused was admitted to practice in 1988 and has focused his practice in the criminal law. Standards, §9.22(i).

2. This stipulation involves two rule violations arising out of a single client engagement and complaint. Standards, §9.22(d).

E. Mitigating Factors. Mitigating factors to be considered include (Standards §9.32):

1. The Accused does not have a prior disciplinary record. Standards, §9.32(a).

2. The Accused did not act with dishonest or selfish motives. Standards, §9.32(b).

3. The Accused cooperated with Disciplinary Counsel's Office in responding to the complaint and in resolving this disciplinary proceeding. Standards, 9.32(e).

4. The Accused acknowledges the wrongfulness of his conduct and is sorry for it. Standards, §9.32(l).

8.

The Standards provide that a public reprimand is generally appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes injury or potential injury to a client. Standards, §4.43. Oregon case law is in accord. In re Hannam, 8 DB Rptr 9 (1994), public reprimand for violation of DR 6-101(B); In re Rhodes, 8 DB Rptr 45 (1994), public reprimand for violation of DR 6-101(B) and DR 2-110(B)(3); In re Stasack, 6 DB Rptr 7 (1992), public reprimand for violation of DR 6-101(B); In re O'Connell, 6 DB Rptr 25 (1992) public reprimand for violation of DR 6-101(B) and DR 2-110(B)(4).

9.

Consistent with the Standards and Oregon case law, the Bar and the Accused agree that a public reprimand is an appropriate sanction. The Accused agrees to accept a public reprimand upon the Disciplinary Board's approval of this Stipulation for Discipline.

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, this Stipulation shall be submitted to the Disciplinary Board for consideration pursuant to the terms of BR 3.6.

EXECUTED this 14th day of June, 1995.

/s/ Mark W. Brownlee

MARK W. BROWNLEE

/s/ Jane E. Angus

JANE E. ANGUS

Assistant Disciplinary Counsel

Oregon State Bar

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re:)	
)	
Complaint as to the Conduct of	)	Case No. 95-47
)	
MARK W. BROWNLEE,	)	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, Mark W. Brownlee, 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 Marion, State of Oregon.

3.

In or about April, 1990, the Accused was appointed to represent Michael Jenkins (hereinafter "Jenkins") in a post-conviction proceeding related to criminal convictions occurring in the Circuit Court of the State of Oregon for the County of Multnomah. Jenkins had previously filed a Petition for Post-Conviction Relief.

4.

Following his appointment, the Accused filed an Amended Petition for Post-Conviction Relief. In May 1990, the Department of Justice filed a Motion to Dismiss the Petition. The motion was granted and an Order of Dismissal was entered by the trial court on October 12, 1990.

5.

Thereafter, the Accused prepared and filed a Notice of Appeal for Jenkins and informed him that the case would be held in abeyance with others pending final resolution on the question of how newly adopted limitations for filing post-conviction cases would apply.

6.

On or about September 17, 1991, the Accused sent Jenkins a letter explaining that his case had been held in abeyance and that he would return trial transcripts to him within a short period of time. The Accused also advised Jenkins that he would re-contact him regarding the

appeal.

7.

The Accused neglected a legal matter entrusted to him in one or more of the following particulars:

- (1) failing to communicate with Jenkins regarding his appeal;
- (2) failing to respond to Jenkins' attempts to communicate with him; and
- (3) failing to promptly return Jenkins' trial court transcripts and other documents related to his convictions and post-conviction proceedings.

8.

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

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

9.

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

10.

By failing to promptly return Jenkins' trial court transcripts and other documents related to his convictions and post-conviction proceedings, the Accused failed to promptly deliver to a client, as requested by the client, the property in the Accused's possession which the client was entitled to receive.

11,

The aforementioned conduct of the Accused violated the following standard of professional responsibility established by law and by the Oregon State Bar: DR 9-101(C)(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 that pursuant thereto, such action be taken as may be just and proper under the circumstances.

EXECUTED this 20th day of April, 1995.

OREGON STATE BAR

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

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)
)
Complaint as to the Conduct of) Case No. 95-103
)
EDWARD J. MURPHY,)
)
Accused.)
_____)

Bar Counsel: None

Counsel for the Accused: None

Disciplinary Board: Chair: None

Disposition: Violation of DR 5-103(B).
Stipulation for Discipline. Public reprimand.

Effective Date of Order: June 26, 1995.

Note: Due to space restrictions, exhibits are not included but may be obtained by calling the Oregon State Bar

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of	)	No. 95-103
)	
EDWARD J. MURPHY,	)	ORDER APPROVING STIPULATION
	)	FOR DISCIPLINE
Accused.)	
_____)	

THIS MATTER having come 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 on June 22, 1995 is hereby approved upon the terms set forth therein.

DATED this 26th day of June, 1995.

/s/ Fred Avera
Fred E. Avera, State
Disciplinary Board Chairperson

/s/ Ann Fisher
Ann L. Fisher, Regional Chair
Region 5, Disciplinary Board

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of	)	Case No. 95-103
)	
EDWARD J. MURPHY,	)	STIPULATION FOR DISCIPLINE
)	
Accused.)	
_____)	

Edward J. Murphy, 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, Edward J. Murphy, was admitted by the Oregon Supreme Court to the practice of law in Oregon in 1964, 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. The Accused hereby stipulates that his conduct described herein violated DR 5-103(B).

4.

FACTS

On March 2, 1995, the Accused wrote the Bar advising that he had "violated an ethics rule pertaining to the lending of money to a client who was injured in an automobile accident." The Accused met with Disciplinary Counsel and the Accused and the Bar agree that the following are undisputed facts:

1. The Accused was retained by Sam Ramos (hereinafter "Ramos") to represent him regarding a serious personal injury automobile accident which made it impossible for Ramos to return to work;

2. Because Ramos could not work he could not pay certain living expenses including continuation of his medical insurance;

3. Beginning in June of 1993, approximately ten months after the inception of the representation and continuing until September of 1994, the Accused advanced certain living and medical expenses for Ramos. Copies of all checks were provided to the Bar and a list of

the checks showing payee and the amount of the check is attached as Exhibit A. The Accused advanced a total of \$11,624.31;

4. The funds advanced were not loaned as a condition of employment or continued employment of the Accused;

5. The Accused referred Ramos to another attorney when the issue of impropriety was raised.

5.

SANCTIONS

Pursuant to the analytical framework found in the ABA's Standards for Imposing Lawyer Sanctions, the following four factors are utilized in determining the appropriate sanction: Duty violated, mental state involved, injuries sustained, and aggravating or mitigating circumstances.

A. DUTIES VIOLATED

(1) The conduct of the Accused is difficult to fit within the precise duties described in the Standards. Since the rule is within the conflicts section of the Code of Professional Responsibility, Standard 4.3 regarding the failure to avoid conflicts of interest provides some guidance. It states:

Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving conflicts of interest:

* * *

4.32 Suspension 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 a client.

4.33 Reprimand is generally appropriate when a lawyer is negligent in determining whether the representation of a client may be materially affected by the lawyer's own interests, or whether the representation will adversely affect another client, and causes injury or potential injury to a client.

4.44 Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence in determining whether the representation of a client may be materially affected by the lawyer's own instance, or whether the representation will adversely affect another client, and causes little or no actual or potential injury to a client.

(2) The conduct of the Accused also implicates the duties he owes to the profession. While not specifically described in Standards 7.0, the conduct violates the purpose of the rule. The historical origin of the rule comes from the common law crimes of champerty and

maintenance. See Legal Ethics, at 777, Rhode and Luban, The Foundation Press, 1992. There the authors explain:

"Apart from this concern, there is also the risk that attorneys who acquire an interest in litigation may develop conflicts of interest with their clients. The temptation will be for these lawyers to make tactical and settlement decisions that further their own financial interest rather than those of their clients."

B. MENTAL STATE

Again, it is difficult to fit the state of mind of the Accused within the precise definitions of the Standards which utilize the following definitions:

"Intent" is the conscious objective or purpose to accomplish a particular result.

"Knowledge" is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result.

"Negligence" is the failure of a lawyer to heed a substantial risk that circumstances exist 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.

In this case, the Accused was aware of the ethical prohibition in DR 5-103(B) and acted contrary to it, but without any particular objective or result in mind.

C. INJURY

The Standards define injury as "harm to a client, the public, the legal system, or the profession which results from a lawyer's misconduct. The level of injury can range from "serious" injury to "little or no" injury; a reference to "injury" alone indicates any level of injury greater than "little or no" injury.

Potential injury is defined as "the harm to a client, the public, the legal system or the profession that is reasonably foreseeable at the time of the lawyer's misconduct, and which, but for some intervening factor or event, would probably have resulted from the lawyer's misconduct."

In this case there is little or no injury that resulted from the conduct of the Accused other than when the impropriety was revealed, the Accused had to seek new counsel for Ramos.

D. AGGRAVATING AND MITIGATING FACTORS

The Standards 9.21 define aggravating circumstances as considerations or factors that may justify an increase in the degree of discipline to be imposed. The following aggravating factors are present:

* * *

9.22 (i) substantial experience in the law.

The Standards 9.31 define mitigating circumstances as considerations or factors that may justify a reduction in the degree of discipline to be imposed. In this case the following

mitigating factors are present:

- 9.32 (a) absence of a prior disciplinary record;
- 9.32 (b) absence of a dishonest or selfish motive;

* * *

9.32 (e) full and free disclosure to disciplinary board or cooperative attitude toward proceedings.

* * *

- 9.32 (g) the character and reputation of the Accused.

E. OREGON CASE LAW

In In re Brown, 298 Or 285, 692 P2d 107 (1984), the Supreme Court suspended a lawyer for two years when he advanced money to a client for personal use. However, this case was aggravated because the lawyer also had his client sign an affidavit that the lawyer had prepared which tried to cover up the loan to the client. The court found as mitigating factors that no one was hurt and the total amount was small (\$361.00).

In In re Baker, 7 DB Rptr 145 (1993), the accused was charged with violating DR 1-102(A)(4), DR 5-103(B) and DR 6-101(B) and the SPRB approved a public reprimand.

6.

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

7.

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 20th day of June, 1995.

/s/ Edward Murphy _____
Edward J. Murphy

/s/ Chris Mullmann _____
Chris L. Mullmann
Assistant Disciplinary Counsel
Oregon State Bar

321 Or 324 (1995)

IN THE SUPREME COURT

OF THE STATE OF OREGON

In Re:)
)
 Complaint as to the Conduct of)
)
 ARTHUR P. ALTSTATT,)
)
 Accused.)
 _____)

(OSB 92-17; SC S41565)

In Banc

On review from a decision of the Trial Panel of the Disciplinary Board.

Argued and submitted March 8, 1995.

Stephen R. Moore, Portland, argued the cause and filed the briefs on behalf of the accused.

Lia Saroyan, Assistant Disciplinary Counsel, Oregon State Bar, Lake Oswego, argued the cause and filed a brief on behalf of the Oregon State Bar.

PER CURIAM

Violation of DR 1-102(A)(4), DR 2-106(A) and DR 5-101(A).

The accused is suspended from the practice of law for a period of one year commencing on the effective date of this decision.

Summary:

On July 7, 1995, the Oregon Supreme Court rendered an opinion suspending Bend attorney Arthur Altstatt for a period of one year. A petition for reconsideration was denied and the suspension became effective November 10, 1995. The suspension was a result of Altstatt's misconduct while representing two co-personal representatives in the probate of an estate.

In August 1988, Altstatt borrowed \$30,000 from a client. The loan was evidenced by an unsecured promissory note requiring payment by August 1989. The client died in October 1988. As of that date, Altstatt had not repaid the loan. Prior to his death, the client told his two nieces, the co-personal representatives named in the client's will, to retain Altstatt to handle the probate. The two co-personal representatives conformed with their uncle's wish and retained Altstatt. At the time of the retention, Altstatt, by virtue of being both debtor of and lawyer for the estate had a lawyer self-interest conflict which required full disclosure pursuant to DR 5-101(A) and DR 10-101(B)(1). The court found that prior to accepting employment as the estate's attorney, Altstatt failed to make full disclosure in violation of DR 5-101(A).

In 1989, shortly before payment on the promissory note was due, Altstatt asked the co-personal representatives if he could defer payment. The court found that when Altstatt made this request he made no disclosures to the co-personal representatives about the conflict created by Altstatt's continued status as both a past due debtor of and lawyer for the estate and that such failure constituted a second violation of DR 5-101(A).

The court found two additional violations, both as a result of Altstatt's taking estate funds for the payment of attorney fees prior to obtaining court approval. Between October 1988 and July 1989 Altstatt made requests of the co-personal representatives for attorney fees. At no time did he couple those requests with billings to the clients or a petition to the probate court for a partial award of attorney fees. As of July 1989, Altstatt had received \$59,000 from estate funds absent court approval.

In reviewing Altstatt's actions, the court reiterated that ORS 116.183 and Oregon Supreme Court case law require prior court approval before an attorney can collect attorney fees from an estate and any attorney fee that is collected without such approval is an illegal fee. The court concluded, therefore, that by collecting \$59,000 in illegal fees, Altstatt violated DR 2-106(A). Such misconduct also violated DR 1-102(A)(4) as Altstatt deprived the probate court of the ability to oversee the distribution of estate assets and further deprived the devisees and other interested parties of notice of an attorney fee application as required by UTCRC 9.090(4).

In fashioning a sanction, the court found several aggravating factors, the most significant one being that Altstatt was untruthful to the probate court, the Bar and to the trial panel. Altstatt has no prior discipline.

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)
)
Complaint as to the Conduct of) Case No. 94-143
)
FREDERICK R. CORNILLES,)
)
)
Accused.)
_____)

Bar Counsel: None

Counsel for the Accused: None

Disciplinary Board: None

Disposition: Violation of 1-102(A)(3) and DR 7-102(A)(5).
Stipulation for Discipline. Public reprimand.

Effective Date of Order: July 14, 1995.

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of	)	No. 94-143
)	
FREDERICK R. CORNILLES,	)	ORDER APPROVING STIPULATION
	)	FOR DISCIPLINE
Accused.)	
)	

This matter having come 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 on March 18, 1995 is hereby approved upon the terms set forth therein.

DATED this 14th day of July, 1995.

/s/ Fred Avera

Fred E. Avera
State Disciplinary Board Chairperson

/s/ Ann Fisher

Ann L. Fisher
Disciplinary Board Chairperson, Region 5

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of	)	Case No. 94-143
)	
FREDERICK R. CORNILLES,	)	STIPULATION FOR DISCIPLINE
)	
Accused.)	
_____)	

Frederick R. Cornilles, 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, Frederick R. Cornilles, was admitted by the Oregon Supreme Court to the practice of law in Oregon on September 18, 1961, and has been a member of the Oregon State 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 and under the confidentiality restrictions of BR 3.6(h).

4.

On March 18, 1995, the State Professional Responsibility Board of the Oregon State Bar authorized the filing of formal disciplinary proceedings against the Accused, alleging that he violated DR 1-102(A)(3) (misrepresentation) and DR 7-102(A)(5) (misstatement of fact) in connection with his representation of James and Sharon Dodge. This case was designated OSB Case No. 94-143.

5.

For purposes of this stipulation alone, the Accused and the Bar agree to the facts and the disciplinary rule violations described herein.

6.

The Accused was retained by Mrs. Dodge in 1991 to prepare a living trust. On June 13, 1991, at the request of clients, the Accused took the paperwork to the Dodges' home for execution. Some of the documents needed to be witnessed. The Accused requested that the

Dodges have two friends or neighbors to act as witnesses. The Dodges called a neighbor, Jim Adkins, who came over to witness the wills. A second witness could not be found. The Accused reluctantly acted as the other witness. No one was present who could notarize the affidavit of the attesting witnesses. At the Accused's request, Mr. Adkins wrote his telephone number next to his signature on the affidavit to facilitate a later contact by a notary. Upon returning to his office, the Accused told his secretary that he and Mr. Adkins signed the affidavit and asked her to call Mr. Adkins to confirm his identity and signature. Several days later, the Accused's secretary, Anne Berger, apparently called Mr. Adkins to confirm his signature. Ms. Berger (now Shaw) thereafter notarized the signature as follows: "Confirmed and Acknowledged to before me this 20th day of June, 1991."

7.

The parties agree that the representation that the witness signed in the presence of the notary was untrue. The Accused thereby caused his staff to sign a document he knew to contain a factual misrepresentation.

8.

The conduct described in paragraph 6, supra, violated DR 1-102(A)(3) and DR 7-102(A)(5).

9.

The Accused and the Bar agree that in fashioning the appropriate sanction, the court should refer to the ABA Standards and Oregon case law. The Standards require an analysis of the Accused's conduct in light of four factors: ethical duty violated, attorney's mental state, actual or potential injury, and existence of aggravating or mitigating factors. In this case, the Accused violated his duty to the public to refrain from misrepresentations. The Accused's mental state was "knowing" in that the misrepresentation was made despite the Accused's awareness of the true circumstances, but without any conscious objective or purpose by him to accomplish a particular result. The clients suffered no potential or actual injury by the Accused's conduct. An aggravating factor is the Accused's substantial experience in the practice of law. Mitigating factors include: no prior disciplinary record; absence of a dishonest or selfish motive; this was an isolated incident; full and free disclosure to disciplinary authorities and a cooperative attitude toward the proceeding.

The Standards provide that public reprimand is appropriate when a lawyer knowingly engages in a misrepresentation that adversely reflects on the lawyer's fitness to practice law. Standards 5.13. Under the ABA Standards, a public reprimand is appropriate in this case, particularly in the absence of client injury.

10.

The following Oregon case law is on point as to the appropriate sanction: In re Walter, 247 Or 13, 427 P2d 96 (1967); Eric Shilling/David Wagner, (Nos. 94-114A & B) 9 DB Rpt. _____ (1995). Both cases imposed a public reprimand on lawyers who violated their notarial duties by blindly acknowledging signatures or causing their staff to do so. The Accused in this case, however, did take steps to verify the witness's signature by telephone.

11.

The Accused has no prior disciplinary record.

12.

Consistent with the Standards and Oregon case law, the Bar and the Accused agree that the Accused shall be publicly reprimanded.

13.

This Stipulation for Discipline is subject to review by Disciplinary Counsel of the Oregon State Bar and to the approval of the State Professional Responsibility Board (SPRB). On March 18, 1995, the SPRB authorized the sanction proposed in this stipulation. The parties agree that this stipulation shall also be submitted for approval to the State and Regional Chairpersons of the Disciplinary Board pursuant to the terms of BR 3.6(e).

EXECUTED this 10th day of July, 1995.

/s/ Frederick Cornilles

Frederick R. Cornilles

/s/ Mary Cooper

Mary A. Cooper

Assistant Disciplinary Counsel

Oregon State Bar

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
	)	No. 91-127-B
Complaint as to the Conduct of:)	
)	
DOUGLAS VANDE GRIEND,)	
)	
Accused.)	
_____)	

Bar Counsel: Susan Bischoff, Esq.

Counsel for the Accused: None

Disciplinary Board: Fred E. Avera, Chair; Nori McCann-Cross and Chalmers Jones, public member

Disposition: Violation of DR 1-102(A)(3), and DR 1-102(A)(4) and ORS 9.460(2).
Not Guilty.

Effective Date of Opinion: July 14, 1995

Note: Due to space restrictions, exhibits are not included but may be obtained by calling the Oregon State Bar.

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
	)	Case No. 91-127-B
Complaint as to the Conduct of:)	
	)	OPINION OF THE
DOUGLAS VANDE GRIEND,	)	TRIAL PANEL
)	
Accused.)	

This matter came regularly before a Trial Panel of the Disciplinary Board on May 31, June 1 and June 14, 1994. The Oregon State Bar appeared by Susan Bischoff, Bar Counsel, and by Susan Roedl Cournoyer, Assistant Disciplinary Counsel. The Accused appeared personally and represented himself.

Testimony was heard, exhibits were received and arguments were made. At the conclusion of the hearing, the parties were allowed additional time to file written closing arguments. Those arguments were received in due course.

Having considered all of the above, the Trial Panel has reached certain findings of fact, conclusions and its disposition, which are set out below.

I. FINDINGS OF FACT

A. Uncontested Facts.

The following facts are either admitted or agreed to by the parties, or there is no serious dispute as to their truth.

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

2. The accused, Douglas Vande Griend¹ is and was at all times pertinent, 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 Marion County, Oregon.

3. At all times pertinent Vande Griend has shared office space with attorney Jay R. Jackson. Jackson and Vande Griend are not partners, but do work together closely, share office space, a phone number, office equipment and staff.

4. Before the acts alleged in this matter, a legal dispute arose between Lester Kahl and

¹ This case was consolidated for trial with In Re Jay R. Jackson, Case Number 91-127-A. To avoid confusion, we will refer to each accused attorney by his name rather than as "the accused."

Russell Durham.

5. At all times material herein, Jackson and Vande Griend represented Kahl in connection with that dispute. In particular, the two attorneys represented Kahl in the case of Lester Kahl v. Russell J. Durham and Kathy Hampton, Linn County Circuit Court Case Number 87-0957, and in other related legal matters before various state and federal courts.

6. The case of Kahl v. Durham and Hampton was tried without a jury before the Honorable Robert Gardner in January 1989. In February 1989, Judge Gardner issued a letter opinion finding that Durham and Hampton had converted Kahl's property as part of a conspiracy to defraud. In a judgment entered March 30, 1989, Judge Gardner awarded \$179,449 in damages against both defendants, plus \$75,000 in punitive damages against Durham and \$25,000 in punitive damages against Hampton. This judgment was appealed to the Oregon Court of Appeals and ultimately affirmed on August 18, 1993. A motion to stay execution of the judgment was denied because Durham did not file the required bond.

7. Following entry of judgment Jackson and Vande Griend attempted to collect on it by levying against Durham's personal property. These efforts were substantially without success.

8. In 1990 Jackson and Vande Griend commenced proceedings to execute on real property in Linn County. Attorneys William Brandt and Clayton Patrick resisted those efforts on behalf of Durham.

9. On March 9, 1990 a hearing was held before Judge Gardner. Jackson requested that the court sign the order allowing the sheriff's sale to proceed. Brandt and Patrick requested that the sale be halted and a receiver be appointed pursuant to ORCP 80. By letter dated March 14, the court ruled that it must sign the order authorizing the sale. Judge Gardner also indicated he would appoint a receiver if he had the legal authority to do so. Patrick subsequently submitted a statement of supplemental authorities supporting the request for receiver, but on April 27, 1990, Judge Gardner ruled that he did not have the authority to take this action so he denied the request.

10. On May 14, 1990, just before the scheduled date of the sheriff's sale, Brandt filed on behalf of Durham, a petition with the United States Bankruptcy Court seeking protection. This caused the Linn County Sheriff to stay the sale for a period of time. There was apparently some procedural defect in the filing, and the Bankruptcy Court dismissed the petition on its own motion on June 6.

11. On June 12, the Linn County Sheriff sold the real property to Kahl for \$71,007. The following documents and facts are important to understanding that sale:

a) Jackson and Vande Griend filed the Petition to have the property² sold. With the petition were supporting documents describing the property. These documents did not describe, exclude or in any way mention the mobile home on the Albany property.

b) A hearing was held on the Petition. This hearing, and the rulings that followed, are

² There were actually two parcels of property involved. The "Lacomb" property is a farm with three mobile homes on it. The "Albany" property consisted of three lots and also had a mobile home on it. The dispute that leads to this proceeding involved the Albany property.

described in paragraph 8 above.

c) A writ of execution was signed April 3, 1990 and the relevant documents were forwarded to the sheriff. On April 4, 1990 the sheriff conducted a records search concerning the mobile home on the Albany property. Department of Motor Vehicles records showed the registered owner of the mobile home to be Howard and Elise Durham of Blue River, Oregon. This registration was, however, more than 10 years old and had never been renewed. Linn County tax records showed the tax account for the mobile home to be in the name of Russell J. Durham, the judgment debtor.

d) When a mobile home is manufactured and sold, and before it is moved on the highway, it must be registered in the owner's name with the Department of Motor Vehicles. The mobile home is issued a license plate, which must be in place when the home is moved. Once a mobile home is placed on a foundation and the wheels are removed, as in this case, it is common to not re-title the home with DMV when it is sold. The license plate is often removed and the formerly mobile home becomes, for all intents and purposes, part of the land.

e) Despite this, and based on the discrepancy between the DMV and tax records, the sheriff's office was unsure as to the ownership of the mobile home. Without advice, instruction or notice, the sheriff altered the documents forwarded to him by excluding mobile homes from the description of the property.³

f) The Sheriff never did anything to specifically call anyone's attention to the fact that the documents had been altered, other than to send copies to the relevant parties, including Jackson and Vande Griend. Jackson was present when the sheriff conducted the sale and read the legal description of the property, including the language excluding the mobile home.

12. On June 13, 1990, the day after the sheriff's sale, Brandt filed a new bankruptcy petition on behalf of Durham.

13. On June 15, 1990, a telephone hearing was held in the Kahl v. Durham case. Participants were Judge Gardner, Jackson, Vande Griend, Brandt and Patrick. Judge Gardner was very frustrated by the turn of events and was unclear what, if any authority he had to act in view of the bankruptcy filings. The judge decided that he would appoint a receiver notwithstanding the fact that he had already ruled that he had no authority to do so. The judge told Jackson and Vande Griend to choose a receiver. Chris Casebeer, an associate of Brandt, prepared a form of order and forwarded that to Judge Gardner. A copy was sent to Vande Griend. That order provided in pertinent part:

"[I]t is the order of the court that a receiver be appointed to take charge and

³ On the Sheriff's certificate of Levy upon Execution dated April 6, 1990, the sheriff added the phrase, "Note: Mobile Homes are not included in levy." Similar language also appeared in the four required newspaper advertisements in the Albany Democrat Herald. In the Return on Sale of Real Property dated June 12, 1990, the sheriff inserted the phrase "Note: The mobile homes on said property are NOT included in sale." Inexplicably, on the Sheriff's Certificate of Sale of Real Property issued the same day, the sheriff does not attempt to exclude the mobile homes.

custody of this property and that the plaintiffs are to submit a name of an impartial receiver to the defendants for approval by the defendants and if the parties are not able to agree on a receiver, then the Court shall intervene."

This order was signed by Judge Gardner on June 18 and entered June 21.

14. Jackson contacted his father-in-law, Calvin Kent, and asked him to act as receiver. Kent agreed to do so. Kent had recently retired as property manager for Ohmart and Calaba Realtors of Salem, had many years of property management experience, and had previously served as a court-appointed receiver. Jackson contacted Brandt on June 20 and tendered these facts along with Kent's phone number. Jackson did not tell Brandt that Kent is Jackson's father-in-law and a former client. Brandt did nothing to examine the qualifications or background of Kent. On June 22 Brandt told Jackson that Kent was acceptable. Jackson forwarded an order to Judge Gardner again without any disclosure of the relationship between himself and Kent. That order was signed July 6, 1990.

15. On July 3, 1990, Durham's attorneys obtained an ex parte order reinstating the bankruptcy proceeding that had been previously dismissed. This order purports to relate back as if the dismissal had never been entered. On July 5, the second bankruptcy petition was dismissed. A hearing was then held on July 24, 1990 in the Bankruptcy Court on Durham's motion to set aside the sheriff's sale.⁴ That motion was denied by Bankruptcy Judge Albert Radcliffe on that date.

16. On July 26, 1990 Jackson went to the Albany property with Calvin Kent. Jackson had prepared certain notices to be posted in connection with the Receivership. Kent posted those and made a general inspection of the property. Jackson determined to enter the mobile home to inspect that. At some point the Albany police arrived on the scene responding to a reported burglary. Durham arrived shortly thereafter. The police took no action other than to direct Durham off the property. While the police were there Durham disclaimed any interest in the mobile home or its contents.

17. Upon entering the mobile home, Jackson found a number of documents stored in containers such as file cabinets, boxes and suitcases. He saw that some of the documents pertained to Durham's assets. These assets, as well as the documents found by Jackson had been concealed during efforts to enforce the Kahl v. Durham judgment. Jackson seized all of the documents, loaded them into his car, and returned to his office in Salem. He then called or attempted to call each of Durham's attorneys to see if they wanted to claim the personal property. Patrick and McCleery declined to claim the property, and Brandt could not be reached. McCleery asked Jackson to see if Kent would take possession, but Kent declined. Jackson also called the Oregon State Bar for advice.

18. Eventually, Vande Griend arrived at the office. Jackson showed him the documents

⁴ By the time of this hearing Eugene attorney Scott McCleery has been added to the Durham legal team. McCleery was hired by the Professional Liability Fund to "repair" the damage Brandt had done by allowing the bankruptcy petition to be dismissed and the sheriff's sale to proceed.

and explained their source. At Vande Griend's request, Jackson again called Patrick who would not claim ownership, but told Jackson "well, they are not yours, you know that." Jackson and Vande Griend then examined the documents. They copied some documents that pertained to their collection efforts. These copies were later made exhibits to pleadings filed in the Linn County action.⁵

19. On August 7, there was a conference call concerning the Albany property and the papers taken by Jackson. Participating were Judge Gardner, Jackson, Vande Griend, Patrick, McCleery and Kent. The judge ordered, among other things, that Jackson turn over all "personal papers and other property" that he had taken from the mobile home to McCleery. McCleery was ordered to preserve the documents until further order of the court. Durham was allowed access, but only if supervised by McCleery or his agent. Durham was specifically prohibited from taking or destroying any of the items. An order was entered memorializing this holding on August 8.

20. Jackson delivered the papers to McCleery on August 15, 1990. McCleery stored them in a spare office. On September 24, 1990, Durham, Patrick and McCleery reviewed the documents. McCleery prepared an affidavit, a copy of which was received as Exhibit 14. Within the affidavit, McCleery generally described a few of the documents found. Although it is difficult to tell, some of the documents might involve material covered by attorney-client privilege, while some of them clearly do not.

21. Durham prepared a separate affidavit dated October 1, 1990. Therein, he lists a number of items that he claims were in the boxes when Jackson took them, but which were missing by September 24. The implication is that Jackson and Vande Griend must have stolen those items.⁶

22. On some unknown date, McCleery took the boxes of material home and allowed Durham and a woman unsupervised access for a period of hours. This was directly contrary to Judge Gardner's order.

23. The Bar subpoenaed McCleery and directed him to bring all of the material to the hearing in this matter. Instead, McCleery brought boxes of material completely unrelated to this case, including a file case full of his firm's old billing records. He failed to bring the items that had been entrusted to him. His only explanation was that he had lost the items. McCleery did produce a suitcase full of papers, which he represented to be items he received from Jackson. The suitcase was opened and displayed for the panel. Despite invitation, however, the Bar chose to not have any particular item reviewed or described.

B. Contested Facts.

⁵ For some reason not apparent to the panel, neither side chose to make those pleadings exhibits in this proceeding so that we could see what they were. The significance of this failure will be discussed in more detail below.

⁶ It is noteworthy that the Bar chose to not call Mr. Durham as a witness although he was present at the hearing. This decision was perhaps occasioned by Durham's total lack of credibility. He had repeatedly been found guilty of fraudulent conduct by Judge Gardner. At one point, the Bar stipulated that Durham was not credible.

Below we discuss various disputed claims or assertions made either by the Oregon State Bar or Vande Griend. In making findings with regard to these issues we will explain our rationale.

ISSUE: What was Judge Gardner's intent in ordering the appointment of a receiver? What did Jackson and Vande Griend understand Judge Gardner's intent to be?

The Oregon State Bar contends that Judge Gardner intended that a neutral, impartial receiver be appointed in order to take control of the assets in the Kahl v. Durham case. The Bar further contends that this intention was plain and was known to Jackson and Vande Griend. The following evidence tends to support the Bar's claim:

a) Judge Gardner's order (Exhibit 6) directs that an impartial receiver be appointed.
b) A copy of the order was mailed to Vande Griend and presumably available for review by Jackson.

c) Judge Gardner testified that he wanted the receiver to be impartial. Vande Griend asserts that Judge Gardner was not particularly concerned about the impartiality of the receiver, or at least that such was his good faith, reasonable belief. The following evidence tends to support Vande Griend's claim:

a) Jackson and Vande Griend both testified that Judge Gardner did not use the word "impartial" during the hearing. They said that their understanding was that they could choose any receiver they wanted.

b) The handwritten notes prepared by Jackson during the phone conversation corroborate the testimony noted above (Exhibit 110).

c) Patrick's handwritten notes of the hearing (Exhibit 16) do not mention an "impartial" receiver.

d) Judge Gardner acknowledged that this was a very unusual case, that he had no authority to appoint a "receiver" in the traditional sense, and that given the "tortuous" history of the case it would be impossible to find a traditional "impartial" receiver.

DISCUSSION

The parties made much in the testimony and exhibits about the court's desire for an "impartial receiver." What the parties never seemed to define is what the term "impartial receiver" means. To the Bar and its witnesses the term means "unrelated to the parties." Jackson and Vande Griend deny that was the judge's intent. Judge Gardner's testimony makes it clear that what he wanted [was] a receiver who would act impartially. Judge Gardner was not necessarily concerned about any relationship that the receiver might have had to any party. He said:

"What I wanted the receiver to do was basically take charge of this property and act sort of as a buffer between the parties, and so hopefully we could control the situation until the case was reviewed on appeal. How that tied into a, you use the term, commercial receiver, I really can't answer that." (Transcript, Page 599)

"I think I wanted -- well, sort of repeating the same thing I said. Obviously, I

was concerned that the plaintiffs had somebody in there that could protect their property interest because they had a judgment and they wanted to sell the property, execute on the property, and that wasn't going to be possible, in my mind, until the appeal was concluded. And I wanted to make sure their rights were protected, and I also wanted to have somebody who would, you know, make sure the property wasn't damaged or assets ruined in the event that the judgment was reversed." (Transcript, Pages 599-600)

When asked if Mr. Kent's relationship with Jackson would have disqualified Kent as a receiver, Judge Gardner said that if the other side had objected, the judge would have held a hearing, but that he might well have appointed Kent anyway. (Transcript, Pages 613-614). We find that Judge Gardner's testimony disproves the Bar's contention that the judge wanted an "unrelated" person to act as receiver.

FINDINGS OF FACT

24. When Judge Gardner ordered the appointment of a receiver on June 15, 1990 he intended that the receiver be a person who would act impartially as an agent of the court in preserving the property in question. Judge Gardner was not concerned about the relationship the receiver might have with any party unless that relationship would cause the receiver to act in a partial manner.

25. Jackson and Vande Griend correctly understood Judge Gardner's intentions as stated above and acted in accordance with them.

ISSUE: If Brandt and Patrick had known of the relationship between Kent and Jackson, would that have caused them to object? If an objection had been lodged, how would Judge Gardner have handled it?

The Oregon State Bar contends that Brandt and Patrick "would not have agreed to the appointment" of Kent had they known all of the facts. The Bar claims that they would have objected and that as a result of that objection, Judge Gardner would not have appointed Kent. The following evidence tends to support the Bar's claim:

- a) Patrick and Brandt both testified that they would have objected had they known.
- b) Judge Gardner testified that in this contentious proceeding in which both sides objected to everything, he believes that Patrick and Brandt would have objected.

Vande Griend contends that Jackson's relationship with Kent is immaterial, and that disclosure of that relationship would not have made any difference. The following evidence tends to support Vande Griend's claims:

- a) Brandt did nothing to examine the qualifications of Kent after he was proposed by Jackson.
- b) In an earlier attempt to get Judge Gardner to appoint a receiver, Patrick had nominated two persons to act in that capacity. Each had some relationship to or with Durham or his attorneys. One was Gloria Williams, a friend and associate of Durham. The other was attorney Paul Meadowbrook, a former student, friend, associate and future partner of Patrick.

- c) After Durham found out about the relationship he did not object.
- d) After Brandt and Patrick found out about the relationship between Kent and Jackson, they took no steps to have Kent removed. Patrick explained this failure to act as follows:

"By that time the damage had been done. We had also -- it was also apparent that Judge Gardner was routinely ruling with Mr. Vande Griend and Mr. Jackson, I thought many of those rulings were erroneous, I did not feel like we were getting a fair trial on any of these issues from Judge Gardner. I felt that he was already greatly prejudiced against my client, so at that time I just felt like it wasn't going to do any good. Besides, I was also -- there were other disclosures that were made to me at the same time of this disclosure that concerned me more greatly, and I spent my time dealing with those instead." (Transcript, Page 256)

- e) After Judge Gardner found out about the relationship, he did not remove Kent as receiver.

DISCUSSION

The question of what Brandt and Patrick would have done under a hypothetical situation is difficult to answer. Both testified that they would have objected, but that testimony is questionable.

Brandt's demeanor in answering this particular question was uncomfortable and unsure. It is apparent from other evidence that Brandt's failure to block the sheriff's sale resulted in a PLF claim against Brandt. It is also clear that Durham was a contentious litigator and demanding client who must have been very difficult to work with. If Brandt had testified in this proceeding, which Durham attended, that he would not have objected, his testimony would have exacerbated the problems between him and Durham. It is always difficult to speculate what one would have done in the past if the circumstances had been completely different. The Trial Panel believes that there is a reasonable probability that Brandt's hindsight is better than his foresight. We do not say that there is sufficient evidence to say Brandt would not have objected, we only say that there is insufficient evidence to conclude that he would have.

Patrick, on the other hand, was quite certain in his answer that he would have objected to the appointment of Kent. In fact, Patrick seemed indignant that Jackson would propose a receiver related by marriage to one of the lawyers. This testimony is substantially undermined by the fact that Patrick had earlier proposed receivers with relationships to either Durham or to Patrick. Patrick's explanation as to why he did not later object to Kent continuing as receiver does not ring true. He said that the "damage had been done," and later referred to Jackson's entry into the mobile home. The only damage done by that entry was Jackson's discovery of documents that had earlier been wrongfully concealed from the court. The record shows that Durham's attorneys made many motions to Judge Gardner. Some were denied and some were allowed. Yet Patrick says he made no motion to remove Kent because Judge Gardner was prejudiced against their case and it would do no good. Patrick would have us believe that 1) he had evidence that Kahl and his attorneys had perpetrated a fraud on the court and engaged in

conduct that violated a number of disciplinary rules, yet 2) he decided to take no action whatsoever. We do not so believe.

What was apparent throughout these proceedings is that the case of Kahl v. Durham has caused an unfortunate and disturbing degree of personal animosity between the attorneys. Patrick dislikes Jackson and Vande Griend, and they dislike him. We believe that Patrick's animosity has colored his recollection and his testimony. We do not find Patrick credible on this point.

Judge Gardner testified that he would have expected Durham's lawyers to object, in effect because they had objected to everything else. This was, however, only Judge Gardner's speculation about what someone else might have thought or done under a hypothetical situation. As such, it is entitled to little or no weight. Even if we believed Durham's attorney's would have objected, we believe Judge Gardner would, as he testified, have held a hearing and appointed Kent anyway.

In deciding what Gardner would have ruled at such a hearing, the Trial Panel takes into account the rancorous nature of these proceedings. Becoming the receiver in this case would have been a job that no reasonable person would have wanted. Jackson's un rebutted and credible testimony was that it would have been impossible to find an ordinary, commercial receiver who would want to take on this job as a profit making venture. The only way anyone was going to find a receiver was by calling in a favor. Patrick and Brandt certainly recognized this when they nominated Williams and Meadowbrook to be receiver. Judge Gardner testified that even if he did not recognize this fact immediately, he certainly did later as he saw Kent try to deal with Durham and ultimately be sued. Kent had impeccable credentials and was very well qualified for the job. It is unlikely that a more fitting receiver could have been found.

FINDINGS OF FACT

26. The Oregon State Bar has failed to prove by clear and convincing evidence that Durham's attorneys would have objected to the appointment of Kent had they known of his relationship to Jackson.⁷

27. If Kent's relationship to Jackson had been made known, and if an objection on that ground had been raised, Judge Gardner would have conducted a hearing and confirmed Kent's appointment as receiver.

ISSUE: Did Kent act as a neutral and impartial receiver?

The Oregon State Bar contends that Kent did not act in a neutral and impartial manner. The Bar asserts that Kent favored Jackson to the detriment of Durham. The following evidence tends to support the Bar's claim:

⁷ Despite our findings, the Trial Panel cannot help but feel that it would have been more courteous and professional for Jackson to have simply gotten the matter on the table. Lawyers should be more civil in their practice. However, lack of courtesy and civility alone do not rise to the level of a Disciplinary Rule violation any more than the "mere appearance of impropriety." (In Re Ainsworth, 289 Or 479 (1980)).

- a) None

Jackson contends that Kent acted impartially and professionally in his role as receiver. The following evidence tends to support Vande Griend's claim:

- a) Judge Gardner testified that Kent performed well as the receiver in this case and that he acted impartially and professionally.

DISCUSSION

There is simply no evidence that Mr. Kent acted in any way other than impartially and professionally.

FINDINGS OF FACT

28. At all times Kent acted in a neutral, impartial and professional manner as a receiver in the Kahl v. Durham case.

ISSUE: Who owned the mobile home following the Sheriff's sale. If the mobile home was not purchased by Kahl, did Jackson and Vande Griend know this fact?

The Oregon State Bar contends that on July 26, 1990, the mobile home belonged to Durham's brother and sister-in-law, or at least that neither Kahl nor the receiver had any right to possession. The Bar further contends that Jackson knew this fact. The Bar reasons, therefore, that Jackson was guilty of a trespass in going in the home. The following evidence tends to support the Bar's claim:

- a) The Sheriff of Linn County excluded the mobile home from the sale.
b) Documents containing that deletion were mailed to Jackson and Vande Griend and published in the Albany Democrat Herald. Jackson was present when Deputy Davis read the legal description including the exclusion.
c) Ten year old DMV records showed the mobile home to be owned by someone else.

Vande Griend asserts that legal ownership of the mobile home passed to Kahl by the Sheriff's sale, or at least that he and Jackson reasonably believed it had on July 26, 1990 when Jackson entered the mobile home. The following evidence tends to support Vande Griend's claim:

- a) The order for Sheriff's sale signed by Judge Gardner did not contain the exclusion.
b) None of the documents prepared and sent by Jackson and Vande Griend contained the exclusion. That was typed in later by the Sheriff.
c) The Certificate of Sale of Real Property does not contain the mobile home exclusion.
d) The current tax records listed Durham as owner.
e) After the sale, all parties acted as if the mobile home had been sold to Kahl, for example:
1) On July 24, 1990, Brandt and McCleery argued a motion in bankruptcy court seeking to have the property, including the mobile home, returned to Durham. This would have been unnecessary if the lawyers knew the mobile home had been excluded.
2) On August 7, Judge Gardner directed Kent to rent the Albany property to Durham

and allowed Durham to live in the mobile home. Again, if the parties or the Judge had known of the exclusion, the Order would have been different.

3) Durham paid rent to live in the mobile home for many months.

4) The exclusion would have also affected the mobile homes on the Lacombe property, yet Kent rented those to a tenant and collected rents throughout the period of the receivership.

DISCUSSION

Jackson and Vande Griend reasonably believed that the mobile home was property of Russell Durham that was subject to levy and sale. Abundant evidence showed that Russell Durham treated and claimed the mobile home as his own. The only evidence to the contrary was the ten year old DMV registration. The reasons why this should have been unpersuasive are noted above. A sheriff's sale is a ministerial act performed pursuant to a court order. No prudent lawyer would expect a sheriff to modify documents in derogation of a court order. Upon receiving back signed copies of the sale documents the lawyer had prepared, no prudent lawyer would search pages of metes and bounds descriptions to determine if the sheriff had wrongfully amended them. The Albany Democrat Herald is not a newspaper generally circulated in Salem, the home of Jackson and Vande Griend. Although Jackson was present at the sale, it would not be unusual to not pay close attention to the reading of the legal description to listen for alterations. On the contrary, had Jackson become aware of the mobile home deletion, he would have likely stopped the proceedings to make inquiry. He did not do so. Following the sale, all parties acted under the assumption that the mobile home had been sold to Kahl.

There is a question whether the sheriff's action served to deprive Kahl of legal ownership of the mobile home. That is a substantive legal question that is beyond the expertise of the panel members, and we make no finding with regard to it, because the question in this case is whether Jackson actually and reasonably believed that on July 26, 1990 his client owned the mobile home and that he was entitled to enter it as his client's agent. We find that he did.

FINDINGS OF FACT

28. At the time of the sheriff's sale Russell Durham was the owner of the mobile home on the Albany property. As such, it, should have been included in the sale pursuant to the court's order.

29. The sheriff of Linn County purported to exclude the mobile home from the sale. This act was improper, perhaps illegal, and was done without effective notice to Jackson, Vande Griend, the Court, or anyone else.

30. Jackson and Vande Griend were unaware of the sheriff's action at all times pertinent to this matter.

31. On July 26, 1990, Jackson and Vande Griend actually and reasonably believed that their client owned the mobile home and that they had the right to enter it as Kahl's agents.

ISSUE: Were some of the documents found by Jackson in the mobile home protected by attorney-client privilege? If so, did Jackson and Vande Griend inspect those documents?

The Oregon State Bar contends that some of the documents found and inspected by Jackson were protected by attorney-client privilege. The following evidence tends to support the Bar's claim:

a) Although they were not directly asked, Patrick and McCleery hinted that some of the documents Jackson turned over and that they reviewed on September 24 were privileged.

b) McCleery's affidavit (Exhibit 14) describes documents that could be privileged.

c) Durham's affidavit (Exhibit 16) more clearly describes documents that would probably be privileged and that he claims Jackson kept in violation of the court's order. Vande Griend contends that none of the documents Jackson took and that he and Jackson inspected were protected by attorney-client privilege. The following evidence tends to support Vande Griend's claim:

a) Jackson and Vande Griend testified that they did not inspect any privileged items.

DISCUSSION

With regard to Durham's affidavit, the Bar stipulated that he is not credible and declined to call him as a witness. We can see no reason to give any weight to Durham's affidavit.

McCleery and Patrick inspected the documents, and presumably would have been in a position to testify about documents that were privileged. The Bar did not ask them to do so. We decline to infer from their testimony that the documents were privileged.

McCleery's affidavit describes a number of documents that might be privileged. The most obvious are items numbered 1, 2, 5, 6, 7 and 11. It is, however, difficult to determine whether these documents are privileged without reviewing them and hearing testimony as to how they were created and how they were used and distributed after creation. We do not know which of these documents McCleery may have lost.

McCleery did produce a suitcase full of documents. This was opened and displayed on the floor. The panel invited the Bar to call our attention to any document that was of significance. Any such document could have been reproduced and received in evidence.⁸ Testimony could have been received explaining the significance of such a document. We could have been told how it was produced, kept, used and distributed. Despite specific invitation from the panel to do so (see Transcript pages 211-213) the Bar declined. We will not speculate as to why the Bar chose to not present evidence that it had and to instead rely on second hand evidence and inference. We will, however, apply the principles of ORS 10.095(8) (less satisfactory evidence) and ORS 40.550-40.585 (best evidence)⁹ to conclude that the Bar has not proven its point.

FINDINGS OF FACT

32. The Oregon State Bar has failed to prove by clear and convincing evidence that

⁸ Durham waived attorney-client privilege with regard to documents pertinent to this matter.

⁹ We recognize that neither of these statutes are, strictly speaking, applicable to this proceeding. We find the logic and policy behind these statutes persuasive, however, in deciding whether second hand evidence and inference "posses probative value commonly accepted by reasonably prudent persons in the conduct of their affairs," when the actual documents are available. We find that the evidence presented by the Bar on this issue did not possess such characteristics.

the documents removed by Jackson contained material that was covered by the attorney-client privilege.

33. The Oregon State Bar has failed to prove by clear and convincing evidence that Jackson or Vande Griend kept any item removed from the mobile home.

34. If any of the documents were privileged, the Oregon State Bar has failed to prove by clear and convincing evidence that either Jackson or Vande Griend actually reviewed the documents.

ISSUE: Was Jackson otherwise legally barred from inspecting the items he found in the mobile home?

The Oregon State Bar contends that the items found and inspected by Jackson "included other property to which he had no right to inspect, remove, duplicate or possess without permission from its owner." The following evidence tends to support the Bar's claim:

a) None, other than has been discussed above. Vande Griend contends that he did have a right to inspect and copy the items described. The following evidence tends to support Vande Griend's claim:

a) None, other than what has been discussed above.

DISCUSSION

We have already found that Vande Griend actually and reasonably believed that his client owned the mobile home. We have also found that Vande Griend and Jackson actually and reasonably believed that Jackson had the right to be in the mobile home on July 26. Acting under these assumptions, it was reasonable and prudent for Jackson to inspect the contents of the mobile home in order to determine what was there. Failure to do so could have later resulted in false claims regarding allegedly missing property¹⁰ In the course of conducting a lawful inspection and inventory, Jackson found documents that were plainly material to the Kahl v. Durham matter and had been wrongfully concealed during prior court proceedings. Jackson was justified in seizing those documents for safe keeping given the totality of the circumstances of this case. Jackson then went the extra mile by calling Durham's attorneys and offering the documents to them, contacting Kent and offering them to him, and calling the Oregon State Bar for advice. No one would claim the documents and no one would keep them. All of these facts were related to Vande Griend by Jackson. Vande Griend suggested another attempt to get Patrick to claim the documents, but Patrick refused. Under the circumstances, Vande Griend was warranted in regarding the items as abandoned. The Bar cites no fact or law to the contrary.

FINDING OF FACT

35. Jackson was legally justified in inspecting, removing, duplicating and possessing all of the items taken from the mobile home. Vande Griend was legally justified in the assistance to this effort which he gave.

Actually, a false claim was made anyway. See Exhibit 16.

¹⁰ Actually, a false claim was made anyway. See Exhibit 16.

III. APPLICATION OF FACTS TO THE COMPLAINT

A. First Cause of Complaint

In its first cause of complaint, the Bar alleges that Jackson failed to disclose that Calvin Kent is his father-in-law and a former client, and that Durham's attorneys would not have agreed to the appointment of Kent as receiver had they known. The Bar alleges that Vande Griend ratified that non-disclosure. By so acting, the Bar alleges, Vande Griend "failed to employ only those means that are consistent with the truth; engaged in conduct involving dishonesty, fraud, deceit or misrepresentation; and engaged in conduct prejudicial to the administration of justice," thereby violating ORS 9.460(2)¹¹, DR 1-102(A)(3)¹², DR 1-102(A)(4)¹³.

The Bar does not contend that Jackson or Vande Griend made any affirmative false statement. Rather, the Bar contends that Jackson, and Vande Griend by ratification, withheld material information and thereby misled Durham's attorney's and the court.

The Bar correctly cites abundant authority for the proposition that "misrepresentation" is "a broad term encompassing nondisclosure of material fact." In Re Leonard 308 Or 560 at 569, 784 P2d 95 (1989). While Jackson did not disclose that Calvin Kent was his father-in-law and a former client, that is not enough to violate the rule. The nondisclosure must concern a material fact. In Re Williams 314 Or 530, 840 P2d 1280 (1992). The Bar claims that the nondisclosed facts were material because, had they been known, Durham's lawyers would have objected, and Judge Gardner would not have appointed Kent. We have found that the bar has failed to prove it first point, and that the opposite of its second point is true.

The fact that Jackson and Kent are related was not a material fact. It follows that Jackson did not engage in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of DR 1-102 (A)(3), nor did he mislead the court by any artifice or false statement of law or fact

¹¹ Actually, the complaint references ORS 9.460(4), which concerns the causes of the defenseless and the oppressed. We assume this is a typographical error and amend the complaint to cite the correct statute, ORS 9.460(2) which provides:

"An attorney shall:

"(2) Employ, for the purpose of maintaining the causes confided to the attorney, such means only as are consistent[ce] with truth, and never seek to mislead the court of jury by any artifice or false statement of law or fact."

¹² DR 1-102(A)(3) provides

"It is professional misconduct for a lawyer to:

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

¹³ 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."

in violation of ORS 9.460(2).

Even if the Bar had proven that Jackson had withheld a material fact, and thereby violated the disciplinary rules in question, there was no proof that Vande Griend was aware of that nondisclosure. Vande Griend's undisputed and credible testimony is that he did not know that Jackson had failed to disclose the relationship until after a complaint was filed with the Oregon State Bar. Vande Griend can not be said to have ratified an act that he did not know had taken place.

The Bar also charges that Vande Griend violated DR 1-102(A)(4), conduct prejudicial to the administration of justice. In its trial memorandum the Bar succinctly sets forth the parameters of this rule.

"The Supreme Court sets out the elements of this rule in In Re Haws 310 Or 741, 801 P2d 818 (1990). 'Conduct' describes doing something that one should not do or not doing something that one should do. Id at 746. The court interprets 'prejudice' to require either repeated conduct causing some harm to the administration of justice or a single act causing substantial harm to the administration of justice. Id at 748. The 'administration of justice' refers to either the procedural functioning of a judicial proceeding or the substantive interest of a party in the proceeding. Id at 746-47 (OSB Trial Memorandum at (8-9)

Jackson's nondisclosure was a single act, so the Bar must show "substantial harm to the administration of justice" in order to make out a violation of the rule. In fact, the Bar was unable to prove any harm at all. Calvin Kent was a highly qualified property manager with considerable experience as a receiver. He performed his duties well under very difficult circumstances. The judge who appointed him praised his performance. The Bar was unable to elicit a single instance in which Calvin Kent in any way acted to the prejudice of either party, the court or justice. The Bar's only claim of prejudice is that by not disclosing the relationship, Jackson deprived Patrick and Brandt of the opportunity to file an objection that we have found the court would have denied. Even if this can be considered prejudice, we have also found that the Bar has failed to prove that such an objection would have been made.

There has been no showing that Jackson's conduct in any way caused any harm to the administration of justice in violation of DR 1-102(A)(4). It follows that Vande Griend did not ratify any conduct that was prejudicial to the administration of justice.

B. Second Cause of Complaint.

In its second cause of complaint the Bar alleges that when Jackson entered the mobile home, and inspected the documents and then removed them, he knew that he had no right to do so. The Bar further alleges that the documents were protected by the attorney-client privilege and that this conduct constitutes dishonesty, fraud, deceit or misrepresentation in violation of DR 1-102(A)(3)¹⁴. As with the first cause, the Bar alleges that Vande Griend ratified this wrongful

¹⁴ See footnote 11 for the text of this rule.

conduct and is therefore responsible for it.

If the Linn County Sheriff had not excluded the mobile home from some of the documents, title to the mobile home would have passed to Kahl at the time of the sheriff's sale. There was nothing in the receivership order that would have prevented Kahl, or Jackson as his attorney, from going to the property and inspecting it. The situation is made quite complicated, however, because the sheriff did alter the documents. As noted above, the Panel does not know whether title to the mobile home passed to Kahl through the sheriff's sale. Resolution of that fact is unnecessary, because we do find beyond any reasonable doubt that Jackson actually and reasonably believed his client owned the mobile home on July 26, 1990. The Bar has failed to enunciate any fact, law or theory that would make Jackson's conduct wrongful.

The Trial Panel also notes with interest that the Bar chose to charge Jackson and Vande Griend with a violation of DR 1-102(A)(3) for this conduct. The Bar's Trial Memorandum focuses on the "dishonesty" portion of that rule. If we had found that Jackson knew he had no right to do what he did, the evidence also showed the following facts: Durham and the Albany Police were at the mobile home and knew that Jackson was there; Kent was also aware of this fact; Jackson openly removed the documents and took them to his office; he attempted to talk to all three of Durham's attorneys, and did speak to two of them; he told those attorneys what he had done and what he possessed; he offered them the opportunity to claim the documents on behalf of their client; both refused; McCleery even told Jackson to do whatever he wanted to do with the documents; Jackson tried to get the receiver to take the documents, but he refused; Jackson even called the Oregon State Bar; only then did Jackson review the papers.

To the Trial Panel the term "dishonesty" implies a tendency to conceal the truth and to act in an untrustworthy manner. Jackson's conduct was the opposite. He did what he did openly for all the world to see. He fully informed all appropriate parties of his action. By separate opinion we have found Jackson not guilty of violating DR 1-102(A)(3)¹⁵. It follows that Vande Griend can have no vicarious liability for Jackson's action.

IV. CONCLUSION

The Oregon State Bar has failed to prove that the Accused, Douglas Vande Griend, has violated the statutes or disciplinary rules as alleged in its formal complaint. The Trial Panel find Vande Griend not guilty of all charges.

V. DISPOSITION

The Oregon State Bar's formal Complaint in this matter is dismissed.
IT IS SO ORDERED.

¹⁵ Arguably, if we were to find the facts to be as urged by the Bar, Jackson's conduct might violate a number of criminal statutes (ORS 164.015; ORS 163.065; ORS 164.215; ORS 164.225; ORS 164.245; ORS 164.255; ORS 164.345-164.365) and therefore be a violation of DR 1-102(A)(2), ORS 9.527(1) and (5) and ORS 9.460(1). The Bar has not, however, charged Jackson under these sections. As noted elsewhere, we do not find the facts to be as claimed by the Bar, so we would have found Jackson not guilty under these sections as well.

DATED this 14th day of July, 1995.

/s/ Fred Avera

Fred E. Avera
Trial Panel Chair

/s/ Nori McCann-Cross

Nori McCann-Cross
Trial Panel Member

/s/ Chalmers Jones

Chalmers Jones
Trial Panel Member

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
	)	No. 91-127-A
Complaint as to the Conduct of)	
)	
JAY R. JACKSON,)	
)	
Accused.)	
_____)	

Bar Counsel: Susan Bischoff, Esq.

Counsel for the Accused: None

Disciplinary Board: Fred E. Avera, Chair; Nori McCann-Cross and Chalmer Jones, public member.

Disposition: Violation of DR 1-102(A)(3), DR 1-102(A)(4) and ORS 9.460(2).
Not Guilty.

Effective Date of Opinion: July 14, 1995

Note: Due to space restrictions, exhibits are not included but may be obtained by calling the Oregon State Bar.

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
	)	Case No. 91-127-A
Complaint as to the Conduct of)	
	)	OPINION OF THE
JAY R. JACKSON,	)	TRIAL PANEL
)	
Accused.)	
_____)	

This matter came regularly before a Trial Panel of the Disciplinary Board on May 31, June 1 and June 14, 1994. The Oregon State Bar appeared by Susan Bischoff, Bar Counsel, and by Susan Roedl Cournoyer, Assistant Disciplinary Counsel. The Accused appeared personally and represented himself.

Testimony was heard, exhibits were received and arguments were made. At the conclusion of the hearing, the parties were allowed additional time to file written closing arguments. Those arguments were received in due course.

Having considered all of the above, the Trial Panel has reached certain findings of fact, conclusions and its disposition, which are set out below.

I. FINDINGS OF FACT

A. Uncontested Facts.

The following facts are either admitted or agreed to by the parties, or there is no serious dispute as to their truth.

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

2. The accused, Jay R. Jackson¹⁶ is and was at all times pertinent, 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 Marion County, Oregon.

3. At all times pertinent Jackson has shared office space with attorney Douglas Vande Griend. Jackson and Vande Griend are not partners, but do work together closely, share office space, a phone number, office equipment and staff.

4. Before the acts alleged in this matter, a legal dispute arose between Lester Kahl and

¹⁶ This case was consolidated for trial with In Re Douglas Vande Griend, Case Number 91-127-B. To avoid confusion, we will refer to each accused attorney by his name rather than as "the accused."

Russell Durham.

5. At all times material herein, Jackson and Vande Griend represented Kahl in connection with that dispute. In particular, the two attorneys represented Kahl in the case of Lester Kahl v. Russell J. Durham and Kathy Hampton, Linn County Circuit Court Case Number 87-0957, and in other related legal matters before various state and federal courts.

6. The case of Kahl v. Durham and Hampton was tried without a jury before the Honorable Robert Gardner in January 1989. In February 1989, Judge Gardner issued a letter opinion finding that Durham and Hampton had converted Kahl's property as part of a conspiracy to defraud. In a judgment entered March 30, 1989, Judge Gardner awarded \$179,449 in damages against both defendants, plus \$75,000 in punitive damages against Durham and \$25,000 in punitive damages against Hampton. This judgment was appealed to the Oregon Court of Appeals and ultimately affirmed on August 18, 1993. A motion to stay execution of the judgment was denied because Durham did not file the required bond.

7. Following entry of judgment Jackson and Vande Griend attempted to collect on it by levying against Durham's personal property. These efforts were substantially without success.

8. In 1990 Jackson and Vande Griend commenced proceedings to execute on real property in Linn County. Attorneys William Brandt and Clayton Patrick resisted those efforts on behalf of Durham.

9. On March 9, 1990 a hearing was held before Judge Gardner. Jackson requested that the court sign the order allowing the sheriff's sale to proceed. Brandt and Patrick requested that the sale be halted and a receiver be appointed pursuant to ORCP 80. By letter dated March 14, the court ruled that it must sign the order authorizing the sale. Judge Gardner also indicated he would appoint a receiver if he had the legal authority to do so. Patrick subsequently submitted a statement of supplemental authorities supporting the request for receiver, but on April 27, 1990, Judge Gardner ruled that he did not have the authority to take this action so he denied the request.

10. On May 14, 1990, just before the scheduled date of the sheriff's sale, Brandt filed on behalf of Durham, a petition with the United States Bankruptcy Court seeking protection. This caused the Linn County Sheriff to stay the sale for a period of time. There was apparently some procedural defect in the filing, and the Bankruptcy Court dismissed the petition on its own motion on June 6.

11. On June 12, the Linn County Sheriff sold the real property to Kahl for \$71,007. The following documents and facts are important to understanding that sale:

a) Jackson and Vande Griend filed the Petition to have the property¹⁷ sold. With the petition were supporting documents describing the property. These documents did not describe, exclude or in any way mention the mobile home on the Albany property.

b) A hearing was held on the Petition. This hearing, and the rulings that followed, are

¹⁷ There were actually two parcels of property involved. The "Lacomb" property is a farm with three mobile homes on it. The "Albany" property consisted of three lots and also had a mobile home on it. The dispute that leads to this proceeding involved the Albany property.

described in paragraph 8 above.

c) A writ of execution was signed April 3, 1990 and the relevant documents were forwarded to the sheriff. On April 4, 1990 the sheriff conducted a records search concerning the mobile home on the Albany property. Department of Motor Vehicles records showed the registered owner of the mobile home to be Howard and Elise Durham of Blue River, Oregon. This registration was, however, more than 10 years old and had never been renewed. Linn County tax records showed the tax account for the mobile home to be in the name of Russell J. Durham, the judgment debtor.

d) When a mobile home is manufactured and sold, and before it is moved on the highway, it must be registered in the owner's name with the Department of Motor Vehicles. The mobile home is issued a license plate, which must be in place when the home is moved. Once a mobile home is placed on a foundation and the wheels are removed, as in this case, it is common to not re-title the home with DMV when it is sold. The license plate is often removed and the formerly mobile home becomes, for all intents and purposes, part of the land.

e) Despite this, and based on the discrepancy between the DMV and tax records, the sheriff's office was unsure as to the ownership of the mobile home. Without advice, instruction or notice, the sheriff altered the documents forwarded to him by excluding mobile homes from the description of the property.¹⁸

f) The Sheriff never did anything to specifically call anyone's attention to the fact that the documents had been altered, other than to send copies to the relevant parties, including Jackson and Vande Griend. Jackson was present when the sheriff conducted the sale and read the legal description of the property, including the language excluding the mobile home.

12. On June 13, 1990, the day after the sheriff's sale, Brandt filed a new bankruptcy petition on behalf of Durham.

13. On June 15, 1990, a telephone hearing was held in the Kahl v. Durham case. Participants were Judge Gardner, Jackson, Vande Griend, Brandt and Patrick. Judge Gardner was very frustrated by the turn of events and was unclear what, if any authority he had to act in view of the bankruptcy filings. The judge decided that he would appoint a receiver notwithstanding the fact that he had already ruled that he had no authority to do so. The judge told Jackson and Vande Griend to choose a receiver. Chris Casebeer, an associate of Brandt, prepared a form of order and forwarded that to Judge Gardner. A copy was sent to Vande Griend. That order provided in pertinent part:

"[I]t is the order of the court that a receiver be appointed to take charge and

¹⁸ On the Sheriff's certificate of Levy upon Execution dated April 6, 1990, the sheriff added the phrase, "Note: Mobile Homes are not included in levy." Similar language also appeared in the four required newspaper advertisements in the Albany Democrat Herald. In the Return on Sale of Real Property dated June 12, 1990, the sheriff inserted the phrase "Note: The mobile homes on said property are NOT included in sale." Inexplicably, on the Sheriff's Certificate of Sale of Real Property issued the same day, the sheriff does not attempt to exclude the mobile homes.

custody of this property and that the plaintiffs are to submit a name of an impartial receiver to the defendants for approval by the defendants and if the parties are not able to agree on a receiver, then the Court shall intervene."

This order was signed by Judge Gardner on June 18 and entered June 21.

14. Jackson contacted his father-in-law, Calvin Kent, and asked him to act as receiver. Kent agreed to do so. Kent had recently retired as property manager for Ohmart and Calaba Realtors of Salem, had many years of property management experience, and had previously served as a court-appointed receiver. Jackson contacted Brandt on June 20 and tendered these facts along with Kent's phone number. Jackson did not tell Brandt that Kent is Jackson's father-in-law and a former client. Brandt did nothing to examine the qualifications or background of Kent. On June 22 Brandt told Jackson that Kent was acceptable. Jackson forwarded an order to Judge Gardner again without any disclosure of the relationship between himself and Kent. That order was signed July 6, 1990.

15. On July 3, 1990, Durham's attorneys obtained an ex parte order reinstating the bankruptcy proceeding that had been previously dismissed. This order purports to relate back as if the dismissal had never been entered. On July 5, the second bankruptcy petition was dismissed. A hearing was then held on July 24, 1990 in the Bankruptcy Court on Durham's motion to set aside the sheriff's sale.¹⁹ That motion was denied by Bankruptcy Judge Albert Radcliffe on that date.

16. On July 26, 1990 Jackson went to the Albany property with Calvin Kent. Jackson had prepared certain notices to be posted in connection with the Receivership. Kent posted those and made a general inspection of the property. Jackson determined to enter the mobile home to inspect that. At some point the Albany police arrived on the scene responding to a reported burglary. Durham arrived shortly thereafter. The police took no action other than to direct Durham off the property. While the police were there Durham disclaimed any interest in the mobile home or its contents.

17. Upon entering the mobile home, Jackson found a number of documents stored in containers such as file cabinets, boxes and suitcases. He saw that some of the documents pertained to Durham's assets. These assets, as well as the documents found by Jackson had been concealed during efforts to enforce the Kahl v. Durham judgment. Jackson seized all of the documents, loaded them into his car, and returned to his office in Salem. He then called or attempted to call each of Durham's attorneys to see if they wanted to claim the personal property. Patrick and McCleery declined to claim the property, and Brandt could not be reached. McCleery asked Jackson to see if Kent would take possession, but Kent declined. Jackson also called the Oregon State Bar for advice.

18. Eventually, Vande Griend arrived at the office. Jackson showed him the documents

¹⁹ By the time of this hearing Eugene attorney Scott McCleery has been added to the Durham legal team. McCleery was hired by the Professional Liability Fund to "repair" the damage Brandt had done by allowing the bankruptcy petition to be dismissed and the sheriff's sale to proceed.

and explained their source. At Vande Griend's request, Jackson again called Patrick who would not claim ownership, but told Jackson "well, they are not yours, you know that." Jackson and Vande Griend then examined the documents. They copied some documents that pertained to their collection efforts. These copies were later made exhibits to pleadings filed in the Linn County action.²⁰

19. On August 7, there was a conference call concerning the Albany property and the papers taken by Jackson. Participating were Judge Gardner, Jackson, Vande Griend, Patrick, McCleery and Kent. The judge ordered, among other things, that Jackson turn over all "personal papers and other property" that he had taken from the mobile home to McCleery. McCleery was ordered to preserve the documents until further order of the court. Durham was allowed access, but only if supervised by McCleery or his agent. Durham was specifically prohibited from taking or destroying any of the items. An order was entered memorializing this holding on August 8.

20. Jackson delivered the papers to McCleery on August 15, 1990. McCleery stored them in a spare office. On September 24, 1990, Durham, Patrick and McCleery reviewed the documents. McCleery prepared an affidavit, a copy of which was received as Exhibit 14. Within the affidavit, McCleery generally described a few of the documents found. Although it is difficult to tell, some of the documents might involve material covered by attorney-client privilege, while some of them clearly do not.

21. Durham prepared a separate affidavit dated October 1, 1990. Therein, he lists a number of items that he claims were in the boxes when Jackson took them, but which were missing by September 24. The implication is that Jackson and Vande Griend must have stolen those items.²¹

22. On some unknown date, McCleery took the boxes of material home and allowed Durham and a woman unsupervised access for a period of hours. This was directly contrary to Judge Gardner's order.

23. The Bar subpoenaed McCleery and directed him to bring all of the material to the hearing in this matter. Instead, McCleery brought boxes of material completely unrelated to this case, including a file case full of his firm's old billing records. He failed to bring the items that had been entrusted to him. His only explanation was that he had lost the items. McCleery did produce a suitcase full of papers, which he represented to be items he received from Jackson. The suitcase was opened and displayed for the panel. Despite invitation, however, the Bar chose to not have any particular item reviewed or described.

B. Contested Facts.

²⁰ For some reason not apparent to the panel, neither side chose to make those pleadings exhibits in this proceeding so that we could see what they were. The significance of this failure will be discussed in more detail below.

²¹ It is noteworthy that the Bar chose to not call Mr. Durham as a witness although he was present at the hearing. This decision was perhaps occasioned by Durham's total lack of credibility. He had repeatedly been found guilty of fraudulent conduct by Judge Gardner. At one point, the Bar stipulated that Durham was not credible.

Below we discuss various disputed claims or assertions made either by the Oregon State Bar or Jackson. In making findings with regard to these issues we will explain our rationale. **ISSUE: What was Judge Gardner's intent in ordering the appointment of a receiver? What did Jackson and Vande Griend understand Judge Gardner's intent to be?**

The Oregon State Bar contends that Judge Gardner intended that a neutral, impartial receiver be appointed in order to take control of the assets in the Kahl v. Durham case. The Bar further contends that this intention was plain and was known to Jackson and Vande Griend. The following evidence tends to support the Bar's claim:

a) Judge Gardner's order (Exhibit 6) directs that an impartial receiver be appointed.
b) A copy of the order was mailed to Vande Griend and presumably available for review by Jackson.

c) Judge Gardner testified that he wanted the receiver to be impartial. Vande Griend asserts that Judge Gardner was not particularly concerned about the impartiality of the receiver, or at least that such was his good faith, reasonable belief. The following evidence tends to support Vande Griend's claim:

a) Jackson and Vande Griend both testified that Judge Gardner did not use the word "impartial" during the hearing. They said that their understanding was that they could choose any receiver they wanted.

b) The handwritten notes prepared by Jackson during the phone conversation corroborate the testimony noted above (Exhibit 110).

c) Patrick's handwritten notes of the hearing (Exhibit 16) do not mention an "impartial" receiver.

d) Judge Gardner acknowledged that this was a very unusual case, that he had no authority to appoint a "receiver" in the traditional sense, and that given the "tortuous" history of the case it would be impossible to find a traditional "impartial" receiver.

DISCUSSION

The parties made much in the testimony and exhibits about the court's desire for an "impartial receiver." What the parties never seemed to define is what the term "impartial receiver" means. To the Bar and its witnesses the term means "unrelated to the parties." Jackson and Vande Griend deny that was the judge's intent. Judge Gardner's testimony makes it clear that what he wanted [was] a receiver who would act impartially. Judge Gardner was not necessarily concerned about any relationship that the receiver might have had to any party. He said:

"What I wanted the receiver to do was basically take charge of this property and act sort of as a buffer between the parties, and so hopefully we could control the situation until the case was reviewed on appeal. How that tied into a, you use the term, commercial receiver, I really can't answer that." (Transcript, Page 599)

"I think I wanted -- well, sort of repeating the same thing I said. Obviously, I was concerned that the plaintiffs had somebody in there that could protect their

property interest because they had a judgment and they wanted to sell the property, execute on the property, and that wasn't going to be possible, in my mind, until the appeal was concluded. And I wanted to make sure their rights were protected, and I also wanted to have somebody who would, you know, make sure the property wasn't damaged or assets ruined in the event that the judgment was reversed." (Transcript, Pages 599-600)

When asked if Mr. Kent's relationship with Jackson would have disqualified Kent as a receiver, Judge Gardner said that if the other side had objected, the judge would have held a hearing, but that he might well have appointed Kent anyway. (Transcript, Pages 613-614). We find that Judge Gardner's testimony disproves the Bar's contention that the judge wanted an "unrelated" person to act as receiver.

FINDINGS OF FACT

24. When Judge Gardner ordered the appointment of a receiver on June 15, 1990 he intended that the receiver be a person who would act impartially as an agent of the court in preserving the property in question. Judge Gardner was not concerned about the relationship the receiver might have with any party unless that relationship would cause the receiver to act in a partial manner.

25. Jackson and Vande Griend correctly understood Judge Gardner's intentions as stated above and acted in accordance with them.

ISSUE: If Brandt and Patrick had known of the relationship between Kent and Jackson, would that have caused them to object? If an objection had been lodged, how would Judge Gardner have handled it?

The Oregon State Bar contends that Brandt and Patrick "would not have agreed to the appointment" of Kent had they known all of the facts. The Bar claims that they would have objected and that as a result of that objection, Judge Gardner would not have appointed Kent. The following evidence tends to support the Bar's claim:

- a) Patrick and Brandt both testified that they would have objected had they known.
- b) Judge Gardner testified that in this contentious proceeding in which both sides objected to everything, he believes that Patrick and Brandt would have objected.

Vande Griend contends that Jackson's relationship with Kent is immaterial, and that disclosure of that relationship would not have made any difference. The following evidence tends to support Vande Griend's claims:

- a) Brandt did nothing to examine the qualifications of Kent after he was proposed by Jackson.
- b) In an earlier attempt to get Judge Gardner to appoint a receiver, Patrick had nominated two persons to act in that capacity. Each had some relationship to or with Durham or his attorneys. One was Gloria Williams, a friend and associate of Durham. The other was attorney Paul Meadowbrook, a former student, friend, associate and future partner of Patrick.
- c) After Durham found out about the relationship he did not object.

d) After Brandt and Patrick found out about the relationship between Kent and Jackson, they took no steps to have Kent removed. Patrick explained this failure to act as follows:

"By that time the damage had been done. We had also -- it was also apparent that Judge Gardner was routinely ruling with Mr. Vande Griend and Mr. Jackson, I thought many of those rulings were erroneous, I did not feel like we were getting a fair trial on any of these issues from Judge Gardner. I felt that he was already greatly prejudiced against my client, so at that time I just felt like it wasn't going to do any good. Besides, I was also -- there were other disclosures that were made to me at the same time of this disclosure that concerned me more greatly, and I spent my time dealing with those instead." (Transcript, Page 256)

e) After Judge Gardner found out about the relationship, he did not remove Kent as receiver.

DISCUSSION

The question of what Brandt and Patrick would have done under a hypothetical situation is difficult to answer. Both testified that they would have objected, but that testimony is questionable.

Brandt's demeanor in answering this particular question was uncomfortable and unsure. It is apparent from other evidence that Brandt's failure to block the sheriff's sale resulted in a PLF claim against Brandt. It is also clear that Durham was a contentious litigator and demanding client who must have been very difficult to work with. If Brandt had testified in this proceeding, which Durham attended, that he would not have objected, his testimony would have exacerbated the problems between him and Durham. It is always difficult to speculate what one would have done in the past if the circumstances had been completely different. The Trial Panel believes that there is a reasonable probability that Brandt's hindsight is better than his foresight. We do not say that there is sufficient evidence to say Brandt would not have objected, we only say that there is insufficient evidence to conclude that he would have.

Patrick, on the other hand, was quite certain in his answer that he would have objected to the appointment of Kent. In fact, Patrick seemed indignant that Jackson would propose a receiver related by marriage to one of the lawyers. This testimony is substantially undermined by the fact that Patrick had earlier proposed receivers with relationships to either Durham or to Patrick. Patrick's explanation as to why he did not later object to Kent continuing as receiver does not ring true. He said that the "damage had been done," and later referred to Jackson's entry into the mobile home. The only damage done by that entry was Jackson's discovery of documents that had earlier been wrongfully concealed from the court. The record shows that Durham's attorneys made many motions to Judge Gardner. Some were denied and some were allowed. Yet Patrick says he made no motion to remove Kent because Judge Gardner was prejudiced against their case and it would do no good. Patrick would have us believe that 1) he had evidence that Kahl and his attorneys had perpetrated a fraud on the court and engaged in conduct that violated a number of disciplinary rules, yet 2) he decided to take no action

whatsoever. We do not so believe.

What was apparent throughout these proceedings is that the case of Kahl v. Durham has caused an unfortunate and disturbing degree of personal animosity between the attorneys. Patrick dislikes Jackson and Vande Griend, and they dislike him. We believe that Patrick's animosity has colored his recollection and his testimony. We do not find Patrick credible on this point.

Judge Gardner testified that he would have expected Durham's lawyers to object, in effect because they had objected to everything else. This was, however, only Judge Gardner's speculation about what someone else might have thought or done under a hypothetical situation. As such, it is entitled to little or no weight. Even if we believed Durham's attorney's would have objected, we believe Judge Gardner would, as he testified, have held a hearing and appointed Kent anyway.

In deciding what Gardner would have ruled at such a hearing, the Trial Panel takes into account the rancorous nature of these proceedings. Becoming the receiver in this case would have been a job that no reasonable person would have wanted. Jackson's unrebutted and credible testimony was that it would have been impossible to find an ordinary, commercial receiver who would want to take on this job as a profit making venture. The only way anyone was going to find a receiver was by calling in a favor. Patrick and Brandt certainly recognized this when they nominated Williams and Meadowbrook to be receiver. Judge Gardner testified that even if he did not recognize this fact immediately, he certainly did later as he saw Kent try to deal with Durham and ultimately be sued. Kent had impeccable credentials and was very well qualified for the job. It is unlikely that a more fitting receiver could have been found.

FINDINGS OF FACT

26. The Oregon State Bar has failed to prove by clear and convincing evidence that Durham's attorneys would have objected to the appointment of Kent had they known of his relationship to Jackson.²²

27. If Kent's relationship to Jackson had been made known, and if an objection on that ground had been raised, Judge Gardner would have conducted a hearing and confirmed Kent's appointment as receiver.

ISSUE: Did Kent act as a neutral and impartial receiver?

The Oregon State Bar contends that Kent did not act in a neutral and impartial manner. The Bar asserts that Kent favored Jackson to the detriment of Durham. The following evidence tends to support the Bar's claim:

- a) None

²² Despite our findings, the Trial Panel cannot help but feel that it would have been more courteous and professional for Jackson to have simply gotten the matter on the table. Lawyers should be more civil in their practice. However, lack of courtesy and civility alone do not rise to the level of a Disciplinary Rule violation any more than the "mere appearance of impropriety." (In Re Ainsworth, 289 Or 479 (1980)).

Jackson contends that Kent acted impartially and professionally in his role as receiver. The following evidence tends to support Jackson's claim:

a) Judge Gardner testified that Kent performed well as the receiver in this case and that he acted impartially and professionally.

DISCUSSION

There is simply no evidence that Mr. Kent acted in any way other than impartially and professionally.

FINDINGS OF FACT

28. At all times Kent acted in a neutral, impartial and professional manner as a receiver in the Kahl v. Durham case.

ISSUE: Who owned the mobile home following the Sheriff's sale. If the mobile home was not purchased by Kahl, did Jackson and Vande Griend know this fact?

The Oregon State Bar contends that on July 26, 1990, the mobile home belonged to Durham's brother and sister-in-law, or at least that neither Kahl nor the receiver had any right to possession. The Bar further contends that Jackson knew this fact. The Bar reasons, therefore, that Jackson was guilty of a trespass in going in the home. The following evidence tends to support the Bar's claim:

- a) The Sheriff of Linn County excluded the mobile home from the sale.
- b) Documents containing that deletion were mailed to Jackson and Vande Griend and published in the Albany Democrat Herald. Jackson was present when Deputy Davis read the legal description including the exclusion.
- c) Ten year old DMV records showed the mobile home to be owned by someone else.

Jackson asserts that legal ownership of the mobile home passed to Kahl by the Sheriff's sale, or at least that he and Jackson reasonably believed it had on July 26, 1990 when Jackson entered the mobile home. The following evidence tends to support Jackson's claim:

- a) The order for Sheriff's sale signed by Judge Gardner did not contain the exclusion.
- b) None of the documents prepared and sent by Jackson and Vande Griend contained the exclusion. That was typed in later by the Sheriff.
- c) The Certificate of Sale of Real Property does not contain the mobile home exclusion.
- d) The current tax records listed Durham as owner.
- e) After the sale, all parties acted as if the mobile home had been sold to Kahl, for example:
 - 1) On July 24, 1990, Brandt and McCleery argued a motion in bankruptcy court seeking to have the property, including the mobile home, returned to Durham. This would have been unnecessary if the lawyers knew the mobile home had been excluded.
 - 2) On August 7, Judge Gardner directed Kent to rent the Albany property to Durham and allowed Durham to live in the mobile home. Again, if the parties or the Judge had known

of the exclusion, the Order would have been different.

3) Durham paid rent to live in the mobile home for many months.

4) The exclusion would have also affected the mobile homes on the Lacombe property, yet Kent rented those to a tenant and collected rents throughout the period of the receivership.

DISCUSSION

Jackson and Vande Griend reasonably believed that the mobile home was property of Russell Durham that was subject to levy and sale. Abundant evidence showed that Russell Durham treated and claimed the mobile home as his own. The only evidence to the contrary was the ten year old DMV registration. The reasons why this should have been unpersuasive are noted above. A sheriff's sale is a ministerial act performed pursuant to a court order. No prudent lawyer would expect a sheriff to modify documents in derogation of a court order. Upon receiving back signed copies of the sale documents the lawyer had prepared, no prudent lawyer would search pages of metes and bounds descriptions to determine if the sheriff had wrongfully amended them. The Albany Democrat Herald is not a newspaper generally circulated in Salem, the home of Jackson and Vande Griend. Although Jackson was present at the sale, it would not be unusual to not pay close attention to the reading of the legal description to listen for alterations. On the contrary, had Jackson become aware of the mobile home deletion, he would have likely stopped the proceedings to make inquiry. He did not do so. Following the sale, all parties acted under the assumption that the mobile home had been sold to Kahl.

There is a question whether the sheriff's action served to deprive Kahl of legal ownership of the mobile home. That is a substantive legal question that is beyond the expertise of the panel members, and we make no finding with regard to it, because the question in this case is whether Jackson actually and reasonably believed that on July 26, 1990 his client owned the mobile home and that he was entitled to enter it as his client's agent. We find that he did.

FINDINGS OF FACT

28. At the time of the sheriff's sale Russell Durham was the owner of the mobile home on the Albany property. As such, it, should have been included in the sale pursuant to the court's order.

29. The sheriff of Linn County purported to exclude the mobile home from the sale. This act was improper, perhaps illegal, and was done without effective notice to Jackson, Vande Griend, the Court, or anyone else.

30. Jackson and Vande Griend were unaware of the sheriff's action at all times pertinent to this matter.

31. On July 26, 1990, Jackson and Vande Griend actually and reasonably believed that their client owned the mobile home and that they had the right to enter it as Kahl's agents.

ISSUE: Were some of the documents found by Jackson in the mobile home protected by attorney-client privilege? If so, did Jackson and Vande Griend inspect those documents?

The Oregon State Bar contends that some of the documents found and inspected by Jackson were protected by attorney-client privilege. The following evidence tends to support the Bar's

claim:

a) Although they were not directly asked, Patrick and McCleery hinted that some of the documents Jackson turned over and that they reviewed on September 24 were privileged.

b) McCleery's affidavit (Exhibit 14) describes documents that could be privileged.

c) Durham's affidavit (Exhibit 16) more clearly describes documents that would probably be privileged and that he claims Jackson kept in violation of the court's order. Jackson contends that none of the documents he took and that he and Vande Griend inspected were protected by attorney-client privilege. The following evidence tends to support Jackson's claim:

a) Jackson and Vande Griend testified that they did not inspect any privileged items.

DISCUSSION

With regard to Durham's affidavit, the Bar stipulated that he is not credible and declined to call him as a witness. We can see no reason to give any weight to Durham's affidavit.

McCleery and Patrick inspected the documents, and presumably would have been in a position to testify about documents that were privileged. The Bar did not ask them to do so. We decline to infer from their testimony that the documents were privileged.

McCleery's affidavit describes a number of documents that might be privileged. The most obvious are items numbered 1, 2, 5, 6, 7 and 11. It is, however, difficult to determine whether these documents are privileged without reviewing them and hearing testimony as to how they were created and how they were used and distributed after creation. We do not know which of these documents McCleery may have lost.

McCleery did produce a suitcase full of documents. This was opened and displayed on the floor. The panel invited the Bar to call our attention to any document that was of significance. Any such document could have been reproduced and received in evidence.²³ Testimony could have been received explaining the significance of such a document. We could have been told how it was produced, kept, used and distributed. Despite specific invitation from the panel to do so (see Transcript pages 211-213) the Bar declined. We will not speculate as to why the Bar chose to not present evidence that it had and to instead rely on second hand evidence and inference. We will, however, apply the principles of ORS 10.095(8) (less satisfactory evidence) and ORS 40.550-40.585 (best evidence)²⁴ to conclude that the Bar has not proven its point.

FINDINGS OF FACT

32. The Oregon State Bar has failed to prove by clear and convincing evidence that

²³ Durham waived attorney-client privilege with regard to documents pertinent to this matter.

²⁴ We recognize that neither of these statutes are, strictly speaking, applicable to this proceeding. We find the logic and policy behind these statutes persuasive, however, in deciding whether second hand evidence and inference "posses probative value commonly accepted by reasonably prudent persons in the conduct of their affairs," when the actual documents are available. We find that the evidence presented by the Bar on this issue did not possess such characteristics.

the documents removed by Jackson contained material that was covered by the attorney-client privilege.

33. The Oregon State Bar has failed to prove by clear and convincing evidence that Jackson or Vande Griend kept any item removed from the mobile home.

34. If any of the documents were privileged, the Oregon State Bar has failed to prove by clear and convincing evidence that either Jackson or Vande Griend actually reviewed the documents.

ISSUE: Was Jackson otherwise legally barred from inspecting the items he found in the mobile home?

The Oregon State Bar contends that the items found and inspected by Jackson "included other property to which he had no right to inspect, remove, duplicate or possess without permission from its owner." The following evidence tends to support the Bar's claim:

a) None, other than has been discussed above. Jackson contends that he did have a right to inspect and copy the items described. The following evidence tends to support Jackson's claim:

a) None, other than what has been discussed above.

DISCUSSION

We have already found that Jackson actually and reasonably believed that his client owned the mobile home. We have also found that Jackson actually and reasonably believed that Jackson had the right to be in the mobile home on July 26. Acting under these assumptions, it was reasonable and prudent for Jackson to inspect the contents of the mobile home in order to determine what was there. Failure to do so could have later resulted in false claims regarding allegedly missing property.²⁵ In the course of conducting a lawful inspection and inventory, Jackson found documents that were plainly material to the Kahl v. Durham matter and had been wrongfully concealed during prior court proceedings. Jackson was justified in seizing those documents for safe keeping given the totality of the circumstances of this case. Jackson then went the extra mile by calling Durham's attorneys and offering the documents to them, contacting Kent and offering them to him, and calling the Oregon State Bar for advice. No one would claim the documents and no one would keep them. Under the circumstances, Jackson was warranted in regarding the items as abandoned. The Bar cites no fact or law to the contrary.

FINDING OF FACT

35. Jackson was legally justified in inspecting, removing, duplicating and possessing all of the items taken from the mobile home. Vande Griend was legally justified in the assistance to this effort which he gave.

Actually, a false claim was made anyway. See Exhibit 16.

III. APPLICATION OF FACTS TO THE COMPLAINT

A. First Cause of Complaint

²⁵ Actually, a false claim was made anyway. See Exhibit 16.

In its first cause of complaint, the Bar alleges that Jackson failed to disclose that Calvin Kent is his father-in-law and a former client, and that Durham's attorneys would not have agreed to the appointment of Kent as receiver had they known. By so acting, the Bar alleges, Jackson "failed to employ only those means that are consistent with the truth; engaged in conduct involving dishonesty, fraud, deceit or misrepresentation; and engaged in conduct prejudicial to the administration of justice," thereby violating ORS 9.460(2)²⁶, DR 1-102(A)(3)²⁷, DR 1-102(A)(4)²⁸.

The Bar does not contend that Jackson made any affirmative false statement. Rather, the Bar contends that Jackson withheld material information and thereby misled Durham's attorney's and the court.

The Bar correctly cites abundant authority for the proposition that "misrepresentation" is "a broad term encompassing nondisclosure of material fact." In Re Leonard 308 Or 560 at 569, 784 P2d 95 (1989). While Jackson did not disclose that Calvin Kent was his father-in-law and a former client, that is not enough to violate the rule. The nondisclosure must concern a material fact. In Re Williams 314 Or 530, 840 P2d 1280 (1992). The Bar claims that the nondisclosed facts were material because, had they been known, Durham's lawyers would have objected, and Judge Gardner would not have appointed Kent. We have found that the bar has failed to prove its first point, and that the opposite of its second point is true.

The fact that Jackson and Kent are related was not a material fact. It follows that Jackson did not engage in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of DR 1-102 (A)(3), nor did he mislead the court by any artifice or false statement of law or fact in violation of ORS 9.460(2).

The Bar also charges that Jackson violated DR 1-102(A)(4), conduct prejudicial to the

²⁶ Actually, the complaint references ORS 9.460(4), which concerns the causes of the defenseless and the oppressed. We assume this is a typographical error and amend the complaint to cite the correct statute, ORS 9.460(2) which provides:

"An attorney shall:

"(2) Employ, for the purpose of maintaining the causes confided to the attorney, such means only as are consistent[ce] with truth, and never seek to mislead the court of jury by any artifice or false statement of law or fact."

²⁷ DR 1-102(A)(3) provides

"It is professional misconduct for a lawyer to:

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

²⁸ 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."

administration of justice. In its trial memorandum the Bar succinctly sets forth the parameters of this rule.

"The Supreme Court sets out the elements of this rule in In Re Haws 310 Or 741, 801 P2d 818 (1990). 'Conduct' describes doing something that one should not do or not doing something that one should do. Id. at 746. The court interprets 'prejudice' to require either repeated conduct causing some harm to the administration of justice or a single act causing substantial harm to the administration of justice. Id. at 748. The 'administration of justice' refers to either the procedural functioning of a judicial proceeding or the substantive interest of a party in the proceeding. Id. at 746-47 (OSB Trial Memorandum at (8-9))

Jackson's nondisclosure was a single act, so the Bar must show "substantial harm to the administration of justice" in order to make out a violation of the rule. In fact, the Bar was unable to prove any harm at all. Calvin Kent was a highly qualified property manager with considerable experience as a receiver. He performed his duties well under very difficult circumstances. The judge who appointed him praised his performance. The Bar was unable to elicit a single instance in which Calvin Kent in any way acted to the prejudice of either party, the court or justice. The Bar's only claim of prejudice is that by not disclosing the relationship, Jackson deprived Patrick and Brandt of the opportunity to file an objection that we have found the court would have denied. Even if this can be considered prejudice, we have also found that the Bar has failed to prove that such an objection would have been made.

There has been no showing that Jackson's conduct in any way caused any harm to the administration of justice in violation of DR 1-102(A)(4).

B. Second Cause of Complaint.

In its second cause of complaint the Bar alleges that when Jackson entered the mobile home, and inspected the documents and then removed them, he knew that he had no right to do so. The Bar further alleges that the documents were protected by the attorney-client privilege and that this conduct constitutes dishonesty, fraud, deceit or misrepresentation in violation of DR 1-102(A)(3)²⁹.

If the Linn County Sheriff had not excluded the mobile home from some of the documents, title to the mobile home would have passed to Kahl at the time of the sheriff's sale. There was nothing in the receivership order that would have prevented Kahl, or Jackson as his attorney, from going to the property and inspecting it. The situation is made quite complicated, however, because the sheriff did alter the documents. As noted above, the Panel does not know whether title to the mobile home passed to Kahl through the sheriff's sale. Resolution of that fact is unnecessary, because we do find beyond any reasonable doubt that Jackson actually and reasonably believed his client owned the mobile home on July 26, 1990. The Bar has failed to

²⁹ See footnote 11 for the text of this rule.

enunciate any fact, law or theory that would make Jackson's conduct wrongful.

The Trial Panel also notes with interest that the Bar chose to charge Jackson and Vande Griend with a violation of DR 1-102(A)(3) for this conduct. The Bar's Trial Memorandum focuses on the "dishonesty" portion of that rule. If we had found that Jackson knew he had no right to do what he did, the evidence also showed the following facts: Durham and the Albany Police were at the mobile home and knew that Jackson was there; Kent was also aware of this fact; Jackson openly removed the documents and took them to his office; he attempted to talk to all three of Durham's attorneys, and did speak to two of them; he told those attorneys what he had done and what he possessed; he offered them the opportunity to claim the documents on behalf of their client; both refused; McCleery even told Jackson to do whatever he wanted to do with the documents; Jackson tried to get the receiver to take the documents, but he refused; Jackson even called the Oregon State Bar; only then did Jackson review the papers.

To the Trial Panel the term "dishonesty" implies a tendency to conceal the truth and to act in an untrustworthy manner. Jackson's conduct was the opposite. He did what he did openly for all the world to see. He fully informed all appropriate parties of his action. We find Jackson not guilty of violating DR 1-102(A)(3)³⁰.

IV. CONCLUSION

The Oregon State Bar has failed to prove that the Accused, Jay R. Jackson, has violated the statutes or disciplinary rules as alleged in its formal complaint. The Trial Panel find Jackson not guilty of all charges.

³⁰ Arguably, if we were to find the facts to be as urged by the Bar, Jackson's conduct might violate a number of criminal statutes (ORS 164.015; ORS 163.065; ORS 164.215; ORS 164.225; ORS 164.245; ORS 164.255; ORS 164.345-164.365) and therefore be a violation of DR 1-102(A)(2), ORS 9.527(1) and (5) and ORS 9.460(1). The Bar has not, however, charged Jackson under these sections. As noted elsewhere, we do not find the facts to be as claimed by the Bar, so we would have found Jackson not guilty under these sections as well.

V. DISPOSITION

The Oregon State Bar's formal Complaint in this matter is dismissed.
IT IS SO ORDERED.

DATED this 14th day of July, 1995.

/s/ Fred Avera

Fred E. Avera
Trial Panel Chair

/s/ Nori McCann-Cross

Nori McCann-Cross
Trial Panel Member

/s/ Chalmers Jones

Chalmers Jones
Trial Panel Member

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
	)	Nos. 92-112; 93-18; 93-133
Complaint of the Conduct of)	
)	
JOHN L. DEZELL,)	
)	
Accused.)	
_____)	

Bar Counsel: Angie Lanier, Esq.

Counsel for the Accused: Thad Guyer, Esq.

Disciplinary Board: Stephen Brown, Chair; Glenn Munsell and Max Kimmell, public member.

Disposition: Violation of DR 6-101(B), DR 9-101(B)(2) (current DR 9-101(C)(2)) and DR 9-101(B)(4) (current DR 9-101(C)(4)).
Stipulation for Discipline. Three year suspension.

Effective Date of Order: December 28, 1994.

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
	)	SC S42000
Complaint of the Conduct of)	
	)	ORDER ACCEPTING STIPULATION
JOHN L. DEZELL,	)	FOR DISCIPLINE
)	
Accused.)	

The Oregon State Bar and John L. DeZell have entered into a Stipulation for Discipline. The Stipulation for Discipline is accepted. John L. DeZell is suspended from the practice of law for a period of three years. The Stipulation for Discipline is effective 30 days from the date of this order.

DATED this 18th day of July, 1995.

/s/ Wallace Carson _____
WALLACE P. CARSON, JR.
Chief Justice

c: Jane E. Angus
Charles Carreon
Angie LaNier
John L. DeZell

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
	)	OSB Case Nos. 92-112; 93-18; 93-133
Complaint of the Conduct of)	
	)	SC S42000
JOHN L. DEZELL,)	
	)	AMENDED ORDER DISMISSING JUDICIAL
Accused.	)	REVIEW OF DISCIPLINARY PROCEEDINGS
_____)	

By order dated July 18, 1995, the court accepted a stipulation for discipline entered into between the accused and the Oregon State Bar. The stipulation for discipline disposed of a number of disciplinary proceedings, including the disciplinary proceedings subject to review in this case. Therefore, further review of OSB case numbers 92-112, 93-18 and 93-133 is dismissed.

DATED this 18th day of August, 1995.

/s/ Wallace Carson
WALLACE P. CARSON, JR.
Chief Justice

c: Jane E. Angus
Charles Carreon
Angie LaNier
John L. DeZell

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
	)	Nos. 92-112; 93-18; 93-133
Complaint of the Conduct of)	
)	
JOHN L. DEZELL,	)	TRIAL PANEL DECISION
)	
Accused.)	
)	

TRIAL PANEL DECISION

This matter came before the trial panel for hearing on July 13, 1994. The Oregon State Bar appeared by and through Jane Angus, Assistant Disciplinary Counsel and Angie Lanier, Bar Counsel. The Accused appeared personally and was represented by Thad Guyer. Witnesses testified at the hearing. The Oregon State Bar's exhibits, numbered 1 through 16 were received into evidence.

The Bar has charged John DeZell with committing a variety of ethics violations in his representation of four clients on separate matters. These matters included an appeal to the Oregon Court of Appeals, an action to collect a debt, personal injury claim, domestic relations matter and defense of a criminal matter.

FIRST CAUSE OF COMPLAINT

RODNEY MATTER

The first cause of complaint alleges that the Accused neglected a legal matter entrusted to him in violation of DR 6-101(B) and failed to maintain complete records and render appropriate accounts in violation of DR 9-101(B)(3) [current DR 9-101(C)(3)].

FINDINGS

Mr. DeZell was admitted to practice June 23, 1989 (Tr.69). On or about July 20, 1990, Dana Rodney retained him to pursue two collection matters against two individuals - Gabel and Egger. She paid him approximately \$700 in advance for filing fees and costs.

Approximately nine months later, the Accused finalized the Gabel complaint. She elected not to proceed with the collection. Mr. DeZell filed the complaint against Egger November 1, 1991, 14 months after he was retained by Rodney. The complaint was dismissed for want of prosecution in November, 1992.

Mr. Dezell deposited Ms. Rodney's \$700 in his trust account. He has no records or recollection of the disbursements (see Ex. 2, 3, 4, 5; Tr. 13-18). He is unable to provide Ms. Rodney an accounting.

SECOND CAUSE OF COMPLAINT

DODSON MATTER

The second cause of complaint alleges that the Accused failed to provide competent

representation to James Dodson in violation of DR 6-101 (A).

FINDINGS

Mr. Dodson retained Mr. DeZell to handle an appeal of an adverse judgment rendered against him in a mining claim lawsuit. At Mr. Dodson's request the Accused filed a motion for a new trial. Approximately two weeks later, and prior to the date set for hearing on that motion, Mr. DeZell filed a Notice of Appeal, one day beyond the statutory deadline. He did not submit the statutory filing fee and did not serve a copy of the notice on the court reporter or trial court administrator. By filing the Notice of Appeal, the matter was removed from the jurisdiction of the trial court, thus rendering moot the petition for a new trial.

THIRD CAUSE OF COMPLAINT

SHANEYFELT MATTER

In the third cause of complaint the Bar alleges that the Accused neglected a legal matter entrusted him by Myrna Shaneyfelt, failed to maintain client property in a place of safekeeping, and failed to promptly pay or deliver to his client funds or other property in his possession that she was entitled to receive in violation of DR 6-101(B), DR 9-101(B)(2) [current DR 9-101(C)(2)] and DR 9-101(B)(4) [current DR 9-101(C)(4)].

FINDINGS

Ms. Shaneyfelt retained Mr. DeZell to pursue a personal injury claim. The trial was set for September 18, 1991.

On August 29, 1991, counsel for the opposing parties served on the Accused an offer to allow judgment. Pursuant to the terms of the offer and ORCP 54E, Ms. Shaneyfelt would be responsible for paying the defendant's costs and attorney fees incurred after the offer if the judgment she finally obtained was not more favorable than the offer. The Accused did not inform Ms. Shaneyfelt of the offer. He testified that it probably remained unopened on his desk during this period of time (Tr. 30). He eventually withdrew from representing her.

On a separate matter, he agreed to represent Ms. Shaneyfelt in an effort to collect \$4,000 owed to an organization she belonged to: CPC. He came to possession of a check from the debtor payable to CPC in the amount of \$378.35. He neither deposited the check in his client trust account nor kept it in safekeeping. He was unable to return the check to Ms. Shaneyfelt when she requested it. He misplaced it and did not find it until two years later (see Ex. 8).

FOURTH CAUSE OF COMPLAINT

HOWARD MATTER

In the fourth cause of complaint, the Bar alleges that Mr. DeZell represented David Howard when his interests were adverse to Marian Howard, his former client, on a matter that was significantly related to the matter in which he represented Mr. Howard in violation of DR 5-105 (C).

FINDINGS

In May, 1991, the Accused undertook representation of Marian Howard against her husband, David Howard. On behalf of Ms. Howard, he filed a petition for a restraining order. The petition alleges that Mr. Howard physically abused her and caused her bodily injury. The petition further recites that Mr. Howard should be restrained from molesting, interfering with or menacing the couples' minor son and daughter. The petition was dismissed for lack of

jurisdiction (Ex. 15).

In January, 1993 the Accused undertook representation of Mr. Howard who was charged with sexually molesting the Howards' minor children between 1988 through 1991. Neither Mrs. Howard nor Mr. Howard consented to the Accused's representation of Mr. Howard in connection with the criminal matter. Disclosure was not made to Mrs. Howard.

CONCLUSION

The trial panel finds that Mr. DeZell's nine month delay in preparing the Gabel complaint, the 15 month delay in preparing and filing the Egger's complaint, and misfiling the Shaneyfelt check for a period of two years constitutes neglect. The bar must prove only a course of negligent conduct to establish a violation of DR 6-101 (B). In re Collier, 295 Or 320, 329-30 (1983). It has sustained its burden.

The Accused's conduct with regard to the Dodson appeal goes beyond mere neglect. The Supreme Court has noted that incompetence is often found where there is a lack of basic knowledge or preparation, or a combination of those factors. In re Gastineau, 317 OR 545 at 553 (1993). That combination is found here. Mr. DeZell had never before filed a motion for a new trial or Notice of Appeal. He did not consult the appropriate references, he filed the notice untimely, without the proper fee, and without serving a copy on the court reporter or trial court administrator (Tr. 22). His representation was not competent.

Separate from the neglect allegation, the bar has failed to prove by clear and convincing evidence that Mr. Dezell failed to maintain client property in a safe manner. The check in question was not Ms. Shaneyfelt's property; it was payable to CPC (Ex. 8). The bar did not establish that he represented CPC.

With regard to the conflict matter, regardless of who paid his bill when the restraining order was sought, Ms. Howard was the client. Mr. DeZell should not have undertaken representation of Hr. Howard regarding acts that allegedly occurred when Mr. DeZell was seeking to protect the very children Mr. Howard was accused of molesting. He did not attempt to obtain her consent, which was a minimal prerequisite.

SANCTIONS

Mr. DeZell has been in practice since June 23, 1989. This is his first disciplinary matter. He argues that the violations result from his inexperience. He knew he needed a mentor, and tried unsuccessfully to obtain one. The first three incidents occurred during the first two years of his practice. The Howard conflict matter arose in January, 1993, but is attributable to his failure to track his representation of Ms. Howard in May, 1991. He argues, in essence, that things are better now.

The panel is not convinced that Mr. DeZell has taken any meaningful steps to prevent further conflicts, or maintain his clients' property or records adequately. Were it possible, the panel would suspend Mr. DeZell from practice until he obtained a mentor to oversee his work for a probationary period. We do not feel that sanction is within our power. Nor will the sanction the Bar seeks, a one year suspension, assure that Mr. Dezell will competently represent clients upon his return to practice.

On the other hand, the public must be protected, and for that reason we hold that the Accused should be suspended for a period of six months. To offer an incentive to Mr. DeZell

to "clean up his act", the panel will suspend three months of that suspension on the condition that the Accused successfully complete the following:

- a. Pass the professional responsibility portion of the Bar exam.
- b. The Accused will 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 will initiate 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 accounting and conflict problems. If Ms. Wilson requires the Accused to seek further advice or to attend seminars or training session in the area of office management the Accused will comply with such requirements and bear all costs. The Accused will adopt procedures recommended by Ms. Wilson.

Dated this 28th day of December, 1994.

/s/ Stephen Brown
Stephen D. Brown
Trial Person, Chairperson
OSB #72-038

/s/ Glenn Munsell
Glenn H. Munsell
Trial Panel Member
OSB #65-087

/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	)	No. 94-33
)	
DALE C. JOHNSON,)	
)	
Accused.)	
_____)	

Bar Counsel: None

Counsel for the Accused: None

Disciplinary Board: None

Disposition: Violation of DR 1-102(A)(3), DR 7-102(A)(7) and DR 2-110(B)(2).
Stipulation for Discipline. 90 day suspension.

Effective Date of Order: August 15, 1995.

Note: Due to space restrictions, exhibits are not included but may be obtained by calling the Oregon State Bar.

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:	)	SC S42475
)	
Complaint as to the Conduct of)	
)	
DALE C. JOHNSON,	)	ORDER ALLOWING MOTION TO AMEND
	)	ORDER ACCEPTING STIPULATION FOR
Accused.	)	DISCIPLINE
)	

The Oregon State Bar and Dale C. Johnson have moved to amend the order accepting the Stipulation for Discipline to change the effective date of Mr. Johnson's suspension from August 30 to August 15, 1995. The motion is allowed. The Stipulation for Discipline is effective August 15, 1995.

DATED this 2nd day of August, 1995.

/s/ Wallace Carson

 WALLACE P. CARSON, JR.
 Chief Justice

c: Jane E. Angus
 Michael A. Greene

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:	)	SC S42475
)	
Complaint as to the Conduct of)	
)	
DALE C. JOHNSON,	)	ORDER ACCEPTING STIPULATION
	)	FOR DISCIPLINE
Accused.)	
_____)	

The Oregon State Bar and Dale C. Johnson have entered into a Stipulation for Discipline. The Stipulation for Discipline is accepted. Dale C. Johnson is suspended from the practice of law for a period of 90 days. The accused also agrees that during the period of suspension, he shall not participate as a law clerk or paralegal in the business of his law firm. The Stipulation for Discipline is effective 30 days from the date of this order.

DATED this 1st day of August, 1995.

/s/ George Van Hoomissen _____
GEORGE A. VAN HOOMISSEN
Presiding Justice

c: Jane E. Angus
Michael W. Greene

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of	)	Case No. 94-33
)	
DALE C. JOHNSON,	)	STIPULATION FOR
	)	DISCIPLINE
Accused.)	
)	

DALE C. JOHNSON, (hereinafter, "the Accused") and the Oregon State Bar (hereinafter, "the Bar"), pursuant to BR 3.6(c) stipulate:

1.

The Bar was created and exists by virtue of the laws of the State of Oregon and is, and at all times mentioned 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 the practice of law in Oregon on April 22, 1982, and has been an active member of the Oregon State Bar since that time and at all times mentioned herein.

3.

The Accused enters into this Stipulation freely and voluntarily, and after consulting with legal counsel.

4.

On September 24, 1994, the State Professional Responsibility Board (hereinafter "SPRB") authorized formal disciplinary proceedings alleging that the Accused violated DR 1-102(A)(3), DR 2-110(B)(2) and DR 7-102(A)(7) of the Code of Professional Responsibility. Pursuant to the SPRB's authorization, a Formal Complaint was filed and served on the Accused.

5.

In or about 1988, Clarence W. Greene (hereinafter "the Client") retained the Accused for the purpose of pursuing a claim for worker's compensation benefits for an on-the-job injury to his ring finger, SAIF Claim No. 4879026G (hereinafter "the Claim"). SAIF accepted the Claim and commenced paying temporary disability benefits to the Client.

6.

On or about September 26, 1989, the Accused was informed by the Client's mother that SAIF had failed to timely pay benefits to the Client for the period of August 22 through September 19, 1989, and that the Client had returned to part-time employment in August, 1989. As a result of SAIF's failure to timely make payments of temporary disability benefits, the Client was entitled to penalties and attorney fees from SAIF.

7.

On or about September 28, 1989, the Accused prepared and filed a Request for Hearing and Specification of Issues for the award of penalties and attorney fees resulting from SAIF's failure to timely pay benefits. That same date, the Accused advised the Client in writing that he was required to report his employment earnings which would result in an adjustment of partial time-loss benefits to which the Client was and would be entitled.

8.

On or about January 2, 1990, the Client advised the Accused that he had commenced employment with Sears Roebuck on or about August 27, 1989, was earning \$180 per week, and that he had not reported his return to work or earnings to SAIF. In fact, the Client had returned to work on or about August 4, 1989 and was earning about \$217.60 per week.

9.

As a result of the Client's failure to report his employment and earnings to SAIF, the Accused knew that his Client had collected and was collecting time loss benefits, without adjustment for employment earnings, to which he was not entitled and that the Client's activity was illegal or fraudulent.

10.

On or about January 2, 1990, the Accused did not repeat his earlier advice to the Client to report his employment and earnings to SAIF, and determined (1) not to report his Client's illegal activity because of his obligation to preserve the Client's confidences or secrets pursuant to DR 4-101; (2) to request SAIF to expedite closure of the Client's claim in an effort to stop additional payments of time loss benefits to the Client; and (3) to immediately settle the Client's claim for late payment of time loss benefits. On January 2, 1990, the Accused settled the Client's claim for late payment of time loss benefits, the settlement based on SAIF's assumption that the Client was eligible for full benefits during the relevant time period.

11.

On or about January 8, 1990, the Accused, among other comments, reported to his Client that he had settled the claim for late payment of benefits; that it appeared SAIF was not aware of his employment; that he assumed that if SAIF found out that he was working there would have been a substantial overpayment of his claim and that he would not receive permanent disability benefits; and if SAIF did not discover his employment, the money received as an overpayment would put him "ahead of the game" in actual dollars he would otherwise be entitled.

12.

On and after January 2, 1990, the Accused did not advise the Client to report his employment and earnings to SAIF, nor did he withdraw from continued representation of the Client when the Accused knew that his Client had illegally obtained benefits to which he was not entitled. In June 1990, SAIF contacted the Accused. The Accused advised SAIF that a return to work questionnaire should be forwarded to the Client. The questionnaire was returned to SAIF through the assistance of the Accused.

13.

Between August 4, 1989 and May 29, 1990, the Client illegally obtained \$6,421.21 in

time loss benefits to which he was not entitled. SAIF recovered \$4,214.16 as a result of a Determination Order of July 30, 1990 and other actions. The Client was charged and convicted of the crime of Theft in the First Degrees in the Client's criminal trial, the court considered the Accused's January 8, 1990 report to the Client and was critical of the Accused's conduct and SAIF's lack of diligence and action.

14.

Based on the foregoing, the Accused admits that he engaged in conduct in violation of DR 1-102(A)(3), DR 7-102(A)(7) and DR 2-110(B)(2) of the Code of Professional Responsibility.

15.

The Accused and the Bar agree that in fashioning an appropriate sanction in this case the Supreme Court should consider ABA Standards for Imposing Lawyer Sanctions (hereinafter "Standards") and Oregon case law. The Standards require that the Accused's conduct be analyzed considering the following four factors: (1) the ethical duty violated; (2) the attorney's mental state; (3) the actual or potential injury; and (4) the existence of aggravating and mitigating circumstances.

A. Duties Violated. The Accused violated his duties to the public, the legal system and the profession. Standards § 5.0, § 5.1, § 6.0, § 6.1 and § 7.0, and § 7.1.

B. State of Mind. The Accused acted with knowledge or the conscious awareness of the nature of the attendant circumstances of the conduct but without the conscious objective or purpose to accomplish illegal or fraudulent activity. The Accused's conduct also reflected a failure to heed a substantial risk that circumstances existed or a result would follow, which failure was a deviation from the standard of care that a reasonable lawyer would exercise in the situation. Standards p. 7.

C. Injury. The Accused's conduct indirectly caused some actual injury. The Accused allowed the Client's criminal activity to continue without withdrawing or renewing - his advice to the Client that he disclose his employment and earnings. SAIF did not expedite the closure of the Client's claim and continued to pay the Client benefits even after its representatives were informed in March 1990 by a consulting psychologist that the Client had returned to work.

D. Aggravating Factors. (Standards 89.22):

1. The Stipulation involves three rule violations. Standards § 9.22(d).
2. The Accused has substantial experience in the practice of law having been admitted to practice in 1982. Standards § 9.22(i).
3. SAIF's representatives assumed, based on information in their file, that the Client was not employed in making payments to and settling the Client's Claim. Standards § 9.22(h).

E. Mitigating Factors. (Standards § 9.32):

1. The Accused has no prior record of discipline. Standards § 9.32(a).
2. The Accused did not act with selfish motive. The Accused did not instigate the Client's plan or actions to obtain benefits to which he was not entitled. Standards § 9.32(b).
3. The Accused cooperated with Disciplinary Counsel and the Local Professional Responsibility Committee in the investigation of the complaint and with Disciplinary

Counsel in resolving the authorized formal prosecution. Standards § 9.32(e).

4. The Accused acknowledges the wrongfulness of his conduct and is sorry for it, as more fully set forth in Exhibit 1 attached hereto and by this reference made a part hereof. Standards § 9.32(d).

5. The Accused's reputation and character are regarded in the profession and the community as excellent according to letters which were submitted on behalf of the Accused by the Accused's law partners, insurance defense lawyers, workers compensation hearings officers, law school professors and others. Standards § 9.32(g).

6. The Accused is committed to re-educate himself so that his misconduct will not recur and to rehabilitate himself by sharing with his colleagues what he has learned from his experience. As part of this process, and not part of any sanction which may be imposed in this case, the Accused plans to retake and pass the ethics course offered at the University of Oregon Law School, subject to law school approval; to retake and pass the ethics portion of the Oregon State Bar examination; and to assist in the planning of and to participate in a CLE program for the OSB/PLF concerning ethical considerations for worker's compensation claimants' lawyers. Standards § 9.32(j).

16.

Suspension is generally appropriate when a lawyer knows that material information is improperly being withheld, and takes no remedial action, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding or when a lawyer knowingly engages in conduct that is a violation of the duty owed to the profession and causes injury or potential injury to a client, the public, or the legal system. Standards § 6.12, § 7.2, § 5.12.

Although Oregon case law discloses no cases describing the exact conduct and circumstances detailed in this Stipulation, several cases provide guidance for imposition of sanction. In In re Dinerman, 314 Or 308, 840 P2d 5 (1992), the Supreme Court imposed a 63-day suspension for violation of DR 1-102(A)(2), DR 1-102(A)(3) and DR 7-102(A)(7). The court imposed a 63-day suspension in In re Hockett, 303 Or 150, 734 P2d 877 (1987) for violation of DR 1-102(A)(4) [current DR 1-102(A)(3)], DR 7-102(A)(7) and ORS 9.460(4). A four-month suspension was imposed by the Supreme Court in In re Hiller, 298 Or 526, 694 P2d 540 (1985) for violation of DR 1-102(A)(4) [current DR 1-102(A)(3)] and ORS 9.460(4). Finally, a six-month suspension was imposed in In re Benson, 317 Or 164, 854 P2d 466 (1993) for violation of DR 1-102(A)(3), DR 7-102(A)(5), DR 7-102(A)(7), and DR 1-103(C).

17.

In light of the Standards and Oregon case law, the Bar and the Accused agree that the Accused should be suspended from the practice of law for a period of ninety (90) days. The Accused also agrees that during the period of suspension, he shall not participate as a law clerk or paralegal in the business of his law firm.

18.

The sanction set forth in this Stipulation has been approved by the State Professional Responsibility Board and is subject to the approval of the Oregon Supreme Court pursuant to BR 3.6. This Stipulation shall be effective commencing thirty (30) days after approval by the Supreme Court.

EXECUTED this 14th day of July, 1995.

/s/ Dale Johnson
DALE C. JOHNSON, OSB No. 82067

/s/ Jane Angus
JANE E. ANGUS, OSB No. 73014
Assistant Disciplinary Counsel
Oregon State Bar

321 OR 360 (1995)

IN THE SUPREME COURT

OF THE STATE OF OREGON

In Re:)
)
 Complaint as to the Conduct of)
)
 E. JEFF JEFFREY,)
)
 Accused.)
 _____)

(OSB 92-156, 93-90, 94-27; SC S42185)

In Banc

On review from a decision of the Trial Panel of the Disciplinary Board.

Mary Cooper, Assistant Disciplinary Counsel, Oregon State Bar, Lake Oswego, filed the brief on behalf of the Oregon State Bar.

E. Jeff Jeffrey, Coquille, waived appearance.

PER CURIAM

Violation of DR 5-105(E), DR 5-101(A), DR 7-104(A)(2) and DR 1-102(A)(4).

The accused is suspended from the practice of law for a period of nine months.

Summary:

Effective Aug. 31, 1995, the Oregon Supreme Court suspended Coquille lawyer E. Jeff Jeffery from the practice of law for a period of nine months. The court found in its opinion that Jeffery had violated DR 5-105(E), DR 5-101(A), DR 7-104(A)(2) and DR 1-102(A)(4) of the Code of Professional Responsibility.

The charges arose out of Jeffery's representation of clients in several criminal defense matters. In the first matter, Jeffery undertook to represent simultaneously two individuals who were charged with conspiring with one another to deliver methamphetamine. The interests of these clients were adverse to one another; nevertheless, Jeffery failed to fully disclose the

conflict to his clients or obtain their informed consent within the meaning of DR 10-101(B). At one point during the dual representation, one of the clients was offered a plea bargain on an unrelated case in exchange for testimony against Jeffery's other client. This ripened the likely conflict between clients into an actual conflict. Jeffery never conveyed the offer to the first client, who was ultimately convicted in the unrelated case. This conduct violated DR 5-105(E).

In the second matter, Jeffery was representing a criminal defendant on drug charges. During the course of that matter, a police informant alleged that Jeffery himself had participated in the same drug transaction on which his client was facing charges. Special investigators were assigned to investigate Jeffery's possible involvement. Jeffery authorized the special investigators to interview Jeffery's client outside of Jeffery's presence. The client denied that Jeffery had been present at the transaction, but admitted that he (the client) had been there. These admissions gutted the entrapment defense that Jeffery had previously raised on the client's behalf. Ultimately, the special investigators concluded that there was not enough evidence to implicate Jeffery, and ended their investigation. The supreme court concluded that in allowing the special investigators to speak with the client, Jeffery's judgment was clouded by his own self-interest. Jeffery's continued representation of his client when his professional judgment was reasonably likely to be so affected violated DR 5-101(A).

In the third matter, Jeffery undertook to represent a client facing criminal drug charges. The client's live-in girlfriend had made numerous statements to law enforcement authorities that were adverse to the client's interests. Nevertheless, the accused undertook to provide her (the non-client) with "free legal advice." The court found that by giving such advice, Jeffery violated DR 7-104(A)(2), since the non-client's interests were adverse to those of his client's.

In the fourth matter, Jeffery appeared with his client for the first day of a criminal trial and made several motions. When the judge refused to grant them, Jeffery stated that he intended to refuse to put on any defense whatsoever, for the avowed purpose of creating reversible error on appeal. The judge's efforts to persuade Jeffery to retract this threat were unsuccessful. The supreme court held that such conduct was prejudicial to the administration of justice, in violation of DR 1-104(A)(4).

Jeffery was found to have acted intentionally or knowingly with respect to the various violations. Jeffery's clients and the trial court were injured by his conduct. Several aggravating factors were present, including a prior disciplinary record (consisting of two previous letters of admonition), a pattern of misconduct involving three separate conflicts of interest, a violation of multiple rules and substantial experience in the practice of law. No mitigating factors were present. The accused was suspended from the practice of law for a period of nine months.

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of	)	Case No. 94-216
)	
RANDALL D. KLEMP,	)	ORDER
)	
Accused.)	
_____)	

Bar Counsel: None

Counsel for the Accused: None

Disciplinary Board: None

Disposition: Violation of DR 2-110(A)(2).
Stipulation for Discipline. Public reprimand.

Effective Date of Order: September 6, 1995

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of	)	Case No. 94-216
)	
RANDALL D. KLEMP,)	
)	
Accused.)	
_____)	

This matter having come 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 on August 30, 1995 is hereby approved upon the terms set forth therein. The Accused shall be publicly reprimanded for violation of DR 6-101(B) and DR 9-101(C)(4).

DATED this 6th day of September, 1995.

/s/ Fred Avera
Fred E. Avera
State Disciplinary Board Chairperson

/s/ Walter Barnes
Walter A. Barnes, Region 6,
Disciplinary Board Chairperson

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of	)	Case No. 94-216
)	
RANDALL D. KLEMP,	)	STIPULATION FOR
	)	DISCIPLINE
Accused.)	
_____)	

Randall D. Klemp, 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, Randall D. Klemp, was admitted by the Oregon Supreme Court to the practice of law in Oregon on January 8, 1987, and has been a member of the Oregon State 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.

4.

In April 1995, the State Professional Responsibility Board of the Oregon State Bar authorized formal disciplinary proceedings against the Accused alleging that he violated DR 2-110(A)(2) in connection with the handling of a client matter. The Accused and the Bar agree to the following facts and disciplinary rule violation.

5.

On or about March 1993, the Accused was retained by Duane Allen Yeager to represent Mr. Yeager in a dissolution. Arbitration on Mr. Yeager's dissolution was held and on or about October 11, 1993, arbitrator Robert Martin issued a ruling.

On or about October 27, 1993, the Accused filed, on Mr. Yeager's behalf, a Notice of Appeal and Request for Trial De Novo in the Multnomah County Circuit Court. On that same date, the Accused terminated his attorney-client relationship with Mr. Yeager.

Mr. Yeager's dissolution trial was scheduled for December 3, 1993. As the Accused did

not advise the Multnomah County Circuit Court that he was no longer representing Mr. Yeager, notice of the trial was sent to the Accused. The Accused failed to forward the notice to Mr. Yeager.

On the day before trial, opposing counsel Joel Overlund called the Accused's office and left a message confirming that trial would be held December 3, 1993. The Accused did not forward Mr. Overlund's message to Mr. Yeager.

Mr. Overlund appeared for trial on December 3, 1993. Neither the Accused nor Mr. Yeager appeared. The trial proceeded and the judge upheld the arbitrator's award and also awarded Mr. Overlund his attorney fees.

The Accused admits that he did not notify the Multnomah County Circuit Court or opposing counsel Overlund that he had terminated his relationship with Mr. Yeager, did not forward the notice of trial to Mr. Yeager and did not advise Mr. Yeager of the time, date and place of his trial and that in so doing he violated DR 2-110(A)(2).

6.

The Accused and the Bar agree that in fashioning the appropriate sanction, the Disciplinary Board should consider the ABA Standards and Oregon case law. Those standards require analyzing the Accused's conduct in light of four factors: ethical duty violated, attorney's mental state, actual or potential injury and the existence of aggravating and mitigating circumstances.

a. Ethical duty violated.

In violating DR 2-110(A)(2), the Accused violated a duty to his client and to the legal profession. Standards at 5.

b. Mental state.

The Accused acted negligently. Standards at 7.

c. Injury.

As a result of the Accused's failure to notify Mr. Yeager of the court date, Mr. Yeager failed to appear and was assessed the opposing counsel's attorney fees.

d. Mitigating factors.

The Accused has no prior discipline and at the time the Accused terminated his representation of Mr. Yeager, he was undergoing personal problems. Standards 9.32(a) and (c).

The Standards provide that a public reprimand is generally appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client and causes injury or potential injury to a client.

Oregon Case Law

Oregon case law also supports the imposition of a public reprimand. In re Daughters, 8 DB Rptr. 15 (1994); In re Black, 6 DB Rptr. 95 (1992); In re O'Connell, 6 DB Rptr. 25 (1992).

8.

Consistent with the Standards and Oregon case law, the Bar and the Accused agree that the Accused receive a public reprimand.

9.

This Stipulation for Discipline was approved by the State Professional Responsibility Board (SPRB) on April 20, 1995. 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 August, 1995.

/s/ Randall Klemp

Randall D. Klemp

/s/ Lia Saroyan

Lia Saroyan

Assistant Disciplinary Counsel

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)
)
Complaint as to the Conduct of) Case No. 94-75
)
JAMES W. POWERS,)
)
Accused.)
_____)

Bar Counsel: None

Counsel for the Accused: None

Disciplinary Board: None

Disposition: Violation of DR 5-105(C) and DR 5-105(E).
Stipulation for Discipline. Public reprimand.

Effective Date of Order: September 11, 1995

Note: Due to space restrictions, exhibits are not included but may be obtained by calling the Oregon State Bar.

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of	)	No. 94-75
)	
JAMES W. POWERS,	)	ORDER APPROVING STIPULATION
	)	FOR DISCIPLINE
Accused.)	
)	

THIS MATTER having come 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 on September 2, 1995 is hereby approved upon the terms set forth therein.

DATED this 11th day of September, 1995.

/s/ Fred Avera
Fred E. Avera, State
Disciplinary Board Chairperson

/s/ Eugene Hallman
W. Eugene Hallman, Regional Chair
Region 1, Disciplinary Board

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of	)	Case No. 95-75
)	
JAMES W. POWERS,	)	STIPULATION FOR
	)	DISCIPLINE
Accused.)	
_____)	

JAMES W. POWERS (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 the practice of law in this state and a member of the Oregon State Bar, maintaining his office and place of business in the County of Crook, State of 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 March 18, 1995 meeting, the State Professional Responsibility Board authorized formal disciplinary proceedings against the Accused, alleging violation of DR 5-105(C) and DR 5-105(E) of the Code of Professional Responsibility.

5.

The Oregon State Bar filed its Formal Complaint, which was served, together with a Notice to Answer, upon the Accused. A copy of the Formal Complaint is attached hereto as Exhibit 1 and by this reference made a part hereof.

6.

The Accused admits that his conduct constitutes violations of DR 5-105(C) and DR 5-105(E).

7.

The Accused and the Bar agree that in fashioning an appropriate sanction in this case,

the ABA Standards for Imposing Lawyer Sanctions and Oregon case law should be considered. The ABA Standards require that the Accused's conduct be analyzed considering the following four factors: (1) the ethical duty violated; (2) the attorney's mental state; (3) the actual or potential injury; and (4) the existence of aggravating and mitigating circumstances.

A. Duty. In violating DR 5-105(C) and DR 5-105(E), the Accused violated duties to clients. Standards §4.3.

B. State of Mind. The Accused's conduct demonstrates a failure to heed a substantial risk that circumstances exist 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. Standards, p. 7.

C. Injury. The Accused's conduct resulted in potential injury to his clients.

D. Aggravating Factors. Aggravating factors to be considered include (Standards § 9.22):

1. The Accused was admitted to practice in 1971 and has substantial experience in the practice of law. Standards, §9.22(i).

2. This stipulation involves two rule violations. Standards, §9.22(d).

3. The Accused has a prior record of discipline, having been admonished for violation of DR 7-104(A)(1) in 1981. Standards, §9.22(a).

4. One of his clients was vulnerable in that her mental competency was in question and her interests were in actual or likely conflict with another client. Standards, §9.22(h).

E. Mitigating Factors. Mitigating factors to be considered include (Standards §9.32):

1. The Accused did not act with dishonest or selfish motives. Standards, §9.32(b).

2. The Accused cooperated with Disciplinary Counsel's Office in responding to the complaint and in resolving this disciplinary proceeding. Standards,

§9.32(e).

3. The Accused acknowledges the wrongfulness of his conduct and is sorry for it. Standards, §9.32(l).

4. The Accused's prior record of discipline occurred over 14 years ago. Standards, §9.32(m).

8.

The Standards provide that a public reprimand is generally appropriate when a lawyer is negligent in determining whether the representation of a client will adversely affect another client and causes injury or potential injury to a client. Standards, §4.33. Oregon case law is in accord.

9.

Consistent with the Standards and Oregon case law, the Bar and the Accused agree that a public reprimand is an appropriate sanction. The Accused agrees to accept a public reprimand upon the Disciplinary Board's approval of this Stipulation for Discipline.

10.

This Stipulation for Discipline has been approved by the State Professional Responsibility Board and shall be submitted to the Disciplinary Board pursuant to BR 3.6.

EXECUTED this 2nd day of September, 1995.

/s/ James Powers

JAMES W. POWERS

/s/ Jane Angus

JANE E. ANGUS

Assistant Disciplinary Counsel

Oregon State Bar

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re:)	
)	
Complaint as to the Conduct of	)	Case No. 94-75
)	
JAMES W. POWERS,	)	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, James W. Powers, 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 Crook, State of Oregon.

3.

In or about April 17, 1992, Wilhemenia ("Betty") Jones executed a Last Will and Testament naming her granddaughter, Candace Clemens, her personal representative and beneficiary of one-third of her estate, and giving the balance of her estate to named charities.

4.

On or about November 16, 1992, Betty Jones retained the Accused to prepare a new Last Will and Testament naming Marcus Jones her sole beneficiary and personal representative. On or about the same date, the Accused also prepared a Bargain and Sale Deed for Betty Jones, conveying a one-half interest, with right of survivorship, in her personal residence to Marcus Jones, reserving a life estate in the property to herself. The Accused's fees for services performed for Betty Jones were paid by Marcus Jones.

5.

On or about November 16, 1992, Marcus Jones retained the Accused to prepare a Last Will and Testament for himself.

6.

At the time of the representation, the Accused knew, or in the exercise of reasonable care should have known, that Betty Jones' competency was in question and that the interests of Betty Jones and Marcus Jones were in actual or likely conflict with respect to the disposition of Betty

Jones' property. In undertaking to represent each of the clients, the Accused failed to obtain the consent of Marcus Jones and Betty Jones to his representation after full disclosure, as required by DR 10-101(B) of the Code of Professional Responsibility.

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 the allegations of paragraphs 1 through 5 as if fully set forth herein.

9.

In or about May 1993, the Accused was informed by Marcus Jones of the following:

A. Betty Jones had been moved to a foster home and that her health had rapidly and severely deteriorated;

B. Betty Jones' bank accounts, which had been joint with Marcus Jones, were, on May 28, 1993, changed, removing Marcus Jones and adding Candace Clemens and LaDonna Hehn as joint account holders with Betty Jones;

C. Personal property had been removed from Betty Jones' residence;

D. Marcus Jones had been barred from visiting Betty Jones at the foster residence; and

E. Betty Jones had executed a consent and direction that Marcus Jones be appointed her guardian and conservator on May 8, 1993.

10.

In or about this time, the Accused also learned that Betty Jones had executed a general Power of Attorney, dated May 28, 1993, naming her granddaughter, Candace Clemens, as her attorney-in-fact and revoking any and all prior Powers of Attorney.

11.

On or about June 2, 1993, Betty Jones signed a Consent and Petition for the Appointment of Conservator and Guardian, naming Candace Clemens as her guardian and conservator.

12.

On or about June 5, 1993, the Accused met with Betty Jones. The Accused purportedly represented Betty Jones and Marcus Jones. Betty Jones expressly stated to the Accused that she desired to have Candace Clemens manage her affairs.

13.

On or about June 8, 1993, Betty Jones signed and Marcus Jones delivered to the Accused a Consent to the appointment of Marcus Jones as Betty Jones' conservator. On or about June 8, 1993, Betty Jones executed a new Last Will and Testament naming Candace Clemens as her personal representative and beneficiary of a one-third interest in her estate. The will was prepared by an attorney other than the Accused.

14.

On or about June 21, 1993, a Petition for the Appointment of Candace Clemens as Guardian and Conservator for Betty Jones was filed with the court. On or about June 23, 1993, the Accused prepared and filed with the court a Petition for the appointment of Marcus Jones to serve as the guardian and conservator for Betty Jones. Prior to filing the Petition, the Accused discovered that a petition for the appointment of Candace Clemens, signed by Betty Jones, had already been filed. The Accused nonetheless filed the Petition for the Appointment of Marcus Jones to serve as Betty Jones' guardian and conservator.

15.

In and after July 1993, James Minturn and Gary Bodie represented Betty Jones in regard to the petitions for the appointment of guardian and conservator. On or about October 1, 1993, the Accused was confronted with an objection to his representation of Marcus Jones based on conflict of interest and was asked to withdraw from the representation. The Accused declined to withdraw.

16.

On or about November 12, 1993, the issue of conflict was again raised. The court allowed the Accused ten (10) days to withdraw as the attorney for Marcus Jones. Thereafter, the Accused withdrew from further representation in the matter.

17.

Based on the foregoing, the Accused knew, or in the exercise of reasonable care should have known, that the interests of Marcus Jones and Betty Jones were in actual or likely conflict with respect to the appointment of Marcus Jones as guardian and conservator for Betty Jones, the disposition of her property and management of her affairs.

18.

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(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 25th day of May, 1995.

OREGON STATE BAR

By: /s/ Ann Bartsch
ANN BARTSCH
Acting Executive Director

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of	)	Case No. 94-58
)	
WILLIAM N. KENT,)	
)	
Accused.)	
_____)	

Bar Counsel: Lee C. Weichselbaum, Esq.

Counsel for the Accused: None

Disciplinary Board: None

Disposition: Violation of DR 6-101(B).
Stipulation for Discipline. Public reprimand.

Effective Date of Order: September 18, 1995

Note: Due to space restrictions, exhibits are not included but may be obtained by calling the Oregon State Bar.

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of	)	No. 94-58
)	
WILLIAM N. KENT,	)	ORDER APPROVING STIPULATION
	)	FOR DISCIPLINE
Accused.)	
)	

THIS MATTER having come 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 on July 31, 1995 is hereby approved upon the terms set forth therein.

DATED this 18th day of September.

/s/ Fred Avera
Fred E. Avera, State
Disciplinary Board Chairperson

/s/ Howard Speer
Howard Speer, Regional Chair
Region 2, Disciplinary Board

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of	)	Case No. 94-58
)	
WILLIAM N. KENT,	)	STIPULATION FOR
	)	DISCIPLINE
Accused.)	
_____)	

William N. Kent, 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, William N. Kent, was admitted by the Oregon Supreme Court to the practice of law in Oregon on April 24, 1978, and has been a member of the Oregon State Bar continuously since that time, having 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 BR 3.6(h).

4.

On September 24, 1994, the State Professional Responsibility Board (hereinafter, "the Board") authorized formal proceedings against the Accused in Case No. 94-58, alleging that he violated DR 2-110(A)(2) and DR 6-101(B) (two counts).

5.

Pursuant to the Board's authorization, a formal complaint was filed against the Accused on November, 15, 1994. The Accused accepted service of the formal complaint on March 2, 1995. A copy of the formal complaint is attached hereto, marked as Exhibit 1, and incorporated by reference herein. The Accused and the Bar agree to the following facts and disciplinary rule violations.

6.

Between 1986 and April, 1992, the Accused represented Jonny Reigels and Gary Owens and their business, Aqua Tech, Inc., dba Valley Pools and Spas (hereinafter collectively referred to as "the complainants").

7.

In November, 1989, a fire occurred on the grounds of the complainants' business. Approximately thirty days before the fire occurred, the complainants had received notice of cancellation of their fire insurance. The Accused agreed to represent the complainants in a law suit to claim that their fire insurance had been wrongfully terminated and in January, 1990, accepted \$250.00 towards the filing fee for the proposed litigation.

8.

The Accused never filed the proposed litigation against complainants' insurance company, despite Reigels' numerous inquiries about the status of the case. He had stopped working on the case in early 1991 and in November, 1992, the complainants requested the return of their file. The statute of limitations ran on the complainants' claim against their insurance company in November, 1991.

9.

The complainants filed a malpractice claim against the Accused with the Professional Liability Fund and settled this claim for \$17,500.

10.

In January, 1993, the Accused undertook to represent the complainants in a Lane County District Court case entitled Total Communications Company v. Valley Pools and Spas. On January 29, 1993, Plaintiff's counsel faxed a letter to the Accused and informed him of Plaintiff's intent to take a default in the case without further notice if the Accused failed to appear in the case on or before February 8, 1993.

11.

The above-referenced facsimile transmission was filed by the Accused's office staff in the wrong file and not brought to the Accused's attention. A default judgment was entered against the complainants on February 18, 1993, but the Accused was unaware of this judgment until the complainants notified him of it shortly after February 18, 1993.

12.

The Accused then undertook to set aside the order of default and default judgment, but failed to file a motion for relief from judgment pursuant to ORCP 71 until June 18, 1993, even though he knew ORCP 71 required the motion to be filed within a reasonable amount of time after the judgment was entered. The ORCP 71 motion was denied by the court. The Accused admits that there was no reason why he could not have filed the motion shortly after he learned of the default order and judgment.

13.

The Accused admits that the above-described conduct constitutes neglect of two matters entrusted to him by clients in violation of DR 6-101(B).

14.

The Accused and the Bar agree that there is not sufficient evidence to prove that the Accused violated DR 2-110 (A) (2) as alleged in the formal complaint. The Bar agrees that this charge should be dismissed.

15.

The Accused and the Bar agree that in fashioning the appropriate sanction in this case,

the Disciplinary Board should consider the ABA Standards for Imposing Lawyer Sanctions and Oregon case law. The ABA Standards require that the Accused's conduct be analyzed by considering the following four factors: the ethical duty violated; the attorney's mental state; the actual or potential injury; and the existence of aggravating and mitigating circumstances.

- a. The Accused violated his duty of diligence to his clients. Standards §4.4.
- b. With regard to the Accused's state of mind, he knew he had a duty to act on behalf of the complainants and knowingly failed to do so. Standards at 7.
- c. The complainants were actually injured by the Accused's failure to act on their behalf in that they were unable to assert their claim with respect to their fire insurance because the statute of limitations had expired. There was also the potential for injury in the Accused's failure to act in response of a notice of intent to take a default, even though the complainants were not actually injured in this case because they had acknowledged the debt to the plaintiffs. Standards §3.0 (c).
- d. Aggravating factors to be considered are:
 1. The Accused was admonished in 1984 for violation of former DR 6-101(A)(3) [current DR 6-101(B)] and DR 7-101(A)(2);
 2. The Accused has committed two disciplinary offenses;
 3. The Accused has substantial experience in the practice of law, having been admitted to the Bar in 1978. Standards §9.22.
- e. Mitigating factors to be considered are:
 1. The Accused did not act with a dishonest or selfish motive;
 2. The Accused made full and free disclosure in the course of the investigation of this matter and has displayed a cooperative attitude towards the disciplinary proceedings;
 3. The Accused acknowledges the wrongfulness of his conduct; and
 4. The admonition described above is remote in time.
 5. In the spring of 1989, the Accused's son, then 2 years old, developed a serious medical condition requiring extensive surgeries involving the left ear and bones in and around the ear. These and three subsequent surgeries in years following were only partially covered by medical insurance, resulting in significant debt for the Accused and his family. [I]n addition, an injury and resulting surgery left the Accused's wife disabled for seven months in 1990, with the Accused becoming the primary care-taker for his wife and two sons, then 3 years old and 2 years old. Debt from the surgeries and other obligations ultimately resulted in the Accused selling his family residence to repay the debt in full. These events created significant stress for the Accused during the period in which the misconduct described in this stipulation occurred. Standards §9.32.

16.

The ABA Standards provide that, without consideration of aggravating or mitigating

circumstances, a suspension is generally appropriate when a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client. Standards §4.42(a). Oregon case law is in accord. See, In re Moeller, 6 DB Rptr 79 (1992), where the lawyer was suspended for 30 days for neglecting two client matters; and, In re Ross, 8 DB Rptr 195 (1994), where the lawyer was suspended for 30 days for neglecting a client's dissolution of marriage (DR 6-101(B)) and withdrawing from representing the client without taking reasonable steps to avoid foreseeable prejudice to the client's interests (DR 2-110(A) (1) and (2)). The parties stipulate, however, that the mitigating circumstances are such that a public reprimand is an appropriate sanction in this matter.

17.

The Bar and the Accused agree that the Accused shall receive a public reprimand for the two violations of DR 6-101(B) set forth in this stipulation.

18.

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. The parties agree that this stipulation is to be submitted to the Disciplinary Board for consideration pursuant to the terms of BR 3.6.

EXECUTED this 28th day of July, 1995.

/s/ William Kent

William N. Kent

/s/ Martha Hicks

Martha M. Hicks

Assistant Disciplinary Counsel

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of	)	Nos. 92-105A and 94-162
)	
KAROL W. KERSH,)	
)	
Accused.)	
_____)	

Bar Counsel: None

Counsel for the Accused: None

Disciplinary Board: None

Disposition: Violation of DR 1-102(A)(3), DR 1-102(A)(4), DR 5-101(A) and DR 7-101(A)(1).
Stipulation for Discipline. 6 month suspension.

Effective Date of Order: October 1, 1995.

Note: Due to space restrictions, exhibits are not included but may be obtained by calling the Oregon State Bar

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:	)	SC S42614
)	
Complaint as to the Conduct of)	
)	
KAROL W. KERSH,	)	ORDER ACCEPTING STIPULATION
	)	FOR DISCIPLINE
Accused.)	
)	

The Oregon State Bar and Karol W. Kersh have entered into a Stipulation for Discipline. The Stipulation for Discipline is accepted. Karol W. Kersh is suspended from the practice of law for a period of six months. The Stipulation for Discipline is effective October 1, 1995.

DATED this 26th day of September, 1995.

/s/ Wallace Carson
 WALLACE P. CARSON, JR.
 Chief Justice

c: Chris L. Mullmann
 Susan D. Isaacs
 Cynthia Phillips

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of,	)	Case Nos. 92-105A and 94-162
)	
KAROL W. KERSH,	)	STIPULATION FOR DISCIPLINE
)	
Accused.)	
_____)	

Karol Kersh, 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.

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 Marion, 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 January 16, 1993, the State Professional Responsibility Board (hereinafter "SPRB") authorized formal disciplinary charges against the Accused and on April 13, 1994, a formal complaint was filed against the Accused alleging that the Accused violated DR 1-102(A)(3); DR 1-102(A)(4); DR 4-101(B)(1); DR 5-101(A); DR 7-101(A)(1) and ORS 9.460(2). A copy of the formal complaint is attached hereto as Exhibit 1 and incorporated herein by reference.

5.

On June 28, 1994, the Accused filed his Answer to the complaint. A copy of the Answer is attached hereto as Exhibit 2 and incorporated herein by reference.

6.

The Accused hereby stipulates that his conduct violated DR 1-102(A)(3); DR 1-102(A)(4); DR 5-101(A); and DR 7-101(A)(1) as set forth below.

LELAND MATTER

7.

On or about May 20, 1988, Nicholas F. Leland (hereinafter "Leland") retained the law firm of Kersh & Shaw, P.C., with the Accused as the primary attorney, to represent him in a dissolution of marriage. The Judgment of Dissolution of Marriage was signed on September 7, 1989, and awarded Leland's ex-wife child support and 35% of his retirement fund.

8.

Leland was experiencing financial difficulty subsequent to September 7, 1989. He sought the assistance of Kersh and Shaw to arrange a cash withdrawal from his pension fund. On October 10, 1990, Leland completed documents necessary to make a pension withdrawal and delivered them to Kersh and Shaw for filing with the Retirement Fund Administrator (hereinafter "Administrator"). At that time, Leland owed Kersh & Shaw, P.C. over \$8,000.00 in attorneys fees and was in arrears on his child support.

9.

Kersh and Shaw did not file the pension withdrawal documents with the Administrator until October 24, 1990. In the interim, the Accused and Shaw submitted to the Circuit Court a stipulated order Modifying Judgment of Dissolution restricting Leland's use of his pension funds should they be withdrawn requiring that the funds be placed in the client trust account of Kersh & Shaw, P.C., and be used for child support arrearage before payment of any other obligations. The Accused and Shaw were subsequently advised by the Administrator that this order did not qualify as a Qualified Domestic Relations Order and would not be honored by the Administrator. Leland contends he was unaware of the stipulation as set forth in the order filed with the court, as he contends that neither the Accused nor Shaw disclosed to him their intent to file such an order.

DR 5-101(A)(1) LAWYER SELF INTEREST

10.

After learning that the Administrator would not honor the October 24, 1990 Order, the Accused and Shaw drafted a Motion and Order for Temporary Restraining Order supported by an Affidavit and Notice of Claim of Lien for payment of attorneys fees, the filing of which created a conflict between the interests of their client and the personal and financial interests of the Accused and Shaw. In particular, Leland's interest was to obtain the release of funds to pay creditors, while the interest of the Accused and Shaw was to ensure that Leland comply with the court's order, which they attempted to do through filing the Temporary Restraining Order which also requested payment of outstanding legal fees. The lien, motion and order for the Temporary Restraining Order are attached as Exhibits 3, 4, and 5, respectively. The temporary restraining order was directed at the retirement fund ordering the Administrator not to disburse retirement funds directly to Leland and was obtained because the Accused and Shaw were concerned that Leland would not pay his child support arrearage. Neither at this time, nor at any time during the representation of Leland, did the Accused and Shaw make full disclosure to Leland of their conflicting interests, nor did the Accused and Shaw obtain Leland's informed consent to the continued representation.

The Accused and Shaw could not continue employment for Leland because the exercise of their professional judgment on behalf of Leland would have been, or reasonably may have been, affected by their own financial and personal interests. The Accused acknowledges that this conduct constitutes a violation of DR 5-101 (A)(1).

DR 1-102(A)(3) MISREPRESENTATION

11.

Prior to filing the Notice of Claim of Lien, Motion and Order for a Temporary Restraining Order and supporting Affidavit by Kersh, the Accused and Shaw spoke with Leland in the morning of November 14, 1990, assuring him that they were still representing Leland's best interest in connection with the pension funds. In the afternoon of November 14, 1990 they left one telephone message on an answering machine for Leland asking him to call them. In filing the Motion and Order for the TRO, the Accused and Shaw made the following misrepresentations:

1. The language in the supporting affidavit recited that messages had been left for Leland to return calls when, in fact, only one call had been made to Leland.
2. The language in the affidavit recited that immediate and irreparable harm would occur to Kersh & Shaw, P.C. if the relief sought was not granted when no such injury would occur.
3. The Order for a Temporary Restraining Order recited that reasonable efforts to notify Leland of the motion and to return calls had been made when, in fact, such efforts had not been made.

Further, by failing to notify Leland in that telephone message of their intent to file the Notice of Claim of Lien for attorneys fees, Motion and Order for a Temporary Restraining Order, and supporting affidavit, the Accused and Shaw failed to disclose information which should have been disclosed to their client.

Although the Accused and Shaw contend that the plural in the documents regarding the number of phone calls made to Leland was a drafting error, they acknowledge that they had an affirmative duty to be certain that the allegations in the affidavit regarding the number of attempts to contact Leland were true and accurate and further acknowledge that, because of the drafting error they stated facts that were not true, and thereby made a misrepresentation to the court. The Accused hereby stipulates that his conduct herein violated DR 1-102(A)(3).

DR 1-102(A)(4) CONDUCT PREJUDICIAL TO ADMINISTRATION OF JUSTICE

12.

The Accused admits to a violation of DR 1-102(A)(4) of conduct prejudicial to the administration of justice in that he stated in his affidavit in support of a motion and order for a TRO that immediate and irreparable harm would occur to Kersh & Shaw P.C. if the relief sought was not granted. Such harm could not have occurred.

DR 7-101(A) INTENTIONAL FAILURE TO SEEK LAWFUL OBJECTIVES OF CLIENT

13.

Additionally, the Accused admits to a violation of DR 7-101(A) for intentional failure to seek the lawful objectives of a client through reasonably available means in that he caused

the delay in submitting the documents for a cash withdrawal to the Administrator from approximately October 10, 1990, through October 24, 1990, and in the interim secured the October 24, 1990, order restricting Leland's use of the said funds should they be withdrawn.

14.

On or about December of 1990, Leland filed for protection in bankruptcy court and was ultimately discharged on March 10, 1992.

15.

The Bar and the Accused stipulate as to these factual allegations and disciplinary rule violations in the Bar's Complaint and the factual allegations and those charges, i.e., DR 4-101 (A) and ORS 9.460(2), which are not admitted in the Accused's Answer or in the Stipulation are dismissed [sic].

HOLBROOK MATTER

16.

On August 25, 1994, the SPRB authorized formal disciplinary charges against the Accused alleging that the Accused violated DR 9-101(C)(3) and 9-101(C)(4) and [sic] ordering that Case No. 94-162 be consolidated with Case No. 92-105A.

DR 9-101(C)(3) FAILURE TO MAINTAIN COMPLETE RECORD;

DR 9-101(C)(4) FAILURE TO PROMPTLY DELIVER

CLIENT PROPERTY

17.

Allan and Margaret Holbrook retained the Accused to represent them with regard to foreclosure proceedings against another individual. On or about January 19, 1994, the Holbrooks indicated that they had no further need for the Accused's legal services and requested an itemized accounting of fees paid along with a refund of unearned fees. Not having heard back from the Accused in response to their January 19, 1994 letter, the Holbrooks complained to the Oregon State Bar by a letter dated May 3, 1994. By a letter dated June 3, 1994, the Accused rendered an accounting to the Holbrooks and refunded unearned fees.

18.

By failing to respond promptly to the Holbrooks, the Accused failed to render appropriate accounts to his clients as well as failed to promptly pay or deliver to the clients as requested by the clients the funds in the possession of the Accused which the clients were entitled to receive.

19.

The Accused hereby stipulates that his conduct violated DR 9-101(C)(3) and DR 9-101(C)(4).

SANCTIONS

20.

Pursuant to the analytical framework found in ABA's Standards for Imposing Lawyer Sanctions the following four factors are utilized: Duty violated, mental state involved, injuries sustained, and aggravating or mitigating circumstances.

(A) The following duties were violated:

(1) DUTY TO CLIENT.

(a) Duty to avoid conflicts (Standards 4.3) and

(b) Duty of candor (Standards 4.6)

(2) DUTY TO THE PUBLIC. "The community expects lawyers to exhibit the highest standards of honesty and integrity, and lawyers have a duty not to engage in conduct involving dishonesty, fraud, or interference with the administration of justice." Standards at p. 5.

(3) DUTY TO THE LEGAL SYSTEM. Lawyers are officers of the court, expected to operate within the bounds of the law. The public expects lawyers to abide by the legal rules of substance and procedure, and lawyers cannot make false statements of material fact.

(B) MENTAL STATE. The state of mind involved from the ABA Standards is as follows: "Knowledge is a conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result" and "[N]egligence is the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in a situation."

(C) INJURY. For sanctions to be imposed, the injury need not be actual, only potential, since the purpose of the disciplinary process is to protect the public. Standards at p. 25. The conduct of Kersh delayed the filing of the withdrawal forms which permitted Shaw and the Accused to seek a restrictive distribution order. They learned that the Administrator would treat the October 24, 1990 order as a prohibited attempt to assign benefits. On November 14, 1990, they decided to seek a TRO to prevent the Administrator from disbursing the funds. They filed an attorney[']s lien purportedly to give them party status and then represented to the court that they, as applicants, would suffer immediate and irreparable injury as required by ORCP Rule 79 if the TRO was not granted. This occurred without the consent or knowledge of their client. Leland then hired another attorney to assist him in filing for bankruptcy.

Joining together the factors of duty, mental state, and injury, but before examining aggravating and mitigating factors, the ABA Standards provide that:

4.32 Suspension is generally appropriate when a lawyer knows of a conflict of interest and does not disclose to a client the possible effect of that conflict, and causes injury or potential injury to a client.

4.62 Suspension is generally appropriate when a lawyer knowingly deceives a client, and causes injury or potential injury to the client.

6.12 Suspension is generally appropriate when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld, and takes no remedial action, and causes an adverse or potentially adverse effect on the legal proceeding.

(D) AGGRAVATING AND MITIGATING FACTORS. The aggravating factors are multiple offenses, refusal to acknowledge wrongful nature of conduct (until settlement), and experience in the practice of law. The mitigating factors are: Remoteness of prior discipline,

full and free disclosure and cooperation in the disciplinary process and delay in the disciplinary proceedings.

(E) OREGON CASE LAW.

In In re Hiller 298 Or 526, 694 P2d 540 (1985), the Supreme Court suspended two accused lawyers for four months when they failed to disclose, on a motion for summary judgment, the character of a pro-forma transfer of title, which was made in order to trigger the opposing parties' obligation to repay on a promissory note in violation of DR 1-102(A)(3) and ORS 9.460(4).

In In re Purvis 306 OR 522 760 P2d 254 (1988), the accused lawyer was retained to obtain reinstatement of child support payments, he repeatedly told the client that he had prepared the paper or taken other action when he had not done so between June of 1986 and September of 1986 when he finally admitted he had done nothing on the case. The accused lawyer never offered to reimburse the client for the loss in having to hire new counsel and was suspended for six months for violation of DR 1-102(A)(3) and DR 6-101(B).

In In re Leonard 308 Or 560, 784 P2d 95 (1982), the court imposed a 35 day suspension when a lawyer violated DR 1-102(A)(3) in changing a rent ceiling in a lease.

21.

As a result of the Accused's misconduct, the Accused and the Bar agree that the Accused will be suspended from the practice of law for a period of six months.

22.

The Accused and the Bar acknowledge that the Accused's application for reinstatement following suspension shall be made pursuant to BR 8.3.

23.

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 Bar's Disciplinary Counsel and to approval by the State Professional Responsibility Board. If the SPRB approves the stipulation for discipline, the parties agree that it will be submitted to the Supreme Court for consideration pursuant to the terms of BR 3.6.

Executed this 1st day of August, 1995.

/s/ Karol Kersh _____
Karol Kersh

/s/ Chris Mullmann _____
Chris Mullmann, OSB No. 72311
Oregon State Bar
Assistant Disciplinary Counsel

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
	)	No. 92-105B
Complaint as to the Conduct of)	
)	
MARILYN SHAW,)	
)	
Accused.)	
_____)	

Bar Counsel: None

Counsel for the Accused: None

Disciplinary Board: None

Disposition: Violation of DR 1-102(A)(3) and DR 5-101(A).
Stipulation for Discipline. 4 month suspension.

Effective Date of Order: October 1, 1995.

Note: Due to space restrictions, exhibits are not included but may be obtained by calling the Oregon State Bar

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:	)	SC S42613
)	
Complaint as to the Conduct of)	
)	
MARILYN SHAW,	)	ORDER ACCEPTING STIPULATION
	)	FOR DISCIPLINE
Accused.)	
)	

The Oregon State Bar and Marilyn Shaw have entered into a Stipulation for Discipline. The Stipulation for Discipline is accepted. Marilyn Shaw is suspended from the practice of law for a period of four months. The Stipulation for Discipline is effective October 1, 1995.

DATED this 26th day of September, 1995.

/s/ Wallace Carson _____
WALLACE P. CARSON, JR.
Chief Justice

c: Chris L. Mullmann
Susan D. Isaacs
Cynthia Phillips

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of,	)	Case No. 92-105B
)	
MARILYN SHAW,	)	STIPULATION FOR DISCIPLINE
)	
Accused.)	
_____)	

Marilyn Shaw, 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.

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 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, and is currently an inactive member of the Oregon State Bar, having her office and place of business in the County of Whitman, State of Washington, where she is also admitted to practice.

3.

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

4.

On January 16, 1993, the State Professional Responsibility Board (hereinafter "SPRB") authorized formal disciplinary charges against the Accused and, on April 13, 1994, a formal complaint was filed against the Accused alleging that the Accused violated DR 1-102(A)(3); DR 5-101(A); and DR 7-101(A)(1). A copy of the formal complaint is attached hereto as Exhibit 1 and incorporated herein by reference.

5.

On July 1, 1994, the Accused filed her Answer to the complaint. A copy of the Answer is attached hereto as Exhibit 2 and incorporated herein by reference.

6.

The Accused hereby stipulates that her conduct violated DR 1-102(A)(3) and DR 5-101(A) as set forth below.

LELAND MATTER

7.

On or about May 20, 1988, Nicholas F. Leland (hereinafter "Leland") retained the law firm of Kersh & Shaw, P.C., with Kersh as the primary attorney, to represent him in a dissolution of marriage. The Judgment of Dissolution of Marriage was signed on September 7, 1989, and awarded Leland's ex-wife child support and 35% of his retirement fund.

8.

Leland was experiencing financial difficulty subsequent to September 7, 1989. He sought the assistance of Kersh and Shaw to arrange a cash withdrawal from his pension fund. On October 10, 1990, Leland completed documents necessary to make a pension withdrawal and delivered them to Kersh and Shaw for filing with the Retirement Fund Administrator (hereinafter "Administrator"). At that time, Leland owed Kersh & Shaw, P.C. over \$8,000.00 in attorneys fees and was in arrears on his child support.

9.

Kersh and Shaw did not file the pension withdrawal documents with the Administrator until October 24, 1990. In the interim, the Accused and Kersh submitted to the Circuit Court a stipulated order Modifying Judgment of Dissolution restricting Leland's use of his pension funds should they be withdrawn requiring that the funds be placed in the client trust account of Kersh & Shaw, P.C., and be used for child support arrearage before payment of any other obligations. The Accused and Kersh were subsequently advised by the Administrator that this order did not qualify as a Qualified Domestic Relations Order and would not be honored by the Administrator. Leland contends he was unaware of the stipulation as set forth in the order filed with the court, as he contends that neither the Accused nor Kersh disclosed to him their intent to file such an order.

DR 5-101(A)(1) LAWYER SELF INTEREST

10.

After learning that the Administrator would not honor the October 24, 1990 Order, the Accused and Kersh drafted a Motion and Order for Temporary Restraining Order supported by an Affidavit and Notice of Claim of Lien for payment of attorneys fees, the filing of which created a conflict between the interests of their client and the personal and financial interests of the Accused and Kersh. In particular, Leland's interest was to obtain the release of funds to pay creditors, while the interest of the Accused and Kersh was to ensure that Leland comply with the court's order, which they attempted to do by filing the temporary restraining order which also requested payment of outstanding legal fees. The Lien, Motion and Order for the Temporary Restraining Order are attached as Exhibits 3, 4, and 5, respectively. The temporary restraining order was directed at the retirement fund ordering the Administrator not to disburse retirement funds directly to Leland and was obtained because the Accused and Kersh were concerned that Leland would not pay his child support arrearage. Neither at this time, nor at any time during the representation of Leland, did the Accused and Kersh make full disclosure to Leland of their conflicting interests, nor did the Accused and Kersh obtain Leland's informed consent to the continued representation. The Accused and Kersh could not continue employment for Leland because the exercise of

their professional judgment on behalf of Leland would have been, or reasonably may have been, affected by their own financial and personal interests. The Accused acknowledges that this conduct constitutes a violation of DR 5-101(A)(1).

DR 1-102(A)(3) MISREPRESENTATION

11.

Prior to filing the Notice of Claim of Lien, Motion and Order for a Temporary Restraining Order and supporting Affidavit by Kersh, the Accused and Kersh spoke with Leland in the morning of November 14, 1990, assuring him that they were still representing Leland's best interest in connection with the pension funds. In the afternoon of November 14, 1990 they left one recorded telephone message on an answering machine for Leland asking him to call them. In filing the Motion and Order for the TRO, Kersh and the Accused made the following misrepresentations:

1. The language in the supporting affidavit recited that messages had been left for Leland to return calls when, in fact, only one call had been made to Leland.
2. The Order for a Temporary Restraining Order recited that reasonable efforts to notify Leland of the motion and to return calls had been made when, in fact, such efforts had not been made.

Further, by failing to notify Leland in that telephone message of their intent to file the Notice of Claim of Lien for attorneys fees, Motion and Order for a Temporary Restraining Order, and supporting affidavit, Kersh and the Accused failed to disclose information which should have been disclosed to their client.

Although Kersh and the Accused contend that the plural in the documents regarding the number of phone calls made to Leland was a drafting error, they acknowledge that they had an affirmative duty to be certain that the allegations in the affidavit were true and accurate and further acknowledge that, because of the drafting error they stated facts that were not true, and thereby made a misrepresentation to the court. The Accused hereby stipulates that her conduct herein violated DR 1-102(A)(3).

12.

On or about December, 1990, Leland sought protection in bankruptcy court and was ultimately discharged on March 31, 1992.

13.

The Bar and the Accused stipulate as to these factual allegations and disciplinary rule violations in the Bar's Complaint and the charge of DR 7-101(A) and factual allegations which are not admitted in the Accused Answer or in the Stipulation are dismissed.

SANCTIONS

14.

Pursuant to the analytical framework found in ABA's Standards for Imposing Lawyer Sanctions the following four factors are utilized: Duty violated, mental state involved, injuries sustained, and aggravating or mitigating circumstances.

(A) The following duties were violated:

(1) DUTY TO CLIENT.

(a) Duty to avoid conflicts (Standards 4.3) and

(b) Duty of candor (Standards 4.6)

(2) DUTY TO THE PUBLIC. "The community expects lawyers to exhibit the highest standards of honesty and integrity, and lawyers have a duty not to engage in conduct involving dishonesty, fraud, or interference with the administration of justice." Standards at p. 5.

(3) DUTY TO THE LEGAL SYSTEM. Lawyers are officers of the court, expected to operate within the bounds of the law. The public expects lawyers to abide by the legal rules of substance and procedure, and lawyers cannot make false statements of material fact.

(B) MENTAL STATE. The state of mind involved from the ABA Standards is as follows: "Knowledge is a conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result" and "[N]egligence is the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in a situation."

(C) INJURY. For sanctions to be imposed, the injury need not be actual, only potential, since the purpose of the disciplinary process is to protect the public. Standards at p. 25. The conduct of Kersh and the Accused delayed the filing of the withdrawal forms which permitted Kersh and the Accused to seek a restrictive distribution order. They learned that the Administrator would treat the October 24, 1990 order as a prohibited attempt to assign benefits. On November 14, 1990, they decided to seek a TRO to prevent the Administrator from disbursing the funds. They filed an attorney[']s lien purportedly to give them party status and then represented to the court that they, as applicants, would suffer immediate and irreparable injury as required by ORCP Rule 79 if the TRO was not granted. This occurred without the consent or knowledge of their client. Leland then hired another attorney to assist him in filing for bankruptcy.

Joining together the factors of duty, mental state, and injury, but before examining aggravating and mitigating factors, the ABA Standards provide that:

4.32 Suspension is generally appropriate when a lawyer knows of a conflict of interest and does not disclose to a client the possible effect of that conflict, and causes injury or potential injury to a client.

4.62 Suspension is generally appropriate when a lawyer knowingly deceives a client, and causes injury or potential injury to the client.

6.12 Suspension is generally appropriate when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld, and takes no remedial action, and causes an adverse or potentially adverse effect on the legal proceeding.

(D) AGGRAVATING AND MITIGATING FACTORS. The aggravating factors are multiple offenses, refusal to acknowledge wrongful nature of conduct (until settlement), and experience in the practice of law. The mitigating factors are: No prior discipline, full and free disclosure and cooperation in the disciplinary process and delay in the disciplinary proceedings.

(E) OREGON CASE LAW.

In In re Hiller, 298 Or 526, 694 P2d 540 (1985), the Supreme Court suspended two accused lawyers for four months when they failed to disclose, on a motion for summary judgment, the character of a pro-forma transfer of title, which was made in order to trigger the opposing party's obligation to repay on a promissory note in violation of DR 1-102(A)(3) and ORS 9.460(4).

In In re Purvis, 306 OR 522 760 P2d 254 (1988), the accused lawyer was retained to obtain reinstatement of child support payments, he repeatedly told the client that he had prepared the paper or taken other action when he had not done so between June of 1986 and September of 1986 when he finally admitted he had done nothing on the case. The accused lawyer never offered to reimburse the client for the loss in having to hire new counsel and was suspended for six months for violation of DR 1-102(A)(3) and DR 6-101(B).

In In re Leonard, 308 Or 560, 784 P2d 95 (1982) the court imposed a 35 day suspension when a lawyer violated DR 1-102(A)(3) in changing a rent ceiling in a lease.

15.

As a result of the Accused's misconduct, the Accused and the Bar agree that the Accused will be suspended from the practice of law for a period of four months.

16.

The Accused and the Bar acknowledge that the Accused's application for reinstatement following suspension shall be made pursuant to BR 8.3.

17.

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 Bar's Disciplinary Counsel and to approval by the State Professional Responsibility Board. If the SPRB approves the stipulation for discipline, the parties agree that it will be submitted to the Supreme Court for consideration pursuant to the terms of BR 3.6.

Executed this 9th day of August, 1995.

/s/ Marilyn Shaw

Marilyn Shaw

/s/ Chris Mullman

Chris Mullmann, OSB No. 72311

Oregon State Bar

Assistant Disciplinary Counsel

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of	)	Case No. 94-242(B)
)	
DOUGLAS M. FELLOWS,)	
)	
Accused.)	
_____)	

Bar Counsel: Craig Bachman, Esq.

Counsel for the Accused: None

Disciplinary Board: None

Disposition: Violation of 2-101(A)(1); 2-101(E); 2-103(C)(4).
Stipulation for Discipline. Public reprimand.

Effective Date of Order: October 4, 1995.

Note: Due to space restrictions, exhibits are not included but may be obtained by calling the Oregon State Bar.

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of	)	No. 94-242(B)
)	
DOUGLAS M. FELLOWS,	)	ORDER APPROVING STIPULATION
	)	FOR DISCIPLINE
Accused.)	
_____)	

THIS MATTER having come 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 on September 25, 1995 is hereby approved upon the terms set forth therein.

DATED this 4th day of October, 1995.

/s/ Fred Avera
Fred E. Avera, State
Disciplinary Board Chairperson

/s/ Ann L. Fisher
Ann L. Fisher, Regional Chairperson
Region 5, Disciplinary Board

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of	)	Case No. 94-242(B)
)	
DOUGLAS M. FELLOWS,	)	STIPULATION FOR
	)	DISCIPLINE
Accused.)	
_____)	

Douglas M. Fellows, 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, Douglas M. Fellows, was admitted by the Oregon Supreme Court to the practice of law in Oregon in 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.

4.

On November 9, 1993, the Accused registered the assumed business name of Case Evaluation & Referral Service (hereinafter "CERS") and thereafter placed an advertisement in the US West Yellow Pages directory for the Portland vicinity. A copy of the advertisement is attached as Exhibit A. The advertisement appeared under the heading of "Attorneys' Referral and Information Service". The advertisement failed to comply with the Code of Professional Responsibility in one or more of the following particulars:

1. Some of the referrals were made to partners or associates of the Accused;
2. It failed to identify the name and office address of the lawyer or law firm whose services were being offered to the public;
3. Some lawyers on the list of lawyers to whom cases might be referred had not been contacted or consented to use of their names; and
4. Not all lawyers on the list were experienced.

5.

The CERS advertisement did not disclose any affiliation with the Accused or his law firm. As operated by the Accused, CERS did not constitute a Lawyer Referral Service.

6.

The advertisement omitted a statement of fact necessary to make the communication considered as a whole not materially misleading.

7.

In publishing the advertisement, the Accused violated the following standards of professional conduct established by law and by the Oregon State Bar:

1. DR 2-101(A)(1) of the Code of Professional Responsibility;
2. DR 2-101(E) of the Code of Professional Responsibility; and
3. DR 2-103(C)(4) of the Code of Professional Responsibility.

8.

The Accused and the Bar agree that in fashioning the appropriate sanction the Disciplinary Board should consider the ABA Standards For Imposing Lawyer Sanctions (Standards) and Oregon case law. Those Standards require analyzing the Accused's conduct in light of four factors: ethical duty violated, attorney's mental state, actual or potential injury, and the existence of aggravating and mitigating circumstances.

a. The Accused violated his duty to the legal profession by engaging in the conduct above described. ABA Standard 7.4, OSB Legal Ethics Op No 1991-101 and OSB Legal Ethics Op No 1991-108.

b. The Accused acted negligently. ABA Standards III.

c. The misleading advertisement could lead to potential injury by the fact that a member of the public could conclude that CERS was a legal referral system in which the accused had no financial interest. ABA Standards III.

d. Aggravating factors to be considered are:

1. Substantial experience in the practice of law.

e. Mitigating factors to be considered are:

1. Absence of a prior disciplinary record.

g. Case law:

1. In re Yacob, 381 Or 10, 860 P2d 811 (1993). Attorney's yellow pages advertisement identifying a branch office that did not exist constituted a false advertisement, despite claim that attorney expected to open the office when the advertisement was placed. Specific intent is not necessary for a violation of DR 2-101(A).

9.

Consistent with the Standard and Oregon Case law, the Bar and the Accused stipulate that based on these violations of the Code of Professional Responsibility, the Accused shall receive a public reprimand and that all other charges alleged in the Bar's Formal Complaint shall be dismissed.

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 State Disciplinary Board for consideration pursuant to the terms of BR 3.6.

EXECUTED this 21st day of September, 1995.

/s/ Douglas Fellows
Douglas M. Fellows

/s/ Chris Mullman
Chris L. Mullmann
Assistant Disciplinary Counsel
Oregon State Bar

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)
)
Complaint as to the Conduct of) Case No. 95-47; 95-85
)
D. DALE MAMMEN,)
)
Accused.)
_____)

Bar Counsel: None

Counsel for the Accused: Peter R. Jarvis, Esq.

Disciplinary Board: None

Disposition: Violation of DR 5-105(C) DR 5-105(E) (two counts).
Stipulation for Discipline. Public reprimand.

Effective Date of Order: October 27, 1995

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of	)	No. 95-47; 95-85
)	
D. DALE MAMMEN,	)	ORDER APPROVING STIPULATION
	)	FOR DISCIPLINE
Accused.)	
)	

THIS MATTER having come 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 on October 9, 1995 is hereby approved upon the terms set forth therein.

DATED this 27th day of October, 1995.

/s/ Fred Avera

Fred E. Avera, State
Disciplinary Board Chairperson

/s/ Eugene Hallman

W. Eugene Hallman, Regional Chair
Region 1, Disciplinary Board

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of	)	Case No. 94-57; 95-85
)	
D. DALE MAMMEN,	)	STIPULATION FOR
	)	DISCIPLINE
Accused.)	
_____)	

D. Dale Mammen, 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, D. Dale Mammen, was admitted by the Oregon Supreme Court to the practice of law in Oregon on September 15, 1967, and has been a member of the Oregon State Bar continuously since that time, having his office and place of business in Union County, Oregon.

3.

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

4.

In May and July 1995, the State Professional Responsibility Board of the Oregon State Bar authorized formal disciplinary proceedings against the Accused alleging that he violated DR 5-105(E) in connection with the handling of one client matter and DR 5-105(C) and (E) in connection with the handling of other client matters. The Accused and the Bar agree to the following facts and disciplinary rule violations.

5.

Sale of House from Prince to Jambura

In April 1993, Patricia Prince (hereinafter "Prince") retained the Accused to initiate a conservatorship/ guardianship for Prince's mother, Florence Beck (hereinafter "Beck"). On May 14, 1993, Prince was appointed Beck's guardian/conservator and the Accused represented Prince in this capacity until June 1994.

In June 1993, the Accused represented John Jambura (hereinafter "Jambura") relative

to the dissolution of a business partnership.

In June 1993, Prince wanted to sell Beck's primary asset, a piece of real estate. The Accused advised Jambura that the house was for sale and on June 10, 1993, Jambura offered the Accused \$25,000 to purchase the property. On June 22, 1993, Jambura tendered a \$25,000 check to the Accused who retained the check, unnegotiated, in the file until its return to Jambura. On July 19, 1993, at Prince's request, the Accused prepared a right of first refusal for the sale of Beck's home in favor of Jambura.

In June and July 1993, Prince and Jambura were current clients of the Accused on unrelated matters whose objective business interests in the property transaction were adverse. As such, the Accused had a likely conflict of interest. At no time did the Accused obtain the informed consent from Prince and Jambura to represent Prince in the sale to Jambura. The Accused admits that he violated DR 5-105(E).

6.

A. 1987 Condominium Reorganization

In August 1985, Grande Ronde Medical Center II (hereinafter "GR II"), a partnership consisting of Drs. German, Stephens and Griffith, retained the Accused to assist in the restructuring of a land sale contract. GR II was purchasing, on a contract, an office building from the Grande Ronde Hospital Foundation (hereinafter "Foundation"). At the time of his retention, GR II had fallen behind in its payments to the Foundation and the Foundation had agreed to repurchase the building and then resell portions of it to Drs. German and Stephens.

GR II dissolved in February 1986, but Drs. Stephens and German remained interested in the resale. In April 1986, an agreement of intent was reached between Drs. Stephens and German and the Foundation which provided that the real property repurchased by the Foundation would be condominiumized and the individual condominium units resold to tenant/doctors. The remaining unsold condominium units would be retained by the Foundation for ultimate resale to other tenant/doctors.

In September 1986, the Accused, on behalf of Drs. Stephens and German, prepared a land sale contract with respect to two units in the building. The contract was signed by all parties in October 1986, but as the condominiumization had not yet occurred, the property description was left blank. The contract specifically provided that once the condominiumization was completed, a complete legal description would be substituted and a memorandum of contract would be executed and recorded.

In February 1987, prior to the completion of the condominiumization, the Accused commenced performing legal services for the Foundation.

The condominiumization and sale was completed on June 17, 1986 with the recording of the condominium's plat and the signing of a memorandum which confirmed the October 1, 1986 contract. The Accused prepared the memorandum on behalf of Drs. Stephens and German.

While the Foundation retained outside counsel to represent its interests on the condominiumization and resale to Drs. Stephens and German, the Accused also performed legal services on the Foundation's behalf with respect to the condominiumization and resale.

As the interests of Drs. Stephens and German and the Foundation as buyers and

sellers were in actual conflict, the Accused admits that when he performed legal services for both buyer and seller he violated DR 5-105(E).

B. Storage Lease Matter

In January 1988, the Accused became the Foundation's general counsel. During the summer of 1988, Drs. Stephens and German requested that the Foundation lease to Drs. Stephens and German storage space. In August 1988, on behalf of the Foundation, the Accused negotiated the lease of 200 square feet of storage space at \$.50 per foot per month payable on a semi-annual basis in advance to two of the Accused's former clients, Drs. Stephens and German.

Because the interests of the Foundation and Drs. Stephens and German as lessors/lessee were adverse and the Accused, as a result of his prior representation of Drs. Stephens and German, possessed client confidences or secrets which could have injured his former clients in connection with the lease matter, the Accused had a former client conflict of interest when he undertook the subsequent representation of the Foundation on this matter.

At no time did the Accused obtain the informed consent from the Foundation or from Drs. Stephens and German to represent the Foundation in negotiating the lease of the storage space.

The Accused admits that he violated DR 5-105(C).

C. 1989-90 Amendment to Land-Sale Contract Between Foundation and Drs. Stephens and German

In January 1988, the Accused became the Foundation's general counsel.

In November 1989, Drs. Stephens and German contacted the Accused regarding a desire to amend the October 1, 1986 land-sale contract between Drs. Stephens and German and the Foundation by accelerating its payments and simultaneously reducing the interest rate. The Accused forwarded this request to the Foundation which agreed. In facilitating the modification of payment terms between Drs. Stephens and German and the Foundation, the Accused was representing both parties. As such, he represented two current clients whose interests were adverse and admits that such representation violated DR 5-105(E).

7.

The Accused and the Bar agree that in fashioning the appropriate sanction the Disciplinary Board should consider the ABA Standards and Oregon case law. Those standards require analyzing the Accused's conduct in light of four factors: ethical duty violated, attorney's mental state, actual or potential injury and the existence of aggravating and mitigating circumstances.

a. The Accused violated his duty of loyalty to current and former clients. ABA Standards at 5.

b. The Accused was negligent in not determining whether a current or former client conflict existed with respect to all instances. ABA Standards at 7.

c. No actual injury occurred. ABA Standards at 7.

d. Aggravating factors to be considered:

1. The Accused has substantial experience in practicing law having been admitted to the Bar in 1967. Standards 9.22(i)

- e. Mitigating factors to be considered:
1. The Accused has no prior disciplinary record. Standards 9.32(a).
 2. The Accused was not acting dishonest or with a selfish motive. Standards 9.32(b).
 3. The Accused fully and freely disclosed the conflicts to Disciplinary Counsel. Standards 9.32(e).
 4. The Accused, having served as the District Attorney for Union County from 1971 to 1984, had recently reentered the private practice prior to the GRII/Foundation reorganization and condominiumization.
 5. With respect to all conflicts referenced herein, none of the Accused's clients objected and none complained to the Oregon State Bar.

The Standards provide that a public reprimand is generally appropriate when a lawyer is negligent in determining whether a conflict of interest exists between clients that has the potential to injure those clients. Standards. 4.33 at 31.

Oregon case law is in accord. See, In re Cohen, 316 Or 659, 853 P2d 286 (1993), In re Carey, 307 Or 317, 767 P2d 438 (1989); In re Harrington, 301 Or 18, 718 P2d 725 (1986).

8.

Consistent with the Standards and Oregon case law, the Bar and the Accused agree that the Accused receive a public reprimand.

9.

This Stipulation for Discipline is subject to review by Disciplinary Counsel of the Oregon State Bar. The SPRB approved the sanction contained herein on July 22, 1995. Pursuant to BR 3.6, the parties agree the stipulation is to be submitted to the Disciplinary Board for consideration.

EXECUTED this 9th day of October, 1995.

/s/ Dale Mammen

D. Dale Mammen

/s/ Lia Saroyan

Lia Saroyan

Assistant Disciplinary Counsel

Oregon State Bar

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of	)	Case No. 95-84
)	
SONA JEAN JOINER,)	
)	
Accused.)	
_____)	

Bar Counsel: None

Counsel for the Accused: None

Disciplinary Board: Chair: None

Disposition: Violation of DR 1-102(A)(2) and ORS 9.527(2).
Stipulation for Discipline. 24 month suspension.

Effective Date of Order: October 31, 1995

Note: Due to space restrictions, exhibits are not included but may be obtained by calling the Oregon State Bar

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
	)	No. 95-84
Complaint as to the Conduct of)	
)	
SONA JEAN JOINER,	)	ORDER ACCEPTING STIPULATION
	)	FOR DISCIPLINE
Accused.)	
_____)	

The Oregon State Bar and Sona Jean Joiner have entered into a Stipulation for Discipline. The Stipulation for Discipline is accepted. Sona Jean Joiner is suspended from the practice of law for a period of 24 months. The Stipulation for Discipline is effective the date of this order.

DATED this 31st day of October, 1995.

/s/ Wallace Carson
WALLACE P. CARSON, JR.
Chief Justice

c: Jane E. Angus
Sona Jean Joiner

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of	)	Case No. 95-84
)	
SONA JEAN JOINER,	)	STIPULATION FOR
	)	DISCIPLINE
Accused.)	
_____)	

SONA JEAN JOINER (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 the practice of law in this state and a member of the Oregon State Bar.

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 or about April 7, 1995, the Accused entered a plea of guilty to Rape III (ORS 163.335), in Circuit Court of the State of Oregon for the County of Yamhill in the matter of State of Oregon v. Sona Jean Joiner, Case No. CR94-566. A true copy of the Indictment is attached hereto as Exhibit 1 and by this reference made a part hereof. Rape III is a Class C felony, but may be treated as a misdemeanor under Oregon law pursuant to ORS 161.705. The offense is one which involves moral turpitude.

5.

At its May 20, 1995 meeting, the State Professional Responsibility Board authorized formal disciplinary proceedings against the Accused, alleging violation of DR 1-102(A)(2) of the Code of Professional Responsibility and ORS 9.527(2).

6.

On June 2, 1995, the court sentenced the Accused and ordered that the Accused's conviction to be treated as a misdemeanor. Further, the court suspended imposition of sentence and placed the Accused on supervised probation with Yamhill County Community

Corrections for five (5) years, subject to conditions which included, among others, 200 hours community service, registration as a sex offender, and continuation of sex offender treatment. A true copy of the Judgment of Conviction and Sentence is attached hereto as Exhibit 2 and by this reference made a part hereof.

7.

The Oregon State Bar filed its Formal Complaint, which was served, together with a Notice to Answer upon the Accused. The Accused admits the allegations of the Formal Complaint and that her conduct violated DR 1-102(A)(2) and ORS 9.527 (2).

8.

In the summer of 1987, the victim of the criminal action visited Yamhill County, staying with a family friend. The family friend was also a friend of the Accused and her boyfriend, who in turn became acquainted and friends with the victim. During the daylight hours of the victim's 15th birthday, August 6, 1987, the Accused and the victim went horseback riding, during which time the Accused questioned the victim about her sexual preferences and experience. Later, the Accused invited the victim to swim, sauna and spend the night at her home. During the course of the evening, activities turned to a sexual nature. The Accused's boyfriend engaged in acts of sodomy and attempted intercourse with the victim in the presence of the Accused. After the Accused boyfriend left the room, the Accused and the victim engaged in other sexual contact and spent the night together. The victim did not then report the incident to law enforcement authorities.

In or about April or May 1993, the Yamhill County Sheriff's Office received information concerning the 1987 incident from someone other than the victim. The Sheriff's Office commenced an investigation which eventually lead to the three count indictment of the Accused and her boyfriend for Rape III (ORS 163.355), Sodomy III (ORS 163.385) and Using a Child in a Display of Sexual Conduct (ORS 163.670).

9.

The Accused and the Bar agree that in fashioning an appropriate sanction in this case, the ABA Standards for Imposing Lawyer Sanctions (hereinafter "Standards") and Oregon case law should be considered. The Standards require that the Accused's conduct be analyzed considering the following four factors: (1) the ethical duty violated; (2) the attorney's mental state; (3) the actual or potential injury; and (4) the existence of aggravating and mitigating circumstances.

A. Duty. In violating DR 1-102(A)(2) and ORS 9.527(2), the Accused violated her duties to maintain personal integrity and to the profession. Standards §§ 5.0 and 7.0.

B. State of Mind. The Accused's conduct demonstrates that she at times acted with intent and at other times with knowledge. "Intent" is defined as the conscious objective or purpose to accomplish a particular result. "Knowledge" is defined as the conscious awareness of the nature of the attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result. Standards, p. 7.

C. Injury. The Accused acknowledges that her conduct caused actual and potential injury to the victim, a non-client. Although the Accused did not employ physical force or alcohol to facilitate the relationship with the victim, and the victim voluntarily

participated in the sexual activity with the Accused and the Accused's boyfriend, the activity was nonetheless illegal because of the victim's age.

D. Aggravating Factors. Aggravating factors to be considered include (Standards § 9.22):

1. The Accused acted with selfish motive. Standards, § 9.22(b).
2. This stipulation involves two rule violations arising out of a single event and complaint. Standards, § 9.22(d).
3. The Accused's reputation in the community was good prior to the disclosure of the events leading to her conviction of a crime.

Standards, § 9.32(g).

4. The victim of the Accused's conduct was vulnerable. She was at the time 15 years of age and trusted the Accused. Standards, § 9.22(h).
5. The Accused has substantial experience in the practice of law, having been admitted to practice in 1984. Standards, § 9.22(i).

E. Mitigating Factors. Mitigating factors to be considered include (Standards 9.32):

1. The Accused has no prior record of discipline. Standards, § 9.32(a).
2. The Accused did not act with dishonest motive. Standards, § 9.32(b).
3. The Accused fully and freely cooperated in the disciplinary process. Standards, § 9.32(e).
4. The Accused acknowledges the wrongfulness of her conduct and is sorry for it. Standards, § 9.32(i)
5. The acts constituting the crime for which the Accused was convicted occurred in 1987, but were not reported until 1993. There are no other reported instances of misconduct. Standards, § 9.32(m).
6. The court imposed penalties or sanctions as part of the sentence for the criminal conviction. In addition, the Accused has not practiced law since the criminal indictment was returned by the grand jury in October 1994, and was suspended from the practice of law by the Supreme Court on July 5, 1995 pursuant to BR 3.4(d). Standards. § 9.32(k).

F. Factors Neither Mitigating Nor Aggravating.

1. The Accused sought and received sexual offender counselling after the indictment was returned and before entry of plea and sentencing. The Accused plans to continue counselling as ordered by the court, and thereafter as may be recommended by her therapist after termination of her probation.

10.

The Standards provide that suspension is appropriate when a lawyer knowingly engages in criminal conduct which does not contain the elements of listed in Standard § 5.11 (e.g. intentional interference with the administration of justice, fraud, misrepresentation, theft) and that seriously adversely reflects on the lawyer's fitness to practice, and when a lawyer knowingly engages in conduct that this [is] a violation of a duty owed to the

profession, and causes injury to the public. Standards, §§ 5.12, 7.2. Oregon case law is in accord. See In re Wolf, 312 Or 655, 826 P2d 628 (1992), lawyer suspended for 18 months for contributing to the sexual delinquency of a minor despite dismissal of the criminal charges following diversion; In re Nash, 299 Or 310, 702 P2d 399 (1985), lawyer convicted of sodomy in the first degree involving a minor child resulted in disbarment.

11.

Consistent with the Standards and Oregon case law, the Bar and the Accused agree that the Accused shall be suspended for a period of 24 months, effective upon acceptance of this stipulation by the Oregon Supreme Court.

12.

The sanction set forth in this Stipulation for Discipline is subject to the approval of the State Professional Responsibility Board, and is subject to the approval of the Oregon Supreme Court pursuant to the terms of BR 3.6. The Accused acknowledges that she will be required to file a formal application for reinstatement pursuant to BR 8.1.

EXECUTED this 15th day of September, 1995.

/s/ Sona Joiner

SONA JEAN JOINER

/s/ Jane Angus

JANE E. ANGUS

Assistant Disciplinary Counsel

Oregon State Bar

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of	)	Case No. 92-158
)	
J. ALAN JENSEN,)	
)	
Accused.)	
_____)	

Bar Counsel: Peter Chamberlain, Esq.

Counsel for the Accused: Bernard Jolles, Esq.

Disciplinary Board: Richard Yugler, Chair; Amy Alpern and Ralph E. Bunch, public member

Disposition: Violation of 1-102(A)(3), DR 7-102(A)(3), DR 7-102(A)(5).
Public reprimand.

Effective Date of Opinion: October 6, 1994 (Request for Review filed October 14, 1994, Order Dismissing Review January 11, 1995)

Note: Due to space restrictions, exhibits are not included but may be obtained by calling the Oregon State Bar.

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
	)	No. 92-158
Complaint as to the Conduct of)	
	)	TRIAL PANEL DECISION
J. ALAN JENSEN,)	
)	
Accused.)	
)	

This lawyer disciplinary proceeding was instituted by the Oregon State Bar ("Bar") by its formal complaint and notice to answer on March 3, 1994 against J. Alan Jensen ("Jensen"). The Bar's complaint alleged violations of DR 1-102(A)(3), DR 7-102(A)(3), and DR 7-102(A)(5). Jensen filed his answer on March 17, 1994 which denied that his conduct violated any of these disciplinary rules. The matter came before the trial panel for hearing on July 22, 1994 in the Multnomah County Courthouse, was continued on July 27, 1994 and was concluded on August 3, 1994. The Bar appeared by and through Mary A. Cooper, Assistant Disciplinary Counsel, and Peter R. Chamberlain, Bar Counsel. Jensen appeared personally and was represented by Bernard Jolles. The Bar presented testimony from witnesses Donald McEwen, William Janz, and called Jensen to testify in its case-in-chief. The Bar's exhibits numbered 1-21 were received into evidence. Jensen testified on his own behalf and further called as witnesses Richard A. Edwards, Gary M. King, Robert Weiss, John Langfield, Sally Landauer, and Catherine Travis. Jensen's exhibits 1-24 were received into evidence.

FINDINGS OF FACT

Jensen, a member of the Oregon State Bar since 1963, is a taxation specialist who is held in very high regard in the legal community for his integrity, veracity, and skill. He has been employed as a professor at several law schools, acted as counsel to both private business and governmental agencies, and has been in the private practice of law, in Portland, Oregon, since approximately 1976 to present.

In February, 1987, Jensen and others left the lawfirm of Bullivant, Houser, Bailey (Bullivant") to form the law firm of Hanna, Ubigkeit, Jensen, Goyak and O'Connell ("HUIGO"). HUIGO rented law offices in Portland at the Pacwest Center that was managed by 1200 Building Associates Ltd ("Pacwest"). Jensen and other members of HUIGO were required to guarantee the firm's office lease obligations with Pacwest. HUIGO also found it desirable to obtain a line of credit from the United States National Bank of Oregon ("USNB") for operating expenses. USNB did not require any personal guarantees of the members of HUIGO, but instead secured the loan with all of the firm's accounts receivable. Both the lease obligation and the line of credit involved substantial financial commitments in excess of one-million dollars.

In May, 1988, HUIGO dissolved. Jensen and others formed a new law firm, Hanna,

Murphy, Jensen and Holloway ("HMJH") that continued to practice in the office space at Pacwest that had been occupied by HUIGO. Jensen's personal liability under his guarantee to Pacwest continued under the lease with HMJH.

When HUIGO dissolved it was in default on its line of credit with USNB. USNB, therefore, assumed the task of liquidating HUIGO's accounts receivable to reduce the debt. The amount of accounts receivable should have been ample to cover the debt and to leave a surplus for HUIGO firm members. The collection efforts of USNB, however, progressed slowly and without full collection of the accounts. Some of the accounts receivable were collected directly by former HUIGO members without authority from USNB and without remittance to USNB.

In August, 1988, Jensen and others offered to voluntarily provide a personal guarantee to USNB to secure approximately \$107,000 owing on the line of credit in order to allow several creditors of HUIGO to get paid. Jensen's individual share of the personal guarantee to USNB was \$31,250. In February, 1989, Jensen left HMJH to join the lawfirm of Weiss, DesCamp and Botteri, which thereafter became Weiss, Jensen, Ellis and Botteri ("Weiss-Jensen").

When HMJH formally dissolved in June, 1989, the Pacwest office space became vacant. The vacancy caused Jensen and others to become liable on their personal guarantees for the full amount of HUIGO's lease obligations to Pacwest. Jensen and some of the other personal guarantors of the Pacwest lease hired attorney Richard A. Edwards ("Edwards") to negotiate a global settlement of the lease obligation. Negotiations with Pacwest were difficult and stressful, but Edwards succeeded in obtaining an agreement with Pacwest to resolve the dispute. Jensen agreed to pay Pacwest \$137,000 as his individual share for the settlement. During the course of negotiations with Pacwest, its attorney asked that a financial statement be submitted by Jensen.

On February 3, 1992, Jensen and Edwards briefly met to discuss preparation of a financial statement for Pacwest. Jensen brought with him a prior financial statement that he had submitted previously to USNB in support of his personal line of credit at USNB's Executive Banking division. This financial statement listed \$95,000 in vested pension accounts, no residence, and a total net worth of \$189,235.

Edwards advised Jensen that an explanatory note was needed to indicate that Jensen's residence would not be subject to collection because he owned no equity in it. A footnote to the financial statement was required to clarify that the home had been brought into the marriage solely by his wife and that joint title to the residence was solely the result of a lending requirement for a home remodeling loan.

As Jensen read from the USNB financial statement, Edwards obtained the incorrect impression that Jensen's pension accounts were only with his current law firm, Weiss-Jensen, and that these accounts were not vested. Edwards, therefore, advised Jensen that it would not be necessary to list pension amounts on the financial statement that Jensen was preparing for Pacwest.

Jensen left his meeting with Edwards with a different impression. Jensen knew that his pension plans were all fully vested. Jensen believed that Edwards had informed him that it was not necessary to list any pension amounts on the financial statement because such assets were not subject to the claims of creditors. Jensen returned to his office, gave his secretary

instructions to complete the financial statement for Pacwest, and then forwarded his personal financial statement to Edwards, who in turn forwarded it to Pacwest. The financial statement prepared by Jensen on February 3, 1992, used a copy of the front sheet of a USNB form financial statement, and failed to list any amounts in the space provided for vested pension assets. It set forth a total net worth of \$84,120.

Jensen subsequently paid his share of the lease obligation to Pacwest by withdrawing approximately \$71,500, subject to payment of penalty and tax, from his fully vested pensions that he had acquired through his past employment as a professor at Lewis & Clark College, as a partner in the Bullivant and HUIGO's firms, individual IRAs and vested retirement plan through Weiss-Jensen. Jensen paid the balance owed to Pacwest with other cash and by providing a promissory note.

Edwards was prevented, due to a conflict of interest, from representing Jensen in connection with the debt owed to USNB on Jensen's personal guarantee of the line of credit. Therefore, in April, 1991, Jensen had hired attorney Gary M. King ("King") to represent him in the dispute with USNB. Through King, Jensen denied having any obligation under the personal guarantee primarily on the ground that USNB had failed to exercise its duty to promptly and reasonably collect the security for the line of credit. King emphasized that USNB had improperly allowed other former members of HUIGO to directly collect accounts receivable without remitting the proceeds to USNB for reduction of the debt and had failed to pursue these claims against such firm members.

On February 27, 1992, a meeting occurred to discuss USNB's demand for payment of Jensen's personal guarantee of HUIGO's line of credit. Present were King, Jensen, and two members of USNB's Special Assets Group, Mr. Dow ("Dow") and William Janz ("Janz"), along with one of USNB's attorneys, David Paradis. USNB's Special Assets Group was in charge of collecting non-performing accounts, liquidating those accounts, turning the matter over to litigation, or finding some alternative method of obtaining payment on debts owed to USNB.

At the meeting, Dow renewed USNB's settlement offer that Jensen pay \$10,000 plus payment of one account receivable in the sum of \$1,500 that had been collected directly by Jensen and withheld from USNB by Jensen in his trust account. Dow informed Jensen and King that anything less would cause USNB to go forward with litigating the entire amount of the guarantee obligation against Jensen in the amount of \$31,250. Jensen, through King, rejected USNB's demand, and responded that USNB was not entitled to collect any amount of the guarantee obligation because of its unreasonable action in collection the accounts receivable. Jensen, through King, offered [to] settle the claim by returning the \$1,500 account receivable that was held in Jensen's trust account.

During the meeting on February 27, 1992 King mentioned that Jensen was not a wealthy lawyer because most of his available cash had gone to resolve HUIGO's Pacwest lease obligation. From statements made by King or Jensen, Janz was given the impression that Jensen was unable to pay substantially more because he did not have sufficient assets due to financial difficulties arising from HUIGO's dissolution. Although a discussion of Jensen's financial condition was not the purpose of the meeting, King suggested to Jensen that a financial statement be submitted to USNB. The meeting concluded with an agreement that Jensen would forward

a signed personal financial statement to Janz who was taking over from Dow the responsibility to collect Jensen's personal guarantee.

On February 28, 1992, a separate department at USNB, its Executive Banking division, independently and unknown to USNB's Special Assets Group, requested an updated personal financial statement from Jensen in connection with putting his personal line of credit on an amortizing basis. Jensen's owed approximately \$59,000 on a personal line of credit that had been frozen by Executive Banking. In order to expedite the preparation of Jensen's financial statement, Executive Banking enclosed a copy of the last financial statement it had on file, dated February 14, 1991, which set forth Jensen's net worth at \$189,735 and vested pension assets of \$95,000.

On March 5, 1992, Jensen forwarded to King an unsigned financial statement for transmission to USNB's Special Assets Group. Jensen did not request any assistance from King or Edwards in the preparation of a financial statement for USNB's Special Assets Group. On March 10, 1992 Jensen's unsigned financial statement was forward by King to Paradis along with a formal settlement offer to pay \$2,500 in cash, which included the \$1,500 account receivable in Jensen's trust account, plus \$1,000. In King's transmission to USNB, he reconfirmed that "[A]s you can see from Mr. Jensen's balance sheet, the past few years have been a financial disaster for him." This financial statement was a photocopy of the financial statement that had been provided by Jensen to Pacwest on February 3, 1992 and which, on a USNB form, had set forth a net worth of \$84,120 and had omitted reference to the existence of any vested pension assets.

When Janz received the financial statement he noticed that it had not been signed by Jensen. Janz, therefore, requested that Jensen sign and return it. On March 18, 1992, Jensen signed the financial statement that showed \$84,120 net worth and no pension assets and then had it forwarded back through Paradis to USNB's Special Assets Group. The next day, on March 19, 1992, Jensen submitted to USNB's Executive Banking Division, a personal financial statement showing a net worth of \$224,120 and listed \$140,000 in vested pension assets.

When Janz received a signed financial statement, he undertook a due diligence investigation of its contents, which included a reference to the \$59,000 owed to USNB's Executive Banking division. He contacted Jensen's financial officer at Executive Banking and learned that a recent financial statement had been submitted to Executive Banking. Janz requested that the financial statement be transmitted for comparison. He then discovered that Jensen had listed \$140,000 in vested pension assets on his March 19, 1992 financial statement and omitted disclosure of any pension assets on his March 18, 1992 financial statement.

On April 6, 1992 Paradis demanded an explanation of these discrepancies, On April 10, 1992, Jensen's response was forwarded to USNB. Jensen explained that he had previously consulted with Edwards who had informed him that it was not necessary to list his vested pension assets because they were not subject to the claims of creditors. Jensen stated that these assets were listed for Executive Banking in order to be consistent with past statements submitted for his personal line of credit. Jensen denied that he had any intent to deceive USNB.

On April 16, 1992 Janz prepared a criminal referral report to the FBI concerning a possible violation of federal banking laws by Jensen arising from the discrepancies between the

two financial statements. The FBI never acted on the referral. On April 16, 1992, Edwards sent a letter to Pacwest indicating that, as a result of miscommunications with Jensen, the material statement of February 3, 1992, inadvertently omitted Jensen's pension account and offered to send an amended statement.

Janz explained that Jensen's omission on the March 18, 1992 financial statement was material because, if Janz had not promptly discovered the discrepancy between the two financial statements, it would have been in USNB's interest to compromise at something less than \$10,000 in order to get the matter settled, but likely at an amount greater than that which had been offered by Jensen. Janz understood that Dow's bottom line settlement position had been \$10,000 plus return of the \$1,500 account receivable, but when Janz took over the account from Dow, the final decision shifted to him. No damage was caused by USNB's reliance on the failure of Jensen to disclose the amount of his vested pension assets because Janz promptly discovered the discrepancy.

On June 9, 1992, USNB through its attorney filed a disciplinary complaint with the Bar. After discovery of the discrepancy USNB's demand for \$10,000 never changed. On October 19, 1992, Jensen settled with USNB by paying the bank \$10,000 plus returning the \$1,500 account receivable. USNB and Jensen executed a mutual release of claims without any admission of liability concerning the discrepancy.

Jensen explained that he intentionally, knowingly and deliberately decided that he did not disclose the amounts of vested pension assets to USNB's Special Assets Group for a variety of reasons. Primarily, Jensen did not list his vested pension assets because he decided that he was not going to offer them as payment to USNB and that USNB did not have a right to collect the debt against such assets. Jensen incorrectly believed that his failure to disclose pension assets on his financial statement would not have had any tendency to influence a financial institution in USNB's position, which he believed would look to a debtor's monthly income in discussing settlement of a debt. Jensen, however, did intend to persuade USNB's Special Assets Group to accept his settlement offer of \$2,500 in order to resolve his personal guarantee liability. Jensen attributed the decision to submit a financial statement to Special Assets Group to his reliance upon the legal advice he received from King, and attributed the decision about what information needed to be included in the financial statement to prior legal advice he had received from Edwards concerning Pacwest.

It was highly probable that the omission of the amount of vested pension assets, and resulting lowered net worth, was material because it tended to bolster statements made during the meeting of February 27, 1992, concerning Jensen's financial problems and his difficulty in obtaining funds to meet the \$10,000 demand for settlement. A lower net worth would have tended to make some creditors, including USNB in particular, more flexible in negotiations. Although Jensen knew he owned \$140,000 in vested pension benefits, by leaving the space blank, he chose to give the USNB's Special Assets Group the inaccurate impression that he did not own any such assets. Unlike his clarification by footnote concerning his lack of equity in his residence, he failed to include any similar footnote concerning the blank provided for listing vested pension assets. He failed to note that significant assets existed which would not be disclosed either because the assets were not subject to the claims of creditors, or because he

would not liquidate them in order to satisfy USNB's demand on the personal guarantee. Jensen's state of mind included an emotional response as well. He believed that he had been badly burned and was frustrated at the impact on his financial condition in his efforts to honor all the financial commitments arising from HUIGO's dissolution.

CONCLUSIONS OF LAW

It is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." DR 1-102(A)(3). It is a disciplinary violation to "conceal or knowingly fail to disclose that which the lawyer is required by law to reveal" or to "knowingly make a false statement of law or fact," whether in a lawyer's representation of the lawyer's own interest or in representation of a client. DR 7-102(A)(3) and (5). In the present case, the Bar contends that a lawyer's intentional and knowing submission of an inaccurate personal financial statement which deliberately and incorrectly omitted disclosure of substantial vested pension assets, made during negotiations with a financial institution over settlement of the lawyer's personal liability, constitutes a misrepresentation of a material matter prohibited under these disciplinary rules. We agree.

For the purposes of applying the disciplinary rules to the facts of this case, we can find no meaningful distinctions to be drawn amongst the three charged violations under DR 1-102(A)(3), DR 7-102(A)(3) and DR 7-102(A)(5). The accused was represented by Messrs. King and Edwards in the negotiations with creditors, but also represented himself by actively participating in the decision making process underlying the negotiations. The nature of the financial obligations were directly connected to the accused's status as a lawyer in a law firm obtaining credit in the course of its business activities. Therefore, the additional requirement of DR 7-102(A) that a lawyer be engaged in "representation" of his own interests is satisfied here.

DR 7-102(A)(3) and (5) do not use the terms "misrepresentation" or "dishonesty." The term "misrepresentation" is not defined in DR 1-102(A)(3). DR 7-102(A)(3) and (5) prohibit conduct which constitutes the "conceal[ment] or knowing failure to disclose that which the lawyer is required by law to reveal," and "knowing mak[ing] of a false statement of fact," both of which are conduct that would also constitute a "misrepresentation" under DR 1-102(A)(3).

The central issue in this case is whether the accused's intentional and knowing failure to disclose \$140,000 in vested pension assets, and his failure to accurately set forth his net worth at \$224,120 on his March 18, 1992, signed financial statement, constituted either "misrepresentation" or "dishonesty." The Bar did not argue that Jensen engaged in fraud or deceit. It proceeded to hearing on the theory that Jensen's conduct constituted either "dishonesty" or a "misrepresentation."

We begin our analysis with *In re Hiller*, 298 Or 526, 694 P2d 540 (1985). In *Hiller* the court wrote that "fraud, deceit, dishonesty and misrepresentation" overlap but are not identical concepts.

"DR 1-102(A)(4) [current DR 1-102(A)(3)] is even broader insofar as its prohibition of dishonesty is not limited to litigation or even to the representation of clients. The words 'fraud, deceit or misrepresentation,' however, in other contexts connote more detailed elements of knowledge, intent or purpose than the standard of 'means consistent with

truth' in ORS 9.460(4). Failure to disclose material information as well as expressed falsehood violates the rule. *In re Greene* 290 Or 291, 298, 620 P2d 1379, 1382 (1980), but there must be clear and convincing proof that the lawyer had the undisclosed fact in mind and knowingly failed to disclose it. *In re Huffman* 289 Or 515, 519, 614 P2d 586, 587 (1980)." 298 Or at 532.

"We do not interpret 'fraud, deceit or misrepresentation' to be three words for the same thing. A misrepresentation becomes fraud or deceit when it is intended to be acted upon without being discovered." 298 Or at 533.

The terms "fraud" and "deceit" as used under DR 1-102(A)(3) required tortious conduct in the sense that all nine of the common law elements of fraud or deceit must be present. *In re Hockett* 303 Or 150, 158, 734 P2d 877 (1987). Given USNB's prompt discovery of the discrepancy between the March 18, 1992 and March 19, 1992 financial statements, there was no proof of reliance or damage, and, thus, no demonstration of tortious conduct. "Dishonesty" is determined on a case by case basis but is generally conduct that is inconsistent with an attorney's obligation to be candid and fair or conduct that indicates "a disposition to lie, cheat or defraud; untrustworthiness; lack of integrity." *In re Hockett, supra*.

We note that DR 1-102(A)(3) uses the broad noun "dishonesty," rather than the more limited adjective "dishonest" that would apply to a single isolated instance of conduct. A single isolated instance of an omission to state a material fact is not alone sufficient to indicate "dishonesty" in the broader sense of a general disposition to lie or cheat or a character trait of untrustworthiness or lack of integrity. See *In re Gygi* 273 Or 443, 450-51, 541 P2d 1392 (1975) (held: an isolated instance of ordinary negligence is not alone sufficient to warrant disciplinary action for neglect of a legal matter). There was no clear and convincing evidence that Jensen's conduct, albeit untruthful and not dispositive of the issue of "misrepresentation," indicated that he had a *disposition* to lie or cheat others, or engaged in conduct indicative of a propensity or character trait for untrustworthiness or lack of integrity.

A "misrepresentation" exists under DR 1-102(A)(3) where a lawyer makes a false statement of a material fact or a nondisclosure of a material fact. *In re Leonard* 308 Or 560, 569, 784 P2d 95 (1989). A "misrepresentation" under DR 1-102(A)(3) may be present if there was no damage. *In re Fulop* 297 Or 354, 685 P2d 414 (1984). Accordingly there need not be any "reliance" upon the false representation or omission for a "misrepresentation" to exist. See, *Evens v Holtzmann*, 64 Or App 145, 152, 667 P2d 1028, *rev. denied* 296 Or 120 (1983); Restatement (2d) of Torts § 525, (Comment b). Black's Law Dictionary, p. 1152 (1968) defines "misrepresentation" without reference to either causation, damage or reliance, as follows: "Any manifestation by words or other conduct by one person to another that, under the circumstances, amount to an assertion not in accordance with the facts."

In *In re Hiller, supra*, the court held that there need not be any intent to defraud or deceive for a "misrepresentation" to exist under DR 1-102(A)(3). *In re Leonard, supra*. The element of intent is satisfied if the lawyer had "the undisclosed fact in mind and knowingly failed

to disclose it." 298 Or 532. The fact that a person did not intend injury to any party, or that a misrepresentation never in fact caused injury, has not precluded the finding of a disciplinary rule violation. *In re Boar*, 312 Or 452, 456-457, 822 P2d 709 (1991). A lawyer's failure to correct a false impression made by an unintentional misstatement constitutes a misrepresentation. Similarly, in *In re Morin* 319 Or 547, 554, ___ P2d ___ (1994) the court held that a lawyer's failure to correct a misapprehension of a material fact and failure to disclose a material fact may constitute a misrepresentation for purposes of DR 1-102(A)(3).

A lawyer's conduct in an effort to avoid the claims of creditors, as well as the failure to accurately set forth a lawyer's financial condition on a financial statement, have been found to constitute misrepresentation in violation of the disciplinary rules. For example, in *In re Griffith* 304 Or 575, 627-28, 748 P2d 86 (1987) the accused prepared inconsistent financial statements, one of which disclosed contingent liabilities and another which failed to disclose contingent liabilities. Although the format of the financial statement did not purport to show whether the maker had contingent liabilities, and the bank could have inquired further, the court agreed that the accused was responsible for the accuracy of financial statements prepared for him and submitted by him through others if he knew the information provided, while true, was not accurate.

Jensen argued that his failure to disclose his pension assets did not constitute a disciplinary violation in the absence of some form of "moral culpability." We reject this contention. We find no element of "moral culpability" required under DR 1-102(A)(3). The case relied upon by the accused, *In re Chase* 299 Or 391, 702 P2d 1082 (1985) does not supply an element of "moral culpability" in the definition of "misrepresentation." The issue in *Chase* was whether an accused's conviction for certain misdemeanors were crimes involving moral turpitude under ORS 9.527.

In the present case, Jensen admitted that he deliberately and intentionally chose to omit from his March 18, 1992 signed financial statement any reference to the amount of vested pension benefits that he owned. This admission provided clear and convincing proof that Jensen had an undisclosed fact in mind and knowingly failed to disclose it. *In re Hiller, supra*. The fact that the accused did not believe USNB had a right to subsequently execute on vested pension benefits, or that he was unwilling to voluntarily liquidate another portion of his pension benefits to meet the claims of creditors, did not excuse or justify a misrepresentation. The formulation of a reason to make a misrepresentation does not change the fact that a deliberate, intentional and knowing misrepresentation was made.

Jensen also argued that the misrepresentation was not "material" because USNB had adopted a bottom line position to settle for no less than \$10,000, and that the bank would rely primarily on his income producing capacity to pay the personal guarantee rather than a voluntary liquidation of assets beyond the reach of creditors, and because his primary defense to payment of his personal liability was due to the bank's unreasonable conduct in failing to collect accounts receivable.

We agree that a disciplinary violation cannot be found unless there is clear and convincing proof of materiality of the misrepresentation or omission. In *Milliken v. Green*, 283 Or 283, 285, 583 P.2d 548 (1978), the court in a common law fraud action defined "materiality"

as follows:

"A misrepresentation is material where it would be likely to affect the conduct of a reasonable man with reference to a transaction with another person."

The Restatement (2d) of Torts § 538 defines materiality as follows:

- (1) Reliance upon a fraudulent misrepresentation is not justifiable unless the matter misrepresented is material.
- (2) The matter is material if:
 - (a) a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question; or
 - (b) the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining his choice of action, although a reasonable man would not so regard it.

"Clear and convincing" evidence requires proof that the truth of the facts asserted are "highly probable." *In re Chambers* 292 Or 670, 672, 642 P2d 286 (1982). It was highly probable that Jensen's financial condition was important to his negotiations with USNB to resolve his obligation under the personal guarantee. Janz established that in February - March 1992, although the discrepancies in financial statements ultimately had no actual impact because of his prompt discovery of the discrepancies, he knew it would have been in USNB's interest to compromise at something less than the \$10,000 in order to get the matter settled. Janz convincingly established that, in making his decision to resolve the matter, it was important for him to know the entire financial picture of Jensen.

Jensen's own banking expert conceded that the discrepancy between the two financial statements would be a serious concern to a reasonably prudent banker despite his opinion that the discrepancy was actually irrelevant to resolution of Jensen's debt obligation. He conceded that different banking institutions would view the discrepancy differently. He agreed with the principle that all reasonable bankers expect a person who submits a signed financial statement to provide true, complete and correct information on the statement. He stated that a reasonably prudent banker would probably be less flexible in negotiations with a debtor who has a substantial amount of assets outside the reach of creditors, that can be liquidated even at a penalty, and would be more flexible with a debtor that does not have significant assets in times of financial trouble.

While the deteriorating financial condition of Jensen was not the primary grounds upon which he sought to dispute the debt, it was one of the many factors that was brought to USNB's attention during the course of negotiations. Jensen could well have provided an explanatory note to his financial statement indicating that pension information was being withheld. The existence of a footnote concerning his residence could only cause further confusion to USNB because it indicated that there was at least one asset that would appear on a credit inquiry that would be outside the reach of creditors. Rather than disclosing the

existence of all substantial assets that would be outside the reach of creditors, the accused deliberately disclosed one such asset and omitted others. While some banking institutions may not request disclosure of pension information, USNB's form contained a specific blank space for entry of the amount of all vested pension assets.

If Jensen's financial condition was truly immaterial to the negotiations, then there was simply no need for him to provide any information whatsoever concerning his financial condition, let alone to provide a sound reason for communication of false information. It was highly probable that his financial condition was likely to affect the conduct of a reasonable banking institution with reference to its negotiations, and would have been important to USNB in particular. USNB would have been justifiable in its reliance on the March 18, 1992 if it had not discovered the discrepancy before conclusion of its negotiations. As so often quoted from, *In re Hiller, supra* we find the following to be controlling in the present case:

"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, or hidden meanings, deliberate half-truths, or camouflaged escape hatches. That trustworthiness is the essential principle embodied in DR 1-102(A)(4)[current DR 1-102(A)(3)]." 298 Or at 534.

USNB should not have had to look for any camouflaged meaning in the Jensen's financial statement when he signed it on March 18, 1992. The bank could not have known that Jensen was being equivocal concerning his financial condition or that he intended to provide the bank solely with a list of those assets that were subject to the claims of creditors. The failure to disclose the existence of \$140,000 in vested pension assets, done knowingly, deliberately and intentionally by the accused, constituted a misrepresentation in violation of the disciplinary rules.

DISPOSITION

It is the decision of the trial panel that the accused be publicly reprimanded as a result of our application of the ABA standards to the above disciplinary violation. In *In re Boardman, supra*, the accused also was publicly reprimanded for similar conduct. ABA standards provide as follows:

5.11(B) Disbarment is general[ly] appropriate when a lawyer engaged in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

5.12 Suspension is generally appropriate when a lawyer knowingly engages in criminal conduct which does not contain the elements listed in standard 5.11 and that seriously adversely reflects on the lawyer's fitness to practice.

5.13 Reprimand is generally appropriate when a lawyer knowingly engaged in any other conduct that involves dishonesty, fraud, deceit, or misrepresentation and that

adversely reflects on the lawyer's fitness to practice law.

Among the aggravating or mitigating circumstances which may justify an increase or decrease in discipline, we considered the following:

Aggravating factors present were a selfish motive on the part of the accused and substantial experience in the practice of law, particularly Jensen's tax experience, an area of practice in which the importance of accurate financial disclosures should have been of some significance. Jensen disputed the wrongful nature of his conduct, but did acknowledge he should have done things differently.

Mitigating factors present were as follows: The complete absence of any prior disciplinary record, no pattern of misconduct, no multiple offenses, and no vulnerability of the victim. Also present was the existence of significant emotional frustrations arising from HUIGO's dissolution which certainly clouded his judgment on this one occasion. Although Jensen's settlement with USNB can hardly be called restitution, there was a rectification of the consequence of his action by ultimate payment of USNB's demand and a disclosure to Pacwest following discovery of the discrepancies. Jensen made a full and free disclosure to the disciplinary board, exhibited a cooperative attitude towards the proceeding, and showed that he otherwise enjoyed an impeccable reputation for truthfulness, integrity, skill, and veracity in the legal community.

Application of these factors, and the discipline imposed in *In re Boardman*, particularly in conjunction with the apparent and obvious impact of the disciplinary proceedings upon the accused, which was visibly apparent to the trial panel, convinced us that there is no need to impose a more severe sanction to "deter" future violations. A public reprimand is amply sufficient to punish the accused for this misrepresentation.

DATED this 6th day of October, 1994.

/s/ Richard Yugler
Richard S. Yugler, OSB #80416
Trial Panel Chairperson

/s/ Amy Alpern
Amy R. Alpern
Trial Panel Member

/s/ Ralph Bunch
Ralph Bunch
Trial Panel Public Member

322 Or 316 (1995)

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)
)
 Complaint as to the Conduct of)
)
 DONALD DICKERSON,)
)
 Accused.)
 _____)

(OSB 94-96, 94-77, 94-78; SC S42276)

In Banc

On review of an order by default of the Trial Panel of the Disciplinary Board.

Submitted on the record July 10, 1995.

Ann Bartsch, Acting Executive Director of the Oregon State Bar, filed the formal complaint for the Oregon State Bar.

No appearance contra.

PER CURIAM

Violation of DR 1-102(A)(3), ORS 9.527(4), DR 6-101(B), DR 9-101(C)(3) and DR 1-103(C).

The accused is disbarred.

Summary:

On November 24, 1995, the Oregon Supreme Court disbarred former Eugene attorney Donald Dickerson after finding him guilty of violating DR 1-102(A)(3) and ORS 9.527(4) (dishonesty or misrepresentation), DR 6-101(B) (neglect of a legal matter), DR 9-101(C)(3) and (4) (failure to maintain client funds in a trust account, failure to maintain complete records, failure to render appropriate accounts, and failure to promptly return client funds), and DR 1-103(C) (duty to cooperate). The ethics violations arose out of the complaints of

three of Dickerson's former clients.

In one case, Dickerson was retained to handle a visitation matter for the sum of \$1,250 which the clients paid. Ten days before trial Dickerson had yet to discuss the case, and the clients terminated him and demanded return of their file and retainer. Although he ultimately turned over the file to the client's new attorney, he did not contact the clients regarding the refund as he promised he would, and he never refunded the retainer.

In the second case, in January of 1993, the clients decided to adopt their granddaughter and retained Dickerson to do so. Despite assurances that things were going well, nothing had been done to effectuate the adoption. In May of 1993, Dickerson advised the clients that he needed \$220 to file an affidavit. The clients paid the \$220 only to learn in August of 1993 that Dickerson was moving to California and that the adoption had not been finalized. Dickerson failed to return the file and made no accounting for the money received from the clients.

In May of 1993, Dickerson was retained in the third case to represent a client in a personal injury action. The client signed the necessary releases so that Dickerson could obtain medical information. Approximately one month after being retained, Dickerson called the client indicating that things were going well. Dickerson subsequently failed to return numerous calls from his client. Despite assurances that he would get PIP reimbursement for the client's doctors, he failed to do so and the client was required to discontinue treatment. In late August of 1993, the client again called Dickerson only to learn that he was no longer working on the matter and that the file could not be located.

In all three cases, Dickerson failed to cooperate with Disciplinary Counsel's Office regarding these allegations. Despite being personally served with the formal complaint, Dickerson made no appearance at trial or before the Supreme Court.

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
	)	No. 95-83
Complaint as to the Conduct of)	
)	
RICHARD D. COHEN,)	
)	
Accused.)	
_____)	

Bar Counsel: None

Counsel for the Accused: None

Disciplinary Board: None

Disposition: Violation of DR 6-101(B).
Sipulation for Discipline. 180 day suspension with 120 days stayed pending 2
years of probation.

Effective Date of Order: November 28, 1995.

**Note: Due to space restrictions, exhibits are not included but may be obtained by
calling the Oregon State Bar**

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:	)	SC S39908
)	
Complaint as to the Conduct of)	
	)	AMENDED
RICHARD D. COHEN,	)	ORDER ACCEPTING STIPULATION
	)	FOR DISCIPLINE
Accused.)	
)	

The Oregon State Bar and Richard D. Cohen have entered into a Stipulation for Discipline. The Stipulation for Discipline is accepted. Richard D. Cohen is suspended from the practice of law for a period of 180 days, 120 days of which shall be stayed pending the accused's completion of two years of probation commencing the effective date of this stipulation. The Stipulation for Discipline is effective 30 days from the date of this Order.

DATED this 6th day of December, 1995, *nunc pro tunc* November 28, 1995.

/s/ Wallace P. Carson
WALLACE P. CARSON, JR.
Chief Justice

c: Jane E. Angus
Richard D. Cohen

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of	)	Case No. 95-83
)	
RICHARD D. COHEN,	)	STIPULATION FOR
	)	DISCIPLINE
Accused.)	
_____)	

RICHARD D. COHEN (hereinafter, "the Accused") and the Oregon State Bar (hereinafter, "the Bar"), pursuant to Oregon State Bar Rule of Procedure 3.6(c), stipulate:

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 the practice of law in this state and a member of the Oregon State Bar, maintaining his office and place of business in the County of Clackamas, State of 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 20, 1995 meeting, the State Professional Responsibility Board authorized formal disciplinary proceedings against the Accused, alleging violation of DR 6-101(B).

5.

The Oregon State Bar filed its Formal Complaint, which was served, together with a Notice to Answer upon the Accused. The Bar subsequently filed an Amended Formal Complaint which was served upon the Accused.

6.

In or about August 1992, Lisa Joy Richardson (hereinafter "Richardson") retained the Accused to pursue claims against the State of Oregon on behalf of her minor daughter who was sexually abused by a patient who had walked away from Dammasch State Hospital. On or about August 12, 1994, the Accused filed a complaint against the State of Oregon in the Circuit Court of the State of Oregon for the County of Clackamas, Case No. CCV 9408328 ("Court Action"). The State of Oregon was served with summons and a copy of the complaint on August 12, 1994. Thereafter, and on or about November 29, 1994, the court

served a Notice of Judgment of Dismissal Pursuant to UTCR 7 on the Accused, a copy of which is attached hereto as Exhibit 1 and by this reference made a part hereof (hereinafter "Notice "). Pursuant to the Notice, the case was to be dismissed for want of prosecution the 28th day after the date of the Notice, and could be reinstated only upon an order of reinstatement signed by the presiding judge. On December 23, 1994 the Accused filed a Motion and Order for Judgment of Dismissal Pursuant to UTCR To Be Held In Abeyance, by which the Accused sought to extend the effective date of the Notice for 30 days or until January 26, 1995. The court granted the Accused's motion, reinstated the case, and ordered that it would not be dismissed if either an answer or default motion was presented to the court prior to January 26, 1995. Thereafter, the Accused took no action to pursue the Court Action and his client's claims. Neither an answer nor motion for order of default was filed with the court.

Between about August 1992 and November 1994, Richardson called the Accused once or twice a month. The Accused would occasionally return her calls. Beginning about November 1994 and until about March 1995, Richardson estimates that she called the Accused about 25 times to discuss her child's case. The Accused failed or refused to return her calls and did not communicate with her in any other manner, eventually resulting in the Client obtaining new counsel in March 1995 to pursue the Court Action.

7.

The Accused neglected a legal matter entrusted to him in the following particulars:

1. Failing to communicate with Richardson regarding the Court Action;
2. Failing to respond to Richardson's attempts to communicate with him;
3. Failing to actively pursue the Court Action;
4. Failing to advise Richardson that the court had served a Notice and Judgment of Dismissal on the Accused and that the Court Action would be dismissed;
5. Failing to advise Richardson that he had filed a motion for reinstatement and for extension of time to delay the effective date of the dismissal of the Court Action;
6. Failing to advise Richardson that an answer or motion for order of default was not filed by January 26, 1995; and
7. Failing to serve a notice of intent to take default or file a motion for order of default and judgment against the State of Oregon.

8.

The Accused admits the allegations of the Amended Formal Complaint and that his conduct violated DR 6-101(B).

9.

The Accused and the Bar agree that in fashioning an appropriate sanction in this case, the ABA Standards for Imposing Lawyer Sanctions and Oregon case law should be considered. The Standards require that the Accused's conduct be analyzed considering the following four factors: (1) the ethical duty violated; (2) the attorney's mental state; (3) the actual or potential injury; and (4) the existence of aggravating and mitigating circumstances.

A. Duty. In violating DR 6-101(B), the Accused violated duties to his client. Standards § 4.4.

B. State of Mind. The Accused acted with knowledge or the conscious awareness of the nature of the attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result. Standards p. 7. The Accused knew action on his part was required if he was to avoid prejudice to his client. Nonetheless, the Accused failed to take action on his client's case, failed to notify his client that the case may be dismissed, failed to file necessary pleadings, and failed to communicate with his client despite his client's attempts to communicate with him.

C. Injury. The Accused caused actual and potential injury to his client by his conduct. The Accused's client retained the Accused to provide representation and advice, and to pursue claims against the State of Oregon. The Accused's client believed these actions and services were being performed when they were not. The Accused's failure to perform the services in a timely manner and failure to communicate caused the client frustration and stress, and delayed the Court Action and resolution of her child's claims.

D. Aggravating Factors. Aggravating factors to be considered include (Standards § 9.22):

1. The Accused has substantial experience in the practice of law, having been admitted to practice in 1979. Standards § 9.22 (i).
2. The Accused's client and her child were vulnerable in that they relied on the Accused to protect their interests. Standards § 9.22 (h).:
3. The Accused has a prior disciplinary record consisting of an admonition imposed in May, 1989 for violation of DR 6-101(B), an admonition in December 1990 for violation of DR 6-101(B) and a public reprimand in August 1993 for violation of DR 5-105(E). Standards § 9.22 (a).

E. Mitigating Factors. Mitigating factors to be considered include (Standards § 9.32):

1. The Accused did not act with a dishonest or selfish motive. Standards § 9.32
2. The Accused cooperated with Disciplinary Counsel's Office in responding to the complaint and in resolving this disciplinary proceeding. Standards § 9.32 (e).
3. The Accused acknowledges the wrongfulness of his conduct and is remorseful. Standards, § 9.32 (1).
4. During the past several years the Accused has experienced several events which (have contributed to his emotional state. The Accused voluntarily sought and has received counselling from Barry T. Jones, Ph.D. Dr. Jones has diagnosed the Accused as suffering from an adjustment disorder with depressed mood, a chronic depressive condition referred to as dysthymic disorder. Persons suffering from such psychological conditions experience difficulty sleeping, difficulty concentrating or difficulty making decisions, feelings of hopelessness and hypervigilance. The condition causes clinically significant distress or impairment in social, occupations, or other important areas of functioning. In Dr. Jones' professional opinion, the Accused was unable to adequately perform the duties of an attorney during the latter part of 1994, and in 1995 as a result of his psychological impairment. Dr. Jones is of the further opinion that the Accused was not able to monitor his caseload and respond to

the pressure of his legal practice in an adequate fashion. The Accused acknowledges that he has been unable to properly attend to client matters. The Accused plans to continue counselling as may be recommended by Dr. Jones. Standards § 9.32 (h), (j).

10.

The Standards provide that suspension is appropriate where a lawyer knowingly fails to perform services for a client and causes injury, or potential injury or engages in a pattern of neglect which causes injury or potential injury. Standards § 4.42(a) and (b) Oregon case law is in accord. In re Hilke S Ct 40610 (1993), 180 days suspension, 150 days stayed subject to two (2) years probation with conditions for violation of DR 6-101(B), among other rules; In re Holm 285 Or 189, 590 P2d 233 (1979), 60-day suspension for violation of DR 6-101(A)(3) [current DR 6-101(B)], when lawyer neglected to record a client's deed, forcing the client to seek other counsel to perfect his title; In re Berg 276 Or 383, 554 P2d 509 (1976), lawyer suspended for one (1) year and placed on three years probation where guilty of neglect in handling the legal affairs entrusted to him and falsely representing the status of the case to cover up his neglect; and In re Rudie 294 Or 740, 662 P2d 321 (1983), seven (7) month suspension where a lawyer violated former DR 6-101(A)(2) [current DR 6-101(A)], former DR 6-101(A)(3), [current DR 6-101(B)], and DR 7-101(A)(2), after previous discipline for a similar rule violation.

11.

The Accused agrees to accept a suspension of 180 days, 120 days of which shall be stayed subject to a two-year period of probation commencing the effective date of this Stipulation. During the period of probation, the Accused shall comply with the following conditions:

A. Comply with all provisions of Oregon's Code of Professional Responsibility and ORS Chapter 9.

B. John Chally, Esq., or such other person acceptable to the Bar, shall supervise the Accused's probation. The Accused acknowledges that the person supervising his probation is required to report to the Disciplinary Counsel's Office.

C. The Accused shall continue mental health treatment with Dr. Barry Jones, or such other mental health professional acceptable to the Bar, the frequency and scope of treatment to be determined by the mental health professional. The Accused shall, however, meet with the mental health professional at least once a month throughout the period of his probation for the purpose of evaluating the Accused's psychological condition and need for continuing treatment, or until such time as the mental health professional determines such contact is not necessary for the Accused to adequately maintain professional and social functioning. The Accused may not discontinue mental health treatment or counseling unless the Bar has first been notified in writing by the mental health professional who shall provide the current evaluation and reasons why such counseling or treatment is no longer necessary. If, in the reasonable opinion of the mental health professional, the Accused requires ongoing or additional treatment, the Accused shall comply with all treatment recommendations. The mental health professional shall report to the attorney supervising the Accused's probation and/or to Disciplinary Counsel's Office, on a quarterly basis, or more frequently as may be

reasonably requested by Disciplinary Counsel's Office, concerning the Accused's conduct, diagnosis, treatment, and compliance with the conditions of his probation. In the event the mental health professional reports or determines that the Accused does not require ongoing treatment, the Bar may require the Accused to obtain an additional evaluation from another mental health professional acceptable to the Bar. The Accused shall bear the financial responsibility for the cost of all professional services required under the terms of this Stipulation for Discipline.

D. The Accused shall not be eligible for reinstatement until such time as Dr. Jones, or such other mental health professional acceptable to the Bar, provides an opinion that the Accused is able to adequately perform his duties of an attorney.

E. Within fourteen (14) days after the court approves this Stipulation, the Accused shall meet with the person supervising his probation to review the Accused's existing case load and shall take all appropriate measures to conclude or to refer all cases to other counsel prior to the effective date of his suspension. Thereafter, this review and referral process shall recur every 30 days during the term of the Accused's probation. The Accused shall immediately remedy, or refer out to other counsel all cases in need of immediate attention.

E. Within 14 days of each review, the Accused shall prepare and sign an affidavit, approved by the person supervising his probation, which shall be delivered to the Disciplinary Counsel's Office, certifying the following:

1. That the Accused has conducted a complete review of existing cases, including the date of any such review. If not, the Accused shall explain the reasons for his failure to do so.
2. That the Accused has brought all cases to a current status or referred them out to other counsel. If not, the Accused shall explain the reasons for his failure to do so.
3. That the Accused continues mental health counseling, including the identity of any mental health professional, the frequency and purpose of contacts since the last report and any recommendations made.
4. That the Accused has complied with all terms of the probation since the last report. In the event the Accused has not complied, he shall describe in detail the nature of such non-compliance.
5. At some future time and subject to the approval of the Disciplinary Counsel's Office, the frequency of reports to the Disciplinary Counsel's Office may be adjusted to a quarterly report.

F. The Accused shall undertake such remedial action in the Accused's pending matters as may be required or as may be recommended by the person supervising his probation. The Accused agrees to cooperate and shall comply with all reasonable requests of the person supervising the Accused's probation and Disciplinary Counsel's Office, provided that such requests are designed to achieve the purpose of the probation and the protection of the Accused's clients.

G. The Accused hereby waives any privileges and expressly authorizes the disclosure of all information by Dr. Jones and any other medical and/or mental health

provider as may be necessary, in the reasonable discretion of the Disciplinary Counsel's Office or any person serving as a probation supervisor for the Accused, during the period of probation, including without limitation, information concerning diagnosis and treatment.

H. All notices and approvals required under the terms of this Stipulation for Discipline shall be in writing, signed by the party required to give the notice or whose approval is required.

I. The Accused acknowledges that this Stipulation and sanction are limited to the matters described herein.

J. In the event the Accused fails to comply with the conditions of his probation, the Bar may initiate proceedings to revoke the Accused's probation pursuant to Rule of Procedure 6.2(d) and impose the stayed 120 day period of suspension.

12.

The sanction set forth in this Stipulation for Discipline is subject to the approval of the State Professional Responsibility Board, and is subject to the approval of the Oregon Supreme Court pursuant to the terms of BR 3.6. This Stipulation shall be effective commencing 30 days after its approval by the Oregon Supreme Court.

EXECUTED this 30th day of October, 1995.

/s/ Richard Cohen
RICHARD D. COHEN

/s/ Jane Angus
JANE E. ANGUS
Assistant Disciplinary Counsel
Oregon State Bar

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of	)	Case No. 93-190
)	
JOHN R. HANSON,)	
)	
Accused.)	
_____)	

Bar Counsel: None

Counsel for the Accused: James A. Wallan, Esq.

Disciplinary Board: Guy B. Greco, Chair; Rebecca Orf, and Linda Beard, public member.

Disposition: Violation of DR 5-101(A) and DR 7-104(A)(1).
Stipulation for Discipline. Public reprimand.

Effective Date of Order: November 28, 1995

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of	)	No. 93-190
)	
JOHN R. HANSON,	)	ORDER APPROVING STIPULATION
	)	FOR DISCIPLINE
Accused.)	
_____)	

THIS MATTER having come 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 on October 27, 1995 is hereby approved upon the terms set forth therein.

DATED this 28th day of November, 1995.

/s/ Fred Avera
Fred E. Avera, State
Disciplinary Board Chairperson

/s/ Arminda Brown
Arminda J. Brown, Regional Chairperson
Region 3, Disciplinary

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of	)	Case No. 93-190
)	
JOHN R. HANSON,	)	STIPULATION FOR
	)	DISCIPLINE
Accused.)	
_____)	

John R. Hanson, 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 R. Hanson, 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 Oregon State Bar continuously since that time, having his office and place of business in Jackson County, Oregon.

3.

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

4.

In September 1994, the State Professional Responsibility Board of the Oregon State Bar authorized formal disciplinary proceedings against the Accused alleging that he violated DR 5-101(A) and DR 5-105(C) in connection with the Accused's representation of himself and one of the creditors in a bankruptcy proceeding and DR 7-104(A)(1) when he contacted represented parties after a dispute arose between himself and those creditors. The Accused and the Bar agree to the following facts and disciplinary rule violations.

5.

Lawyer Self-Interest

Since the early 1980s, the Accused has participated with law partners and relatives in putting together joint ventures in various investments.

In 1986, the Accused's aunt and uncle, Richard and Doris Nyland, (hereinafter "the Nylands") participated in a joint venture with the Accused's then-law partner, his then-law

partner's parents and the Accused. That investment was successful, yielding the Nylands a 40% return.

In 1988, the Accused received a call from a friend, Art Woolard (hereinafter "Woolard") who needed monies to finance the purchase of a piece of real property in California. The Accused approached the Nylands and asked whether they wanted to participate in a joint venture similar to the one in 1986. The Nylands agreed and on March 16, 1988 loaned \$50,000. Woolard executed a promissory note to the Nylands for \$50,000. The note called for monthly payments of \$834 and a balloon payment of the balance in April 1989. A trust deed prepared concurrently with the note and naming the Nylands as the beneficiaries was never recorded.

A second trust deed was recorded in November 1989. This deed named the beneficiaries as the Accused, as trustee for the Nylands and the Accused himself. This deed secured the Nylands \$50,000 note to Woolard and a \$30,000 note evidencing an earlier loan which the Accused had facilitated between Woolard and a second aunt and uncle (the Zenovich's). The Nylands were unaware of the preparation and filing of the second trust deed.

The Nylands received monthly payments in a timely fashion through December 1989. As of that date, Woolard had repaid \$19,536 on the note.

Woolard filed for bankruptcy in March of 1990. On April 2, 1990, Mr. Nyland sent the Accused the notice of bankruptcy and the claim form and requested the Accused's assistance.

On behalf of himself and the Nylands, the Accused, on June 18, 1990, filed in the United States Bankruptcy Court for the District of Oregon, a Motion for Relief from Automatic Stay. In the motion, the Accused sought court permission to either foreclose on Woolard's interest in the California property or to allow Woolard to execute a deed in lieu of foreclosure to the Accused and the Nylands, the secured creditors. The motion attached the two promissory notes and the second trust deed and asserted that Woolard owed \$86,500 on both notes and that the fair market value of the property did not exceed \$85,000.

The court granted the Accused's motion. Thereafter, the Accused, on behalf of himself and the Nylands, obtained from Woolard's attorney a deed in lieu of foreclosure naming the Nylands and the Accused as grantees.

At the time the Accused filed the motion for stay on behalf of himself and the Nylands, he and the Nylands were competing creditors. The Accused knew that the Nylands expected him to exercise his professional judgment for their protection and did not disclose to the Nylands the conflict created by their competing interests in the same property or advise them to seek independent counsel or otherwise obtain their informed consent to the conflict. The Accused admits that he violated DR 5-101(A).

6.

Contact with Represented Party.

On or about March 20, 1992, the Nylands retained attorney John Hutchison (hereinafter "Hutchison") regarding the status of their interest in the California property referenced in paragraph 5. On or about March 20, 1992, Hutchison wrote the Accused and

advised him that he was representing the Nylands relative to their interest in the California property.

Subsequent to the receipt of Hutchison's letter, the Nylands initiated communications with the Accused and he responded directly to them on three separate occasions. The Accused's communications were on the subject matter of Hutchison's representation and at no time did Hutchison consent to them.

The Accused admits that in so doing, he violated DR 7-104(A)(1).

7.

Dismissed Charge

For purposes of this stipulation, the Bar agrees to dismiss the DR 5-105(C) charge which was authorized by the State Professional Responsibility Board.

8.

Sanction

The Accused and the Bar agree that in fashioning the appropriate sanction the Disciplinary Board should consider the ABA Standards and Oregon case law. Those standards require analyzing the Accused's conduct in light of four factors: ethical duty violated, attorney's mental state, actual or potential injury and the existence of aggravating and mitigating circumstances.

Ethical Duty Violated.

- a. The Accused violated his duty of loyalty to current clients, a duty which includes an obligation to avoid a conflict of interest. ABA Standards 4.3.
- b. The Accused violated his duty to the legal system when he communicated with individuals who were represented by counsel. ABA Standards at 6.3.

Mental State

- a. The Accused was negligent in not determining whether a lawyer's self interest conflict existed between himself and the Nylands. ABA Standards at 7.
- b. The Accused was also negligent in not determining that even though the Nylands were writing directly to him, it was improper for him to respond directly, rather than through their attorney. ABA Standards at 7.

Injury.

- a. The Nylands suffered no actual injury with respect to the Accused's representation of their interests in the bankruptcy proceeding. However, they may have elected to pursue additional legal remedies had the Accused's interest in the trust deed been disclosed at the time the representation was undertaken.
- b. The Nylands suffered no actual injury as a result of the Accused's direct communication.

Aggravating/Mitigating Factors

- a. Aggravating factor:
 1. The Accused has substantial experience in the practice of law having been admitted to the Bar in 1977. ABA Standards 9.22(i).
- b. Mitigating factor:

1. The Accused has no prior disciplinary record. ABA Standards 9.32(a).
2. The Accused did not charge the Nylands a legal fee for his services.

The Standards provide that a public reprimand is generally appropriate when a lawyer is negligent in determining whether the representation of a client may be materially affected by the lawyer's own interest and causes injury or potential injury to a client. Standards 4.33 at 31. The Standards also provide that a reprimand is generally appropriate when a lawyer is negligent in determining whether it is proper to engage in communication with an individual in the legal system and causes potential injury to a party. Standards 6.33 at 43.

Oregon case law is in accord. See, In re Carey, 303 Or 315, 767 P2d 438 (1989); In re Harrington, 301 Or 18, 718 P2d 725 (1986); In re McCaffrey, 275 Or 23, 549 P2d 666 (1976); In re Schwabe, 242 Or 169, 408 P2d 922 (1965).

9.

Consistent with the Standards and Oregon case law, the Bar and the Accused agrees that the Accused receive a public reprimand.

10.

This Stipulation for Discipline is subject to review by Disciplinary Counsel of the Oregon State Bar. The State Professional Responsibility Board (SPRB) approved the sanction contained herein on September 16, 1995. Pursuant to BR 3.6 the parties agree the stipulation is to be submitted to the Disciplinary Board for consideration.

EXECUTED this 27th day of October, 1995.

/s/ John Hanson _____
John R. Hanson

/s/ Lia Saroyan _____
Lia Saroyan
Assistant Disciplinary Counsel
Oregon State Bar

322 Or 194 (1995)

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)
)
 Complaint as to the Conduct of)
)
 DAVID JOHN BARBER,)
)
 Accused.)
 _____)

(OSB 92-104; SC S41694)

In Banc

On review from a decision of the Trial Panel of the Disciplinary Board.

Argued and submitted May 5, 1995.

Mary Cooper, Assistant Disciplinary Counsel, Oregon State Bar, Lake Oswego, argued the cause and filed a brief on behalf of the Oregon State Bar.

Susan D. Isaacs, Beaverton, argued the cause and filed the briefs on behalf of the accused.

Peter R. Jarvis and Bradley F. Tellam, of Stoel Rives Boley Jones & Grey, Portland, filed an amicus curiae brief.

PER CURIAM

Violation for DR 1-102(A)(3), DR 7-102(A)(4), DR 7-102(A)(5), DR 7-102(A)(6), ORS 9.527(4), DR 2-106(A), DR 5-105(E) and former DR 5-105(A) and (B).

The accused is disbarred.

Summary:

On December 11, 1995, the Oregon Supreme Court entered a judgment disbaring Sandy attorney David John Barber for violation of DR 1-102(A)(3), DR 7-102(A)(4), DR 7-102(A)(5), DR 7-102(A)(6), ORS 9.527(4), DR 2-106(A), DR 5-105(E) and former DR 5-105(A) and (B) of the Code of Professional Responsibility.

All of the charges against Barber arose out of his representation of two clients injured in a motor vehicle accident. The clients signed a contingency fee agreement retaining Barber and the lawyer with whom he then shared office space. A likely conflict of interest existed between the clients. After several months of the representation, it became clear that settlement funds available were inadequate to cover both clients' injuries. At this point, an actual conflict of interest developed since Barber was required to advocate for each client that she, rather than the other client, was entitled to a larger share of the recovery. Nevertheless, Barber continued to represent both clients until ultimately terminated by them. Such conduct violated DR 5-105(E) and former DR 5-105(A) and (B).

Before he was fired by his clients, Barber and the lawyer with whom he shared office space had a falling out. Barber moved to new office space. The other lawyer contended that he was entitled to a share of the recovery in the PI case; Barber contended that they were his clients alone. The clients thereafter grew dissatisfied with Barber and fired him. The insurance company thereafter disbursed settlement proceeds directly to them. Barber sued both clients on the contingency fee agreement. He attached to his complaint copies of that agreement which he had altered to delete the name of the other lawyer. The Supreme Court found that such conduct violated DR 1-102(A)(3), DR 7-102(A)(4) to (6), and ORS 9.527(4).

During the course of the fee litigation, the attorney for one of Barber's former clients argued that the contingency fee agreement was void for failure to comply with new statutory requirements. Barber thereafter amended his complaint to claim recovery in quantum meruit. When asked by the clients' new attorney for documentation supporting the quantum meruit claim, Barber submitted timesheets which purported to show that his fee on an hourly basis would be roughly equal to that which he would have recovered under a valid contingency fee agreement. The former clients' new attorney, however, also subpoenaed the lawyer with whom Barber had previously been affiliated and obtained copies of time records kept by Barber when he shared space with that lawyer. A comparison of the time records produced by the other lawyer and the time records produced by Barber showed them to be identical, except that Barber's records inflated the number of hours spent by a factor of approximately three. The court concluded that Barber had altered his time records and record of expenses to support his quantum meruit claim against his former clients. Such conduct violated DR 1-102(A)(3), DR 2-106(A), DR 7-102(A)(4) to (6).

In setting a sanction, the court noted that Barber acted intentionally and his misconduct caused a potential for serious injury to the legal system and the legal profession. The court noted several aggravated factors, including a dishonest and selfish motive, misconduct toward particularly vulnerable clients, untruthfulness in his testimony before the trial panel, a pattern of misconduct and multiple ethical violations, and a refusal to acknowledge the wrongful nature of his conduct. The only mitigating factor found applicable was the absence of a prior disciplinary record and inexperience in the practice of law.

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)
) No. 94-10
Complaint as to the Conduct of:)
)
JOB LAZAR,)
)
)
Accused.)
_____)

Bar Counsel: None

Counsel for the Accused: None

Disciplinary Board: None

Disposition: Violation of DR 1-102(A)(3).
Stipulation for Discipline. 120 day suspension.

Effective Date of Order: December 12, 1995.

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:	)	SC S42848
)	
Complaint as to the Conduct of:)	
)	
JOB LAZAR,	)	ORDER ACCEPTING STIPULATION
	)	FOR DISCIPLINE
Accused.)	
)	

The Oregon State Bar and Job Lazar have entered into a Stipulation for Discipline. The Stipulation for Discipline is accepted. Job Lazar is suspended from the practice of law for a period of 120 days. The Stipulation for Discipline is effective the date of this order.

DATED this 12 day of December, 1995.

/s/ Wallace Carson
WALLACE P. CARSON, JR.
Chief Justice

c: Lia Saroyan
Christopher R. Hardman
Gerald Itkin

IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)	
)	
Complaint as to the Conduct of	)	Case No. 94-10
)	
JOB LAZAR,	)	STIPULATION FOR
	)	DISCIPLINE
Accused.)	
_____)	

Job Lazar, 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, Job Lazar, was admitted by the Oregon Supreme Court to the practice of law in Oregon on September 23, 1988, and has been a member of the Oregon State 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.

4.

On September 24, 1994, 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)(3) as a result of his inconsistent testimony in two legal proceedings. The Accused and the Bar agree to the following facts and disciplinary rule violations.

Background

5.

On or about January 1988, the Accused and Mark Nozaki formed a partnership entitled Northwest Development Partnership (hereinafter, "NWDP"), the purpose of which was to invest in and develop real property.

On or about August 19, 1991, NWDP and Clifford Ruttan, an individual who operated Ruttan Construction Incorporated (hereinafter, "Ruttan"), entered into a construction contract. Pursuant to the terms of the contract, Ruttan agreed to do site preparation for a real estate development known as Beacon Hill Estates (hereinafter, "the project").

On or about August 5, 1992, Ruttan filed a lawsuit against the Accused, Nozaki and

NWDP alleging that the defendants breached their contract with Ruttan by failing to pay him \$60,797.20 for services rendered.

Within days of the lawsuit's filing, Ruttan filed a Motion for Provisional Process. On August 13, 1992, a hearing on Ruttan's motion was held. At issue in the provisional process hearing was the Accused's ability to pay a judgment should Ruttan prevail. The Accused testified and submitted an affidavit in support of his testimony. Testimony.

6.

At the provisional process hearing, the Accused testified about his personal net worth, the projected revenues of Phase II of the project, the encumbrances on Phase II, and NWDP's unsecured debt. As to his personal assets, the Accused testified that he had \$200,000 equity in his residence and owned silver, artwork and coins. As to assets attributable to his business, he testified that after selling all the lots in Phase II his interest in NWDP would be between \$200,000 and \$250,000. He further testified that Phase II was subject to only three encumbrances and NWDP had no delinquent unsecured debt.

7.

On or about April 29, 1993, the Accused filed a Chapter 7 bankruptcy petition. On June 4, 1993, a Section 341 first meeting of creditors occurred. During that meeting, the Accused testified that the net worth of his residence was \$50,000, that he owned no art work, coins or silver, that he had no equity in Phase II of the project, that Phase II of the project had numerous encumbrances and that NWDP had many delinquent unsecured debts.

8.

While the Accused did suffer some financial setback between August 1992 and June 1993, he admits that in certain respects his testimony on the two above-mentioned occasions cannot be reconciled. Regarding the provisional process hearing, the Accused admits that at the time he gave this testimony he did not anticipate being called as a witness and while he should have, he did not properly reflect on the need to be totally accurate regarding the values attributed to his assets and the scope of his indebtedness. The Accused further admits that the equity which he attributed to his home was not based on a current appraisal but on his generous estimate of fair market value. Efforts to sell his residence subsequent to August 1992 at or near a price equal to the Accused's value estimation proved unsuccessful. Similarly, any silver, artwork and coins to which the Accused referred were not his sole property but were joint marital assets and he admits that their value was less than represented at the provisional process hearing.

9.

As to his testimony about NWDP's liabilities, the Accused admits that he did not disclose several secured and unsecured partnership debts and also admits that he was overly optimistic in his equity projections. This misplaced optimism was borne out within months of the provisional process testimony when one of NWDP's contractors refused to record certain required permits with the city, precluding NWDP's ability to sell the individual lots. As a result, the Accused was unable to meet NWDP's monthly obligation to its bank, leading to NWDP's collapse and the Accused's filing of a Chapter 7 bankruptcy petition.

10.

Prior to the filing of his bankruptcy petition, the Accused became acutely aware of the

scope of his indebtedness and the inaccuracies of his prior testimony. In hindsight, the Accused admits that his testimony in the provisional process hearing was an inaccurate and incomplete reflection of his net worth. The Accused further admits that such inaccurate and incomplete testimony constituted conduct involving dishonesty fraud, deceit or misrepresentation in violation of DR 1-102(A)(3).

Sanction

11.

The Accused and the Bar agree that in fashioning the appropriate sanction, the Supreme Court should consider the ABA Standards and Oregon case law. Those standards require analyzing the Accused's conduct in light of four factors: ethical duty violated; the attorney's mental state; actual or potential injury; and the existence of aggravating and mitigating circumstances.

- a. Ethical duty
 1. The Accused violated his duty to the legal profession. Standards at 12.
- b. Mental state
 1. The Accused acted with knowledge. Standards at 7.
- c. Potential or Actual Injury
 1. Ruttan was denied provisional process at the August 1992 hearing. During the course of Lazar's bankruptcy, Ruttan and Lazar settled the disputed claim.
- d. Aggravating/mitigating factors
 1. Aggravating factor:
 - a. The Accused had a selfish motive. Standards 9.22(b).
 2. Mitigating factors:
 - a. The Accused has no prior discipline. Standards 9.32(a).
 - b. The Accused was cooperative throughout the investigative process and toward the proceedings. Standards 9.32(e).
 - c. The Accused is remorseful. Standards 9.32(1).
 - d. Between 1989 and 1992, while a member of the Oregon State Bar, the Accused's primary business was as a partner in NWDP and the misconduct occurred in his capacity as a NWDP partner, not in connection with the practice of law. The Accused did not anticipate being called to testify at the provisional process hearing, did not sufficiently reflect on his testimony or its accuracy and did not go into that hearing with the intent to mislead the court.

The Standards provide that suspension is appropriate when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld, and takes no remedial action, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding. Standards at 40.

Oregon case law supports the imposition of a suspension. In re Hiller and Janssen, 298 Or 526, 695 P2d 540 (1985); In re Greene, 290 Or 291, 620 P2d 1379 (1980). While a substantial suspension may be called for under some circumstances, In re Lenske, 269 Or 146,

523 P2d 1262 (1974), the parties believe the facts and mitigating circumstances in this matter justify a lesser term of suspension.

12.

Consistent with the Standards and Oregon case law, the Bar and the Accused agree that for violating the above-referenced disciplinary rule, the Accused will be suspended for a period of 120 days commencing immediately upon the Supreme Court's approval of this Stipulation for Discipline.

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 Supreme Court for consideration pursuant to the terms of BR 3.6.

EXECUTED this 16th day of November, 1995.

/s/ Job Lazar

Job Lazar

EXECUTED this 20th day of November, 1995.

/s/ Lia Saroyan

Lia Saroyan

Assistant Disciplinary Counsel

Oregon State Bar

322 Or 380 (1995)
IN THE SUPREME COURT
OF THE STATE OF OREGON

In Re:)
)
Complaint as to the Conduct of)
)
ANN MARIE MELMON,)
)
Accused.)
_____)

(OSB 92-134; SC S42112)

In Banc

On review from a decision of the Trial Panel of the Disciplinary Board.

Argued and submitted November 2, 1995.

Ann Marie Melmon, Tigard, argued the cause and filed the brief *in propria persona*.

Lia Saroyan, Assistant Disciplinary Counsel, Oregon State Bar, Lake Oswego, argued the cause and filed a brief on behalf of the Oregon State Bar.

PER CURIAM

Violation of DR 5-105(E), DR 1-102(A)(3) and DR 7-102(A)(5).

The accused is suspended from the practice of law for 90 days.

Summary:

On December 21, 1995, the Oregon Supreme Court suspended Tigard attorney Ann Marie Melmon for 90 days. Melmon's suspension was effective January 26, 1996.

Melmon's suspension was the result of the court's finding that she had violated DR 5-105(E) (current client conflict) in representing multiple clients in three different business transactions when the clients' interests required either full disclosure under DR 10-101 or separate representation due to an actual conflict.

In addition, the court found that Melmon violated DR 1-102(A)(3) in conjunction with assisting a client in creating a bill of sale that falsely identified the buyer of a helicopter. Melmon represented the client who had purchased a helicopter with funds belonging to the client or his solely owned corporation. Prior to the purchase, the client told Melmon that insurance rates would be significantly lower if the helicopter was owned by a pilot. The client was not a pilot and directed Melmon to create two aircraft bills of sales, one of which reflected the client as the owner and another reflecting that Jones, the pilot, was the owner. The Jones bill of sale was then submitted to the insurance company and the FAA. At the time Melmon created the two bills of sale, she knew that Jones had no ownership interest in the helicopter and also knew that the only reason for his inclusion on the bill of sale was to gain a more favorable insurance premium. The court concluded that, by assisting the client in creating the false bill of sale, Melmon's conduct was dishonest and misrepresentative.

Melmon has no prior discipline.

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