DISCIPLINARY BOARD REPORTER

VOLUME 18

January 1, 2004, to December 31, 2004

Report of Attorney Discipline Cases
Decided by the Disciplinary Board
and by the
Oregon Supreme Court
for 2004

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PREFACE

This Disciplinary Board Reporter (DB Reporter) contains final decisions of the Oregon Disciplinary Board, stipulations for discipline between accused attorneys and the OSB, summaries of 2004 decisions of the Oregon Supreme Court involving the discipline of attorneys, orders of reciprocal discipline imposed by the court, and related matters. Cases in this DB Reporter should be cited as 18 DB Rptr ___ (2004).

In 2004, a decision of the Disciplinary Board was final if neither the Bar nor the accused sought review of the decision by the Oregon Supreme Court. See Title 10 of the Bar Rules of Procedure (page 53 of the OSB 2005 Membership Directory) and ORS 9.536.

The decisions printed in this DB Reporter have been reformatted and corrected for typographical errors, but no substantive changes have been made to them. Because of space restrictions, most exhibits are not included but may be obtained by calling the Oregon State Bar. Those interested in a verbatim copy of an opinion should contact Barbara Buehler at extension 370, (503) 620-0222 or (800) 452-8260 (toll-free in Oregon). Final decisions of the Disciplinary Board issued on or after January 1, 2005, are also available at the Oregon State Bar Web site, <www.osbar.org>. Please note that the statutes, disciplinary rules, and rules of procedure cited in the opinions are those in existence when the opinions were issued. Care should be taken to locate the current language of a statute or rule sought to be relied on concerning a new matter.

General questions concerning the Bar's disciplinary process may be directed to me at extension 319.

JEFFREY D. SAPIRO
Disciplinary Counsel
Oregon State Bar

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Volume 18
DB Reporter

(includes Oregon Supreme Court stipulations and decisions which also appear in the Advance Sheets)

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re	)	
	)	
Complaint as to the Conduct of	)	Case No. 01-7
	)	
GARY L. HILL,	)	
	)	
Accused.	)	

Counsel for the Bar:	James A. Wallan; Chris L. Mullmann; Amber Bevacqua-Lynott
Counsel for the Accused:	None
Disciplinary Board:	R. Paul Frasier, Esq., Chair; Daniel Glode, Esq.; Philip D. Paquin, Public Member
Disposition:	Violation of DR 1-102(A)(4), DR 5-105(E), and DR 6-101(A). Trial Panel Opinion. 30-day suspension.
Effective Date of Opinion:	February 1, 2004

OPINION OF TRIAL PANEL

This matter came before a duly constituted trial panel of the Disciplinary Board of the Oregon State Bar on May 9, 2003, at the Douglas County Courthouse in Roseburg, Oregon. The panel consisted of R. Paul Frasier, Esq., Chair, Daniel Glode, Esq., Trial Panel Member, and Philip D. Paquin, Public Member. The Accused was present and represented himself. James A. Wallan, Esq., and Chris L. Mullmann, Disciplinary Counsel, represented the Bar.

The Trial Panel has considered the pleadings, trial memoranda, and arguments of counsel. The Trial Panel also considered all testimony and exhibits presented by the parties.

Based upon the findings and conclusions made below, we find that the Accused has not violated DR 102(A)(3). However, we do find that the Accused has violated DR 1-102(A)(4), DR 5-105(E), and DR 6-101(A). We further determine that the Accused should be suspended from the practice of law for 30 days.

Findings of Fact

We find by clear and convincing evidence the following facts:

1.

The Accused is a duly licensed attorney in the State of Oregon and was admitted to the Bar in 1974. He has extensive experience in the practice of criminal law, along with postdivorce-decree domestic relations law and in advising small businesses and charitable organizations. He also has experience in guardianship law.

2.

The Accused, at all material times herein, maintained his practice in Douglas County, Oregon.

3.

That while the Accused had early in his career had done actual divorce work, he had not done so for several years prior to 1999 and was not current in the requirements of this area of law.

4.

The Accused has an excellent reputation in his community for being a hard worker and for being truthful and honest. He also has done a great deal of pro bono and reduced fee legal work in his community.

5.

In 1999, the Accused had an extremely busy practice. During this time frame the Accused relied upon his office staff to draft documents and did not regularly review what was prepared. The Accused also relied upon court staff to "catch" any mistakes or omissions in his court filings.

6.

In 1994, the Accused was first contacted by Donald Kroger ("Kroger") to handle a minor legal matter. Kroger was satisfied with that work. The Accused and Kroger developed a friendship, as both were life long Douglas County residents coming from families who had extensive ties to the early history of Douglas County. The Accused is very much interested in the history of Douglas County and especially former residents who had served in World War II. Over the years after the above legal work, Kroger brought material he had to the Accused regarding persons from Douglas County who had served in World War II.

7.

Kroger was married to Dolores Kroger ("Dolores"). They had five adult children, two of which still reside in Douglas County. Dolores suffered at least two strokes that virtually incapacitated her and left her wheelchair bound, uncommunicative, and unable to meet her basic needs. Kroger and his children decided that a guardianship needed to be established so as to make health care decisions for Dolores. The Bar alleged at the hearing that there was some sort of disagreement between the children and Kroger as to what sort of health care Dolores should receive. However, no evidence was presented as to who objected or why. From the depositions presented at the hearing, it is clear that all the children and Kroger agreed that a guardianship be established for Dolores. We find that the Bar has failed to show by clear and convincing evidence that there was an actual disagreement between the children and Kroger as to what health care Dolores should have received.

8.

In February of 1999 Kroger approached the Accused about establishing a joint guardianship with Kroger and one adult daughter, Janet Miller ("Miller"), being the guardians of Dolores.

9.

The Accused met with both Kroger and Miller and agreed to assist in setting up the guardianship. The Accused failed to recognize that the interests of Kroger and Miller were likely to be in conflict. The Accused failed to advise Miller and Kroger that their interests as joint guardians to Dolores could likely be in conflict and failed to advise that each should consult with their own attorneys on the matter. The Accused did not obtain any written waiver of any potential conflict between the two.

10.

That a likely conflict did exist between Kroger and Miller as joint guardians for Dolores.

11.

At the direction of the Accused, the actual petition and associated paperwork for the guardianship of Dolores was prepared by office staff for the Accused and was not reviewed by the Accused prior to it being filed with the court.

12.

Prior to the petition being prepared and filed, the Accused was aware of the names and addresses for all of the children of Dolores. He was also aware of her assets, including her interest in the family home.

13.

The petition did not list all of Dolores's children as required. The petition did not list her interest in the family home. Such information should have been contained in the petition. The petition also made mention of statutes that had been repealed several years before and pertained to the protection of property of minors and not to guardianships.

14.

The Accused did not serve the petition upon all of Dolores's children as required.

15.

A visitor's report was prepared for the court and did list at least one of Dolores's children not mentioned in the petition.

16.

The guardianship was approved and Kroger and Miller were appointed joint guardians for Dolores.

17.

Sometime after the guardianship was established, Dolores was moved to a skilled care facility. The court was not advised of this in a timely manner by the Accused or by Kroger or Miller. At the hearing the Bar alleged that the Accused was aware of the move and at least by implication should have advised the court of the move. The Bar produced no date when the move was made. No evidence was produced that the Accused actually knew of the move. While the evidence does show that office staff of the Accused were aware of the move, we find the Bar failed to prove by clear and convincing evidence that the Accused knew about the placement of Dolores thus requiring him to notify the court of the move.

18.

In June or July of 1999, Kroger approached the Accused and indicated that he wanted to divorce Dolores. Kroger had two stated reasons for the divorce:

A. To impoverish Dolores so she could qualify for Medicaid. To qualify for such aid, Dolores could only have a certain amount of assets. Kroger did not want to spend the marital assets on such care and was looking for a way to put title to the marital assets in his name so they could not be available to use in the care of Dolores. That way, the assets would be free for Kroger's use and would also be available to the heirs of Kroger, which included Miller, upon his death; and

B. Kroger wanted a divorce so he could marry another woman who happened to have been a care provider for Dolores.

19.

The Accused agreed to represent Kroger in the divorce. The Accused did not recognize that Kroger's interests were now in direct conflict with that of Dolores. As her guardian, Kroger had a fiduciary duty to protect the assets of Dolores. The Accused did not advise Kroger of this conflict, did not advise Kroger of his duty to preserve these assets, and did not advise him to resign as guardian for Dolores.

20.

The staff of the Accused prepared the petition for divorce and associated documents. The Accused did not review the documents prior to their being filed with the court.

21.

A summons was prepared and served upon Miller as the guardian for Dolores. The return of service listed Miller as a guardian for Dolores. The Accused did recognize that Miller's interests were in actual conflict with Dolores. *See* Exhibit 5, p. 25. The Accused did not advise Miller of this conflict, did not advise Miller of her duty to preserve these assets, and did not advise her to resign as guardian for Dolores.

22.

Due to the divorce decision, the interests of Kroger and Miller were in actual conflict with those of Dolores.

23.

In the petition for divorce, the Accused did not inform the court that Dolores was the protected person in a guardianship. The Accused failed to name the joint guardians as party to the divorce action that was required by the Oregon Rules of Civil Procedure. The Accused, as part of the petition, asked that personal property in possession of Dolores be awarded to her and asked that the real property, including the family home, be awarded to Kroger.

24.

After the petition was filed and summons was served, the office staff, at the request of the Accused, prepared the necessary paperwork to obtain a divorce decree by default.

25.

The Accused did not review the default paperwork or proposed divorce decree that was prepared by his staff. The default affidavit did not inform the court that Dolores was a protected person in a guardianship and was thus incapacitated. The default paperwork did not contain an affidavit for nonmilitary service as required.

The proposed decree failed to make any disposition of the real property as requested in the original petition and thus left Dolores with an interest in the property.

26.

The court granted the default and entered the proposed decree for divorce.

27.

That at some point in time, Medicaid benefits were paid for the benefit of Dolores.

28.

That the Senior Services Division of the State of Oregon became concerned Medicaid benefits should not have been paid. The state eventually moved to remove Kroger and Miller as guardians for Dolores. The motion became moot when Dolores subsequently died.

29.

As Dolores still retained an interest in the family home, the state attempted to obtain repayment of the benefits paid. Kroger subsequently paid the state approximately $10,000 to settle the matter.

30.

The Accused either in his answer or at the hearing admitted that his conduct violated DR 5-105(E) and DR 6-101(A). The Accused denied his conduct violated DR 1-102(A)(3) and DR 1-102(A)(4).

31.

The Accused cooperated fully and completely with the investigation of this matter and has remorse for his conduct.

Discussion

Before we address the actual allegations made against the Accused, we believe a few general comments are in order.

First of all, while some may find the goal of the divorce to impoverish Dolores to be reprehensible, the Bar does not allege and we do not find that the actions of the Accused in obtaining the divorce for that reason were illegal or improper. Indeed, we find that the Accused did seek advice from other knowledgeable sources that indicated that a divorce for such purposes was not unlawful.

Second, we address the issue on commonality of interests that has been raised by the Accused. In representing Kroger and Miller in obtaining the joint guardianship and Kroger in obtaining the divorce, the Accused has stated that he insisted that all

the parties be in agreement as to what should be done. The Accused believes that because everyone agreed as to what should happen that any conflict of interest was minor or nonexistent. We have no doubt that Kroger and all of his children felt that it was best for Dolores that a guardianship be entered. Indeed, it appears that all of the children and Kroger had no objection to the divorce and its stated purpose of impoverishing Dolores so that Medicaid benefits could be obtained.

What the Accused fails to see is that Dolores, as the protected person, was entitled to guardians who were capable of making decisions on her behalf free from any possible conflict of interest. While all may have agreed that the guardianship and subsequent divorce were best for Kroger and Dolores, the decisions to not contest the divorce and deny Dolores potential benefits in the divorce, such as spousal support and contesting the proposed property division, especially after a marriage of 49 years, were made by persons whose positions were in direct and actual conflict with that of Dolores. This never should have happened.

Third, the Accused explains that part of his problems were the result of his busy practice and his dependence upon his staff and court personnel to "catch" any problems or omissions with his court filings and presumably any other document prepared by his office.

While it is true that such "checks and balances" do exist, a lawyer is responsible for the work done by his office. A client is entitled to the best representation that his lawyer can ethically and legally provide him. That requires that the attorney be aware of what is going out in his name and that it be in full conformance with the applicable statutes and rules. The fact that someone else will "catch" any mistakes is no excuse for a lawyer to otherwise provide competent representation of a client.

Fourth, the Accused argues that any misrepresentation that may have been made was not material because he believes the end result would still have occurred. In this instance, he argues that any misrepresentation that occurred in the default proceeding was not material because of his belief that the divorce would have been granted regardless whether a default had taken place.

We disagree. We believe a misrepresentation is material when it pertains specifically to the matter upon which a judge is specifically being called upon to rule. In this case, the judge was being asked to grant a divorce based upon the respondent defaulting to the action that had been filed. Any required evidence of why the person was in default, such a being incapacitated or being a protected person in a guardianship, is material information that must be supplied to the court. While the rule in effect in 1999 is different than the present rules pertaining to defaults, the fact remains that under either version of the rule, a default is not possible if the person is incapacitated, which clearly Dolores was. Such information was material and should have been provided to the court. *See In re Davenport*, 335 Or 67, 57 P3d 897 (2002).

We will now address each alleged violation of the disciplinary rules.

1. Disciplinary Rule 1-102(A)(3)

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

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

The Bar alleges that the Accused violated this rule when in the guardianship petition he failed to name all of the children of Dolores and failed to list her interest in the family home. As to the divorce, the Bar alleges that the Accused violated this rule when he did not inform the court in the divorce petition and subsequent default paperwork that Dolores was a protected person in a guardianship proceeding.

We find that these were material misrepresentations by omission that should have been made known to the court.

The problem we have as to these allegations is whether a lawyer must have a requisite mental state to violate this rule. Our research indicates, and the Bar appears to agree in its trial memorandum, that a lawyer engages in misrepresentation subject to discipline if the lawyer has an undisclosed fact in mind and knowingly fails to disclose it. *See In re Hiller*, 298 Or 526, 532, 694 P2d 540 (1985); *In re Boardman*, 312 Or 452, 822 P2d 709 (1991); *In re Fulop*, 297 Or 354, 685 P2d 414 (1984); *In re McKee*, 316 Or 114, 125, 849 P2d 509 (1993).

We hold that in order to violate this rule, the Bar must show by clear and convincing evidence that the Accused knowingly misrepresented by omission the above facts.

While not defined in the disciplinary rules, *knowingly* is defined in ORS 161.085(8) as when a person acts with an awareness that the conduct of the person is of a nature so described or that a circumstance so described exists.

In other words, the Bar must show that the Accused knew that the documents filed with the court contained the above-described misrepresentations by omission. We find that the Bar has failed to carry that burden.

At least by implication, the Bar seems to argue that the information described above was in the Accused's file and that consequently he was aware of the information. That may be true. However, we believe the evidence must show that the Accused knew the documents did not contain that information. The uncontradicted evidence is that the Accused did not prepare the documents; his office staff did. The Accused did not dictate the documents and he did not review them prior to being filed. Combining this evidence with the fact that at least the proof of service in the divorce did list Miller as a guardian and the Accused's reputation for honesty, we cannot say that we are convinced by clear and convincing evidence that the Accused knowingly misrepresented by omission the above stated facts. Consequently, we find the Accused did not violate DR 1-102(A)(3).

2. Disciplinary Rule 1-102(A)(4)

DR 1-102(A)(4) provides:

> (A) It is professional misconduct for a lawyer to: . . .
>
> (4) Engage in conduct that is prejudicial to the administration of justice.

The Bar alleges that that the above-described conduct of the Accused did in fact prejudice the administration of justice. Our research indicates that no mental state is required and that we must look to the effect or likely effect of the conduct of the Accused on the administration of justice. *In re Claussen*, 322 Or 466, 482, 909 P2d 862 (1996).

We find that the Bar has carried its burden of proof as to this rule. As to the guardianship, even though the Accused had been told by at least Kroger and Miller that all of the children agreed with the proposed guardianship, all should have been notified and served with the petition as required by law. Failure to so serve all of the children created a circumstance where the guardianship could have been contested had one of the children later changed their mind.

As to the divorce, the fact Dolores was a protected person should have been by supplied to the court. Clearly, the law would not have allowed a default judgment to be entered given her incapacity. As an improper default was entered, we believe that there was a prejudicial effect upon the administration of justice.

Furthermore, the Accused's failure to recognize the likely conflicts faced by Kroger and Miller as to the guardianship and his failure to recognize the actual conflict of Kroger and Miller in the divorce created a situation in which the state moved to remove Kroger and Miller as guardians for Dolores. Although she died before that motion was ruled upon, it is clear that such conduct was prejudicial to the administration of justice.

Finally, the Accused's failure to properly dispose of the real property in the divorce decree created problems for Kroger later on, resulting in Kroger's having to pay approximately $10,000 to the state. Although Kroger is not complaining, the fact he has no complaint does not lessen the impact of such conduct on our justice system.

Any of the above would suffice to violate this rule. Consequently we find the Accused violated DR 1-102(A)(4).

3. Disciplinary Rule 5-105(E)

DR 5-105(E) states:

> Except as provided in DR5-105(F), a lawyer shall not represent multiple current clients in any matters when such representation would result in an actual or likely conflict.

Clearly the interests of Kroger and Miller as joint guardians were in likely conflict. The Accused did nothing to advise them of the conflict, to seek independent counsel or to otherwise waive the conflict.

Furthermore, the interests of Kroger and Miller were in direct conflict with their obligations as joint guardians for Dolores as they had a fiduciary obligation to protect her assets in the divorce proceeding. The Accused was apparently aware of at least the conflict as to Miller. Again, the Accused did nothing to advise them of the conflict or to seek independent counsel.[1]

We find the Bar has carried its burden of proof and find the Accused did violate DR 5-105(E) as to the likely conflict in the guardianship matter and that he also violated the rule as to the actual conflict in the divorce matter.

4. Disciplinary Rule 6-101(A)

DR 6-101(A) states:

> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

As to the guardianship, the Accused failed to list in the petition and serve the petition on all of the children of Dolores. The petition failed to list her interest in the family home. It also made mention of inapplicable and repealed statutes. At least to the failure to list and serve all of the children, the guardianship was in danger of being set aside for failure to comply with the statutory requirements. This clearly was not competent representation by the Accused.[2]

Furthermore, the Accused did not provide competent representation in the divorce by not filing the nonmilitary affidavit and by not making provisions for the real property in the decree. We further hold that as Dolores was incapacitated, the Accused never should have sought the default. While we have held that the Accused was not misrepresenting by omission to the court that fact that Dolores was incapacitated, clearly he knew she was. A competent lawyer would not have sought the default under these circumstances.

---

[1] The Accused has asked that we consider the case of *In re Robertson*, 16 DB Rptr 104 (2002), as to his argument of commonality of interest. We believe *Robertson* does not aid the Accused because the case indicates that even though there was a commonality of interest in that case, the Accused still was in violation of the rules regarding conflicts of interest resulting in discipline being imposed.

[2] The Bar also claims that the Accused failed to make a prima facie case in the petition. No evidence was presented at the hearing showing how the petition in fact did not set forth a prima facie case. Because the Bar did not show why the petition failed to set forth a prima facie case and as the court did enter the guardianship, we decline to find that the petition failed to state a prima facie case.

We find that the Accused violated DR 6-101(A) in both the guardianship and divorce matters.

Sanction

The Bar has suggested that a suspension of four months would be an appropriate sanction. The Accused feels the lesser sanction of public reprimand would be appropriate.

Although we have found the Accused did not violate DR 1-102(A)(3), the Accused clearly engaged, at the very least negligently, in conduct that was prejudicial to the administration of justice. In addition, his failure to recognize and properly address the likely and actual conflicts of interest and his failure to competently represent his clients actually caused harm to Dolores and Kroger.

The ABA *Standards for Imposing Lawyer Sanctions* § 3.0 ("*Standards*") indicate that we should consider the following factors in considering an appropriate sanction:

1. The duty violated;
2. The lawyer's mental state;
3. The actual or potential injury caused by the lawyer's misconduct; and
4. The existence if aggravating or mitigating factors.

As to duty violated, we find that the Accused violated his duty to Kroger and Miller by failing to avoid conflicts of interest and by his failure to competently represent them as set forth in *Standards* §§ 4.3 and 4.5. He also violated his duty to the Bar as his conduct was prejudicial to the administration of justice as set forth in *Standards* § 7.0.

As to his mental state, we find that the Accused acted negligently except that he knew of the conflict with Miller as to the divorce proceedings.

As to the actual or potential injury caused by his conduct, we find that his conduct caused harm to Dolores as persons who were in an actual conflict with her interests made decisions on her behalf. Harm was caused to Kroger as he had to pay approximately $10,000 to settle the dispute with the state over the paid Medicaid benefits.

The Accused also caused harm to the profession by not properly dealing with the actual and likely conflicts both in the divorce and in the guardianship proceedings. He also caused harm to the profession by not competently handling the guardianship and the divorce.

We find the following aggravating factors:

1. The Accused has one prior letter of admonition dealing with competency, *Standards*, § 9.22(a);

2. There were multiple offenses in both the guardianship and divorce matters, *Standards*, § 9.22(d);

3. Dolores, due to her incapacity, was a vulnerable victim, *Standards*, § 9.22(h); and

4. The Accused has substantial experience in the practice of law, *Standards*, § 9.22(i).

As to mitigation, we find the following:

1. Absence of a dishonest or selfish motive, *Standards*, § 9.32(b);

2. Full and free disclosure during the investigation of this matter, *Standards*, § 9.32(e);

3. The Accused has good character and reputation, *Standards*, § 9.32(g); and

4. The Accused is remorseful for his conduct, *Standards*, § 9.32(*l*).

While the Accused asks for a public reprimand, his conduct was in one instance done knowingly and the balance was at the very least extremely negligent. There simply is no excuse for his failure to recognize and properly deal with the likely and actual conflicts. The Accused should have reviewed the documents prepared by his staff. The omissions never should have occurred. Had the Accused competently represented Kroger, Kroger never would have had to pay the state $10,000. Furthermore, the Accused has been warned in the past about competently representing his clients. Under these circumstances, we believe a public reprimand is not appropriate and that a period of suspension is in order.

We have reviewed Oregon case law and can find no situation where a lawyer was found to have violated DR 1-102(A)(4), DR 5-105(E), and DR 6-101(A). Furthermore, we have found no case that is near what the facts are in this present matter.

However, we do take note of the following cases:

1. *In re Benjamin*, 1 DB Rptr 77 (1988), where the accused was found to have violated DR 1-102(A)(4), DR 1-103(C), DR 6-101(A), DR 6-101(B), and DR 7-101(A)(2) and was suspended for 60 days;

2. *In re Bourcier*, 7 DB Rptr 115 (1993), where the accused violated DR 2-110(A)(1) and (2), DR 6-101(A) and (B), and DR 7-101(A)(1) and was suspended for 60 days;

3. *In re Blakely*, 11 DB Rptr 59 (1997), where the accused was found to have violated DR 1-102(A)(3), DR 1-102(A)(4), DR 6-101(A), DR 7-102(A)(3), and DR 7-102(A)(5) and was suspended for six months;

4. *In re Benson*, 12 DB Rptr 167 (1998), where the accused was found to have violated DR 3-101(A), DR 3-102(A), DR 5-101(A), DR 5-105(E), DR 5-108(A), DR 5-108(B), and DR 6-101(A) and was suspended for 60 days; and

5. *In re James*, 16 DB Rptr 379 (2002), where the accused violated DR 5-105(E), DR 6-101(B), and DR 9-101(C)(3) and was suspended for 60 days.

We do not believe that the facts in this case are as egregious as they were in the above cases, and consequently believe that the suspension in this case should be for a period of 30 days.

Conclusion

We find the Accused violated DR 1-102(A)(4), DR 5-105(E), and DR 6-101(A). We find he did not violate DR 1-102(A)(3). We order that he be suspended from the practice of law for a period of 30 days.

DATED this 5th day of June 2003.

/s/ R. Paul Frasier
R. Paul Frasier
Trial Panel Chair

/s/ Daniel Glode
Daniel Glode
Trial Panel Member

/s/ Philip D. Paquin
Philip D. Paquin
Trial Panel Member

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re	)	
	)	
Complaint as to the Conduct of	)	Case No. 02-73
	)	
SCOTT W. McGRAW,	)	
	)	
Accused.	)	

Counsel for the Bar:	Robert E. L. Bonaparte; Stacy J. Hankin
Counsel for the Accused:	None
Disciplinary Board:	Anthony A. Buccino, Chair; Richard G. Spier; Marcia Keith, Public Member
Disposition:	Violation of DR 1-102(A)(4) and DR 6-101(B). Trial Panel Opinion. Public reprimand.
Effective Date of Opinion:	January 15, 2004

OPINION OF TRIAL PANEL

Introduction

This matter came before the trial panel (Anthony A. Buccino, Chairperson; Marcia Keith, Public Member; Richard G. Spier, Member) for hearing on September 29, 2003.

This proceeding concerns the Accused's conduct in six separate cases. In all six, the panel finds that he failed to respond to court inquiries and failed to comply with statutory reporting requirements. As a result of his conduct, the panel finds that the Accused is guilty of all six counts of conduct prejudicial to the administration of justice, in violation of DR 1-102(A)(4), and neglecting a legal matter, in violation of DR 6-101(B).

The panel finds that most of the cases in question were difficult and sensitive matters, referred to the Accused by the probate judges of Marion County Circuit Court. There was little hope of adequate compensation for the Accused's time and effort on most of the matters. While the foregoing factors do not excuse the Accused's delay in reporting to the court, he was generally motivated to protect the best interests of the parties for whom he had assumed responsibility.

The panel concludes that the Accused should be publicly reprimanded.

Factual Findings

Based on the record, the Panel finds as set forth below.

A. *Hannon Conservatorship*.

In 1986, the court[1] appointed Thomas Hannon conservator of some funds his minor son received in settlement of a personal injury claim. On August 14, 1992, the father was removed as conservator because he failed to file accountings and because the court suspected he had dissipated the funds entrusted to him. The Accused was appointed successor conservator and was instructed to proceed against the father.

In 1992 and 1993, the Accused made some unsuccessful efforts to recover the funds from the father. In late 1993, the father informed the Accused that if he pursued the matter further, there would be an ugly divorce and the minor would suffer negative consequences resulting from that divorce. The Accused decided not to do anything further in the matter and instead wait until the minor had an opportunity to decide whether to pursue the matter when he reached majority.

ORS 125.475(1) requires a conservator to file annual accountings within 30 days after each anniversary of the appointment. The Accused failed to file accountings in the Hannon conservatorship for five years (1993–1997).

On November 3, 1997, Brenda Myers, the court's probate commissioner, sent a letter to the Accused asking him to submit either the appropriate documents to close the matter or annual accountings to bring the matter current. The Accused did not respond to that letter and took no substantive action to pursue the matter.

In a February 23, 1998 status conference with Judge Todd (which the court called, to review with the Accused the status of the Hannon matter and other cases before the court probate department in which the Accused was representing parties or serving in his own right as conservator or personal representative), the Accused agreed to look for the father until March 31, 1998, and if he had no luck he would close the file. The Accused further agreed that if he found the father he would attempt to have him sign a promissory note. The court asked the Accused to report back by March 31, 1998. Thereafter, the Accused performed no substantive work in the matter and failed to report back to the court by March 31, 1998.

At a second status conference, held November 23, 1999, called to review the status of this and other cases, the court discussed imposing a surcharge on or obtaining a note from the father. Judge Todd asked the Accused to pursue those avenues and report back by February 1, 2000. Thereafter, the Accused performed no substantive work in the matter and failed to report back to the court by February 1, 2000.

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[1] All references to "the court" in this opinion are to the Marion County Circuit Court.

On September 18, 2000, because the Accused had not reported to the court, Judge Burton appointed another lawyer to represent the minor. Eventually, the minor waived all rights he had to pursue his father.

B. *Rickard Conservatorship*.

In 1994, Danny Rickard became custodian of some funds that belonged to his minor children. On November 20, 1995, the Accused was appointed special conservator for the children because there was evidence that the father had improperly dissipated the funds entrusted to him. The Accused was directed to investigate the status of the funds, and, if necessary, bring an action against the father to recover the funds.

Shortly after his appointment, the Accused began corresponding with father's lawyer. By October 1996, the Accused understood that father intended to file for bankruptcy and obtain an order discharging any obligation to his children if the Accused pursued the matter. Nonetheless, the Accused expressed his intend to file suit. Thereafter, the Accused took no substantive action.

ORS 125.470(1) requires a conservator to file an inventory of all property that has come into the possession or knowledge of the conservator within 90 days of being appointed. The Accused failed to file an inventory. The Accused also failed to file annual accounting for four years (1996–1999), as required by ORS 125.475(1).

At the February 23, 1998 status conference, the Accused informed Judge Todd that he would have to sue the father for a misuse of funds. Judge Todd asked the Accused to report back by April 15, 1998. Thereafter, the Accused failed to take any substantive action in the matter and failed to report back to the court by April 15, 1998.

At the November 23, 1999 status conference, the Accused told the court that he would speak with the father's lawyer and that he would report back to the court by February 1, 2000. The Accused thereafter took no substantive action in the matter and failed to report to the court by February 1, 2000.

On August 28, 2000, because the Accused had not responded to the court, Judge Burton issued an order requiring the Accused to report to her by September 28, 2000, regarding the status of the matter. The Accused responded to that order and filed a First and Final Accounting. The court then received a letter from the minors' mother objecting to the closing of the conservatorship and stating that she had been unable to locate the Accused for some time. Eventually, Judge Burton left the matter open for another year to allow the minors to take action against the father or the Accused, if they desired to do so. The minors thereafter chose not to pursue their father.

The Accused admits his negligence on the Rickard matter.

C. *Schultz Estate*.

A probate for the estate of Larry Dean Schultz was opened in 1993. Initially, Schultz's wife was appointed personal representative, but in October 1996 the court replaced her with the Accused because she had failed to perform the duties of a personal representative in an expeditious and diligent manner.

When the Accused became personal representative, the sole remaining issue was whether the estate was entitled to receive payment on a surety bond. In 1996, the Accused corresponded with the lawyer representing the bonding company, but was unable to resolve the matter.

On January 24, 1997, Myers sent a letter to the Accused requesting an update regarding the status of the case, as an accounting had been due in January 1996. The Accused failed to respond to that letter.

On September 19, 1997, Myers sent another letter to the Accused asking for a status report on the matter so that it might be brought to closure. The Accused responded to that letter on October 13, 1997, indicating that he would probably be filing an action against the bond company and that he would keep her advised of further developments. Thereafter, the Accused took no substantive action in the matter.

At the February 23, 1998 status conference the Accused told Judge Todd that he would restrict the funds and close the matter. Judge Todd asked the Accused to report back by April 15, 1998. The Accused thereafter took no substantive action in the matter and failed to report to the court by April 15, 1998.

On June 12, 1998, because the Accused had not reported back to the court, Myers sent him a letter asking about the closing documents. The Accused failed to respond to that letter.

On January 19, 1999, Myers again wrote to the Accused asking when the court might expect to receive the closing order. The Accused failed to respond to that letter.

On June 18, 1999, Myers sent a third letter to the Accused asking about the status of the restriction of funds and getting the matter closed. The Accused responded orally to that letter on October 8, 1999. At that time, he informed Myers that he had been trying to track down an individual with no success, that he would review his file and get back to her by the end of the week.

The Accused did not report back to the court until he appeared at the November 23, 1999 status conference. At that conference, the Accused informed Judge Todd that he had not gotten anywhere, that he would need to walk away from the matter, and that he would report back to the court by February 1, 2000. Thereafter, the Accused took no substantive action in the matter and failed to report to the court by February 1, 2000.

On May 24, 2000, because the Accused had not reported to the court, Judge Burton issued an Order to Show Cause as to why the estate should not be closed without discharging the Accused. The Accused did not respond to that Show Cause Order and on July 10, 2000, Judge Burton issued an order closing the estate without discharging the Accused.

ORS 113.165 requires a personal representative to file an inventory of all estate property in his possession or knowledge within 60 days of being appointed. The Accused failed to file an inventory in the Schultz estate.

ORS 116.083 requires a personal representative to file annual accountings within 30 days after each anniversary of the appointment. The Accused failed to file accountings in the Schultz estate for four years (1997–2000).

The Accused admits his negligence on the Schultz matter.

D. *Cash Estate*.

A probate for the estate of Mary Dorothy Cash was opened in 1989. Initially, one of Cash's relatives was appointed personal representative, but on March 30, 1994, the court replaced her with the Accused because no annual accountings had been filed. When the Accused became personal representative, the sole remaining issue was the status of a security held by Cash's mother, who predeceased her.

On May 19, 1995, Myers wrote to the Accused reminding him that an annual accounting had been due on April 30, 1995, and asking him to file one by June 20, 1995. The Accused did not respond to that letter.

On January 13, 1997, Myers wrote the Accused again informing him that he had not filed an accounting and asking him to bring the file current by February 15, 1997. The Accused did not respond to that letter.

On May 22, 1997, Myers wrote a third letter to the Accused reminding him about the prior two letters and asking him to provide an accounting by June 20, 1997. The Accused did not respond to that letter.

At the February 23, 1998 status conference, the Accused informed Judge Todd that although the transfer agent for the security kept changing, he was dedicated to accomplishing the task even though he was not getting paid. Judge Todd asked the Accused to report back by March 31, 1998. The Accused thereafter failed to report to the court by March 31, 1998.

On January 19, 1999, Myers wrote to the Accused asking him to advise her whether or not the matter was in a position to be closed. The Accused did not respond to that letter.

On June 18, 1999, Myers wrote to the Accused again reminding him about the prior letter and asking him to close the file. Again, the Accused did not respond to that letter.

At the November 23, 1999 status conference, the Accused stated that he would probably file a verified statement by February 1, 2000. Thereafter, the Accused failed to file a verified statement or otherwise communicate with the court about the status of the matter.

On June 22, 2000, the court sent a notice to the Accused asking him to inform the court in writing within 20 days about the status of the matter. The Accused failed to respond to that notice within 20 days.

On October 20, 2000, Judge Burton issued an Order to Show Cause by November 27, 2000, why the estate should not be closed without discharging the Accused. The Accused eventually responded to that Show Cause Order and the matter was finally closed in June 2001.

The Accused never filed an inventory, as required by ORS 113.165. He also failed to file annual accountings for the years 1995 through 2000 until April 2001.

E. *Gardner Estate*.

Robert Gardner was the Accused's father-in-law. The Accused represented his wife as personal representative of the estate of Robert Gardner.

On January 30, 1995, Judge Todd approved the final accounting. Pursuant to ORS 116.213, the personal representative is required to submit receipts or other proof of distribution and then the estate can be closed.

On January 22, 1997, February 21, 1997, and November 10, 1997, Myers or Judge Todd sent letters to the Accused requesting receipts and a closing order. The Accused did not respond to any of those letters.

At the February 23, 1998 status conference the Accused acknowledged that he needed to assign a judgment he had obtained in favor of the estate to the two heirs who participated in the lawsuit, file receipts, and close the matter. Judge Todd asked the Accused to report back to her by March 31, 1998. The Accused did not report to the court by March 31, 1998.

On July 13, 1999, Myers sent a letter to the Accused asking him to submit receipts and a closing order by August 13, 1999. The Accused did not respond to that letter.

At the November 23, 1999 status conference the Accused once again told the court that he needed to assign a judgment. Judge Todd asked the Accused to report back to her by December 31, 1999. The Accused did not report back to the court by December 31, 1999.

On August 25, 2000, Judge Burton issued an Order to Show Cause by September 25, 2000, as to why the estate should not be closed without discharging the personal representative. The Accused finally submitted the appropriate paperwork on September 15, 2000, and the matter was closed on September 20, 2000.

F. *Biegler Conservatorship*.

In November 1992, Dorothy Westfall was appointed conservator for Eleanor Biegler. The Accused represented Westfall in that matter.

On February 29, 1996, Myers left a message with the Accused's office advising him that an annual accounting was due. The Accused never responded to that message and did not file an accounting.

When Ms. Westfall was appointed conservator, she was required to post and maintain a $5,000 bond. On March 22, 1996, the bonding company gave notice of its intent to cancel the bond because Westfall had not paid the bond premium. On March 25, 1996, Myers called the Accused's office and instructed them to take care of the matter immediately. The bond premium was not paid and was canceled. Because the bond was canceled, the conservatorship terminated and the conservator was required to file a final accounting.

On August 16, 1996, Myers sent a letter to the Accused reminding him that the annual accounting had been due on February 11, 1996, and asking him to file it. The Accused did not respond to that letter.

On September 19, 1997, Myers sent another letter to the Accused reminding him that it had been more than two years since an accounting had been filed. She also reminded him of the notice of cancellation of the bond and asked him to file an accounting on or before October 20, 1997. On October 15, 1997, the Accused responded to that letter informing the court that he needed to obtain additional information and asking until the following week when he would advise the court of a date certain when he would file the accounting. The Accused thereafter failed to file an annual accounting and failed to advise the court when he would do so.

At the February 23, 1998 status conference the Accused told Judge Todd that he would close the conservatorship, hold a note in escrow, and pay all administrative expenses by April 15, 1998. Thereafter, the Accused failed to close the conservatorship and failed to report to the court by April 15, 1998.

At the November 23, 1999 status conference, the Accused told Judge Todd that he had been having difficulty reaching his client and he would file a motion to withdraw by December 15, 1999, if he could not contact her. The Accused filed a motion to withdraw on January 5, 2000. The court never ruled on that motion but instead on September 18, 2000, Judge Burton issued an order closing the matter without discharging the conservator and canceling the letters of conservatorship as of April 23, 1996.

Conclusions of Law

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." A lawyer violates DR 1-102(A)(4) by engaging in conduct that causes, or has the potential to cause, harm to either the procedural functioning of a judicial proceeding or to the

substantive interest of a party to that proceeding. *In re Haws,* 310 Or 741, 801 P2d 818 (1990). Conduct can be doing something that one should not do or not doing something that one is required to do. *In re Haws, supra,* 310 Or at 746. Prejudice encompasses either repeated conduct causing some harm, or a single act causing substantial harm to the administration of justice. *In re Haws, supra,* 310 Or at 748. The focus of a DR 1-102(A)(4) analysis is not on the lawyer's state of mind when the conduct occurs, but rather on the potential or actual effect of the lawyer's actions on the administration of justice. *In re Haws, supra,* 310 Or at 748.

DR 1-102(A)(4) applies even when a lawyer is not acting as a lawyer. *See In re Rhodes,* 331 Or 231, 13 P3d 512 (2000) (lawyer who was twice found in contempt of court in connection with dissolution of his own marriage engaged in conduct prejudicial to administration of justice because his wife's substantive rights were impaired and because court system was required to expend resources dealing with his noncompliance).

In all six matters at issue here, the Accused failed to respond to the court's inquiries and failed to report to the court after he promised to perform some task. In all of the matters, except Gardner, the Accused failed to timely file inventories or annual accountings. His failure to respond and report to the court required it to expend additional resources pursuing him and resulted in significant delays in administering these matters.[2] A lawyer's repeated failure to respond to a court's request for status reports regarding open probate estates demonstrates a lack of respect for the court. *In re Brown*, 262 Or 171, 177, 493 P2d 1376, *reh'g denied*, 262 Or 171 (1972).

The Accused argues that these matters were difficult to pursue because of either underlying circumstances or problems he had with his clients. Complications do not explain why the Accused failed to respond to court inquiries, failed to keep the court informed about the status of the matters, and failed to comply with statutory obligations to report. He also argues that tactical considerations motivated him to want to keep details of the status of some of the cases (particularly Hannon) and his future intentions off the public record. The panel can see no reason why the Accused could not have simply advised the court that the matters had his attention, but that it would be prejudicial to provide details.

There is clear and convincing evidence that the Accused engaged in a pattern of failing to respond to the court and failing to satisfy his statutory obligations. His conduct caused sufficient harm to the administration of justice such that the trial panel finds the Accused guilty of each of the six alleged violations of DR 1-102(A)(4).

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[2] Judge Burton testified, "Q. Do you have enough time to deal with all of the cases in the probate court before you? A. No." Tr. 107.

DR 6-101(B) provides, "A lawyer shall not neglect a legal matter entrusted to the lawyer." DR 6-101(B) applies to matters entrusted to a lawyer to perform legally related services and not just those matters where the lawyer is acting on behalf of a client. *See In re Crist*, 327 Or 609, 965 P2d 1023 (1998) (arbitrator lawyer selected by the parties owes duty of diligence to parties much like duty of diligence a lawyer owes to a client such that arbitrator can violate DR 6-101(B)).

Discrete and isolated acts of ordinary negligence do not constitute a violation of DR 6-101(B), while a course of neglectful conduct does. *In re Magar,* 335 Or 306, 321, 66 P3d 1014 (2003).

In all six matters, the Accused engaged in a course of neglectful conduct by failing, over a period of a number of years, to pursue the matters and by failing to respond to the court's numerous inquiries and requests.

The panel finds that there is clear and convincing evidence that each of these six matters were entrusted to the Accused and that he engaged in a course of neglectful conduct, in violation of DR 6-101(B).

Sanction

The Supreme Court looks at the ABA *Standards for Imposing Lawyer Sanctions* (hereinafter "*Standards*") and Oregon case law in arriving at an appropriate sanction in a disciplinary case. *In re Binns*, 322 Or 584, 910 P2d 382 (1996). These *Standards* require an analysis of 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. *Standards*, § 3.0.

A. ABA Standards

1. *Duty Violated*. The Accused violated his duty to act with reasonable diligence and promptness, his duty to avoid conduct prejudicial to the administration of justice, and his duty to expedite litigation and obey statutory obligations and court request. *Standards*, §§ 4.4, 6.1, 6.2.

2. *Mental State.* "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. *Standards*, p. 7.

In this case, the Accused knew he had statutory duties to report to the court but failed to comply with those duties. He also knew he had been receiving letters and notices from the court, knew that the court had directed him to take action or report back by a certain date, and nonetheless failed to do so.

3. *Injury.* Injury can be either actual or potential under the ABA *Standards*. *In re Williams,* 314 Or 530, 840 P2d 1280 (1992).

The Accused's conduct caused actual harm to the judicial system because the court expended time and resources pursuing him.

The protected persons in the conservatorships, the heirs in the estates, and the Accused's clients sustained potential injury in that the court may have closed the matters prematurely because the Accused did not respond to its inquiries. However, there was no evidence presented to the panel of any actual injury.

4. *Preliminary Sanction.* Without considering aggravating or mitigating circumstances, the following *Standards* appear to apply.

> 4.42 Suspension is generally appropriate when: (b) a lawyer engages in a pattern of neglect and causes injury or potential injury to a client.
>
> 4.43 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.
>
> . . . .
>
> 6.13 Reprimand is generally appropriate when a lawyer is negligent either in determining whether statements or documents are false or in taking remedial action when material information is being withheld, 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.
>
> . . . .
>
> 6.22 Suspension is appropriate when a lawyer knowingly violates a court order or rule, and there is injury or potential injury to a client or a party, of interference or potential interference with a legal proceeding.

5. *Aggravating Circumstances.* The following aggravating circumstances exist:

a. Prior disciplinary offenses. In 1998, Accused was reprimanded for violating DR 1-102(A)(3) (*In re McGraw*, 12 DB Rptr 110 (1998)). *Standards,* § 9.22(a).

b. A pattern of misconduct. Over the course of a number of years, the Accused knowingly failed to respond to the court in six matters. *Standards,* § 9.22(c).

c. Multiple offenses. *Standards,* § 9.22(d).

d. Substantial experience in the practice of law; the Accused has been practicing in Oregon since 1982. *Standards,* § 9.22(i).

6. *Mitigating Circumstances.* The following mitigating circumstances exist:

a. Absence of a dishonest or selfish motive. *Standards,* § 9.32(b). Indeed, the panel finds that the Accused had a motive of service to the court and the public,

in taking on difficult and sensitive cases at the request of the court, with little hope of fair compensation for his time and efforts.[3]

b. Cooperative attitude toward the proceedings. *Standards,* § 9.32(e).

c. Remorse. *Standards,* § 9.32(*l*).

The panel concludes that the mitigating circumstances outweigh the aggravating circumstances.

B. Oregon Case Law

The panel recognizes that Oregon case law supports imposition of some period of suspension in cases of neglect of legal matters, causing extra burden on the legal system. *See* OSB Trial Memorandum at 17–19. In this case, however, after careful consideration of the entire record and deliberation among the members of the trial panel, the panel concludes that suspension would be unjust under the circumstances of this case.

The panel does not excuse the Accused's responsibility for inconvenience to court personnel, potential prejudice to parties and counsel in other cases who did not receive more immediate attention from the court, and direct or indirect expense to the taxpaying public that supports the judicial branch. On the other hand, the cases that the Bar cites do not involve the distinctive element of charitable and public service by the Accused (applicable to five of the six cases involved here) which is evident on this record. See fn. 3, *supra*. Moreover, there is evidence that for a time the probate court customarily tolerated some level of informality of procedure. Tr. 43-44.

In response to inquiry by the Accused, Myers agreed that in carrying out his duties in appointed cases, the Accused's work was generally "timely, effective, thorough and quite acceptable." Tr. 45. Myers further agreed that the six cases involved in this disciplinary proceeding were "an anomaly" in reference to the rest of the Accused's caseload.

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[3] Myers, the probate commissioner, testified:

Q (by the Accused). The cases which I am asked to do from the Court are not what you would consider to be the normal type of cases that fit directly within the statutory structures?

A. No.

Q. Why is that?

A. Because there are certain attorneys that the Court utilizes because of their unique personalities, and these are the attorneys that will take the cases nobody else will take. . . . These are cases that involve indigent people and where the attorney knows there's no money to be paid. . . . Tr. 42.

Q. Have I ever said no?

A. Not that I recall. Tr. 43.

Conclusion

Based on the foregoing, a unanimous panel finds that the Accused should be publicly reprimanded.

RESPECTFULLY SUBMITTED this 12th day of December 2003.

/s/ Anthony A. Buccino
Anthony A. Buccino, Chairperson

/s/ Marcia Keith
Marcia Keith, Public Member

/s/ Richard G. Spier
Richard G. Spier, Member

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re	)	Case No. 02-73
	)	
Complaint as to the Conduct of	)	ORDER ON COSTS
	)	AND DISBURSEMENTS
SCOTT W. McGRAW,	)	
	)	
Accused.	)	

On July 11, 2002, the Bar filed a complaint in five counts against the Accused alleging 12 disciplinary rule violations. By letter dated August 18, 2003, the Accused offered to settle the matter by a plea to two counts with a sanction of a public reprimand. By letter dated September 9, 2003, the Bar rejected the offer. On the day of the hearing, September 19, 2003, the Accused made an oral offer to accept a 30-day suspension, but the Bar rejected this offer as well. The matter proceeded to a hearing. In a written opinion dated December 12, 2003, the trial panel found the Accused guilty of all 12 of the violations in all counts as alleged in the formal complaint. As a sanction, the panel imposed a public reprimand.

The Bar has asked for its costs (approximately $1,400), to which the Accused objects. The Accused, in turn, asks for his costs including expert witness fees (approximately $5,500), to which the Bar objects.

1. *The Bar's request for costs*.

BR 10.7 (c) provides that if the Bar rejects the Accused's written offer to enter into a stipulation, "and the matter proceeds to hearing and results in a final decision of the Disciplinary Board or of the court imposing a sanction no greater than that to which the accused was willing to . . . stipulate based on the charges the accused was willing to concede or admit, *the Bar shall not recover and the accused shall recover actual and necessary costs* and disbursements incurred after the date the accused's offer was rejected by the SPRB" (emphasis added).

Given that the sanction imposed on the Accused, a public reprimand was no greater than that to which he offered to stipulate before trial, I read this rule to say that Bar may not recover its costs. The Bar argues that it should prevail because the trial panel found the Accused committed all 12 disciplinary rule violations, some of which were in counts he was not willing to admit to. This is true, but not dispositive. As the Bar itself points out in its letter of January 30, 2004, Rule 10.7(c) "is intended to encourage accused lawyers to make and the SRPB to accept reasonable and appropriate settlement offers." I find that the Accused offered a "reasonable and appropriate settlement" as conclusively established by the ultimate sanction imposed. Moreover, on the day of trial the Accused offered to accept a suspension of 30 days,

a sanction far greater than that actually imposed. Because this additional offer was made (albeit orally and not earlier than 14 days of the hearing), the Order of Costs in *In re Bassett*, Case No. 00-47, relied upon by the Bar, is distinguishable. Accordingly, the request by the Bar for its costs is DENIED.

2. *The Accused's request for costs.*

By the above reasoning, the Accused is the prevailing party and is entitled to recover "actual and necessary costs and disbursements incurred after the date the accused's offer was rejected by the SPRB."

a. *Expert Witness Fee*

The Accused seeks reimbursement for expert witness fees in the amount of $5,460. He cites the provision of BR 10.7(a) providing for reimbursement of "filing and witness fees." The Bar objects, arguing that fees paid to experts are not included within costs for disciplinary proceedings. It relies on judicial interpretations of ORCP 68 A(2), which have held that the statute does not include expert witness fees, and on the prevailing civil practice as attested to in the affidavits of two experienced civil lawyers. The Bar also points to the order in *In re Facaros*, Case No. 00-51, in which the then chairperson of the Disciplinary Board held that expert witness fees were not recoverable. For his part, the Accused points to ORS 677.205, which governs sanctions to be imposed by the Board of Medical Examiners. The term "costs" in this statute has been interpreted to include expert witness fees. *Adams v. Board of Medical Examiners*, 170 Or App 1, 11 P3d 676 (2000). The Bar replies that the statutory language "costs as a civil penalty" is not present in Rule 10.7.

I am not persuaded that fees paid to experts are included within "costs" under Rule 10.7. The term *witness fees* does not normally connote the fee received by an expert, which can be quite substantial, as opposed to statutorily permitted witness fees. Had the drafters of the Bar Rules and the Supreme Court of Oregon meant to include fees paid to experts under the term *witness fees*, they would have said so explicitly. I reject the analogy to the statute covering the Medical Board because the language of the statute "costs as a civil penalty" is different from the language in BR 10.7. Furthermore, unlike the BR 10.7, the statute does not discuss the awarding of costs in cases where a sanction imposed on a doctor is no greater than that to which he was willing to agree to. Accordingly, the Accused request to recover the fees paid to the expert is DENIED.

b. *Other Costs*

After considering the written arguments of the parties with respect to the Accused's request for costs of $16.00 for a transcript and $32.25 for copies of documents used at the hearing, I find these costs to have been actual and necessary and that the request is reasonable and timely under the circumstances. Accordingly, the Accused shall have costs in the sum of $48.25.

IT IS HEREBY ORDERED AND ADJUDGED that the Oregon State Bar recover nothing, but that Scott W. McGraw recover of, and have judgment against, the Oregon State Bar in the amount of $48.25, plus interest thereon at the rate of 9% per annum, until paid, and that execution issue therefor.

DATED: May 16, 2004.

/s/ Michael R. Levine
Michael R. Levine
State Disciplinary Board Chairperson

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re	)	
	)	
Complaint as to the Conduct of	)	Case No. 03-12
	)	
DAVID K. WINTER,	)	
	)	
Accused.	)	

Counsel for the Bar:	Douglas G. Combs; Stacy J. Hankin
Counsel for the Accused:	None
Disciplinary Board:	Thomas H. Nelson, Chair
Disposition:	Trial Panel Opinion. Dismissed.
Effective Date of Opinion:	January 22, 2004

OPINION OF TRIAL PANEL

Introduction and Summary of Decision

This proceeding stems from actions the Accused, David K. Winter, committed in the State of Nevada, some of which actions resulted in a public reprimand for the State Bar of Nevada ("Nevada Bar") and consequent reciprocal public reprimand by the Oregon Supreme Court. *In re Winter*, SC No. S50087 (2003). The Oregon State Bar ("OSB") in this matter is seeking to impose additional sanctions on the Accused for conduct alleged to violate Nevada law, which conduct had been a part of the basis for the original complaint to the Nevada Bar, had been brought to the Nevada Bar's attention during the prior disciplinary proceeding, but which the Nevada Bar declined to prosecute. Because the Nevada Bar knowingly declined to prosecute the Accused for the conduct challenged in this proceeding and because the OSB is relying on Nevada law in its prosecution in this docket, it appears that the OSB's prosecution constitutes an attempt to construe Nevada law in a manner inconsistent with Nevada's own interpretation. In any event, it appears that the OSB has failed to establish by clear and convincing evidence that the Accused's conduct violates Nevada law. Consequently, the complaint should be dismissed.[1]

[1] The result may have been different if the Bar were relying on Oregon law as the basis for this proceeding.

Discussion

Burden of Proof

The OSB acknowledges that it has the burden of establishing the Accused's misconduct in this proceeding by clear and convincing evidence. Bar Rules of Procedure (hereinafter "BR") 5.2. Clear and convincing evidence means that the truth of the facts asserted is highly probable. *In re Taylor*, 319 Or 595, 600, 878 P2d 1103 (1994).

Facts

The Accused represented the Gordon family in various matters. When Mr. Gordon died in 1994, the Accused had been defending him in litigation regarding his business. Thereupon the Accused probated Mr. Gordon's estate and came to represent Mrs. Gordon, who received almost a million dollars in insurance money. The Accused advised Mrs. Gordon to create an irrevocable trust for her children and she deposited almost $800,000 of the insurance proceeds into the trust with the Accused named as trustee. The Accused at that time had a business, Trust Deeds Investments, Inc. ("TDI"), which invested in relatively illiquid trust deeds. The Accused invested the trust funds in TDI investments, and has acknowledged that he did not disclose his relationship with TDI nor that she might seek independent counsel. Ex. 10, ¶ 4. It also appears that the Accused failed to keep Mrs. Gordon fully advised of his activities on her behalf. *Id.* ¶ 5. Mrs. Gordon became insistent that the trust money be returned to her, but the Accused was unable or unwilling to do so because liquidating the TDI investments immediately would result in substantial losses. Consequently, Mrs. Gordon commenced a civil action against the Accused, which resulted ultimately in a settlement and stipulated judgment against the Accused in the amount of $500,000. Moreover, based upon her prior experience as a bankrupt, Mrs. Gordon was concerned that the Accused might file for bankruptcy protection and discharge any debt he owed to her. Consequently, in connection with settling the lawsuit, Mrs. Gordon sought some protection from such a possibility.

In general, the bankruptcy code authorizes that debts incurred by wrongful conduct may not be discharged. Specifically, 11 USC § 523(4) provides that a debtor is not discharged with regard to debts for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny. In order to address Mrs. Gordon's concern that the Accused seek the protection of the bankruptcy code and discharge the $500,000 debt owed her, the Accused and Mrs. Gordon's attorney drafted an affidavit for the Accused's signature which admitted that the Accused's conduct in creating the debt fell within the parameters of 11 USC § 523(4) and that consequently the debt could not be discharged in bankruptcy. Ex. 3. According to the Accused, that affidavit was false when executed and is false today. Also according to the Accused, there was an agreement to the effect that the affidavit would be confidential, could be used only in the case of the Accused's bankruptcy, and would remain part of a confidential settlement agreement. Tr. 11. The Accused testified that

he expected the affidavit to be returned upon his payment of the debt, and that the assets to repay the debt were always in place. *Id*. The court papers reflecting the California settlement agreement were sealed by the California court. Ex. 4, p. 2. The California court ordered that "No person shall have access to any court records in this action without first moving this Court for an order unsealing the records and making a showing of good cause to this Court." Id. Notwithstanding this order, the administrator for the California court provided copies of the file to the OSB at the OSB's request. Based on the California court's order, the trial panel excluded from evidence Exhibits 1, 2, and 6, which were the complaint, first amended complaint, and case register in Mrs. Gordon's litigation against the Accused. All of the rest of the offered exhibits were received into evidence.

Analysis

There is no question that the Accused's affidavit was false when it was executed, and there is no question that the affidavit conceivably could have resulted in a bankruptcy court's being misled had the affidavit been submitted in a bankruptcy proceeding. It is also clear that the affidavit, if submitted to a bankruptcy court, could be highly prejudicial to the Accused and highly advantageous to his former client, Mrs. Gordon. In the event that the affidavit were filed with a bankruptcy court, the Accused would be faced with a dilemma: Tell the truth, disavow the affidavit, and thus obtain a discharge of the debt owing to Mrs. Gordon, or keep silent and tacitly condone a fraud upon both the court and upon himself. Of course, it is intent and not motive that governs legal culpability. However, such culpability first requires a clear exposition of the standard being applied, and it is the standard by which the Accused's conduct is to be measured that is in question in this case.

The Accused is being prosecuted under Rule 203(3) of the Nevada Code of Professional Responsibility. Amended Complaint ¶ 6. While over the years there have been arguments regarding whether foreign law is a "question of fact" or a "question of law," in this case there is significant uncertainty regarding whether, under Nevada law, the Accused's execution of a false affidavit is a violation of Rule 203(3). To the affirmative, the OSB cites a Nevada case, *In re Schaefer*, 117 Nev 496, 25 P3d 191 (2001), for the proposition that execution of a false affidavit is sufficient cause of invoking Rule 203(3). In *Schaefer*, however, the accused's conduct was egregious in the extreme and involved multiple—17—serious counts. On the issue of the false affidavit itself, in *Schaefer* that affidavit was publicly released, contained numerous misstatements of fact, and was actually submitted to the decision-maker for consideration in a *pro hac vice* application. In contrast, in this case the affidavit was never released; rather, it was intended to be kept confidential, and was intended to be somewhat of an insurance policy for Mrs. Gordon, the Accused's former client.

Some courts have the luxury of certifying questions of foreign law to the foreign court. *See* ORS 28.200 et seq. (certification of questions of law). This trial panel doubts it has any such authority. There are, however, substantial indications in the record of this proceeding that Nevada has determined that the Accused's

execution of the false affidavit does not violate Rule 203(3). Although the OSB in its Trial Memorandum stated that "The Nevada discipline [of the Accused] did not involve any issues concerning the truth of the affidavit [Exhibit 3]," OSB Trial Memorandum at 7, it appears that the affidavit was in fact called to the attention of the Nevada authorities and that, although they knew it to be false, they took no action based upon such falsity. During the hearing, the Accused and the OSB stipulated to facts concerning Nevada's disciplinary proceeding. The stipulated facts are reprinted below:

1. The Nevada Bar knew about the June 3, 1999 affidavit when it investigated Ms. Gordon's complaint.

2. The Nevada Bar considered the affidavit but never pursued any charges based upon it.

3. The Nevada Bar did not pursue discipline against the Accused arising out of the affidavit because Mrs. Gordon lived in Washington, the Accused had repaid her in full pursuant to a settlement agreement between them, the affidavit was never filed with the bankruptcy court, and Mrs. Gordon did not cooperate with the Nevada Bar's investigation.

Based upon the quoted stipulation, the trial panel is unable to find that the Accused's execution of an affidavit that was never publicly released is in fact a violation of Nevada's Rule 203(3). Indeed, assuming that the question of whether the Accused's execution of a false affidavit that is never used constitutes a violation of Rule 203(3) could be certified to the Nevada Supreme Court, it seems likely that the Accused there would be in a position to claim that that particular issue must be resolved in his favor as a matter of res judicata.[2] This is because the Nevada Bar could have, but did not, discipline the Accused for violating Rule 203(3) when he executed the false affidavit. Of course, under Oregon law the execution of a false affidavit by itself might very legitimately be deemed a violation of the Oregon Code of Professional Responsibility. If such a case were prosecuted under Oregon law, the trial panel would be in the position to make that initial determination and to have it reviewed judicially by the Oregon Supreme Court. Here, however, the question is one of Nevada law and neither the trial panel nor any reviewing authority in Oregon has the power to announce Nevada law; that function must remain with the Nevada judiciary. In this sense, then, Nevada law is a "question of fact" in this proceeding, and based on the quoted stipulation of facts the trial panel finds that the OSB has not established by a preponderance of the evidence, let alone by clear and convincing

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[2] Res judicata encompasses not only matters actually decided but also matters that could have been litigated. *Verret v. DeHarpport*, 49 Or App 801, 621 P2d 598 (1980). As the Oregon Court of Appeals stated, "The judgment in the first suit not only bars all matters actually determined therein, but also every other matter which might have been litigated and decided as incident to or essentially connected therewith, either as a claim or a defense." 49 Or App at 809 (citation omitted).

evidence, that the Accused's execution of the false affidavit without more is a violation of Rule 203(3). For this reason, the complaint should be dismissed.

DATED at Portland, Oregon, this 23rd day of December 2003.

/s/ Thomas H. Nelson
Thomas H. Nelson, Trial Panel

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re	)	
	)	
Complaint as to the Conduct of	)	Case No. 01-168
	)	
SHAWN MICHAEL SORNSON,	)	
	)	
Accused.	)	

Counsel for the Bar:	Jane E. Angus
Counsel for the Accused:	None
Disciplinary Board:	None
Disposition:	Violation of DR 1-102(A)(4) and DR 2-106(A). Stipulation for Discipline. 30-day suspension.
Effective Date of Order:	February 15, 2004

ORDER APPROVING STIPULATION FOR DISCIPLINE

This matter having been heard upon the Stipulation for Discipline entered into by Shawn Michael Sornson (hereinafter "the Accused") and the Oregon State Bar, and good cause appearing,

IT IS HEREBY ORDERED that the stipulation between the parties is approved. The Accused shall be suspended from the practice of law for 30 days, effective February 15, 2004, for violation of DR 1-102(A)(4) and DR 2-106(A) of the Code of Professional Responsibility.

DATED this 11th day of January 2004.

/s/ Michael R. Levine
Michael R. Levine
State Disciplinary Board Chairperson

/s/ Jill A. Tanner
Jill A. Tanner, Region 6
Disciplinary Board Chairperson

STIPULATION FOR DISCIPLINE

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

1.

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

2.

The Accused was admitted by the Oregon Supreme Court to 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 Marion County, Oregon.

3.

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

4.

The State Professional Responsibility Board authorized a formal disciplinary proceeding against the Accused for alleged violations of DR 1-102(A)(3), DR 1-102(A)(4), and DR 2-106(A) of the Code of Professional Responsibility. The parties intend that this stipulation set forth all relevant facts, violations, and the agreed-upon sanction as a final disposition of this proceeding.

Facts and Violations

5.

In or about March 1997, the law firm of Mills & McMillin was retained to file a petition for the appointment of guardian and conservator for Helen Jeanette Langford. In or about March 1997, a petition was filed in the Marion County Circuit Court, *In the Matter of Guardianship and Conservatorship of Helen Jeanette Langford*, Case No. 97C-10794 (hereinafter "*Langford Conservatorship Case*"). On April 24, 1997, Earl Edward Campbell was appointed Langford's guardian and conservator (hereinafter "Conservator"). The Accused, a lawyer in the law firm, was assigned responsibility for the *Langford Conservatorship Case* in or about April 1999. The annual accountings in the *Langford Conservatorship Case* were required to be filed within 30 days after each anniversary of the appointment of the conservator.

6.

The first annual accounting was due by about May 24, 1998. The Accused's law firm failed to file the annual accounting or request an extension of time to do so by the date the accounting was due. On or about July 6, 1999, the Accused prepared and filed an Amended Annual Accounting (first annual accounting) in the *Langford Conservatorship Case* for the period April 24, 1997, through April 24, 1998. The accounting included a request for approval of a $4,500 fee for the Conservator's services, without detail or explanation, which had previously been paid to the Conservator without court approval.

7.

According to the first annual accounting, the Accused and his law firm had charged and collected $670.23 without court approval for legal services performed during the accounting period. According to the Accused's affidavit in support of his request for approval of attorney fees filed with the first annual accounting, the Accused and his law firm charged and collected $954 without court approval for legal services performed during the accounting period. The court did not approve the first annual accounting or approve the fees at that time.

8.

The second annual accounting in the *Langford Conservatorship Case* was due on or about May 24, 1999. The Accused failed to file the accounting or request an extension of time to do so by the date due. On or about January 28, 2000, the Accused prepared and filed a Third Annual Accounting (second annual accounting) for the period April 25, 1998, through April 25, 1999. The Accused and his law firm had charged and collected $836 without court approval for legal services performed during the accounting period. The court did not approve the second annual accounting or approve the fees for legal services at that time.

9.

The third annual accounting in the *Langford Conservatorship Case* was due on or about May 25, 2000. The Accused did not file the accounting or request an extension of time to do so by the due date. On or about June 27, 2000, the court notified the Accused that the first and second annual accountings had not been approved; that the third annual accounting was due on May 25, 2000, and was then overdue; and that notice of cancellation of the bond had been received by the court. The court required the Accused to take action by July 26, 2000. On or about July 12, 2000, the Accused submitted proposed forms of orders for approval of the first and second annual accountings. The proposed orders did not comply with the court's requirements and the court did not approve the accountings at that time.

10.

On or about July 14, 2000, the court requested that the Accused provide additional information concerning the accountings. On July 28, 2000, the court filed and served an Order to Show Cause, which required the Conservator to appear on August 31, 2000, and explain why he should not be removed as the conservator in the *Langford Conservatorship Case*.

11.

On or about August 18, 2000, the Accused notified the court that the protected person had passed away and that he would be filing a final accounting in a couple of weeks. The Accused failed to file a final accounting or communicate further with the court, and on November 1, 2000, the court filed an Order Closing Without Discharge in *the Langford Conservatorship Case*.

12.

On or about November 30, 2000, the Accused represented to the court that he was in the process of preparing the third and final accounting in the *Langford Conservatorship Case* and would file it with the court in December 2000. The Accused failed to submit the accounting to the court until about January 2001. According to the third and final annual accounting, the Accused and his law firm had charged and collected $1,864.41 without court approval for legal services performed during the accounting period. The court did not approve the accounting or approve the fees for legal services at that time.

13.

During the representation of the Conservator, the Accused represented to the court that the attorney fees had been paid by the Conservator with his personal funds and that the Conservator was withdrawing his claim for reimbursement of certain expenses. The representations were inconsistent with information that the Accused had previously submitted to the court. The representations were not accurate and were made without the Accused confirming their accuracy.

14.

Between about April 1999 and July 2002, the Accused failed to submit timely and complete information to the court in the *Langford Conservatorship Case*. Between about July 2000 and July 2002, the court continued to request information from the Accused concerning the accountings and related issues. On or about June 12, 2002, the Accused filed a Second Amendment to Third and Final Accounting. The court directed the Accused to take additional actions to close the *Langford Conservatorship Case*. On December 10, 2002, the court again filed an Order Closing Without Discharge in the *Langford Conservatorship Case.*

15.

The Accused admits that the aforesaid conduct constituted conduct prejudicial to the administration of justice and charging and collecting an illegal or excessive fee in violation of DR 1-102(A)(4) and DR 2-106(A) of the Code of Professional Responsibility. Upon further factual inquiry, the parties agree that the alleged violation of DR 1-102(A)(3) as set forth in the Bar's Formal Complaint, should be and, upon the approval of this stipulation, is dismissed.

Sanction

16.

The Accused and the Bar agree that in fashioning an appropriate sanction in this case, the ABA *Standards for Imposing Lawyer Sanctions* (hereinafter "*Standards*") are considered. The *Standards* require that the Accused's conduct be analyzed by the following 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*. The Accused violated his duties to his clients and the profession. *Standards*, §§ 4.4, 6.2, 7.0.

B. *State of Mind*. The Accused's conduct demonstrates the conscious awareness of the nature or attendant circumstances of the conduct, but without the conscious objective or purpose to accomplish a particular result. *Standards*, p. 7. The Accused knew that he had no experience in conservatorship matters and that he did not know the law and rules applicable to such cases. He also knew that the court required additional information and that he and the Conservator had not complied with its requests. With respect to the Accused's inaccurate representations, he made them carelessly and without intent to mislead.

C. *Injury*. There was actual and potential injury to the court and the Accused's client. Funds were distributed to the Accused's law firm and the Conservator without court approval. The court devoted a substantial amount of time to obtain information from the Accused and to reconcile other information that the Accused submitted in the *Langford Conservatorship Case*. The Conservator was also exposed to liability.

D. *Aggravating Factors.* Aggravating factors include:

1. There is a pattern of misconduct. The conduct occurred over a period of years. *Standards*, § 9.22(c).

2. There are multiple rule violations. *Standards*, § 9.22(d).

3. The Accused was admitted to practice in 1991 and has substantial experience in the practice of law. *Standards*, §9.22(i).

E. *Mitigating Factors.* Mitigating factors include:

1. The Accused has no prior record of formal discipline. *Standards*, § 9.32(a).

2. The Accused cooperated with the disciplinary authorities during the investigation of his conduct and in resolving this disciplinary proceeding. *Standards*, § 9.32(e).

3. The Accused is remorseful. *Standards*, § 9.32(*l*).

17.

The *Standards* provide that suspension is appropriate when a lawyer engages in an area of practice in which the lawyer knows he or she is not competent, and causes injury or potential injury to a client. *Standards*, § 4.52. Suspension is also appropriate when a lawyer knowingly violates a court order or rule, and there is injury or potential injury to a client or party, or interference or potential interference with a legal proceeding. *Standards*, § 6.22. The *Standards* also provide that suspension is 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 a client, the public, or the legal system. *Standards*, § 7.2. Oregon case law is in accord. *See, e.g., In re Gresham*, 318 Or 162, 864 P2d 360 (1993) (lawyer suspended for 91 days for violation of DR 1-102(A)(4) and other rules); *In re Galaviz*, 14 DB Rptr 176 (2000) (lawyer suspended for 30 days for violation of DR 1-102(A)(4), DR 2-106(A), and DR 6-101(A)). *See also In re Altstatt*, 321 Or 324, 897 P2d 1164 (1995).

18.

Consistent with the *Standards* and Oregon case law, the Bar and the Accused agree that the Accused shall be suspended for 30 days for violation of DR 1-102(A)(4) and DR 2-106(A), the sanction to be effective February 15, 2004.

19.

This Stipulation for Discipline has been reviewed by the Disciplinary Counsel of the Oregon State Bar, the sanction was approved by the State Professional Responsibility Board, and shall be submitted to the Disciplinary Board for consideration pursuant to the terms of BR 3.6.

DATED this 18th day of December 2003.

/s/ Shawn M. Sornson
Shawn M. Sornson
OSB No. 91438

OREGON STATE BAR

By: /s/ Jane E. Angus
Jane E. Angus
OSB No. 73014
Assistant Disciplinary Counsel

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re	)	
	)	
Complaint as to the Conduct of	)	Case No. 03-07
	)	
CALVIN H. LUETJEN,	)	
	)	
Accused.	)	

Counsel for the Bar:	John L. Langslet; Stacy J. Hankin
Counsel for the Accused:	Christopher R. Hardman
Disciplinary Board:	None
Disposition:	Violation of DR 2-106(A), DR 5-101(A), and DR 5-104(A). Stipulation for Discipline. One-year suspension.
Effective Date of Order:	March 27, 2004

ORDER ACCEPTING STIPULATION FOR DISCIPLINE

Upon consideration by the court.

The court accepts the Stipulation for Discipline. The accused is suspended from the practice of law for one year in the State of Oregon, subject to the terms and conditions of the stipulation, effective 60 days from the date of this order.

DATED this 27th day of January 2004.

/s/ Wallace P. Carson, Jr.
Wallace P. Carson, Jr.
Chief Justice

STIPULATION FOR DISCIPLINE

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

1.

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

2.

The Accused was admitted by the Oregon Supreme Court to the practice of law in Oregon in 1954, and has been a member of the Oregon State Bar continuously since that time, having his office and place of business in Multnomah County, Oregon.

3.

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

4.

On January 18, 2003, the State Professional Responsibility Board (hereinafter "SPRB") authorized formal disciplinary proceedings against the Accused for alleged violations of DR 5-101(A) and DR 5-104(A) of the Code of Professional Responsibility. On November 15, 2003, the SPRB authorized amending the proceeding to add an alleged violation of DR 2-106(A). The parties intend that this stipulation for discipline set forth all relevant facts, violations, and the agreed-upon sanction as a final disposition of this proceeding.

Facts

5.

Between 1989 and July 2001, the Accused represented Elsie Fleetwood-Hauer (hereinafter "Fleetwood-Hauer") in various legal matters.

6.

On June 11, 1993, the Accused borrowed $150,000 from Fleetwood-Hauer. On July 6, 1993, the Accused borrowed $250,000 from Fleetwood-Hauer. Neither loan was secured and the promissory notes did not specify a due date for repayment.

7.

The Accused's interests as borrower differed from those of Fleetwood-Hauer as lender, and Fleetwood-Hauer expected the Accused to exercise his professional judgment for her protection in the transactions described in paragraph 6. Although the Accused orally discussed some potential adverse impacts on her of loaning funds to him, the Accused failed to disclose all of the potential adverse impacts and otherwise failed to obtain Fleetwood-Hauer's consent after full disclosure.

8.

After the Accused borrowed funds from Fleetwood-Hauer, he undertook to represent her in various legal matters at a time when he was indebted to her as a result of the loans described in paragraph 6.

9.

In connection with the legal work described in paragraph 8, the exercise of the Accused's professional judgment on behalf of Fleetwood-Hauer was or reasonably may have been affected by his own financial or personal interests. The Accused failed to obtain consent from Fleetwood-Hauer to his continued representation of her after full disclosure.

10.

On or about December 28, 1993, Fleetwood-Hauer agreed to forgo collecting interest payments from the Accused in connection with the loans described in paragraph 6. In exchange, the Accused agreed not to charge Fleetwood-Hauer for any legal work that he did for her, her family, or her estate in the future.

11.

For the years 1995 through 2001, the value of the work that the Accused performed for Fleetwood-Hauer or her family was less than the value of the interest waived by Fleetwood-Hauer, to the point that the Accused charged Fleetwood-Hauer a clearly excessive fee.

Violations

12.

The Accused admits that, by engaging in the conduct described in paragraphs 5 through 11, he violated DR 2-106(A), DR 5-101(A), and DR 5-104(A) of the Code of Professional Responsibility.

Sanction

13.

The Accused and the Bar agree that in fashioning an appropriate sanction in this case, the court should consider the ABA *Standards for Imposing Lawyer Sanctions* (hereinafter "*Standards*"). The *Standards* require that the Accused's conduct be analyzed by considering the following 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 Violated.* The Accused violated his duty to avoid conflicts of interest and to avoid charging a clearly excessive fee. *Standards,* §§ 4.3, 7.0.

B. *Mental State.* "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. *Standards,* p. 7. "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. *Standards*, p. 7.

The Accused acted knowingly with regard to the DR 2-106(A) and DR 5-104(A) violations. He knew that he had an obligation to determine whether the exchange of legal services for waived interest was fair, but negligently failed to evaluate whether it was. The Accused knew that he needed to obtain consent after full disclosure before borrowing funds from Fleetwood-Hauer, but failed to do so.

The Accused acted negligently with regard to the DR 5-101(A) violation. He did not understand that he needed to obtain Fleetwood-Hauer's consent after full disclosure when he undertook to represent her subsequently to borrowing the funds from her.

C. *Injury.* Injury can be either actual or potential under the *Standards*. *In re Williams*, 314 Or 530, 840 P2d 1280 (1992).

Fleetwood-Hauer sustained actual and substantial injury as a result of the Accused's conduct. She did not get a fair rate of return on the funds she loaned to the Accused, and the Accused remains indebted to her for $370,000.

D. *Aggravating Circumstances.* The following aggravating circumstances exist:

1. Selfish motive with regard to the loans. *Standards,* § 9.22(b).

2. Multiple offenses. *Standards,* § 9.22(d).

3. Vulnerability of victim. By approximately 1997, Fleetwood-Hauer's physical and mental condition had been on the decline. She was thereafter unaware and unable to appreciate that the value of the work that the Accused performed for her or her family was less than the value of the interest she was waiving, to the point that the Accused was charging her a clearly excessive fee. *Standards,* § 9.22(h).

4. Substantial experience in the practice of law as the Accused has been a lawyer in Oregon since 1954. *Standards,* § 9.22(i).

E. *Mitigating Circumstances.* The following mitigating circumstances exist:

1. Absence of a prior disciplinary record. *Standards,* § 9.32(a).

2. Cooperative attitude toward the proceeding. *Standards,* § 9.32(e).

3. Restitution. The Accused signed a stipulated judgment on October 14, 2002, in which he agreed to reimbursement Fleetwood-Hauer for $370,000. *Standards,* § 9.32(d).

4. Remorse. *Standards,* § 9.32(*l*).

14.

The *Standards* provide 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. *Standards*, § 4.32. Suspension is also 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 a client, the public, or the legal system. *Standards*, § 7.2.

15.

Lawyers who violate DR 5-101(A) and DR 5-104(A) in connection with borrowing funds from clients have generally been suspended. *In re Byrne*, 298 Or 535, 694 P2d 955 (1985) (lawyer suspended for four months when he failed to obtain consent after full disclosure before borrowing funds from clients and subsequently represented those same clients in a matter where his status as a debtor might reasonably have affected the exercise of his professional judgment on their behalf); *In re Luebke*, 301 Or 321, 722 P2d 1221 (1986) (lawyer suspended for one year when on two occasions he borrowed funds from clients without proper disclosures); *In re Moore*, 299 Or 496, 703 P2d 961 (1985) (lawyer suspended for one year when he failed to obtain consent after full disclosure before borrowing funds from two clients, subsequently represented those clients in matters where his status as a debtor might reasonably have affected the exercise of his professional judgment on their behalf, and then, without obtaining consent after full disclosure, represented those same clients in a matter in which there was a likely conflict of interest between them).

Lawyers who charge a clearly excessive fee and engage in improper conflicts of interest also generally receive suspensions. *In re Wyllie III*, 331 Or 606, 19 P3d 338 (2001) (lawyer suspended for four months when he billed and collected from his client an amount in excess of his hourly rate, and when, without obtaining consent after full disclosure, he rendered a second opinion to three criminal codefendants as to whether they should accept plea agreements); *In re Altstatt*, 321 Or 324, 897 P2d 1164 (1995) (lawyer suspended for one year when he undertook to represent the personal representatives of an estate, at a time when he owed money to the estate, when he thereafter became a past-due debtor of the estate while continuing to represent it, and when he failed to obtain court approval before disbursing funds from the estate in payment of his attorney fees).

16.

Consistent with the *Standards* and Oregon case law, the Accused will be suspended from the practice of law for a period of one year, to commence 60 days after approval of this stipulation by the court, for violations of DR 2-106(A), DR 5-101(A), and DR 5-104(A).

Disciplinary Counsel of the Oregon State Bar has reviewed the stipulation for discipline and the sanction was approved by the SPRB on November 15, 2003. 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 2nd day of December 2003.

/s/ Calvin H. Luetjen
Calvin H. Luetjen
OSB No. 54053

EXECUTED this 3rd day of December 2003.

OREGON STATE BAR

By: /s/ Stacy J. Hankin
Stacy J. Hankin
OSB No. 86202
Assistant Disciplinary Counsel

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re	)	
	)	
Complaint as to the Conduct of	)	Case No. 03-142
	)	
KARL W. FERRIER,	)	SC S51033
	)	
Accused.	)	

ORDER DISBARRING KARL W. FERRIER

Upon consideration by the court.

This matter is before the court on the notice of discipline in another jurisdiction, with a recommendation of disbarment of the accused brought by Disciplinary Counsel of the Oregon State Bar, on behalf of the Oregon State Bar State Professional Responsibility Board. The court accepts the recommendation and Karl W. Ferrier is disbarred, effective the date of this order.

DATED this 27th day of January 2004.

/s/ Wallace P. Carson, Jr.
Wallace P. Carson, Jr.
Chief Justice

SUMMARY

Effective January 27, 2004, the supreme court disbarred Ocean Park, Washington lawyer Karl W. Ferrier, pursuant to BR 3.5 (reciprocal discipline). The State of Washington previously disbarred Ferrier for 28 violations of the Washington Rules of Professional Conduct, including RPC 8.4(b) (engaging in criminal acts); RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation); RPC 1.14(a) (failing to deposit or maintain client funds in trust); RPC 1.15(d) (improper withdrawal); RPC 1.3 and RPC 1.4(a)–(b) (neglect of a legal matter); and RPC 1.5(a) (charging an illegal or clearly excessive fee). The violations arose from Ferrier's representation of clients in four separate matters.

Ferrier failed to deposit client retainers into his client trust account and instead deposited them into his general business account and converted the funds for his own use or uses not related to his clients' representation. Ferrier thereafter failed to account for or return any unearned portions of the retainers or advance his client's legal interests. Ferrier also failed to respond to his client's requests and was found to have done little, if anything, to advance his client's legal interests. Ferrier thereafter failed to cooperate with the Washington State Bar in its disciplinary proceeding.

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re	)	
	)	
Complaint as to the Conduct of	)	Case No. 01-103
	)	
GEORGE M. JENNINGS,	)	
	)	
Accused.	)	

Counsel for the Bar:	Roscoe C. Nelson II; Stacy J. Hankin
Counsel for the Accused:	Peter R. Jarvis
Disciplinary Board:	None
Disposition:	Violation of DR 4-101(B), DR 5-105(C), and DR 7-104(A)(1). Stipulation for Discipline. 30-day suspension.
Effective Date of Order:	April 16, 2004

ORDER APPROVING STIPULATION FOR DISCIPLINE

This matter having been heard upon the Stipulation for Discipline entered into by the Accused and the Oregon State Bar, and good cause appearing,

IT IS HEREBY ORDERED that the stipulation between the parties is approved and the Accused is suspended from the practice of law for 30 days, effective April 16, 2004, for violation of DR 4-101(B), DR 5-105(C), and DR 7-104(A)(1).

DATED this 5th day of February 2004.

/s/ Michael R. Levine
Michael R. Levine, Esq.
State Disciplinary Board Chairperson

/s/ Jill A. Tanner
Jill A. Tanner, Esq., Region 6
Disciplinary Board Chairperson

STIPULATION FOR DISCIPLINE

George M. Jennings, 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, and specifically ORS 9.527(7), 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 19, 1975, and has been a member of the Oregon State Bar continuously since that time, having his office and place of business in Marion County, Oregon.

3.

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

4.

On April 19, 2002, the State Professional Responsibility Board (hereinafter "SPRB") authorized formal disciplinary proceedings against the Accused for alleged violations of DR 1-103(C), DR 4-101(B), DR 5-105(C), DR 7-104(A)(1), and DR 9-101(C)(4) of the Code of Professional Responsibility. On November 15, 2003, the SPRB authorized amending the proceeding to dismiss the alleged violations of DR 1-103(C), and DR 9-101(C)(4). The parties intend that this stipulation for discipline set forth all relevant facts, violations, and the agreed-upon sanction as a final disposition of this proceeding.

Facts

5.

Beginning in 1990, the Accused represented Donald R. Wyant, Sr. (hereinafter "Donald") in numerous legal matters.

6.

In February 1995, Donald advised the Accused that his mother, Gladys Wyant (hereinafter "Gladys"), had a terminal illness and could die at any time, that she owned real estate, and that she had a will in which Donald and his brother Gene Wyant (hereinafter "Gene") were named as personal representatives. The Accused

advised Donald that if his mother were to die, her estate would incur costs associated with probate. The Accused further advised Donald that Gladys could avoid those costs if she transferred her assets to a revocable living trust with provisions substantially similar to those in her will.

7.

At the Accused's direction, an associate at his firm prepared a last will and testament, a durable power of attorney appointing Donald and Gene, as co-agents and co-attorneys, and a revocable living trust in which Gladys, Donald, and Gene were appointed trustees (hereinafter "estate planning documents'). The revocable living trust divided Gladys's estate equally between her four children, Donald, Gene, Cindy Setelo (hereinafter "Cindy"), and Paula Chase. Gladys executed those documents on February 10, 1995. The Accused was not present. The Accused did not believe Gladys was a client, but failed to inform her of his belief. Under these circumstances, Gladys could have a reasonable expectation that the Accused represented her with regard to the estate planning documents.

8.

On April 14, 1999, lawyer James Little (hereinafter "Little") called the Accused's office and advised the Accused's secretary that he represented Gladys, that she was in poor health, that she wanted to put her affairs in order, and that she wanted Little to review the estate planning documents. Little also asked for a copy of those documents. At the time, the Accused was aware that Little had previously represented Gladys and/or Cindy. The Accused's secretary, at the direction of the Accused, telephone Donald to determine whether it was okay to send copies of the estate planning documents to Little. Donald said "no" because he felt that Little was merely trying to increase Gladys's bill.

9.

On April 16, 1999, Little sent a letter to the Accused asking for the estate planning documents and enclosing an Authorization for Release of Information and Documents executed by Gladys on April 14, 1999.

10.

On April 16, the Accused informed Donald that it was necessary to send a copy of the estate planning documents to Little, but explained that this would not be required if Gladys revoked the authorization she had signed on April 14, 1999. Thereafter, the Accused prepared a Revocation of Authorization for Release of Documents (hereinafter "revocation"), and provided that revocation to Donald knowing that Gladys was represented by Little and knowing that Donald would communicate with Gladys for the purpose of determining whether she wanted to sign it.

11.

The Accused admits that it appeared there was a disagreement between Gladys and Donald as to whether the Accused should send copies of the estate planning documents to Little. The Accused represented Donald with respect to that disagreement without obtaining consent after full disclosure from both Donald and Gladys.

12.

Gladys signed the revocation on April 20, 1999, and the Accused did not provide copies of the estate planning documents to Little at that time, but did provide him with a copy of the signed revocation. At that time, Gladys did not revoke the power of attorney and did not remove Donald as trustee of her revocable living trust.

13.

In or about June 2000, Gladys again consulted with Little about her estate plan. On June 12, 2000, Little sent another letter to the Accused stating that he represented Gladys and requested that the Accused provide to him copies of Gladys's estate planning documents. Little enclosed an Authorization for Release of Information and Documents executed by Gladys. In relevant part, the release stated,

> I understand that this information is confidential and protected by the attorney-client privilege. Mr. Little is my attorney, and you are no longer serving in that capacity. I request that you keep this authorization and change of attorney strictly confidential. You are not to communicate this change to any person, specifically including my son, Donald Wyant.

14.

After the Accused received the authorization described in paragraph 13, he decided to withdraw from representing Donald with regard to Gladys's estate. However, he knowingly informed Donald about the existence and substance of the release described in paragraph 13. Thereafter, Donald retained a new lawyer to represent him with regard to Gladys's estate. The Accused admits that he should have withdrawn from representing Donald and should not have disclosed the existence and substance of the release described in paragraph 13 in light of Gladys's directions and the apparent conflicts between Gladys and Donald.

15.

The Accused admits that in June 2000, it appeared there was a disagreement between Gladys and Donald as to whether the Accused should send copies of the estate planning documents to Little. The Accused represented Donald with respect to that disagreement without obtaining consent after full disclosure from both Donald and Gladys.

16.

On June 20, 2000, Gladys signed a document prepared by Donald in which she stated that Little no longer represented her and directed Little not to contact her.

17.

Donald's new lawyer subsequently contacted Little. Thereafter, Gladys discharged Little and retained another lawyer to represent her with regard to her estate planning needs. Gladys's new lawyer requested, and the Accused provided, copies of the estate planning documents. Eventually, Gladys made some changes to the estate planning documents with regard to Cindy and her children's portion of the estate, and removed herself as trustee, but continued to designate Donald as trustee.

Violations

18.

The Accused admits that, by engaging in the conduct described in paragraphs 5 through 17, he violated DR 4-101(B), DR 5-105(C), and DR 7-104(A)(1) of the Code of Professional Responsibility.

Sanction

19.

The Accused and the Bar agree that in fashioning an appropriate sanction in this case, the Disciplinary Board should consider the ABA *Standards for Imposing Lawyer Sanctions* (hereinafter "*Standards*"). The *Standards* require that the Accused's conduct be analyzed by considering the following 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 Violated.* The Accused violated his duty to preserve client confidences and secrets, to avoid conflicts of interest, and to avoid communicating with represented persons. *Standards,* §§ 4.2, 4.3, 6.3.

B. *Mental State.* As used in this stipulation, "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. *Standards,* p. 7. As used in this stipulation, "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. *Standards,* p. 7.

The Accused knowingly violated DR 4-101(B) and DR 7-104(A)(1). The Accused negligently failed to determine that his representation of Donald in April 1999 and in June 2000 was adverse to Gladys.

C. *Injury.* Injury can be either actual or potential. In this case, there was potential injury to Donald and Gladys. Because of the undisclosed conflict of interest,

they did not understand or consent to any division of the Accused's loyalty. There was additional potential injury to Gladys in that the Accused's actions could have interfered with her ability to dispose of her estate as she saw fit. In the end, Gladys was able to obtain the services of another lawyer and dispose of her estate as she wished.

The Accused did not intend to injure or damage Donald or Gladys.

D. *Aggravating Factors.* The following aggravating circumstances exist:

1. Multiple offenses. *Standards,* § 9.22(d).

2. Substantial experience in the practice of law as the Accused has been a licensed Oregon lawyer since 1975. *Standards,* § 9.22(j).

E. *Mitigating Factors.* The following mitigating circumstances exist:

1. Absence of a prior disciplinary record. *Standards,* § 9.32(a).

2. Absence of a dishonest or selfish motive. *Standards,* § 9.32(b).

3. Cooperative attitude toward the proceedings. *Standards,* § 9.32(e).

4. Good character and reputation. *Standards,* § 9.32(g).

5. Remorse. *Standards,* § 9.32(*l*).

20.

The *Standards* provide that suspension is generally appropriate when a lawyer improperly reveals client communications in a manner that may cause injury or potential injury to a client. *Standards,* § 4.22. Suspension is also generally appropriate when a lawyer causes another to communicate with an individual in the legal system whom the lawyer knows to be represented in a manner that may cause injury or potential injury to a party. *Standards,* § 6.32.

21.

Prior Oregon case law suggests that a short term of suspension is appropriate under these circumstances. *Cf. In re Gant*, 293 Or 130, 645 P2d 23 (1982); *In re Wyllie*, 331 Or 606, 19 P3d 338 (2001); *In re Hockett*, 303 Or 150, 734 P2d 877 (1987).

22.

Consistent with the *Standards* and Oregon case law, the Accused will be suspended from the practice of law for a period of 30 days, to commence April 16, 2004, for violations of DR 4-101(B), DR 5-105(C), and DR 7-104(A)(1).

In addition, on or before the last date of the suspension, the Accused shall pay to the Oregon State Bar its reasonable and necessary costs in the amount of $1,156.20, incurred for the Accused's deposition. Should the Accused fail to pay $1,156.20 in full by that date, the Bar may thereafter, without further notice to the

Accused, apply for entry of a judgment against the Accused for the unpaid balance, plus interest thereon at the legal rate to accrue from the date the judgment is signed until paid in full.

23.

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. If approved by the SPRB, the parties agree the stipulation is to be submitted to the Disciplinary Board for consideration pursuant to the terms of BR 3.6.

EXECUTED this 21st day of January 2004.

/s/ George M. Jennings
George M. Jennings
OSB No. 75198

EXECUTED this 2nd day of February 2004.

OREGON STATE BAR

By: /s/ Stacy J. Hankin
Stacy J. Hankin
OSB No. 86202
Assistant Disciplinary Counsel

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re	)	
	)	
Complaint as to the Conduct of	)	Case No. 03-130
	)	
DONALD R. SLAYTON,	)	
	)	
Accused.	)	

Counsel for the Bar:	Martha M. Hicks
Counsel for the Accused:	None
Disciplinary Board:	None
Disposition:	Violation of DR 1-102(A)(4). Stipulation for Discipline. Public reprimand.
Effective Date of Order:	March 15, 2004

ORDER APPROVING STIPULATION FOR DISCIPLINE

This matter having been heard upon the Stipulation for Discipline entered into by the Accused and the Oregon State Bar, and good cause appearing,

IT IS HEREBY ORDERED that the stipulation between the parties is approved and Mr. Slayton is publicly reprimanded, for violation of DR 1-102(A)(4).

DATED this 15th day of March 2004.

/s/ Michael R. Levine
Michael R. Levine, Esq.
State Disciplinary Board Chairperson

/s/ Gregory E. Skillman
Gregory E. Skillman, Esq., Region 2
Disciplinary Board Chairperson

STIPULATION FOR DISCIPLINE

Donald R. Slayton, attorney at law (hereinafter "Mr. Slayton"), and the Oregon State Bar (hereinafter "the Bar") hereby stipulate to the following matters pursuant to Oregon State Bar Rule of Procedure 3.6(c).

1.

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

2.

Mr. Slayton 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 Lane County, Oregon.

3.

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

4.

On December 12, 2003, the State Professional Responsibility Board authorized formal disciplinary proceedings against Mr. Slayton for one alleged violation of DR 1-102(A)(4) of the Code of Professional Responsibility. The parties intend that this stipulation set forth all relevant facts, violations, and the agreed-upon sanction as a final disposition of this proceeding.

Facts

5.

Beginning in May 1997, Mr. Slayton represented Academy Broadway Corp. in a legal action against Cindy Church ("Ms. Church") for open account and fraud. In January 1999, Mr. Slayton obtained a judgment for $3,784 plus costs against Ms. Church in favor of Academy Broadway. Mr. Slayton thereafter sought to collect the judgment on behalf of his client.

6.

After several attempts to serve Ms. Church with notices of judgment debtor exams, Mr. Slayton effected service upon Ms. Church of a Notice to Appear at a Judgment Debtor Exam scheduled for November 20, 2000. Ms. Church failed to appear. Thereafter, Mr. Slayton moved for an Order to Show Cause requiring Ms. Church to appear on March 5, 2001, in Deschutes County Circuit Court. Ms. Church appeared at that March 5, 2001 show cause hearing, but she did not bring the documents required by the prior judgment debtor exam order. Nevertheless, the judge placed Ms. Church under oath and Mr. Slayton conducted a judgment debtor exam at the courthouse that day.

7.

On or about May 14, 2001, Mr. Slayton filed a Motion for Issuance of Bench Warrant and Affidavit seeking a bench warrant for Ms. Church's arrest for failing to appear at the March 5, 2001 show cause hearing. In his affidavit, Mr. Slayton stated that Ms. Church had not appeared at the March 5, 2001 show cause hearing. That statement was not accurate.

8.

Mr. Slayton signed and filed the Motion for Issuance of Bench Warrant and Affidavit in error. He and his office staff prepared a number of bench warrant pleadings for several judgment collection matters at one time, and he failed to pay proper attention to his file notes regarding the March 5, 2001 events in the *Academy Broadway v. Church* matter. In retrospect, Mr. Slayton acknowledges that he should have sought an order for a supplemental judgment debtor exam requiring Ms. Church to produce the documents he sought. Instead, he signed and filed pleadings for a bench warrant for Ms. Church but did not catch his error.

9.

The court granted Mr. Slayton's motion and, on May 22, 2001, ordered a bench warrant for Ms. Church's arrest.

10.

On or about October 11, 2001, Ms. Church was stopped by the Redmond police for a traffic violation. The police arrested her on the outstanding bench warrant and she was handcuffed and transported to Deschutes County jail in Bend, where she was photographed, fingerprinted, and held for several hours until her release.

Violations

11.

Mr. Slayton admits that, by filing the Motion for Issuance of Bench Warrant and Affidavit containing his sworn statement that Ms. Church had failed to appear at a show cause hearing when, in fact, she had appeared, he engaged in conduct prejudicial to the administration of justice in violation of DR 1-102(A)(4) of the Code of Professional Responsibility.

Sanction

12.

Mr. Slayton and the Bar agree that, in fashioning an appropriate sanction in this case, the Disciplinary Board should consider the ABA *Standards for Imposing Lawyer Sanctions* (hereinafter "*Standards*"). The *Standards* requires that Mr. Slayton's conduct be analyzed by considering the following 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 Violated.* By obtaining a bench warrant based upon an inaccurate statement of fact, Mr. Slayton violated a duty to abide by the substantive and procedural rules affecting the administration of justice. *Standards,* § 6.0.

B. *Mental State.* As used in this stipulation, "negligence" is the 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 this situation. *Standards,* p. 7. Mr. Slayton acted with negligence in failing to determine that the material statements contained in his Motion for Issuance of Bench Warrant and Affidavit were inaccurate.

C. *Injury.* Injury can be either actual or potential. In this case, Ms. Church suffered a serious actual injury, in that she was arrested and transported to the Deschutes County jail pursuant to the bench warrant issued on Mr. Slayton's motion.

D. *Aggravating Factors.* Aggravating factors are those considerations that may justify an increase in the degree of discipline to be imposed. There are no aggravating factors present in this matter.

E. *Mitigating Factors.* The following mitigating factors, which may justify a reduction in the degree of discipline to be imposed, include the following:

1. Absence of a prior disciplinary record. *Standards,* § 9.32(a).

2. Absence of a dishonest or selfish motive. *Standards,* § 9.32(b).

3. Imposition of other penalties or sanctions. The PLF paid $5,000 to settle Ms. Church's claim against Mr. Slayton. *Standards,* § 9.32(k).

5. Remorse. *Standards* § 9.32(*l*).

13.

The ABA *Standards* provides that public reprimand is generally appropriate when a lawyer is negligent either in determining whether statements or documents are false or in taking remedial action when material information is being withheld, and causes injury or potential injury to a party to a legal proceeding, or causes an adverse or potentially adverse effect on the legal proceedings. *Standards,* § 6.13.

14.

Prior Oregon discipline cases suggest that a public reprimand is appropriate for an isolated violation of DR 1-102(A)(4). *In re Jackson*, 16 DB Rptr 240 (2002); *In re Gallagher*, 16 DB Rptr 109 (2002); *In re Van Loon*, 15 DB Rptr 61 (2001); *In re McCurdy*, 13 DB Rptr 107 (1999).

15.

Consistent with the *Standards* and Oregon cases, Mr. Slayton will be publicly reprimanded for a violation of DR 1-102(A)(4).

16.

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 March 2004.

/s/ Donald R. Slayton
Donald R. Slayton
OSB No. 86289

EXECUTED this 8th day of March 2004.

OREGON STATE BAR

By: /s/ Martha M. Hicks
Martha M. Hicks
OSB No. 75167
Assistant Disciplinary Counsel

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re	)	
	)	
Complaint as to the Conduct of	)	Case Nos. 03-99, 03-100, 03-133
	)	
BRUCE M. HOWLETT,	)	
	)	
Accused.	)	

Counsel for the Bar:	Martha M. Hicks; Conrad E. Yunker
Counsel for the Accused:	Jenny Cooke
Disciplinary Board:	None
Disposition:	Violation of DR 1-102(A)(2), DR 9-101(A) (two counts), and DR 9-101(C)(3). Stipulation for Discipline. Six-month and one-day suspension, all of which shall be stayed pending successful completion of a two-year probation.
Effective Date of Order:	April 22, 2004

ORDER ACCEPTING STIPULATION FOR DISCIPLINE

Upon consideration by the court.

The court accepts the Stipulation for Discipline, subject to the terms and conditions of the stipulation, effective 30 days from the date of this order.

DATED this 23rd day of March 2004.

/s/ Wallace P. Carson, Jr.
Wallace P. Carson, Jr.
Chief Justice
Stipulation for Discipline

STIPULATION FOR DISCIPLINE

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

1.

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

2.

Mr. Howlett was admitted by the Oregon Supreme Court to the practice of law in Oregon on April 14, 1989, 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.

Mr. Howlett enters into this Stipulation for Discipline freely and voluntarily. This Stipulation for Discipline is made under the public disclosure restrictions of Bar Rule of Procedure 3.6(h).

4.

On October 10, 2003, the State Professional Responsibility Board ("SPRB") authorized formal disciplinary proceedings in Case Nos. 03-99 and 03-100 against Mr. Howlett for alleged violations of DR 9-101(A) and DR 9-101(C)(3) of the Code of Professional Responsibility. On December 12, 2003, the SPRB authorized formal disciplinary proceedings against Mr. Howlett in Case No. 03-133 for an alleged violation of DR 1-102(A)(2) of the Code of Professional Responsibility. The SPRB further directed that these cases be consolidated for prosecution. The parties intend that this Stipulation for Discipline set forth all relevant facts, violations, and the agreed-upon sanction as a final disposition of this consolidated proceeding.

Chapin and Fleetwood Matters

(Case Nos. 03-99 and 03-100)

Facts

5.

In November 2001, Mr. Howlett agreed to represent Reynold Chapin in a criminal matter. At that time and at all relevant times herein, Mr. Chapin was incarcerated in the Multnomah County Detention Center ("MCDC"). Mr. Chapin and Mr. Howlett orally agreed that Mr. Chapin would pay Mr. Howlett a nonrefundable flat fee of $1,750.

6.

On November 12, 2001, Mr. Chapin's attorney-in-fact, Mary Gay Fleetwood, gave Mr. Howlett a $2,000 check, representing Mr. Howlett's $1,750 fee and $250 to be deposited into Mr. Chapin's canteen account at MCDC. (MCDC accepted only

cash or money orders for deposit in the canteen accounts). Mr. Howlett did not deposit the check into his trust account; he endorsed and cashed it on November 16, 2001.

7.

On November 21, 2001, Mr. Chapin signed a written fee agreement with Mr. Howlett establishing a $1,750 nonrefundable flat fee, earned upon receipt.

8.

At the time he received and cashed the $2,000 check for Mr. Chapin, Mr. Howlett and Mr. Chapin had not yet signed the fee agreement designating the fee as nonrefundable and earned upon receipt.

9.

On or about January 25, 2002, Mr. Howlett received a check in the amount of $560 payable to Mr. Howlett, for the benefit of Mr. Chapin. The check represented a portion of Mr. Chapin's share of a decedent's estate.

10.

Mr. Howlett did not deposit the $560 check into his trust account. He cashed it and kept the cash in his desk drawer with the expectation that Mr. Chapin would instruct him to deposit the funds into the MCDC canteen account. However, Mr. Chapin issued conflicting instructions to Mr. Howlett regarding the money until June 2002, when Mr. Chapin clearly instructed Mr. Howlett to deliver the funds to Ms. Fleetwood.

11.

On or about June 26, 2002, Ms. Fleetwood requested an accounting of the funds Mr. Howlett had received on behalf of Chapin. Mr. Howlett did not provide the requested accounting until October 30, 2002, after Ms. Fleetwood and Mr. Chapin had sent separate complaints to the Bar regarding Mr. Howlett's conduct.

Violations

12.

By failing to deposit the Chapin retainer into his trust account upon receipt in November 2001, Mr. Howlett admits that he violated DR 9-101(A). Mr. Howlett also admits that he violated DR 9-101(A) by failing to deposit into his trust account the $560 check he received on behalf of Mr. Chapin in January 2002. By failing to render an appropriate account to Mr. Chapin (or his attorney-in-fact) regarding Mr. Chapin's funds in his possession, Mr. Howlett admits that he violated DR 9-101(C)(3).

DR 1-102(A)(2)

(Case No. 03-133)

Facts

13.

On dates prior to October 2002, Mr. Howlett knowingly possessed and consumed methamphetamines. Pursuant to ORS 475.992(4)(c), knowing or intentional possession of methamphetamines is a Class C Felony.

Violations

14.

By knowingly possessing methamphetamines, Mr. Howlett violated DR 1-102(A)(2).

Sanction

15.

Mr. Howlett and the Bar agree that in fashioning an appropriate sanction in this case, the Supreme Court should consider the ABA *Standards for Imposing Lawyer Sanctions* (hereinafter "*Standards*"). The *Standards* require that Mr. Howlett's conduct be analyzed by considering the following 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 Violated.* By failing to deposit into his trust account and to account for the Chapin funds, Mr. Howlett violated a duty owed to his clients to properly handle their property. *Standards,* § 4.1. In possessing methamphetamines, Mr. Howlett violated his duty to the public to maintain his personal integrity and to abide by the law. *Standards,* § 5.1.

B. *Mental State.* In failing to deposit and maintain Mr. Chapin's advance fee in trust before Mr. Chapin had signed an agreement designating it as nonrefundable and earned upon receipt, Mr. Howlett acted negligently. In failing to render an appropriate account to Mr. Chapin regarding the other funds he received on Mr. Chapin's behalf, Mr. Howlett also acted negligently. In possessing methamphetamines, Mr. Howlett acted knowingly, which the ABA *Standards* define as a conscious awareness of the nature or attendant circumstances of his conduct but without a conscious objective or purpose to accomplish a particular result.

C. *Injury.* Mr. Howlett's possession of methamphetamines had the potential to adversely affect the quality of the representation he provided to his clients. His handling of the Chapin retainer and other funds also posed a potential injury to his client, although he ultimately accounted for all client funds in his possession.

D. *Aggravating Factors.* The following aggravating factors are present in this case:

1. Mr. Howlett has previously been admonished for failing to deposit a client retainer into a trust account in violation of DR 9-101(A). In that matter, Mr. Howlett deposited a retainer directly into his general office account when the signed fee agreement designated the retainer as a flat fee, but did not specifically provide that the fee was nonrefundable and earned upon receipt. *Standards,* § 9.22(a).

2. Mr. Howlett possessed methamphetamines on more than one occasion. A pattern of misconduct is an aggravating factor. *Standards,* § 9.22(c).

3. Mr. Howlett has been licensed to practice law in Oregon since 1989. Substantial experience in the practice of law is an aggravating factor. *Standards,* § 9.22(i).

E. *Mitigating Factors.* The following mitigating circumstances exist in this matter:

1. Absence of a dishonest or selfish motive. *Standards,* § 9.32(b).

2. Physical or mental impairment, including continuous alcohol dependence and episodic methamphetamine dependence. *Standards,* § 9.23(h).

3. A timely good-faith effort to rectify the consequences of his misconduct. *Standards,* § 9.32(d).

4. Cooperative attitude toward the investigation and these proceedings. *Standards,* § 9.32(e).

5. Several members of the Multnomah County Circuit Court bench have described Mr. Howlett's reputation for honesty and for providing competent legal representation to his clients. Good character or reputation is a mitigating factor. *Standards,* § 9.32(g).

6. Mr. Howlett entered and completed a substance abuse rehabilitation program in November 2002 and has maintained his sobriety since that time. Interim rehabilitation is a mitigating factor. *Standards,* § 9.32(j).

16.

The ABA *Standards* suggest that suspension is generally appropriate, absent aggravating and mitigating circumstances, when a lawyer knowingly engages in criminal conduct that seriously adversely reflects on his fitness to practice. *Standards,* § 5.12. When a lawyer is negligent in handling client funds and causes potential injury to a client, reprimand is appropriate. *Standards,* § 4.13. Finally, probation is appropriate for conduct that may be corrected, such as alcohol or chemical dependency. In cases involving illegal drugs, probation should only be used in conjunction with a suspension. *Standards,* § 2.17. Probationary conditions must be appropriate in light of the misconduct at issue. *In re Haws,* 310 Or 741, 801 P2d 818 (1990). In this case, probation is appropriate because Mr. Howlett has achieved

sobriety and has continued abstinence from use of alcohol, methamphetamines, and other substances. The Bar has received no further complaints concerning his conduct. Probation is intended to assist Mr. Howlett in maintaining his sobriety and implementing improved office and law practice management techniques.

17.

The parties agree that Mr. Howlett shall be suspended for a period of six months and one day, all of which shall be stayed pending successful completion of a two-year probation. This sanction shall be effective 30 days from the date this stipulation is approved by the Oregon Supreme Court.

18.

During the term of the probation, Mr. Howlett shall comply with the following conditions:

- Mr. Howlett shall comply with all provisions of this stipulation, the Code of Professional Responsibility and ORS Chapter 9.
- Mr. Howlett shall maintain sobriety and shall refrain from using alcohol or any controlled substances not prescribed by a physician.
- Walter J. Todd, or such other person acceptable to the Bar, shall supervise Mr. Howlett's probation (hereinafter "Supervising Attorney"). Mr. Howlett agrees to cooperate and shall comply with all reasonable requests of the Supervising Attorney and the Bar's Office of Disciplinary Counsel (hereinafter "Disciplinary Counsel") that are designed to achieve the purpose of the probation and the protection of Mr. Howlett's clients, the profession, the legal system, and the public.
- Mr. Howlett shall attend at least one meeting each week of Alcoholics Anonymous (or an equivalent group approved by the Supervising Attorney), or more frequently if recommended by the Supervising Attorney.
- Mr. Howlett shall submit to random urinalysis screenings for controlled substances at his own expense and at the discretion of Disciplinary Counsel.
- Mr. Howlett shall report to Disciplinary Counsel within 14 days of occurrence any civil, criminal, or traffic action or proceeding initiated by complaint, citation, warrant, or arrest, or any incident not resulting in complaint, citation, warrant, or arrest, in which it is alleged that Mr. Howlett has consumed alcohol or controlled substances not prescribed by a physician.
- Within 60 days after this stipulation is approved by the Supreme Court, Mr. Howlett shall meet with a PLF Practice Management Advisor (hereinafter "PLF Advisor") for assistance and advice in the following areas of his law practice: trust account management and handling of client property; calendaring of court appearances and other events relating to the representation of his clients; screening potential cases to determine whether representation

should be undertaken; and any other area of law office management that the PLF Advisor deems appropriate. Mr. Howlett shall also have his office staff meet with the PLF Advisor. Mr. Howlett shall implement all measures recommended by the PLF Advisor and shall submit to any follow-up review recommended by the PLF Advisor. Mr. Howlett shall execute any releases, authorizations, or waivers required by the PLF Advisor to allow the Supervising Attorney to attend his meetings with the PLF Advisor and to monitor and report on Mr. Howlett's compliance with the PLF Advisor's recommendations.

- Mr. Howlett shall make regular quarterly reports certifying that he is in compliance with the terms of this probation or describing and explaining any noncompliance.
- Mr. Howlett acknowledges that the Supervising Attorney will make regular quarterly reports to Disciplinary Counsel regarding Mr. Howlett's compliance or noncompliance with these terms. Mr. Howlett further acknowledges that the Supervising Attorney is required immediately to report to Disciplinary Counsel any noncompliance by Mr. Howlett with the terms of this probation. Mr. Howlett hereby waives any privilege or right of confidentiality as may be necessary to permit the Supervising Attorney to disclose to Disciplinary Counsel any information concerning Mr. Howlett's compliance or noncompliance with these probation terms.

If Mr. Howlett fails to comply with any of the terms of this probation, the Disciplinary Counsel's Office may petition the Oregon Supreme Court to revoke this probation in accordance with the procedure set forth in Rule of Procedure 6.2(d), which will result in the imposition of a period of suspension of six months and one day.

19.

Mr. Howlett agrees and acknowledges that, in the event the probation is revoked and the designated term of suspension is imposed, he will be required to apply for reinstatement after the suspension under BR 8.1.

20.

This Stipulation for Discipline is subject to review by Disciplinary Counsel of the Oregon State Bar and to approval by the 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.

EXECUTED this 11th day of February 2004.

/s/ Bruce M. Howlett
Bruce M. Howlett
OSB No. 89062

EXECUTED this 13th day of February 2004.

OREGON STATE BAR

By: /s/ Martha M. Hicks
Martha M. Hicks
OSB No. 75167
Assistant Disciplinary Counsel

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re	)	
	)	
Complaint as to the Conduct of	)	Case Nos. 03-23, 03-24
	)	
DANIEL A. DOYLE,	)	
	)	
Accused.	)	

Counsel for the Bar:	Stacy J. Hankin
Counsel for the Accused:	Peter R. Jarvis
Disciplinary Board:	None
Disposition:	Violation of DR 6-101(B), DR 9-101(A), DR 9-101(C)(3), and DR 9-101(C)(4). Stipulation for Discipline. 30-day suspension.
Effective Date of Order:	June 5, 2004

ORDER APPROVING STIPULATION FOR DISCIPLINE

This matter having been heard upon the Stipulation for Discipline entered into by the Accused and the Oregon State Bar, and good cause appearing,

IT IS HEREBY ORDERED that the stipulation between the parties is approved and the Accused is suspended from the practice of law for 30 days, effective 60 days after the date this order for violation of DR 6-101(B), DR 9-101(A), DR 9-101(C)(3), and DR 9-101(C)(4).

DATED this 6th day of April 2004.

/s/ Michael R. Levine
Michael R. Levine, Esq.
State Disciplinary Board Chairperson

/s/ Jill A. Tanner
Jill A. Tanner, Esq., Region 6
Disciplinary Board Chairperson

STIPULATION FOR DISCIPLINE

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

1.

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

2.

The Accused was admitted by the Oregon Supreme Court to the practice of law in Oregon on September 18, 1992, and has been a member of the Oregon State Bar continuously since that time, having his office and place of business in Marion County, Oregon.

3.

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

4.

On May 2, 2003, a Formal Complaint was filed against the Accused pursuant to the authorization of the State Professional Responsibility Board (hereinafter "SPRB"), alleging violation of DR 6-101(B), DR 9-101(A), DR 9-101(C)(3), and DR 9-101(C)(4) of the Code of Professional Responsibility in the Kramp matter, and violation of DR 9-101(C)(4) of the Code of Professional Responsibility in the Youd matter. The parties intend that this Stipulation for Discipline set forth all relevant facts, violations, and the agreed-upon sanction as a final disposition of the proceeding.

Kramp Matter

(Case No. 03-23)

Facts

6.

On April 18, 2001, the Accused was retained by Nicki Kramp (hereinafter "Kramp") to foreclose on a trust deed and obtain a variance on a salvage yard she owned. Kramp paid a $4,000 retainer to the Accused. There was no written fee agreement.

7.

The Accused failed to deposit the $4,000 retainer into his lawyer trust account.

8.

Kramp discharged the Accused at the end of May 2002. Between April 2001 and May 2002, there were long periods of time when the Accused failed to pursue Kramp's legal matter. During those 13 months, he also failed to maintain adequate communications with Kramp and failed to respond to her inquiries about the status of her legal matter.

9.

Between April 2001 and the end of May 2002, the Accused failed to render appropriate accountings to Kramp regarding the $4,000 retainer she had paid to him.

10.

On May 31, 2002, Kramp's new lawyer requested that the Accused refund the $4,000 to Kramp. The Accused did not refund the $4,000 to Kramp until July 30, 2002.

Violations

11.

The Accused admits that by engaging in the conduct described in paragraphs 5 thorough 9, he violated DR 6-101(B), DR 9-101(A), DR 9-101(C)(3), and DR 9-101(C)(4) of the Code of Professional Responsibility.

Youd Matter

(Case No. 03-24)

Facts

12.

For a period of time, the Accused represented Aimee Bradley (hereinafter "Bradley") in connection with certain family law matters. Bradley subsequently retained Lance Youd (hereinafter "Youd") to complete one of those matters.

13.

Beginning on July 10, 2002, on Bradley's behalf, Youd requested that the Accused provide him with, among other things, a copy of Bradley's file.

14.

The Accused did not provide a copy of Bradley's file to Youd until March 7, 2003.

Violations

15.

The Accused admits that by engaging in the conduct described in paragraphs 11 through 13, he violated DR 9-101(C)(4) of the Code of Professional Responsibility.

Sanction

16.

The Accused and the Bar agree that in fashioning an appropriate sanction in this case, the Disciplinary Board should consider the ABA *Standards for Imposing Lawyer Sanctions* (hereinafter "*Standards*"). The *Standards* require that the Accused's conduct be analyzed by considering the following 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 Violated.* The Accused violated his duty to properly handle client property, and his duty to act with reasonable diligence and promptness. *Standards*, §§ 4.1, 4.4.

B. *Mental State.* "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. *Standards*, p. 7. "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.

Initially, the Accused acted negligently when he did not pursue Kramp's legal matter. However, as early as July 2001 and no later than January 2002, the Accused's conduct became knowing. The Accused became aware that he was neglecting Kramp's legal matter either because he told her he would pursue it and did not, or because he knowingly failed to respond to Kramp's telephone messages and letters inquiring about the status of her legal matter.

The Accused knowingly failed to account in the Kramp matter, and knowingly failed to return client property in the Kramp and Youd matters.

The Accused negligently failed to deposit the funds he received from Kramp into his lawyer trust account. At the time he deposited those funds into his general account, he mistakenly believed Kramp had signed a written fee agreement stating that the $4,000 retained was earned upon receipt.

C. *Injury.* Kramp sustained actual injury in that there was a delay in pursuing foreclosure on her property. She did not receive the past due payments or have the use of the property for many months because the Accused failed to act on her behalf. The Accused's failure to deposit Kramp's funds into his trust account caused potential injury to Kramp, because if he did not earn the fees, there may not

have been sufficient funds available to make a refund. Kramp sustained potential injury when the Accused failed to provide her with an accounting because she could not confirm that the Accused applied the funds for her benefit and had to file a complaint with the Bar before the Accused responded to her requests. Kramp and Bradley sustained potential injury in that there was a delay in their ability to pursue the underlying matter because the Accused did not promptly respond to their requests.

D. *Aggravating Circumstances.* The following aggravating circumstances exist:

1. Multiple offenses. *Standards,* § 9.22(d).

2. Substantial experience in the practice of law as the Accused has been a licensed Oregon attorney since 1992. *Standards,* § 9.22(i).

E. *Mitigating Circumstances.* The following mitigating circumstances exist:

1. Absence of a prior disciplinary record. *Standards,* § 9.32(a).

2. Absence of a dishonest or selfish motive. *Standards,* § 9.32(b).

3. Cooperative attitude toward the proceedings. *Standards,* § 9.32(e).

17.

The *Standards* provide that 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,* § 4.12. Suspension is also 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).

18.

Oregon case law is in accord. *See In re Eakin*, 334 Or 238, 48 P3d 147 (2002) (suspension of lawyer who violated DR 9-101(A), DR 9-101(C)(3), and DR 9-101(C)(4) when she should have known that she paid herself more than she was entitled); *In re LaBahn*, 335 Or 357, 67 P3d 381 (2003); *In re Holm*, 275 Or 178, 590 P2d 233 (1979) (suspension of lawyers who knowingly neglected a legal matter).

19.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be suspended from the practice of law for 30 days for violation of DR 6-101(B), DR 9-101(A), DR 9-101(C)(3), and DR 9-101(C)(4), the sanction to be effective 60 days after the date the stipulation is approved by the Disciplinary Board.

20.

In addition, on or before the last date of the suspension, the Accused shall pay to the Oregon State Bar its reasonable and necessary costs in the amount of $500.50, incurred for the Accused's deposition. Should the Accused fail to pay $500.50 in full by that date, the Bar may thereafter, without further notice to the Accused, apply for entry of a judgment against the Accused for the unpaid balance, plus interest thereon at the legal rate to accrue from the date the judgment is signed until paid in full.

21.

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. If approved by the SPRB, the parties agree the stipulation is to be submitted to the Disciplinary Board for consideration pursuant to the terms of BR 3.6.

EXECUTED this 30th day of March 2004.

/s/ Daniel A. Doyle
Daniel A. Doyle
OSB No. 92284

EXECUTED this 31st day of March 2004.

OREGON STATE BAR

By: /s/ Stacy J. Hankin
Stacy J. Hankin
OSB No. 86202
Assistant Disciplinary Counsel

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re	)	
	)	
Complaint as to the Conduct of	)	Case No. 04-10
	)	
MICHAEL T. MULLEN,	)	SC S51188
	)	
Accused.	)	

ORDER IMPOSING RECIPROCAL DISCIPLINE

Upon consideration by the court.

The Oregon State Bar has notified this court that the accused has been disciplined by the Supreme Court of Washington. The Oregon State Bar on behalf of the State Professional Responsibility Board recommended the accused be suspended in Oregon for a period of two years, reinstatement conditioned on payment of restitution. The court accepts the recommendation and the accused is suspended from the practice of law in Oregon, effective 30 days from the date of this order.

DATED this 6th day of April 2004.

/s/ Wallace P. Carson, Jr.
Wallace P. Carson, Jr.
Chief Justice

SUMMARY

On April 6, 2004, the Oregon Supreme Court issued an order imposing reciprocal discipline on Michael T. Mullen, an attorney who is licensed in both Oregon and Washington. This order, effective May 6, 2004, suspends Mullen for a period of two years, reinstatement conditioned on payment of restitution. This is the same sanction imposed by the Washington State Bar Association in its order of June 13, 2003.

Mullen was retained to represent a client seeking to modify child visitation and support. Mullen was not diligent in pursuing these matters, and failed to file pleadings with the court. When the client called to inquire about the case, Mullen misrepresented that he had filed the pleadings and had appeared at several hearings.

Mullen also fabricated billing entries to lead his client to believe that he was performing services on the case, when in fact he was neglecting it. After misleading his client for several months, Mullen went to court and obtained a judge's signature

on an ex parte order of child support. He had no legal basis to obtain this order, since the modification petition had never been filed; he did not serve the order on opposing party; and the purpose of obtaining the order was to mislead the client into thinking that the matter was moving forward. Mullen did not file the order, and later obtained a second order of child support ex parte. Again, he did not provide the opposing party with any notice. Intending again to mislead his client, Mullen planned to send a copy of the second order to the client, but not the opposing party; nevertheless, Mullen inadvertently served the opposing party, but not the client. This led to the discovery that the order had been obtained without any service or notice on opposing party.

Mullen admitted that he intended the orders to placate his client, who was complaining that Mullen was not diligent. Mullen did not file the orders after the court signed them.

Mullen's conduct violated Washington rules equivalent to the following Oregon disciplinary rules: DR 6-101(B) (neglect); DR 2-106(A) (illegal or excessive fee); DR 1-102(A)(3) (conduct involving fraud, deceit, misrepresentation); DR 7-110(B) (improper ex parte communication); and DR 1-102(A)(4) (conduct prejudicial to the administration of justice).

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re	)	
	)	
Complaint as to the Conduct of	)	Case No. 01-109
	)	
KEVIN M. MYLES,	)	
	)	
Accused.	)	

Counsel for the Bar:	Martha M. Hicks
Counsel for the Accused:	Susan D. Isaacs
Disciplinary Board:	None
Disposition:	Violation of DR 1-102(A)(3). Stipulation for Discipline. 60-day suspension.
Effective Date of Order:	April 7, 2004

ORDER APPROVING STIPULATION FOR DISCIPLINE

This matter having been heard upon the Stipulation for Discipline entered into by the Accused and the Oregon State Bar, and good cause appearing,

IT IS HEREBY ORDERED that the stipulation between the parties is approved and the Accused is suspended for 60 days, effective immediately upon approval of this order, for violation of DR 1-102(A)(3).

DATED this 7th day of April 2004.

/s/ Michael Robert Levine
Michael Robert Levine, Esq.
State Disciplinary Board Chairperson

/s/ Susan G. Bischoff
Susan G. Bischoff, Esq., Region 5
Disciplinary Board Chairperson

STIPULATION FOR DISCIPLINE

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

1.

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

2.

The Accused was admitted by the Oregon Supreme Court to 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 Multnomah County, Oregon.

3.

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

4.

On November 25, 2002, a Formal Complaint was filed against the Accused pursuant to the authorization of the State Professional Responsibility Board (hereinafter "SPRB"), alleging violations of DR 1-102(A)(3) and DR 1-103(C). The parties intend that this Stipulation for Discipline set forth all relevant facts, violations, and the agreed-upon sanction as a final disposition of the proceeding.

Facts

6.

On or about April 8, 1999, the Accused undertook to represent James E. Cornelious in an administrative proceeding to appeal the denial of unemployment insurance benefits to Mr. Cornelious. At issue in the proceeding was whether Mr. Cornelious had wrongfully failed to return to his employment after his employer had determined that his work-related injuries had been resolved.

7.

In connection with Mr. Cornelious's workers' compensation claim for the above-described injury, Gary A. Ward, M.D., had rendered an opinion that Mr. Cornelious's injury had been resolved and Dr. Ward had released Mr. Cornelious to return to his employment. The Accused expected the employer to introduce

Dr. Ward's records at an April 28, 1999 hearing in the unemployment benefits proceeding.

8.

On April 27, 1999, the Accused executed and submitted an affidavit to an administrative law judge as a potential exhibit in the above-referenced unemployment benefits proceeding. The affidavit stated:

> KEVIN M. MYLES, first duly sworn, deposes and states:
>
> "1. I am the attorney for James E. Cornelious in these proceedings. I have personal knowledge of the matters set forth in this affidavit and, if called to testify, would affirm the contents of this affidavit.
>
> 2. I have personal knowledge of the reputation for untruthfulness of Gary A. Ward, M.D. at Rehabilitation Medicine Associates, P.C., 1040 N.W. 22nd Avenue, Suite 320, Portland, Oregon 97210.
>
> 3. I have been engaged in the practice of law in the Portland area for more than a decade; and that in my practice, I have become familiar with the reputations of many physicians who perform Medical Examinations for usage in worker compensation or personal injury proceedings.
>
> 4. During that time, I have become familiar with Dr. Ward's reputation for untruthfulness.
>
> 5. Knowing Dr. Ward's reputation for untruthfulness, I would not believe the witness testifying under oath and I would not believe the contents of statements or reports or correspondence or such equivalents to testimony if made by him."

The Accused had personal knowledge of the contents of Dr. Ward's records in the Cornelious matter and had received information from other lawyers concerning their dealings with Dr. Ward in other matters. However, this information did not support the Accused's representations concerning Dr. Ward's reputation for untruthfulness in the community.

Violations

9.

The Accused admits that, by engaging in the conduct described in this stipulation, he violated DR 1-102(A)(3). Upon further factual inquiry, the parties agree that the charge of alleged violation of DR 1-103(C) should be and, upon the approval of this stipulation, is dismissed.

Sanction

10.

The Accused and the Bar agree that in fashioning an appropriate sanction in this case, the Disciplinary Board should consider the ABA *Standards for Imposing*

Lawyer Sanctions (hereinafter "*Standards*"). The *Standards* require that the Accused's conduct be analyzed by considering the following 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 Violated.* By submitting the affidavit as a potential exhibit in the unemployment benefits proceeding, the Accused violated his duty to the legal system to avoid making misrepresentations to a court. *Standards,* § 6.1.

B. *Mental State.* The Accused acted knowingly, i.e., with the conscious awareness of the nature or attendant circumstances of his conduct but without the conscious objective or purpose to accomplish a particular result. *Standards,* p. 7.

C. *Injury.* There was potential injury to Dr. Ward's reputation in the statements the Accused made about his reputation for untruthfulness. There was also potential injury to the employer in the unemployment proceeding in that the administrative law judge's decision could have been influenced by Accused's affidavit even though it was withdrawn before the unemployment hearing took place.

D. Aggravating Factors. The Accused has substantial experience in the practice of law, having been admitted to the Oregon State Bar in 1988. *Standards,* § 9.22(i).

E. *Mitigating Factors.* Mitigating factors include:

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

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

3. The Accused is of good character. *Standards,* §9.32(g).

4. There has been significant delay in the disciplinary proceedings. *Standards,* § 9.32(i).

5. The Accused has displayed remorse for his conduct. *Standards,* § 9.32(*l*).

6. The Accused withdrew his affidavit before it was considered by the administrative law judge in the unemployment proceedings.

11.

The *Standards* suggest that a suspension is generally appropriate when a lawyer knows that false statements or documents are being submitted to the court, and causes an adverse or potentially adverse effect on the legal proceeding. *Standards,* § 6.12.

12.

Oregon case law is in accord. See *In re Hiller*, 298 Or 526, 694 P2d 540 (1985), where the lawyer was suspended for four months for violation of *former*

DR 1-102(A)(4) (current DR 1-102(A)(3)) and ORS 9.460(4) (failure to employ means consistent with truth). The Accused's conduct, while similar to that in *Hiller*, is significantly mitigated by the factors set forth in paragraph 9(e). Unlike the lawyers in *Hiller*, the Accused withdrew his affidavit before it was considered by the tribunal.

13.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be suspended for 60 days for violation of DR 1-102(A)(3), the sanction to be effective upon approval of this stipulation by the Disciplinary Board.

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. 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 31st day of March 2004.

/s/ Kevin M. Myles
Kevin M. Myles
OSB No. 88275

EXECUTED this 31st day of March 2004.

OREGON STATE BAR

By: /s/ Martha M. Hicks
Martha M. Hicks
OSB No. 75167
Assistant Disciplinary Counsel

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re	)	
	)	
Complaint as to the Conduct of	)	Case No. 03-95
	)	
JOHN K. McILHENNY,	)	
	)	
Accused.	)	

Counsel for the Bar:	Amber Bevacqua-Lynott
Counsel for the Accused:	None
Disciplinary Board:	None
Disposition:	Violation of DR 9-101(A). Stipulation for Discipline. Public reprimand.
Effective Date of Order:	April 7, 2004

ORDER APPROVING STIPULATION FOR DISCIPLINE

This matter having been heard upon the Stipulation for Discipline entered into by the Accused and the Oregon State Bar, and good cause appearing,

IT IS HEREBY ORDERED that the stipulation between the parties is approved and the Accused is publicly reprimanded for violation of DR 9-101(A).

DATED this 7th day of April 2004.

/s/ Michael Robert Levine
Michael Robert Levine, Esq.
State Disciplinary Board Chairperson

/s/ Susan G. Bischoff
Susan G. Bischoff, Esq., Region 5
Disciplinary Board Chairperson

STIPULATION FOR DISCIPLINE

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

1.

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

2.

The Accused was admitted by the Oregon Supreme Court to the practice of law in Oregon on September 18, 1979, and has been a member of the Oregon State Bar continuously since that time. At all relevant times herein, the Accused had his office and place of business in Multnomah County, Oregon. He currently resides and practices law in the State of Washington.

3.

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

4.

On October 10, 2003, the State Professional Responsibility Board authorized formal disciplinary proceedings against the Accused for an alleged violation of DR 9-101(A) of the Code of Professional Responsibility. The parties intend that this stipulation set forth all relevant facts, violations, and the agreed-upon sanction as a final disposition of this proceeding.

Facts

5.

The Accused represented Jean Lin (hereinafter "Lin"), a Hawaii resident, beginning in May 2001, in a dissolution filed by Lin's husband in Washington County. Lin was given a judgment lien on real property awarded to her husband in the divorce.

6.

On April 4, 2002, the Accused filed an attorney lien against the real property judgment lien, and updated the filing on May 9, 2002.

7.

On May 17, 2002, Lin wrote to the Accused, reaffirming previous correspondence in which she disputed the amount of the Accused's fees and requested that he maintain any funds received as a result of his attorney lien in his trust account pursuant to DR 9-101(A).

8.

On May 23, 2002, the Accused responded to Lin's May 17, 2002 request, agreeing to hold funds received pursuant to the lien, pending resolution of the fee dispute.

9.

On or about June 3, 2002, the funds that were awarded to Lin as part of the judgment in her dissolution were paid by Lin's ex-husband. Two checks were prepared by opposing counsel and sent to the Accused. One was in the amount of his attorney lien, payable to the Accused. The other was the net amount of the judgment payable to Lin. Only the net monies payable to Lin were deposited in trust and held for Lin as required by DR 9-101(A). The Accused did not deposit the attorney lien monies in trust, but treated them, upon receipt, as his own property, believing that they were not subject to DR 9-101(A).

10.

On June 3, 2002, the Accused sent notice to Lin, who was out of the country, of his receipt of the two checks and inquired how she wished to have them disbursed. The notice was sent to the out-of-country address Lin recently had been using and to the out-of-country fax number Lin recently had been using.

11.

On or about June 18, 2002, before hearing anything from Lin about the disposition of the funds, the Accused decided to terminate any further discussion with Lin regarding the amount of his fee and he cashed the attorney lien check. The Accused then notified Lin by fax and first-class mail to the same out-of-country address and number that her account had been satisfied and withdrew from further representation.

12.

In response to a subsequent objection from Lin, the Accused explained his understanding that DR 9-101(A) did not apply to the attorney lien monies because they had not been paid directly by Lin in anticipation of future legal fees. However, the Accused now recognizes that his analysis was incorrect. The judgment proceeds did fall within the category of "funds of a client paid to the lawyer" and accordingly should have been deposited and maintained in trust in accordance with DR 9-101(A).

Violations

13.

The Accused stipulates that, by failing to deposit and maintain in trust all of the proceeds he received as a result of Lin's judgment in her dissolution, he violated DR 9-101(A).

Sanction

14.

The Accused and the Bar agree that in fashioning an appropriate sanction in this case, the Disciplinary Board should consider the ABA *Standards for Imposing Lawyer Sanctions* (hereinafter "*Standards*"). The *Standards* require that the Accused's conduct be analyzed by considering the following 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 Violated.* The Accused violated his duty to preserve client property. *Standards,* § 4.1.

B. *Mental State.* The Accused negligently failed to deposit or maintain client funds in trust. "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. *Standards,* p. 7. The Accused believed that the funds paid in regard to his attorney lien were not subject to DR 9-101(A).

C. *Injury.* Lin suffered potential or actual injury in that she was deprived of her right to dispute the entitlement or amount of the Accused's attorney fees.

D. *Aggravating Factors.* In aggravation, McIlhenny has substantial experience in the practice of law, having been admitted in 1979. *Standards,* § 9.22(i).

E. *Mitigating Factors.* In mitigation, McIlhenny has no prior disciplinary record and has been cooperative in the Bar's investigation. *Standards,* § 9.32(a), (e).

1. The *Standards* provide that a reprimand is generally appropriate when a lawyer is negligent in handling client property and causes potential or actual injury. *Standards,* § 4.13.

2. Oregon case law is in accord. *See In re Mannis*, 295 Or 594, 668 P2d 1224 (1983) (attorney reprimanded for failure of his employees to deposit client funds in a trust account, even though attorney did not know of commingling and had no intent to enrich himself); *In re Dickinson*, 258 Or 475, 483 P2d 813 (1971) (attorney reprimanded for commingling client funds with personal funds); *In re Lundeen*, 257 Or 75, 476 P2d 180 (1970) (mingling of garnished funds with personal funds warrants public reprimand rather than suspension where there is doubt as to intent to appropriate such funds).

3. Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be publicly reprimanded for violation of DR 9-101(A), the sanction to be effective upon approval by the Disciplinary Board.

4. 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 4th day of March 2004.

/s/ John K. McIlhenny
John K. McIlhenny
OSB No. 79320

EXECUTED this 8th day of March 2004.

OREGON STATE BAR

By: /s/ Amber Bevacqua-Lynott
Amber Bevacqua-Lynott
OSB No. 99028
Assistant Disciplinary Counsel

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re	)	
	)	
Complaint as to the Conduct of	)	Case No. 03-68
	)	
GLENN M. FEEST,	)	
	)	
Accused.	)	

Counsel for the Bar:	Amber Bevacqua-Lynott
Counsel for the Accused:	None
Disciplinary Board:	None
Disposition:	Violation of DR 6-101(B), DR 9-101(A), and DR 9-101(C)(4). Stipulation for Discipline. 30-day suspension.
Effective Date of Order:	May 1, 2004

ORDER APPROVING STIPULATION FOR DISCIPLINE

This matter having been heard upon the Stipulation for Discipline entered into by the Accused and the Oregon State Bar, and good cause appearing,

IT IS HEREBY ORDERED that the stipulation between the parties is approved and the Accused is suspended for 30 days, effective May 1, 2004, for violation of DR 6-101(B), DR 9-101(A), and DR 9-101(C)(4).

DATED this 7th day of April 2004.

/s/ Michael Robert Levine
Michael Robert Levine, Esq.
State Disciplinary Board Chairperson

/s/ Arnold S. Polk
Arnold S. Polk, Esq., Region 4
Disciplinary Board Chairperson

STIPULATION FOR DISCIPLINE

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

1.

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

2.

The Accused was admitted by the Oregon Supreme Court to the practice of law in Oregon on September 12, 1980, and has been a member of the Oregon State Bar continuously since that time, having his office and place of business in Washington County, Oregon.

3.

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

4.

On November 14, 2003, a Formal Complaint was filed against the Accused pursuant to the authorization of the State Professional Responsibility Board (hereinafter "SPRB"), alleging violations of DR 6-101(B) (neglect of a legal matter), DR 9-101(A) (failure to deposit or maintain client funds in trust), and DR 9-101(C)(4) (failure to promptly provide client property) of the Code of Professional Responsibility. The parties intend that this Stipulation for Discipline set forth all relevant facts, violations, and the agreed-upon sanction as a final disposition of the proceeding.

Facts

5.

In or about April 2000, the Accused undertook to represent Thomas Durston (hereinafter "Durston") to review the possibility of reducing Durston's child support obligation. Durston paid the Accused a $500 retainer.

6.

The Accused and Durston did not execute a written fee agreement. The Accused did not deposit or maintain Durston's $500 retainer in his client trust account.

7.

The Accused rendered some legal services on Durston's behalf. However, from approximately June 2000 through April 2003, the Accused failed to respond to Durston's attempts to communicate with him or otherwise communicate with Durston regarding his case.

8.

On or about November 25, 2002, Durston requested that the Accused return his $500 retainer. The Accused did not respond until after Durston filed a complaint with the Bar. Thereafter, the Accused returned Durston's retainer and paid him an additional $100 in damages.

Violations

9.

The Accused admits that, by neglecting his client's legal matter, he violated DR 6-101(B); by failing to deposit or maintain client funds in a trust account, he violated DR 9-101(A); and by failing to promptly pay as requested funds to which a client was entitled, he violated DR 9-101(C)(4) of the Code of Professional Responsibility.

Sanction

10.

The Accused and the Bar agree that in fashioning an appropriate sanction in this case, the Disciplinary Board should consider the ABA *Standards for Imposing Lawyer Sanctions* (hereinafter "*Standards*"). The *Standards* require that the Accused's conduct be analyzed by considering the following 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 Violated.* The Accused violated his duty to act with reasonable diligence and promptness in representing a client by neglecting his client's matter and by failing to promptly remit his client's unused funds. *Standards,* § 4.4. The Accused also violated his duty to preserve his client's property by failing to properly deposit or maintain client funds in trust. *Standards,* § 4.1. The most important ethical duties are those obligations that a lawyer owes to clients. *Standards,* p. 5.

B. *Mental State.* In neglecting a legal matter over a prolonged period of time, the Accused acted with knowledge. 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. *Standards,* p. 7. The Accused similarly acted knowingly when he failed to properly deposit or maintain client funds in trust and in failing to promptly remit these funds to the client upon request.

C. *Injury.* Durston was actually injured by the loss of his $500 retainer for the three years it was in the Accused's possession. He did not have the use of these funds for other purposes including to potentially obtain other counsel to pursue the case in light of the Accused's inaction.

D. *Aggravating Factors.* Aggravating factors include:

1. Existence of a prior discipline record, the Accused having been admonished in 1996 for violating DR 6-101(B) (neglect of a legal matter) and DR 1-102(A)(4) (conduct prejudicial to the administration of justice). *Standards,* § 9.22(a). A letter of admonition is considered as evidence of past misconduct if the misconduct that gave rise to that letter was of the same or similar type as the misconduct at issue in the case at bar. *In re Cohen*, 330 Or 489, 500, 8 P3d 953 (2000).

2. Multiple offenses. *Standards,* § 9.22(d).

3. Substantial experience in the practice of law, the Accused having been admitted to practice in Oregon since 1980. *Standards,* § 9.22(i).

E. *Mitigating Factors.* Mitigating factors include:

1. Absence of a dishonest or selfish motive. *Standards,* § 9.32(b).

2. A good-faith effort to make restitution or to rectify consequences of misconduct, the Accused having made restitution and provided for some damages to his client. *Standards,* § 9.32(d).

3. Cooperation in the disciplinary proceedings. *Standards,* § 9.32(e).

4. Remorse. *Standards,* § 9.32(*l*).

11.

The ABA *Standards* provide that a suspension is generally appropriate when a lawyer knowingly fails to perform services for a client or engages in a pattern of neglect causing injury or potential injury. *Standards,* § 4.42. Suspension is also appropriate when a lawyer knows or should know that he or she is dealing improperly with client property and causes actual or potential injury. *Standards,* § 4.12.

12.

Oregon cases are in accord. In *In re Hedges*, 313 Or 618, 836 P2d 119 (1992), the Oregon Supreme Court held that misrepresentation (DR 1-102(A)(3)), neglect of a legal matter (DR 6-101(B)), failure to account for time (DR 9-101(C)(3)), failure to promptly refund money (DR 9-101(C)(4)), and failure to cooperate with Bar investigation (DR 1-103(C)) warranted a 63-day suspension from the practice of law. The conduct in *Hedges* is more egregious than the Accused's conduct however, as Hedges falsely represented to his client that the lack of activity on the case was the fault of opposing counsel when the attorney himself had allowed the case to be

dismissed. There was no such misrepresentation in this case. Hedges' sanction was also aggravated by his failure to respond to the Bar's inquiries.

In *In re Chandler*, 303 Or 290, 735 P2d 1220 (1987), the supreme court held that failure to return client's funds when requested, failure to take steps to collect a judgment which attorney has been hired to collect, and failure to respond to disciplinary inquiry violated DR 1-103(C); current DR 6-101(B); and current DR 9-101(C)(4) and warranted a 63-day suspension from practice of law. In addition to the failure to cooperate, the sanction in *Chandler* was aggravated by the attorney's prior discipline (30-day suspension) for precisely the same charges.

The Accused has cooperated with the Bar's investigation and has only an admonition on similar charges. *See also In re Eakin*, 334 Or 238, 48 P3d 147 (2002) (60-day suspension for violations of DR 9-101(A), DR 9-101(C)(3), and DR 9-101(C)(4)); *In re LaBahn*, 335 Or 357, 67 P3d 381 (2003) (60-day suspension for aggravated neglect under DR 6-101(B)).

13.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be suspended for 30 days for violation of DR 6-101(B), DR 9-101(A), and DR 9-101(C)(4), the sanction to be effective May 1, 2004.

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. 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 25th day of March 2004.

/s/ Glenn M. Feest
Glenn M. Feest
OSB No. 80222

EXECUTED this 29th day of March 2004.

OREGON STATE BAR

By: /s/ Amber Bevacqua-Lynott
Amber Bevacqua-Lynott
OSB No. 99028
Assistant Disciplinary Counsel

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re	)	
	)	
Complaint as to the Conduct of	)	Case No. 03-65
	)	
JACQUELINE L. KOCH,	)	
	)	
Accused.	)	

Counsel for the Bar:	C. Thomas Davis; Jane E. Angus
Counsel for the Accused:	Christopher Hardman
Disciplinary Board:	None
Disposition:	Violation of DR 2-110(A)(2), DR 2-110(B)(2), DR 6-101(B), and DR 9-101(C)(4). Stipulation for Discipline. Public reprimand.
Effective Date of Order:	April 13, 2004

ORDER APPROVING STIPULATION FOR DISCIPLINE

This matter having been heard upon the Stipulation for Discipline entered into by Jacqueline L. Koch and the Oregon State Bar, and good cause appearing,

IT IS HEREBY ORDERED that the stipulation between the parties is approved. The Accused is publicly reprimanded for violation of DR 2-110(A)(2), DR 2-110(B)(2), DR 6-101(B), and DR 9-101(C)(4) of the Code of Professional Responsibility.

DATED this 13th day of April 2004.

/s/ Michael R. Levine
Michael R. Levine
State Disciplinary Board Chairperson

/s/ Susan G. Bischoff
Susan G. Bischoff, Region 5
Disciplinary Board Chairperson

STIPULATION FOR DISCIPLINE

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

1.

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

2.

The Accused was admitted by the Oregon Supreme Court to the practice of law in Oregon on September 25, 1987, 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, voluntarily and with the advise of counsel. This Stipulation for Discipline is made under the restrictions of Bar Rule of Procedure 3.6(h).

4.

The State Professional Responsibility Board authorized a formal disciplinary proceeding against the Accused for alleged violations of DR 2-110(A)(2), DR 2-110(B)(2), DR 6-101(B), and DR 9-101(C)(4) of the Code of Professional Responsibility. The parties intend that this stipulation set forth all relevant facts, violations, and the agreed-upon sanction as a final disposition of this proceeding.

Facts and Violations

5.

In or about August 1993, a decree and judgment of dissolution of marriage was entered in the matter of *James J. Kahut and Esther B. Kahut*, Clackamas County Circuit Court Case No. DR 9305073 (hereinafter "Court Action"). In or about April 1996, the parties agreed to a modification of Esther Kahut's spousal support. An Order Modifying Decree of Dissolution by Stipulation re: Spousal Support was filed in the Court Action on April 17, 1996. The Accused represented Esther Kahut (hereinafter "Kahut") in the support modification proceeding.

6.

In or about February 2002, Kahut retained the Accused to pursue collection of unpaid spousal support. Kahut signed a fee agreement and paid the Accused a $500 retainer. Kahut was incarcerated in Multnomah County, Oregon, at the time she

retained the Accused and at all times thereafter. In or about March 2002, the Accused advised Kahut that she needed to locate Kahut's ex-husband and to demand payment of the delinquent support. Kahut provided the Accused with her ex-husband's current address and also asked the Accused to provide Kahut with a copy of the file from the earlier proceedings in the Court Action. The Accused did not respond to or otherwise communicate with Kahut and took no action on Kahut's legal matter.

7.

On or about June 12, 2002, Kahut again provided the Accused with her ex-husband's address and renewed her request for a copy of the file from the earlier proceeding. On or about June 28, 2002, the Accused advised Kahut that she had drafted a pleading, that she would be out of the office for about a week, and would contact Kahut on her return. Following her return to the office, the Accused did not provide Kahut with a copy of the pleading, did not provide Kahut with a copy of the file she had requested; did not communicate with Kahut; and took no action on Kahut's legal matter.

8.

On or about July 18, 2002, and August 6, 2002, Kahut again inquired about her case and the pleading the Accused had reported she had drafted. Kahut also provided the Accused with a copy of a letter from a physician concerning Kahut's medical condition. On or about August 30, 2002, the Accused advised Kahut that Kahut needed to sign an affidavit and asked how to arrange for her signature. Even though Kahut provided the Accused with the information the Accused had requested, the Accused did not contact or communicate with Kahut, and took no action on Kahut's legal matter.

9.

On or about October 21, 2002, Kahut notified the Accused that if she did not want to handle the legal matter, Kahut would arrange for another lawyer to represent her interests. Kahut asked the Accused to respond. The Accused did not respond and took no action on Kahut's legal matter.

10.

Between about March 2002 and November 2002, the Accused continued her representation of Kahut when she knew or it was obvious that her continued employment would result in violation of a disciplinary rule.

11.

On or about November 12, 2002, Kahut again notified the Accused by letter that she needed action on her case; that she had not received a draft of the above-described pleading or affidavit; and that the Accused had not responded to her questions and requests. Kahut also asked the Accused to return the retainer and all

documents she had provided to the Accused. The Accused did not respond, took no action on Kahut's legal matter, and did not deliver all or any part of the retainer or the documents Kahut had requested.

12.

The Accused admits that the aforesaid conduct constituted withdrawal from employment without taking reasonable steps to avoid foreseeable prejudice to a client's rights; failure to withdraw from employment when she knew or it was obvious that continued employment would result in violation of a disciplinary rule; neglect of a legal matter; and failure to promptly deliver as requested property a client is entitled to receive, in violation of DR 2-110(A)(2), DR 2-110(B)(2), DR 6-101(B), and DR 9-101(C)(4) of the Code of Professional Responsibility.

Sanction

13.

The Accused and the Bar agree that in fashioning an appropriate sanction in this case, the ABA *Standards for Imposing Lawyer Sanctions* (hereinafter "*Standards*") are considered. The *Standards* require that the Accused's conduct be analyzed by the following 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*. The Accused violated duties to her client and the profession. *Standards,* §§ 4.4, 7.0.

B. *State of Mind.* The Accused's conduct demonstrates the conscious awareness of the nature or attendant circumstances of the conduct, but without the conscious objective or purpose to accomplish a particular result. *Standards*, p. 7. The Accused knew that she had taken no action on Kahut's legal matter.

C. *Injury*. The Accused caused actual and potential injury to her client. Resolution of Kahut's claim was delayed during which time Kahut's ex-husband continued to withhold spousal support from Kahut. Kahut was also frustrated by the Accused's failure to communicate with her. After Kahut filed a complaint with the Bar, the Accused returned the retainer to Kahut.

D. *Aggravating Factors.* Aggravating factors include:

1. There are multiple rule violations. *Standards*, § 9.22(d).

2. The Accused's client was vulnerable. She was incarcerated and required to rely on her lawyer to take action to advance and protect her interests. *Standards*, § 9.22(h).

3. The Accused was admitted to practice in 1987 and has substantial experience in the practice of law. *Standards*, § 9.22(i).

E. *Mitigating Factors.* Mitigating factors include:

The Accused has no prior record of discipline. *Standards*, § 9.32(a).

14.

The *Standards* provide that 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. Reprimand is also 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 is in accord. *See, e.g.*, *In re Holden*, 12 DB Rptr 49 (1998) (reprimand for violation of DR 6-101(B) and DR 9-101(C)(4)); *In re Coulter*, 15 DB Rptr 220 (2000) (reprimand for violation of DR 6-101(B) and DR 9-101(C)(4)); *In re Speight*, 17 DB Rptr 220 (2003) (reprimand for violation for DR 2-110(A)(2) and DR 6-101(B)).

15.

Consistent with the *Standards* and Oregon case law, the Bar and the Accused agree that the Accused shall be publicly reprimanded for violation of DR 2-110(A)(2), DR 2-110(B)(2), DR 6-101(B), and DR 9-101(C)(4) of the Code of Professional Responsibility. In addition, on or before the date this stipulation is approved, the Accused shall pay to the Oregon State Bar its reasonable and necessary costs in the amount of $462.35. Should the Accused fail to pay the amount in full by the designated date, the Bar may thereafter, without further notice to the Accused, apply for entry of a judgment against the Accused for the unpaid balance, plus interest thereon at the legal rate to accrue from the date the judgment is signed until paid in full.

16.

This Stipulation for Discipline has been reviewed by the Disciplinary Counsel of the Oregon State Bar. The sanction was approved by the State Professional Responsibility Board, and shall be submitted to the Disciplinary Board for consideration pursuant to the terms of BR 3.6.

DATED this 5th day of April 2004.

/s/ Jacqueline L. Koch
Jacqueline L. Koch
OSB No. 87278

OREGON STATE BAR

By: /s/ Jane E. Angus
Jane E. Angus
OSB No. 73014
Assistant Disciplinary Counsel

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re	)	
	)	
Complaint as to the Conduct of	)	Case No. 03-117
	)	
DANIEL E. RUSSELL,	)	
	)	
Accused.	)	

Counsel for the Bar:	Martha M. Hicks
Counsel for the Accused:	None
Disciplinary Board:	None
Disposition:	Violation of DR 6-101(B). Stipulation for Discipline. Public reprimand.
Effective Date of Order:	April 17, 2004

ORDER APPROVING STIPULATION FOR DISCIPLINE

This matter having been heard upon the Stipulation for Discipline entered into by the Accused and the Oregon State Bar, and good cause appearing,

IT IS HEREBY ORDERED that the stipulation between the parties is approved and the Accused is publicly reprimanded for violation of DR 6-101(B).

DATED this 17th day of April 2004.

/s/ Michael R. Levine
Michael Robert Levine, Esq.
State Disciplinary Board Chairperson

/s/ Susan G. Bischoff
Susan G. Bischoff, Esq., Region 5
Disciplinary Board Chairperson

STIPULATION FOR DISCIPLINE

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

1.

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

2.

The Accused was admitted by the Oregon Supreme Court to the practice of law in Oregon on September 23, 1994, and has been a member of the Oregon State Bar continuously since that time, having his office and place of business in Multnomah County, Oregon.

3.

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

4.

On November 15, 2003, the State Professional Responsibility Board authorized formal disciplinary proceedings against the Accused for alleged violations of DR 6-101(B) of the Code of Professional Responsibility. The parties intend that this stipulation set forth all relevant facts, violations, and the agreed-upon sanction as a final disposition of this proceeding.

Facts

5.

On or about May 30, 2000, Ron Sadler (hereinafter "Sadler") retained the Accused to assist him in the probate of the will of Erna Beall (hereinafter "Beall"). Sadler was appointed as personal representative of the Beall estate on or about August 21, 2000. As part of the probate, Sadler desired to dissolve two testamentary trusts, as he believed that the conditions that had caused Beall to establish them no longer existed.

6.

After about January 2001, the Accused failed and neglected to do the following with respect to the Beall estate:

A. failed to timely file the first annual accounting;

B. failed to timely file the final annual accounting;

C. failed to timely renew Sadler's personal representative's bond;

D. failed to timely file a motion to dissolve the educational trust for Beall's grandchildren;

E. failed to file a motion to dissolve the trust for Beall's daughters or to promptly determine and inform Sadler that such a motion was not well-taken;

F. failed to timely notify Beall's heirs and creditors of the statutory time period for objecting to the final accounting;

G. failed to timely submit to the court a proposed order closing the Beall estate; and

H. failed to adequately communicate with Sadler regarding the status of the Beall probate.

The Accused did not take the necessary actions to close the Beall estate until about November 15, 2002.

Violations

7.

The Accused admits that, by engaging in the conduct described in this stipulation, he violated DR 6-101(B).

Sanction

8.

The Accused and the Bar agree that in fashioning an appropriate sanction in this case, the Disciplinary Board should consider the ABA *Standards for Imposing Lawyer Sanctions* (hereinafter "*Standards*"). The *Standards* require that the Accused's conduct be analyzed by considering the following 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 Violated.* The Accused violated his duty of diligence to his client. *Standards,* § 4.4.

B. *Mental State.* The Accused acted negligently, i.e., he failed to be aware of a substantial risk that circumstances existed or that a result would follow, which failures were a deviation from the standard of care that a reasonable lawyer would exercise in the situation.

C. *Injury.* The Accused's client and the beneficiaries of the Beall estate suffered some actual injury as a result of the delay in closing the estate: the client's administrative duties were prolonged and distribution of the estate asset to heirs and devisees was delayed. The probate court was also required to take extra steps to supervise the administration of the Beall estate.

D. *Aggravating Factors.* There are no aggravating factors properly attributable to the Accused's conduct. *Standards,* § 9.22.

E. *Mitigating Factors.* Mitigating factors include:

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

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

3. The Accused has displayed a cooperative attitude toward these proceedings and has made full and free disclosure to Disciplinary Counsel's office. *Standards,* § 9.32(e).

4. When notified by the court of his failure to timely file the first annual accounting or to notify Beall's heirs and creditors of the statutory time period for objecting to the final accounting described, in paragraphs 6A and 6F herein, the Accused took the required action within the time limit set by the court. *Standards,* § 9.32(d).

9.

Standards § 4.43 suggests 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.

10.

Oregon case law is in accord. *See In re Cohen*, 330 Or 489, 496, 8 P3d 953 (2000) (lawyer reprimanded for one violation of DR 6-101(B)); *In re Mullen*, 18 DB Rptr 75 (2004) (lawyer reprimanded for one violation of DR 6-101(B)).

11.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be publicly reprimanded for violation of DR 6-101(B).

12.

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

EXECUTED this 17th day of March 2004.

/s/ Daniel E. Russell
Daniel E. Russell
OSB No. 94426

EXECUTED this 18th day of March 2004.

OREGON STATE BAR

By: /s/ Martha M. Hicks
Martha M. Hicks
OSB No. 75167
Assistant Disciplinary Counsel

Cite as 336 Or 640 (2004)

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re	)
	)
Complaint as to the Conduct of	)
	)
MARK G. OBERT,	)
	)
Accused.	)

(OSB Nos. 01-150, 01-151, 01-170; SC S50320)

En Banc

On review of the decision of a trial panel of the Disciplinary Board.

Argued and submitted March 4, 2004. Decided May 6, 2004.

Walter J. Todd, Salem, argued the cause for the Accused. Mark G. Obert, Salem, filed the brief on his own behalf.

Stacy J. Hankin, Assistant Disciplinary Counsel, Lake Oswego, argued the cause and filed the briefs for the Oregon State Bar.

PER CURIAM

The Accused is suspended from the practice of law for 30 days, effective 60 days from the date of the filing of this decision.

SUMMARY OF SUPREME COURT OPINION

The Oregon State Bar alleged that in the course of handling three different client matters, the Accused had violated the Code of Professional Responsibility Disciplinary Rule (DR) 6-101(B), DR 5-105(E), DR 1-102(A)(3), DR 5-101(A)(1), and DR 9-101(C)(4). A trial panel of the Disciplinary Board concluded that the Accused had violated all of the rules as alleged, except for DR 1-102(A)(3) and DR 5-101(A)(1). As a sanction, the trial panel suspended the Accused from the practice of law for 90 days, but stayed the suspension in favor of a two-year period of probation. The Bar subsequently sought review, arguing that the appropriate sanction in the Accused's case should entail a suspension of at least six months. *Held:* There was clear and convincing evidence to support the Bar's allegations regarding all the violations at issue except DR 5-101(A)(1). As a result, the Accused is suspended from the practice of law for 30 days.

Cite as 337 Or 15 (2004)

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re	)
	)
Complaint as to the Conduct of	)
	)
ALLAN F. KNAPPENBERGER,	)
	)
Accused.	)

(OSB Nos. 01-9, 01-121, 01-122; SC S49996)

En Banc

On review of the decision of a trial panel of the Disciplinary Board.

Argued and submitted March 9, 2004. Decided May 20, 2004.

Peter R. Jarvis, Hinshaw & Culbertson, Portland, argued the cause and filed the briefs for the Accused. With him on the briefs was Leta E. Gorman.

Stacy J. Hankin, Assistant Disciplinary Counsel, Lake Oswego, argued the cause and filed the brief for the Oregon State Bar.

PER CURIAM

The Accused is suspended from the practice of law for 90 days, commencing 60 days from the filing of this decision.

SUMMARY OF SUPREME COURT OPINION

The Oregon State Bar charged the Accused with violating DR 5-101(A) (conflict of interest with lawyer's self-interest) and DR 6-101(B) (neglect of legal matter) in the course of representing three clients. A trial panel of the Disciplinary Board found that the Accused committed the alleged violations and recommended a one-year suspension (with nine months stayed pending satisfactory compliance with certain conditions) and a two-year probationary period. *Held:* (1) The Accused violated DR 5-101(A) and DR 6-101(B), respectively, in two matters; (2) the Bar did not prove the alleged violations of DR 5-101(A) and DR 6-101(B) in the third matter; and (3) a 90-day suspension is the appropriate sanction. The Accused is suspended from the practice of law for 90 days, commencing 60 days from the date of filing of this decision.

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re	)	
	)	
Complaint as to the Conduct of	)	Case Nos. 01-70, 01-194, 02-91, 02-92
	)	
PHYLLIS KOESSLER,	)	
	)	
Accused.	)	

Counsel for the Bar:	Mark Bronstein; Martha Hicks
Counsel for the Accused:	Jerry Kobelin
Disciplinary Board:	None
Disposition:	Violation of DR 1-102(A)(3), DR 1-102(A)(4), DR 1-103(C) (four counts), DR 6-101(B) (two counts), DR 7-101(A)(2), DR 7-102(A)(5), DR 7-104(A)(1), DR 7-106(A), DR 9-101(A), DR 9-101(C)(3), and DR 9-101(C)(4). Stipulation for Discipline. Six-month suspension.
Effective Date of Order:	July 1, 2004

ORDER APPROVING STIPULATION FOR DISCIPLINE

This matter having been heard upon the Stipulation for Discipline entered into by the Accused and the Oregon State Bar, and good cause appearing,

IT IS HEREBY ORDERED that the stipulation between the parties is approved and the Accused is suspended for a period of six months, effective July 1, 2004, for violation of DR 1-102(A)(3), DR 1-102(A)(4), DR 1-103(C) (four counts), DR 6-101(B) (two counts), DR 7-101(A)(2), DR 7-102(A)(5), DR 7-104(A)(1), DR 7-106(A), DR 9-101(A), DR 9-101(C)(3), and DR 9-101(C)(4).

DATED this 27th day of May 2004.

/s/ Michael R. Levine
Michael R. Levine
State Disciplinary Board Chairperson

/s/ Jill A. Tanner
Jill A. Tanner, Region 6
Disciplinary Board Chairperson

STIPULATION FOR DISCIPLINE

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

1.

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

2.

The Accused was admitted by the Oregon Supreme Court to the practice of law in Oregon on October 7, 1994, and has been a member of the Oregon State Bar continuously since that time, having her office and place of business in Clackamas County, Oregon.

3.

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

4.

On September 12, 2003, a Third Amended Formal Complaint was filed against the Accused pursuant to the authorization of the State Professional Responsibility Board (hereinafter "SPRB"), alleging violation of DR 1-102(A)(3), DR 1-102(A)(4), DR 1-103(C), DR 6-101(B), DR 7-101(A)(2), DR 7-102(A)(5), DR 7-104(A)(1), DR 7-106(A), DR 9-101(A), DR 9-101(C)(3), and DR 9-101(C)(4). The parties intend that this Stipulation for Discipline set forth all relevant facts, violations, and the agreed-upon sanction as a final disposition of the proceeding.

Shoemaker Matter

(Case No. 01-70)

Facts

5.

Before July 1999, the Accused undertook to represent Bonnie Shoemaker, the personal representative of the estate of Richard Skaggs, in a medical malpractice action against the hospital and physicians who had treated Skaggs before he died. On or about July 15, 1999, the Accused filed a complaint for medical malpractice on behalf of Shoemaker in the Circuit Court for Multnomah County, Case No. 9907-07570.

6.

Beginning on or about September 28, 1999, opposing counsel in the medical malpractice litigation made repeated requests that the Accused file an amended complaint to make more definite and certain the allegations of the complaint. The Accused failed to confer with opposing counsel concerning this matter and failed to file an amended complaint, despite a February 24, 2000, order from the court that she do so.

7.

Beginning on or about September 28, 1999, opposing counsel made repeated requests that the Accused produce documents. The Accused failed to comply with the requests for production of documents, despite two orders from the court that she do so.

8.

On or about February 9, 2000, opposing counsel filed motions for summary judgment. The Accused failed to respond to the motions for summary judgment, with the result that Shoemaker's claims against the physicians were dismissed with prejudice, her claims against the hospital were dismissed without prejudice, and a judgment for costs and attorney fees was entered by the court against Shoemaker in her capacity as personal representative of the Skaggs estate.

9.

On or about January 12, 2000, and on or about April 3, 2000, the Accused represented to the court that she had a medical expert who was willing to testify in support of Shoemaker's claims. These representations were misleading and material in that the Accused knew she needed two medical experts to create a genuine issue of material fact, knew that she had only contacted one medical expert, and knew that this expert had not made a definite agreement to testify in her case. The Accused knew her representations to the court were misleading and material when she made them.

10.

After September 28, 1999, the Accused took no other substantial action on behalf of Shoemaker in the litigation and, specifically, did not locate or obtain a second medical expert to substantiate Shoemaker's claims, did not respond to attempts by opposing counsel to contact her, did not attend a conference with the court, and did not inform Shoemaker of the money judgment entered against her in her capacity as personal representative of the Skaggs estate.

11.

The Oregon State Bar received a complaint concerning the Accused's conduct in the Shoemaker matter on January 30, 2001. On February 6, 2001, Disciplinary

Counsel's Office forwarded a copy of the complaint to the Accused and requested her response to it by February 27, 2001. The Accused made no substantive response. On March 27, 2001, Disciplinary Counsel's Office again requested the Accused's response to the complaint by April 9, 2001. The Accused made no response, and Disciplinary Counsel referred the matter to the Clackamas/Linn/Marion County Local Professional Responsibility Committee (hereinafter "LPRC") for investigation.

12.

After April 20, 2001, an LPRC member contacted the Accused on a number of occasions and requested that she provide the member with a copy of Shoemaker's client file and information that would enable the member to contact Shoemaker. The Accused failed to produce Shoemaker's client file and other information to the LPRC member, who was required to issue a subpoena therefore.

Violations

13.

The Accused admits that, by engaging in the conduct described in paragraphs 5 through 12 of this stipulation, she violated DR 1-102(A)(3), DR 1-102(A)(4), DR 1-103(C), DR 6-101(B), DR 7-102(A)(5), and DR 7-106(A).

Brewer Matter

(Case No. 01-194)

Facts

14.

Beginning in about June 1998, the Accused undertook to represent Sharon Brewer in a proceeding to modify a domestic relations judgment. At all relevant times, the Accused knew that Brewer's husband was represented by counsel in the modification proceeding. Accused had had significant difficulty with husband's attorney in that he failed to timely respond to matters and engaged in last minute delay tactics.

15.

On or about October 14, 1998, the Accused received a check payable to Brewer and her husband, the proceeds of which were to be distributed in part to Brewer and in part to Brewer's husband pursuant to the terms of the judgment entered in the modification proceeding.

16.

On or about October 14, 1998, the Accused left a message on Brewer's husband's pager that the check, which the parties were awaiting, was in her office, and that husband should try to get a hold of his attorney. She made this call after

calling the husband's attorney, whose voice mail indicated he was on jury duty and gave no means of reaching him, and then immediately followed up with a letter to the attorney advising him of the contact.

17.

The Oregon State Bar received a complaint concerning the Accused's conduct in the Brewer matter on August 22, 2001. On August 31, 2001, Disciplinary Counsel's Office forwarded a copy of the complaint to the Accused and requested her response to it by September 21, 2001. The Accused made no response. On September 25, 2001, Disciplinary Counsel's Office again requested the Accused's response to the complaint by October 2, 2001. The Accused made no response, and Disciplinary Counsel referred the matter to the Clackamas/Linn/Marion County Local Professional Responsibility Committee for investigation.

Violations

18.

The Accused admits that, by engaging in the conduct described in paragraphs 14 through 17 of this stipulation, she violated DR 1-103(C) and DR 7-104(A)(1).

Horton Matter

(Case No. 02-91)

Facts

19.

On or about August 9, 2000, the Accused undertook to represent [redacted] who was a minor, in a personal injury matter that arose out of an April 16, 2000, automobile accident. [redacted]'s father, Bruce Horton, contracted for the Accused's services to [redacted] and, at all relevant times thereafter, was authorized by [redacted] to act on his behalf in the personal injury matter.

20.

On March 30, 2001, [redacted] reached the age of 18. Thereafter until about January 2002, the Accused intentionally took no substantial action on [redacted]'s case, failed to respond to Bruce Horton's attempts to contact her about the case, failed to contact [redacted] about his father's continued authority to act on his behalf, and failed to communicate with either [redacted] or Bruce Horton about the status of [redacted]'s case.

21.

In about January 2002, [redacted] retained new counsel to represent him in the personal injury matter. On January 10, 2002, and January 29, 2002, through his new counsel, [redacted] requested that the Accused return his client file. [redacted] was entitled to

receive his client file, but the Accused failed to deliver it to him or his counsel, despite [redacted]'s requests for it.

22.

The Oregon State Bar received a complaint from Bruce and [redacted] Horton concerning the Accused's conduct on March 12, 2002. On March 29, 2002, Disciplinary Counsel's Office forwarded a copy of the complaint to the Accused and requested her response to it by April 19, 2002. The Accused made no response. On April 30, 2002, Disciplinary Counsel's Office again requested the Accused's response to the complaint by May 7, 2002. The Accused made no response, and the matter was referred to the Clackamas/Linn/Marion County LPRC for investigation.

Violations

23.

The Accused admits that, by engaging in the conduct described in paragraphs 19 through 22 of this stipulation, she violated DR 1-103(C), DR 6-101(B), DR 7-101(A)(2), and DR 9-101(C)(4).

Salinas Matter

(Case No. 02-92)

Facts

24.

In about June 2001, Alvaro Salinas consulted with Jorge Macias, a paralegal and owner of LPC Paralegal Service, about the dissolution of his marriage. On or about July 23, 2001, the Accused undertook to represent Salinas in his dissolution of marriage proceeding.

25.

Pursuant to a written fee agreement between Salinas and the Accused, Salinas paid Macias $1,500 to be held as a retainer for the Accused's legal services. The Accused did not deposit Salinas's retainer into her lawyer trust account, maintain any records of these funds, or render accounts to Salinas regarding them. Rather, Macias maintained Salinas's retainer in his general business checking account and did not transfer the funds to the Accused until March 2002. Salinas terminated the Accused's employment in December 2001.

26.

The Oregon State Bar received a complaint from Salinas concerning the Accused's conduct on April 1, 2002. On April 8, 2002, Disciplinary Counsel's Office forwarded a copy of the complaint to the Accused and requested her response to it by April 29, 2002. The Accused made no response. On April 30, 2002, Disciplinary

Counsel's Office again requested the Accused's response to the complaint by May 7, 2002. The Accused made no response, and Salinas's complaint was forwarded to the Clackamas/Linn/Marion County Local Professional Responsibility Committee for investigation.

Violations

27.

The Accused admits that, by engaging in the conduct described in paragraphs 24 through 26 of this stipulation, she violated DR 1-103(C), DR 9-101(A), and DR 9-101(C)(3).

Sanction

28.

The Accused and the Bar agree that in fashioning an appropriate sanction in this case, the Disciplinary Board should consider the ABA *Standards for Imposing Lawyer Sanctions* (hereinafter "*Standards*"). The *Standards* require that the Accused's conduct be analyzed by considering the following 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 Violated.* The Accused violated her duty of diligence to her clients; her duty to the public to maintain her personal integrity; her duty to the legal system to avoid conduct prejudicial to the administration of justice and to refrain from improper communications with individuals in the legal system; and her duty as a professional to cooperate with the Bar's investigation of her conduct. *Standards*, §§ 4.0, 5.0, 6.0, 7.0.

B. *Mental State.* The Accused acted knowingly, i.e., with the conscious awareness of the nature or attendant circumstances of her conduct, but without the conscious objective or purpose to accomplish a particular result.

C. *Injury.* In the Shoemaker matter, the opposing party and the court were actually injured by virtue of the delays caused by the Accused's failure to prosecute the litigation and misleading statements to the court. In the Horton matter, the client was actually injured by delays in resolving his claim caused by the Accused's inactivity on his case, failure to communicate with him or his representative, and failure to promptly return his file to new counsel. In the Brewer matter, there was potential injury in that the Accused's direct communication with a represented party could have caused this party to act without benefit of advice from counsel. In the Salinas matter, the Accused's failure to maintain proper control of the funds the client had paid for future legal services exposed the client to the potential that his funds could have been mishandled by a nonlawyer. In all of these matters, the Bar and the complaining parties were actually injured by the Accused's conduct in that

the Bar's investigation of her conduct was rendered more difficult and the resolution of the complainants' concerns was delayed. *Standards,* p. 6.

D. *Aggravating Factors.* Aggravating factors include:

1. A pattern of misconduct. *Standards,* § 9.22(c).

2. Multiple offenses. *Standards,* § 9.22(d).

3. Obstruction of the disciplinary proceeding. *Standards,* § 9.22(e).

E. *Mitigating Factors.* Mitigating factors include:

1. Absence of a prior disciplinary record. *Standards,* § 9.32(a).

2. Personal or emotional problems. *Standards,* § 9.32(c). During the period of time in which the Accused's conduct occurred, her husband underwent several surgeries and contracted a serious medical condition, which temporarily left him a quadriplegic. The Accused's husband was out of the state on business at the time of the surgeries and his illness, and the Accused was required to travel to attend and care for him. When her husband returned home, he needed full-time care and assistance in rehabilitation, which the Accused attempted to render. The Accused was also caring for her son, who suffered from ADHD. While her husband was disabled and under her care, the Accused discovered that her daughter had begun to use and be dependent upon illegal drugs. Accordingly, the Accused was required to arrange for and participate in her daughter's drug rehabilitation and treatment in addition to her ongoing responsibilities with respect to the care and supervision of her son and husband.

3. The Accused cooperated with the LPRC investigation of the Brewer, Salinas, and Horton matters. *Standards,* § 9.32(e).

4. The Accused had little experience in civil litigation, not having undertaken any civil litigation until 1998. Because of her inexperience, the Accused was unaware of her alternatives for advising the court about her expert witnesses in the Shoemaker case outside the presence of opposing counsel. *Standards,* § 9.32(f).

29.

Standards § 4.42 suggests:

> Suspension is generally appropriate when: (a) a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client; or (b) a lawyer engages in a pattern of neglect and causes injury or potential injury to a client.

Standards § 6.12 suggests:

> 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 injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding.

Standards § 7.2 suggests:

> 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 a client, the public, or the legal system.

30.

Oregon case law is in accord. In *In re Recker*, 309 Or 633, 789 P2d 663 (1990), the court suspended the lawyer for two years for neglecting two client matters and lying to the court when questioned about the consequences of her neglect in one of the matters. The court found that the lawyer had violated DR 6-101(B) (two counts), DR 7-101(A)(2), DR 1-102(A)(3), and DR 1-103(C) (two counts). The court found only one mitigating factor: the lawyer's lack of a prior disciplinary record. In aggravation, the court found that the lawyer's victims were vulnerable, that she had committed multiple offenses, and that she was indifferent to making restitution.

In *In re Miles*, 324 Or 218, 923 P2d 1219 (1996), the court imposed a 120-day suspension for two violations of DR 1-103(C) when the lawyer failed to respond to the Bar's inquiries into her conduct in two client matters. The lawyer had not committed any misconduct in the representation of her clients, but the court found that a pattern of misconduct and substantial experience in the practice of law aggravated her failure to respond to the Bar.

In *In re Schaffner*, 323 Or 472, 918 P2d 803 (1996), the lawyer was suspended for 120 days for violation of DR 6-101(B) and DR 1-103(C) in connection with one client matter. The court found in aggravation a pattern of misconduct, multiple offenses, bad-faith obstruction of the disciplinary proceedings, refusal to acknowledge the wrongful nature of the conduct, and indifference to making restitution. In mitigation, the court found a lack of a prior disciplinary record.

Recently, in *In re Worth*, 336 Or 256, 82 P3d 605 (2003), the court suspended a lawyer for 90 days for neglecting three client matters, improperly withdrawing from a fourth, and making false statements in the course of the Bar's investigation of his conduct. In aggravation, the court found a pattern of misconduct, multiple offenses, and substantial experience in the practice of law. In mitigation, the court found no prior disciplinary record, the absence of a dishonest or selfish motive, personal or emotional problems, a good reputation, and remorse.

The Accused's personal circumstances are a strong mitigating factor and distinguish her conduct from that in *Recker* and justify a shorter period of suspension. The Accused's conduct is, however, more egregious than that in *In re Miles*, *In re Schaffner*, and *In re Worth*, because she failed to cooperate in four investigations by the Bar and violated a number of disciplinary rules in the course of her representation of four clients.

31.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be suspended for a period of six months for violation of DR 1-102(A)(3), DR 1-102(A)(4), DR 1-103(C) (four counts), DR 6-101(B) (two counts), DR 7-101(A)(2), DR 7-102(A)(5), DR 7-104(A)(1), DR 7-106(A), DR 9-101(A), DR 9-101(C)(3), and DR 9-101(C)(4), the sanction to be effective beginning on July 1, 2004.

In addition, on or before the expiration of Accused's six-month suspension, the Accused shall pay to the Oregon State Bar its reasonable and necessary costs in the amount of $671.00, incurred for deposition costs and service fees. Should the Accused fail to pay $671.00 in full by the expiration of the Accused's suspension, the Bar may thereafter, without further notice to the Accused, apply for entry of a judgment against the Accused for the unpaid balance, plus interest thereon at the legal rate to accrue from the date the judgment is signed until paid in full.

32.

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 10th day of May 2004.

/s/ Phyllis Koessler
Phyllis Koessler
OSB No. 94511

EXECUTED this 20th day of May 2004.

OREGON STATE BAR

By: /s/ Martha M. Hicks
Martha M. Hicks
OSB No. 75167
Assistant Disciplinary Counsel

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re	)	
	)	
Complaint as to the Conduct of	)	Case No. 02-23
	)	
BRAD A. FLINDERS,	)	
	)	
Accused.	)	

Counsel for the Bar:	Timothy E. Miller; Jane E. Angus
Counsel for the Accused:	None
Disciplinary Board:	John A. Berge, Esq., Chair; Carol DeHaven Skerjanec, Esq.; John G. McBee, Public Member
Disposition:	Violation of DR 1-102(A)(2), DR 1-102(A)(4), DR 1-103(C), and DR 7-106(A). Trial Panel Opinion. Two-year suspension.
Effective Date of Opinion:	June 1, 2004

OPINION OF TRIAL PANEL

I. Introduction

A Formal Complaint was filed by the Oregon State Bar Disciplinary Counsel against Brad A. Flinders (OSB No. 90265) on February 18, 2003. Within that complaint, the Oregon State Bar alleged that the Accused had violated DR 1-102(A)(2), DR 1-102(A)(4), DR 7-106(A), and DR 1-103(C). The Accused filed an answer to the complaint dated March 25, 2003, wherein the Accused admitted that the Bar had the authority to prosecute the complaint; that he was at all relevant times a member of the Oregon State Bar; that a criminal prosecution under ORS 475.992 was initiated against him in Malheur County; that a grand jury indictment was returned against him in Malheur County Circuit Court Case No. 01-12-2175C (*State of Oregon v. Brad A. Flinders*); and that he pled guilty to the crime charged in the indictment. The Accused then essentially denied each of the material allegations within the complaint.

An Amended Formal Complaint was filed against the Accused by Disciplinary Counsel's Office on December 18, 2003. Although some allegations were amended, the Accused was still being charged with violations of the same Disciplinary Rules. The Accused failed to file an answer to the Amended Formal Complaint.

A hearing was held on January 28, 2004. Trial panel members included John B. McBee, Carol DeHaven Skerjanec, and the undersigned, John A. Berge. The Bar was represented by Jane E. Angus and Timothy E. Miller. The Accused failed to appear for the hearing and was not represented. The witnesses called included Daniel Norris, Malheur County District Attorney; Manuel Perez; Benjamin Esplin, and Don Ballou. The Bar offered Exhibits 1 through 45, and all were received. Finally, there were no prehearing rulings that affected the disposition of the case.

II. Findings of Fact

The following facts were proven to the trial panel by clear and convincing evidence:

1. The Accused was licensed to practice law in the state of Oregon in 1990. No evidence was introduced as to the primary practice areas of the Accused.

2. On or about December 6, 2001, the Accused was indicted for the crime of possession of a controlled substance (methamphetamine), a Class C felony (ORS 475.992); the Accused committed the acts alleged within the indictment as a result of his guilty plea to the charge on April 9, 2002.

3. On or about November 4, 2001, a 911 operator received a 9-1-1 phone call from a phone located in a residence occupied by the Accused. The 9-1-1 caller "hung up" and, as a result, the Nyssa Police Department dispatched officers to the scene to be sure that no emergency existed at that location. Benjamin Esplin, a police officer with the Nyssa Police Department, was one of the officers dispatched to the scene and testified at the Disciplinary Hearing. Officer Esplin testified that as he approached the back door to the residence occupied by the Accused, he saw a plate with what appeared to be approximately one-eighth of an ounce of methamphetamine on it. The officers at the scene then found an unlocked side door, tried to enter the side door, but it was pushed shut against them and locked from the inside. Officer Esplin testified that he requested backup from the Oregon State Police and that one of the Oregon State Police officers thought they saw the Accused with a handgun. At that point, the Accused chose to voluntarily leave the residence. Admitted as Exhibit 45 is a copy of the affidavit supporting the search warrant that was ultimately received and executed. Officer Esplin testified that upon executing the search warrant, the plate that he had seen previously with the controlled substance on it was gone. Subsequent testing of some of the items taken from the premises disclosed residual amounts of methamphetamine and the Accused was charged criminally.

4. On or about December 26, 2001, the Malheur County District Attorney offered to allow the Accused a conditional discharge. At that time, it was the policy of the Malheur County District Attorney to offer a conditional discharge so long as the defendant did not enter a "not guilty" plea or file any dispositive motions. If the defendant entered a "not guilty" plea or filed motions, a conditional discharge would not be available. The Accused rejected the conditional discharge offer on January 22, 2002, and on February 5, 2002, entered a plea of not guilty. On February 28, 2002,

the Accused filed various pretrial motions and, on March 19, 2002, the Accused appeared for a hearing on those motions. The court denied the motions. (*See* generally Exhibits 43 and 44.)

5. During the March 19th hearing, a deputy district attorney reported to the court that, in the opinion of the deputy district attorney, the Accused was exhibiting conduct that would normally be associated with the consumption of an intoxicant. The Accused posted bail and was released from custody with conditions. The conditions included submitting to random urinalysis, obeying all laws, not possessing or consuming alcohol, submitting to all orders and processes of the court, and appearing for all appearances directed by the court. The district attorney requested the release be amended to allow the Community Corrections Department to take a urine sample immediately, and to require the Accused to report daily to the Community Corrections Department. The Nyssa Police Department was directed to serve the motion and proposed amended order. Officer Don Ballou of the Nyssa Police Department testified that on March 20, 2002, he attempted to serve the amended order and, although the lights were on in the Accused's residence, the Accused did not answer the door. On March 25, 2002, Officer Ballou again attempted service; he noticed that the Accused's vehicle was present, but the Accused did not answer the door. A copy of the motion and proposed order were posted on the door of the residence and on the Accused's vehicle. (*See* Exhibits 7A and 44.)

6. The Accused did not respond to the district attorney's motion to amend the release order, and on March 25, 2002, the court granted the motion to amend the release conditions and obtain the urine sample. The court also revoked the Accused's release and issued a warrant for his arrest, *nunc pro tunc* March 26, 2002. The court ordered that the Accused immediately take a urinalysis test, sign a modified release agreement for daily reporting to the Community Corrections Office, and submit to random urinalysis.

7. On March 26, 2002, the Accused filed a motion to vacate the warrant for his arrest. The Accused was arrested on or about April 1, 2002, and transferred to Malheur County on or about April 3, 2002. (*See* Exhibits 11 and 40.)

8. On April 9, 2002, the Accused appeared before the court represented by counsel, and pled guilty to the charge of possession of a controlled substance, a Class C felony (ORS 475.992). The court allowed the Accused to be released from custody with the condition that the Accused report daily to the Community Corrections Department and subject himself to random urinalysis. The Accused signed a contract with the Community Corrections Department agreeing to report daily and also signed a release agreement. As a result, the court entered an order continuing the release agreement upon the same terms and conditions.

9. The Accused reported to the Community Corrections Office daily from March 10, 2002, through April 15, 2002. After April 15, 2002, the Accused failed to appear or otherwise report to the Community Corrections Office in violation of the terms of his release. The Accused admitted that he was aware of his obligation to report daily, that he missed two consecutive days as a result of being sick, and that he did not report after missing two consecutive days because it was his opinion he would be immediately arrested upon reporting. The Accused made no further attempts to comply with the court's order or contact the Community Corrections Department.

10. On or about April 22, 2002, the district attorney filed a motion for an order requiring the Accused to show cause why the conditional release should not be revoked as a result of the Accused's failure to appear daily as required by the release agreement. The court granted the motion on April 23, 2002, and ordered that a warrant for the arrest of the Accused be issued and that he be brought before the court to show cause why the release agreement should not be revoked.

11. On or about April 30, 2002, an attorney representing the Accused presented a motion to postpone sentencing and authorize release. The Accused's sentencing was scheduled for May 8, 2002. The Accused and his attorney arranged for the Accused to enter an in-patient substance abuse program, Pine Grove Next Step, which was located in the state of Mississippi. The District Attorney did not object to the Accused's request. On May 1, 2002, the court granted the Accused's motion and signed an order releasing the Accused to enter the treatment program. Sentencing was rescheduled. The Accused left Oregon for the treatment program on May 3, 2002, and returned to Oregon on August 3, 2002.

12. The District Attorney, upon the Accused's successful completion of the inpatient portion of the treatment program, again offered the Accused a conditional discharge. In response to the offer, the Accused and his attorney arranged continuing treatment for the Accused through the Idaho Attorney Assistance Program. The Accused agreed to the terms and conditions of the contract with the facilitator of that program.

13. On September 12, 2002, the Accused and his attorney appeared before the Malheur County Circuit Court and presented the agreement reached for continuing treatment. As a result, the court entered a conditional discharge. The court placed the Accused on probation for 18 months with conditions. In addition to the treatment arrangements with the Idaho Attorney Assistance Program, the Accused was also ordered to comply with Malheur County Circuit Court's ordinary "drug package," requiring the Accused to:

(a) inform the court within seven days of any change of employment;

(b) not to use or possess intoxicants, including alcohol and illegal drugs;

(c) attend Alcoholics Anonymous;

(d) submit to drug, breath, or urine tests at the direction of evaluator, probation officer, court, or treatment provider;

(e) successfully complete the evaluation and treatment recommended by court-approved provider; and

(f) pay all costs of evaluation and treatment.

The Accused did not object to any of the conditions imposed by the court on the conditional release.

1. The facilitator of the Idaho Attorney Assistance Program required a signed release before it would supply any information to the Malheur District Attorney or court so that the Accused's progress could be monitored and compliance determined. However, the Accused did not provide the required release to the facilitator and, therefore, the facilitator was not in a position to supply information regarding the Accused's treatment or continuing compliance to the District Attorney's Office. (*See* Exhibit 41.)

2. The Accused failed to comply with the terms of his probation and conditional discharge. He did not cooperate with the facilitator of the Idaho Attorney Assistance Program and did not do any of the things required by his treatment contract or conditional discharge.

3. In October of 2002, the Malheur County District Attorney submitted a release form to the Accused's attorney in an effort to obtain information regarding the Accused's participation in the substance abuse program and compliance with his conditional discharge. Although the Accused's attorney provided the document to the Accused, the Accused did not sign and return the release nor communicate with the District Attorney's Office regarding his compliance with the conditional discharge. The facilitator for the Idaho Attorney Assistance Program terminated the Accused from the program as a result of his failure to cooperate.

4. On December 24, 2002, the Malheur County District Attorney filed a motion for an order requiring the Accused to sign a release or otherwise provide the treatment record to determine compliance with the treatment contract and conditional discharge. On December 27, 2002, the court granted the motion and ordered the Accused to sign a release by January 10, 2003, and produce treatment records by January 17, 2003. The Accused did not contact or communicate with the court or the District Attorney, nor provide the signed release, or otherwise provide the treatment records so that compliance could be determined.

5. On or about January 30, 2003, the Malheur County District Attorney's Office filed a motion to show cause why the conditional discharge should not be revoked. On February 4, 2003, the court filed an order requiring the Accused to appear and show cause why the conditional discharge should not be revoked and sentence imposed. The court again issued a warrant for the Accused's arrest. The

Accused appeared before the court on March 3, 2003, and requested a court-appointed attorney. Due to budget limitations, the court could not appoint an attorney to represent the Accused. The court advised the Accused he was still bound by the terms of the conditional discharge. The court continued the case until July 2003 at which time a lawyer was appointed to represented the Accused.

6. On July 25, 2003, the Accused and his appointed attorney appeared before the Malheur County Circuit Court. The court advised the Accused and his attorney that the district attorney was entitled to verify whether or not the Accused had complied with the treatment agreement and conditions associated with the conditional discharge. The Accused's attorney advised the court that the Accused was not in compliance with the terms of the conditional discharge. The Accused was of the opinion that participation at AA meetings violated his constitutional right not to have "state religion forced upon him." (*See* Exhibit 43.) The Accused's attorney did, however, represent to the court that the Accused would sign a release so that the district attorney could verify whether the Accused had complied with the remaining terms of the treatment agreement and conditional release. The court reset the matter for approximately one month until August 27, 2003. At no time did the Accused provide the written release nor otherwise provide the treatment records to the District Attorney's Office.

7. On August 27, 2003, the Accused appeared before the court with his attorney and denied that he violated the terms of his conditional discharge. On September 18, 2003, the district attorney filed an amended motion to show cause why conditional discharge should not be revoked.

8. On December 2, 2003, the court held a hearing on the state's motion. The court found that the Accused was in violation of the terms of the conditional discharge but did not revoke it. The court placed the Accused on a new 18-month probationary period, supervised by Community Corrections with conditions.

9. On or about December 24, 2001, the Malheur County District Attorney provided the Bar with information concerning the Accused's criminal conduct and indictment. On January 3, 2002, Oregon State Bar Disciplinary Counsel's Office forwarded a copy of the information received to the Accused at the address the Accused had listed with the Oregon State Bar requesting a response by January 24, 2002. Although the Accused did receive the Bar's letter, he did not respond.

10. On February 5, 2002, the Bar again requested the Accused respond by February 12, 2002. Again, the Accused received the Bar's letter but did not respond. On February 20, 2002, the matter was referred to the Local Professional Responsibility Committee ("LPRC") for investigation. The Accused and his attorney met with the LPRC investigator in September of 2002. Manuel Perez, a member of the Oregon State Bar, was assigned the investigation. Mr. Perez met with the Accused and, within that meeting, the Accused admitted that he was still using methamphetamine, that he failed to appear at the March 25, 2002 hearing because he knew he would be arrested if he appeared; that he refused to provide urine

samples, and that he discontinued reporting to the Corrections Department after missing two consecutive days because he feared he would be arrested as soon as he reported.

11. On December 18, 2002, the Bar sent the Accused's attorney a letter advising that Bar representatives wished to schedule an interview with the Accused. On December 25, 2002, the Bar received a letter dated December 18, 2002, from the Accused's attorney wherein the Bar was advised that he no longer represented the Accused and that he would notify the Accused that the Bar desired to schedule an interview. The Accused admitted that he received a copy of the letter wherein an interview was requested, but made no attempt to communicate with Disciplinary Counsel's Office.

12. On December 26, 2002, the Bar sent a letter to the Accused at his last known and official address. Within that correspondence, the Accused was reminded of his obligation to notify the Bar of any change of address and telephone number and requested he contact Disciplinary Counsel's Office by January 2, 2003, to schedule an interview. The Accused submitted change of address information, but did not respond to Disciplinary Counsel's Office before or after the requested date.

13. On January 17, 2003, the Bar renewed the request to schedule an interview and asked the Accused contact Disciplinary Counsel's Office by January 31, 2003. The Accused did not respond. On February 5, 2003, the Bar received a letter from the Accused in which he refused to make himself available for an interview. (*See* Exhibit 32.) On February 18, 2003, the Bar filed a Formal Complaint. The Accused thereafter requested and was granted transfer to inactive status and the Accused filed an Answer to the Formal Complaint on March 19, 2003.

14. Thereafter, the Bar made several attempts to establish the Accused's deposition. The Accused responded by letter, but did not offer any dates for his deposition. On September 4, 2003, the Bar sent the Accused another letter and notice of deposition for September 29, 2003. Up to that point, the Accused had failed to provide any available dates for deposition. The Accused appeared for his deposition on September 29, 2003. (*See* Exhibit 40.)

III. Conclusions of Law

The trial panel was convinced by clear and convincing evidence of the following Conclusions of Law in response to the following charges:

1. DR 1-102(A)(2)

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

> (A) It is professional misconduct for a lawyer to:
>
> . . . .
>
> (2) Commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness to practice law. . . .

The trial panel was persuaded by the guilty plea entered by the Accused, as well as the testimony of Officer Benjamin Esplin that the Accused possessed a controlled substance, a Class C felony (ORS 475.992). Further, the trial panel is convinced that the Accused failed to appear in the first degree, also a Class C felony (ORS 162.205).

In March of 2002, the Accused was released from custody under a release agreement requiring the Accused submit to all orders of the court and appear at all times directed by the court. The Accused was further required to provide urine samples. The trial panel is convinced by clear and convincing evidence that the Accused was aware of the court's requirements for his release. The trial panel is also convinced as a result of the testimony of Dan Norris, the Malheur County District Attorney, and the testimony of the Local Professional Responsibility Committee investigator, Manuel Perez, that the Accused intentionally failed to appear or otherwise satisfy the terms of his treatment agreement and conditional release. The trial panel is further convinced by clear and convincing evidence that, in spite of the many opportunities provided to the Accused as outlined within the factual section, the Accused nevertheless refused to comply with the court's orders and arrest warrants were issued for the Accused on several occasions as a result of his intentional non-compliance. The Bar points to *In re Allen*, 326 Or 107, 949 P2d 710 (1997), where the court stated that "lawyers may not undermine court orders or Oregon's drug laws with impunity." *In re Allen*, *supra*, 326 Or at 129. There is no question in this case that the Accused has attempted to undermine the court orders, the conditional discharges offered to him, and Oregon's drug laws. The Accused's conduct reflects adversely on his trustworthiness and fitness to practice in violation of DR 1-102(A)(2). The Accused not only admitted to possessing and using methamphetamine but also admitted his intentional disregard of the court's order and the conditions associated with his treatment agreement and conditional release. The Accused showed an intentional pattern of disrespect for the law and the administration of justice.

2. DR 1-102(A)(4)

DR 1-102(A)(4) provides:

> (A) It is professional misconduct for a lawyer to:
>
> . . . .
>
> (4) Engage in conduct that is prejudicial to the administration of justice. . . .

The trial panel is convinced by clear and convincing evidence that the Accused engaged in conduct that was prejudicial to the administration of justice. In spite of many opportunities to correct his behavior, the Accused admitted that he did not cooperate with the District Attorney's Office to facilitate the treatment agreement and conditional discharge. The affect of the Accused's conduct was to hinder the administration of justice and unreasonably delay the prosecution of the Accused's

case. Dan Norris, the Malheur County District Attorney, testified that he provided the Accused with an opportunity for a conditional discharge that he did not ordinarily provide other defendants, as it did appear the Accused was intending to correct his behavior and salvage his career. Unfortunately, the Accused repeatedly flaunted the opportunities being provided to him and willfully failed to provide the information required to comply with the conditional discharge. Further, Dan Norris testified that as a result of providing the Accused with "second and third chances," he was receiving some criticism from members of the Local Criminal Defense Bar inquiring as to why other criminal defendants were not receiving the same opportunities as the Accused. Mr. Norris testified that he changed his policy with regard to conditional discharges and would *never* again provide any opportunity to an accused attorney which was not available to any other criminal defendant. This trial panel was convinced that the Accused was provided several opportunities to correct his behavior and take advantage of a conditional discharge but repeatedly refused to comply with the conditions and requirements. The exhibits gleaned from the court records clearly show that the Accused required the court spend an inordinate amount of time processing his case as a result of his failure to participate, cooperate, or appear. The Accused's conduct was in violation of DR 1-102(A)(4).

3. DR 7-106(A)

DR 7-106(A) provides:

> (A) A lawyer shall not disregard or advise the lawyer's client to disregard a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding but the lawyer may take appropriate steps in good faith to test the validity of such rule or ruling.

The rule also applies to a lawyer representing his own interests. *In re Rhodes*, 331 Or 231, 13 P3d 512 (2000).

The Accused knowingly disregarded orders of the court. On March 19, 2002, the court ordered the Accused to provide an immediate urine sample. The Accused failed to do so. A reasonable inference that can be drawn from the Accused's failure to provide the sample is that the Accused was still using controlled substances. The refusal to provide the sample was a violation of the court order. The Accused was also ordered to appear to determine whether the release agreement should be modified and again provide a urine sample. The Accused did not appear.

On March 25, 2002, the Accused was required by order to appear and a warrant was issued for his arrest. Although the Accused filed a motion to vacate the warrant, he did not voluntarily appear. The Accused was arrested in Idaho as a result of the warrant on April 1 and transported back to Malheur County on April 3.

On April 9, 2002, the Accused was ordered to appear and report daily to Community Corrections. Although the Accused did voluntarily appear from April 11 to April 15, thereafter, the Accused refused to voluntarily appear or otherwise communicate with the court, Community Corrections, or the District Attorney's Office. The Accused admitted that he voluntarily failed to appear after missing two consecutive days due to sickness because he felt that he would be immediately arrested upon his reappearing and incarcerated.

On September 12, 2002, the court ordered conditional discharge terms and conditions. One of the conditions was that the Accused cooperate with the Idaho Attorney Assistance Program in continuing with his treatment and that the Accused supply the appropriate release to the facilitator of the Idaho Attorney Assistance Program so that information could be provided to the District Attorney's Office to monitor the Accused's compliance. The Accused failed to provide the release or otherwise supply the District Attorney's Office or the court with any information that would allow the District Attorney's Office or the court to determine whether the Accused was in compliance with his conditional discharge. The court found, at a December 7, 2003 hearing, that the Accused had violated the terms of his conditional discharge. The trial panel is convinced by clear and convincing evidence that the Accused knowingly and intentionally disregarded orders of the court.

4. DR 1-103(C)

DR 1-103(C) provides:

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

The Accused was requested to supply information in response to a complaint received from the Malheur County District Attorney. The Accused admitted to Mr. Perez, the LPRC investigator, that correspondence from the Bar was received, but that he was choosing not to open his mail. The court has held in *In re Rhodes*, 331 Or 231, 13 P3d 512 (2000), that lawyers who fail to open their mail are not insulated from the requirements of DR 1-103(C). The Accused was provided several opportunities to communicate with the Bar and comply with his obligations as a licensed attorney but intentionally chose not to do so. The fact that the Accused did not file an answer to the Amended Formal Complaint, nor choose to appear for the hearing in this case, is further evidence that the Accused had no intent to cooperate with the Bar as required by the Disciplinary Rule. The trial panel is convinced by clear and convincing evidence that the Accused violated DR 1-103(C).

IV. Sanctions

The ABA *Standards for Imposing Lawyer Sanctions* require that the following factors be considered:

(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.

In violating the referenced Disciplinary Rules, the Accused has violated his duty to the public, the legal system, and the profession. The Accused's violations were done knowingly and intentionally. The Accused admitted to Mr. Perez that he was continuing to use controlled substances, and that he intentionally failed to follow court orders or make his appearances. The Accused was aware of the conditions of his release and conditional discharge, but nevertheless chose not to follow the orders of the court, chose not to voluntarily appear, and chose to ignore the requirements of his treatment agreement and conditional discharge. Finally, the Accused intentionally chose to ignore the inquiries received from the Bar for information in response to the complaint filed by the Malheur County District Attorney.

"Injury" is defined as harm to a client, the public, legal system, or profession that results from the lawyer's conduct. The trial panel is convinced by clear and convincing evidence that the Accused caused actual injury to the court, Community Corrections, the Malheur County District Attorney's Office, Disciplinary authorities, and court-appointed attorneys. Due to the Accused's patterns of refusal to follow court orders and intentional failure to appear, valuable time and resources were devoted to the Accused, the criminal process, and the disciplinary process that would not have been required if the Accused had complied with his obligations. The trial panel is convinced that the Accused's conduct demonstrates a continued disrespect for the legal system and disciplinary process. Further, the fact that Mr. Norris, the Malheur County District Attorney, has been the subject of some criticism as a result of attempting to provide the Accused with an opportunity to correct his behavior and salvage his career is further evidence of the actual harm done to the criminal justice system in Malheur County and the Malheur County District Attorney's Office. The Accused's conduct also caused actual harm to the legal profession as his intentional failure to follow court orders or otherwise appear when required to do so reflects poorly on all licensed attorneys.

Disciplinary counsel points to various standards from the ABA *Standards for Imposing Lawyer Sanctions* ("*Standards*") that apply in this case. These include *Standards* 5.1 (failure to maintain personal integrity); 5.2 (suspension is generally appropriate when a lawyer knowingly engages in criminal conduct that seriously adversely reflects on the lawyer's fitness to practice); 6.2 (abuse of the legal process); 6.21 (disbarment is generally appropriate when a lawyer knowingly violates a court order or rule and causes injury); 6.22 (suspension is generally appropriate when a

lawyer knows that he or she is violating a court order or rule and causes injury); 7.0 (violations of duties owed to the profession); 7.1 (disbarment is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed to the profession with the intent to obtain a benefit for the lawyer and causes serious potential injury to a client, the public, or the legal system), and 7.2 (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 a client, the public, or the legal system).

The panel is required to consider, in determining the appropriate sanctions, aggravating factors. The Accused was admitted to practice in 1990 and, therefore, has substantial experience at the practice of law. Notwithstanding his experience as an attorney, the Accused knowingly violated orders of the court, failed to appear, and also intentionally failed to cooperate with the Bar during its investigation. Finally, the Accused failed to file an answer to the Amended Formal Complaint and failed to appear at the scheduled disciplinary hearing. The Accused's actions highlight an intentional disregard for the court and the Oregon State Bar.

The panel is also required to consider mitigating factors. In this case, the only mitigating factor the panel recognizes is that the Accused has no prior record of discipline. The trial panel is convinced by clear and convincing evidence that the court, the Malheur County District Attorney's Office, and the Oregon State Bar repeatedly provided the Accused with an opportunity to correct his behavior, but the Accused continued to intentionally disregard the orders of the court, or the requests from the Oregon State Bar Disciplinary Counsel's Office.

Although the ABA *Standards* allow chemical dependency and interim rehabilitation to be seen as a mitigating factor under limited circumstances, this trial panel finds that the chemical dependency should not be seen as a mitigating factor in this case. Had the Accused chosen to accept the initial treatment agreement and comply with the first conditional discharge order, and continued to cooperate with the court, his treatment providers and the Bar, then his chemical dependency may have been considered a mitigating factor. Since the Accused has refused to cooperate with the court, his treatment providers, the District Attorney's Office, and the Oregon State Bar, his chemical dependency will not be considered as a mitigating factor in this case.

Although no prior disciplinary cases are analogous to this case, the court has had an opportunity in the past to consider the appropriate sanctions for violations of the same rules under slightly different facts. In summary, a significant period of suspension has been imposed when attorneys have been found guilty of failing to cooperate with disciplinary investigations, conduct involving dishonesty and misrepresentation, failure to follow orders of the court, and serious criminal violations.

V. Disposition

It is the decision of the trial panel that the Accused be suspended from the practice of law for two years.

DATED this 29th day of March 2004.

/s/ John A. Berge
John A. Berge
OSB No. 87166
Trial Panel Chair

/s/ Carol DeHaven Skerjanec
Carol DeHaven Skerjanec
OSB No. 94175
Trial Panel Member

/s/ John B. McBee
John B. McBee, DDS
Trial Panel Member

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re	)	
	)	
Complaint as to the Conduct of	)	Case No. 03-06
	)	
THOMAS DANIEL O'NEIL,	)	
	)	
Accused.	)	

Counsel for the Bar:	Susan R. Gerber; Stacy J. Hankin
Counsel for the Accused:	None
Disciplinary Board:	Mary Kim Wood, Chair; Llewellyn M. Fischer; Joan J. LeBarron, Public Member
Disposition:	Dismissed
Effective Date of Opinion:	June 5, 2004

OPINION OF TRIAL PANEL

This matter came on regularly before a Trial Panel of the Disciplinary Board consisting of Mary Kim Wood, Esq., Chair; Llewellyn M. Fischer, Esq., Member; and Joan LeBarron, Public Member, on February 10, 2004. The Oregon State Bar was represented by Susan Gerber as Bar Counsel and Stacy J. Hankin, Assistant Disciplinary Counsel. The Accused represented himself. The Trial Panel has considered the stipulations, pleadings, exhibits, testimony, trial memoranda, and arguments of counsel.

Introduction

This proceeding arises from the action of the Accused in submitting a 1995 psychological evaluation to the court in connection with an April 3, 2002 motion to modify child support. The Bar argued that his action in doing so was intended to influence the court to decide in favor of the Accused's client because the other party was a bad person, that the Accused had no reasonable belief the report was relevant, and that he desired to embarrass and humiliate the opposing party. The Accused argued that he believed credibility was relevant and that because the judge hearing this motion was new to the case, the insight provided by the report, which included an evaluation of both parties, would be helpful to the court in making its decision.

Summary of Facts

In December 1994, Joseph Paratore ("Paratore") filed a petition for dissolution of his marriage to Cheryl Paratore, now known as Cheryl Blankenbaker ("Blankenbaker"). The dissolution was unusually acrimonious. A psychological evaluation was done the following year in connection with the custody evaluation. The parties settled their differences on the eve of trial such that the custody and psychological evaluations were never submitted into evidence, although there is a possibility that a sealed copy of the custody evaluation is contained in the court files.

The Accused assumed representation of Blankenbaker in the fall of 1996. From that day forward there were repeated motions to modify custody, support, and for contempt. In 2001 Paratore escalated hostilities by filing a complaint against the Accused with the Bar. It was dismissed by the State Professional Responsibility Board ("SPRB") in February 2002.

In the fall of 2001, while the Bar complaint was still pending, the Accused requested a hearing to consider the question of reducing Blankenbaker's support obligation. The matter was heard by ALJ Smith in October of that year and an order reducing support was issued. The Accused filed a petition for review of that order in December. The following month, Paratore filed a motion for contempt claiming Blankenbaker was in default on her support obligations and had failed to meet the requirements of a previous contempt finding.

Judge Van Hoomissen heard the pending matters on April 3, 2002. He left the hearing open for the parties to submit additional information regarding the value of a house transferred to her new husband by Blankenbaker and the income resources available to Paratore from his fiancé. He specifically stated that the additional submissions were "subject to the right of the other side to object." (Exhibit 28.)

While reviewing the file for the information on Blankenbaker's interest in the home, the Accused saw the psychological report, read it, and decided to submit it with the house transfer information. In his transmittal letter (Exhibit 29), he explains that he took this action because he thought "it might provide some insight to the court into the thinking and actions of the parties and give the court a bit of context for witness evaluation."

At the same time this information was sent to Judge Van Hoomissen it was faxed to Paratore's counsel, John Case.[1] Case took issue with this submission and so informed the court. (Exhibit 30.) The court ruled in Case's favor and declined to consider the psychological evaluation. It affirmed the support award and found Blankenbaker in contempt. (Exhibit 31.) It is unclear whether the evaluation was returned to the Accused, destroyed, or retained by the court.

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[1] In addition to representing Paratore in this matter, Case was also called by the Bar as a witness on family law procedures in Marion County Circuit Court.

General Factual Findings

1. The psychological report contained information that was not relevant to the court proceedings. Arguably, some portions of the report were relevant. Additionally, the report included less than flattering information about both parties.

2. The Accused submitted the psychological report to the court.

3. Paratore's counsel was given an opportunity to object, did so, and prevailed on his objection such that the court did not accept the report into evidence nor consider the report in making its ruling.

4. The court ruled in favor of Paratore on both the support and contempt issues.

5. The Accused admitted that he had not thought through the ramifications of submitting the evaluation to the court. He had been reviewing the file the afternoon of the day submissions were due, read the report, thought the information regarding Paratore's deceptive and manipulative personality would be of use to the court in evaluating Paratore's credibility as a witness and submitted the report whole cloth, without considering whether portions should be redacted as irrelevant or unduly prejudicial.

Burden of Proof/Evidentiary Standard

The Bar has the burden of establishing the Accused's misconduct in this proceeding by clear and convincing evidence. BR 5.2. *Clear and convincing evidence* means that the truth of the facts asserts is highly probable. *In re Taylor*, 319 Or 595, 600, 878 P2d 1103 (1994).

Allegations and Determination

The Bar alleges that by submitting the psychological evaluation to the court, the Accused violated DR 7-106(C)(1). That rule states:

> (C) In appearing in the lawyer's professional capacity before a tribunal, a lawyer shall not:
>
> (1) State or allude to any matter that the lawyer has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence.

The Bar alleges that the Accused's motivation in submitting the evaluation was to persuade the court to rule in Blankenbaker's favor because Paratore was a bad person. It also argued that the Accused submitted the evaluation to personally embarrass Paratore because of the Accused's personal animus toward Paratore, who had filed a Bar complaint against him.[2]

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[2] The Bar complaint had been dismissed in February 2002. The evaluation was submitted in April 2002.

The pertinent evidence tendered by the Bar included:

6. A December 3, 1996 letter from the Accused to Paratore's original counsel, Gil Feibelman, which referenced the 1995 psychological report by Dr. Sullivan and establishes that the Accused had read the report as early as 1996. (Exhibit 3A.)

7. A February 12, 2001 letter from the Accused to Blankenbaker wherein he states that he has become "to (*sic*) close to this case to take an objective view any longer." (Exhibit 16A.)

8. A partial transcript of the April 3, 2002 hearing which covers the court's request for additional information and the time within which the record would remain open for the parties to provide that information. The Bar argues that the issues on which the matter was left open were the house and the fiancé's contribution to Paratore's household income. (Exhibit 28.)

9. The 1995 psychological report, which contains information the Bar contends, and the Accused admits, is irrelevant to the support proceedings. (Exhibit 29.)

10. A series of letters from the Accused to the Bar reflecting his irritation with Paratore. (Exhibits 38, 40, 41, 43, 44, and 45.)

11. The Accused's deposition transcript, which the Bar contends reflects his animus toward Paratore. (Exhibit 46.)

The Accused submitted no exhibits, but had previously provided his entire file in this matter to the Bar. Documents submitted by the Bar that support the Accused's position include:

12. File notes dated January 23, 2002, regarding Case wanting the previous judge back on this case because he was familiar with it. (Exhibit 23A.)

13. Petitioner's Exhibit List for the April 3, 2002 hearing, which includes Respondent's 1989 W-2 statements. The Bar contended the statements would have been relevant to the hearing as it involved support modification. The Accused noted that the Bar contended a seven-year-old psychological evaluation was not relevant and referred to the 12-year-old W-2s in rebuttal. He added that Respondent has not worked in years, that she is only qualified for minimum wage work, and that the cost of child care would exceed anything she could bring in so what she had made 12 years in the past was not relevant to the support issues.[3] (Exhibit 26.)

14. A partial transcript of the April 3, 2005 hearing, which covers the court's request for additional information and the time within which the record would

[3] It is unclear from the record, but it appears the parties stipulated to the admissibility of the Exhibits rather than contesting any of them.

remain open for the parties to provide that information. It also references the right of the other party to object to the proffered information. (Exhibit 28.)

15. The April 5, 2002 transmittal letter from the Accused to the court explaining that he is submitting the psychological report to the court to provide insight as to the thinking and actions of the parties. (Exhibit 29.)

16. The April 8, 2002 letter from Case to the court objecting to its consideration of the psychological evaluation. (Exhibit 30.)

17. The court's May 2, 2002 decision sustaining Case's objection and refusing to admit the psychological report and finding Blankenbaker in contempt. (Exhibit 31.)

18. The Bar's February 19, 2002 determination that the Accused had not violated the Code of Professional Responsibility. (Exhibit 42.)

The Accused's deposition transcript was also submitted. In it, the Accused admitted being irritated with Paratore and expressed his poor opinion in frank terms. (Exhibit 46, pg. 41, lns. 1-24.) However, the deposition transcript is consistent with the Accused's prior letter to the court (Exhibit 29) and his testimony at this hearing, which was that he submitted the psychological report because the judge hearing the matter did not know the parties and might not understand his contention that Paratore was a phony, manipulative, etc. In response to the claim that he had intentionally submitted the report to embarrass and harass Paratore, the Accused stated that he valued his license too highly to risk it and the support of his family in such a fashion.

Although the DR is not a model of clarity on this point, the implication of DR 7-106(C)(1) is that in order to violate it, the attorney must have intentionally stated or alluded to a matter knowing it had no relevance to the case at hand, or those cases in which no attorney could reasonably believe the information was relevant. The authority relied upon by the Bar, and its arguments throughout the hearing, support this understanding of the Rule. *In re Eadie*, 333 Or 42, 36 P3d 468 (2001), involved references to defendant's insurance by a plaintiff's attorney. This same attorney had filed a motion in limine to prevent defendant from referencing plaintiff's receipt of insurance payments or the existence of insurance coverage. After being admonished by the judge for referencing insurance during voir dire, that same attorney made repeated references to defendant's insurance during trial.

The Oregon Supreme Court found that even without the trial court's instruction, plaintiff's counsel should have known that evidence of insurance was not admissible. Given the trial court's instructions, it concluded that there was no way the accused could have had a reasonable belief that he was entitled to mention insurance coverage. It ruled that his conduct was intentional and violated DR 7-106(C)(1).

In contrast, the Accused herein, believed that Paratore was a skilled manipulator of the system, which might not be apparent to a judge new to the case.

Even though the subject of the hearing on which the judge was to rule was support modification, the Accused believed that evidence of the parties' credibility was relevant since the parties had testified at that hearing. He testified that he believed the report, even though it was seven years old, was relevant to the issue of credibility since, in his opinion, the parties had not changed much since the report was issued. The Panel does not find his position to be unreasonable.

Moreover, the Accused described the process that led up to his submission of the report as a last-minute review of the file on the day the submission to the court was due, at which time he noticed and reread the report, concluded it was relevant on the issue of credibility and submitted it to the court. The transmittal letter to the court (Exhibit 29) states that he is adding the report in the belief it might provide some insight on the thoughts and actions of the parties. The letter, his deposition, and his testimony are consistent. Furthermore, his account of how he came to submit the report without considering options such as redaction of nonrelevant information is believable.

Disposition

Based upon the foregoing, it is the conclusion of the Trial Panel that the Bar has failed to prove, by clear and convincing evidence, that the Accused committed the charged violation. Accordingly, it is the Trial Panel's determination that this matter should be dismissed.

DATED this 2nd of April 2004.

/s/ Mary Kim Wood
Mary Kim Wood
Trial Panel Chair

/s/ Llewellyn M. Fischer
Llewellyn M. Fischer
Trial Panel Member

/s/ Joan LeBarron
Joan LeBarron
Trial Panel Member

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re	)	
	)	
Complaint as to the Conduct of	)	Case No. 04-30
	)	
LESTER EDWARD SETO,	)	
	)	
Accused.	)	

Counsel for the Bar:	Linn D. Davis
Counsel for the Accused:	Walter J. Todd
Disciplinary Board:	None
Disposition:	Violation of DR 9-101(C)(4). Stipulation for Discipline. Public reprimand.
Effective Date of Order:	June 9, 2004

ORDER APPROVING STIPULATION FOR DISCIPLINE

This matter having been heard upon the Stipulation for Discipline entered into by the Accused and the Oregon State Bar, and good cause appearing,

IT IS HEREBY ORDERED that the stipulation between the parties is approved and the Accused is publicly reprimanded for violation of DR 9-101(C)(4).

DATED this 9th day of June 2004.

/s/ Michael R. Levine
Michael R. Levine, Esq.
State Disciplinary Board Chairperson

/s/ Jill A. Tanner
Hon. Jill A. Tanner, Esq., Region 6
Disciplinary Board Chairperson

STIPULATION FOR DISCIPLINE

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

1.

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

2.

The Accused was admitted by the Oregon Supreme Court to the practice of law in Oregon on April 9, 1979, and has been a member of the Oregon State Bar continuously since that time, having his office and place of business in Marion County, Oregon.

3.

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

4.

On April 16, 2004, the State Professional Responsibility Board authorized formal disciplinary proceedings against the Accused for alleged violation of DR 9-101(C)(4) of the Code of Professional Responsibility. The parties intend that this stipulation set forth all relevant facts, violations, and the agreed-upon sanction as a final disposition of this proceeding.

Facts

5.

The Accused represented Charles T. Harding (hereinafter "Harding") at the trial of a criminal matter. On or about April 27, 2003, Harding filed with the Oregon Court of Appeals a motion to compel the Accused to deliver Harding's client file to Harding. On or about April 27, 2003, Harding mailed a copy of the motion to compel to the Accused. The Accused did not deliver Harding's file.

6.

On July 29, 2003, the court of appeals issued an order granting Harding's motion to compel and the court directed that the Accused should deliver Harding's client file to Harding "forthwith." Although the Accused received the order, the Accused did not deliver Harding's file to Harding until September 11, 2003, after Harding had notified the Bar of the failure of the Accused to deliver the file.

Violations

7.

The Accused admits that, by engaging in the conduct described in this stipulation, he violated DR 9-101(C)(4).

Sanction

8.

The Accused and the Bar agree that in fashioning an appropriate sanction in this case, the Disciplinary Board should consider the ABA *Standards for Imposing Lawyer Sanctions* (hereinafter "*Standards*"). The *Standards* require that the Accused's conduct be analyzed by considering the following 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 Violated.* The Accused violated his duty to properly handle client property, and his duty to act with reasonable diligence and promptness. *Standards*, §§ 4.1, 4.4.

B. *Mental State.* The Accused acted negligently, i.e., he failed to be aware of a substantial risk that circumstances existed or that a result would follow, which failures were a deviation from the standard of care that a reasonable lawyer would exercise in the situation, in that the Accused failed to more quickly deliver his client's file.

C. *Injury*. The Accused's client suffered little or no actual or potential injury aside from a period of frustration.

D. *Aggravating Factors.* Aggravating factors include:

1. The Accused was subjected to suspension and a period of probation on January 30, 2002, for violations of DR 1-103(C), DR 2-110(A)(2), DR 6-101(B), and DR 7-101(A)(2) (*In re Seto*, 16 DB Rptr 10 (2002)). *In re Jones*, 326 Or 195, 200, 951 P2d 149 (1997); *Standards,* § 9.22(a).

2. The Accused has substantial experience in the practice of law, having been admitted to the Oregon State Bar in 1979. *Standards,* § 9.22(i).

E. *Mitigating Factors.* Mitigating factors include:

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

2. The Accused has displayed a cooperative attitude toward these proceedings and has made full and free disclosure to Disciplinary Counsel's office. *Standards,* § 9.32(e).

3. When contacted by the Client Assistance Office of the Oregon State Bar, the Accused quickly took the required action and delivered his client's file. *Standards*, § 9.32(d).

9.

Standards § 4.14 suggests that admonition is generally appropriate when a lawyer is negligent in dealing with client property and causes little or no actual or potential injury to a client. However, the Accused was recently disciplined for misconduct involving multiple rule violations. These factors suggest that public reprimand, a sanction greater than admonishment, is warranted. *See In re Jones*, 326 Or 195, 200, 951 P2d 149 (1997) (prior discipline is a significant aggravating factor where that discipline was recent and serious). Oregon case law is in accord. *In re Moore*, 14 DB Rptr 129 (2000) (attorney reprimanded for violation of DR 9-101(C)(4) where attorney had record of prior discipline); *In re Kneeland*, 281 Or 317, 574 P2d 324 (1978) (attorney reprimanded for unexcused 49-day delay in delivering a client's file).

10.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be publicly reprimanded for violation of DR 9-101(C)(4).

11.

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

EXECUTED this 25th day of May 2004.

/s/ Lester Seto
Lester Edward Seto
OSB No. 79108

EXECUTED this 28th day of May 2004.

OREGON STATE BAR

By: /s/ Linn D. Davis
Linn D. Davis
OSB No. 03222
Assistant Disciplinary Counsel

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re	)	
	)	
Complaint as to the Conduct of	)	Case Nos. 02-165, 03-69, 03-114,
	)	03-115, 03-116
TERRENCE KAY,	)	
	)	
Accused.	)	

Counsel for the Bar:	Jon P. Stride; Stacy J. Hankin
Counsel for the Accused:	Wayne Mackeson
Disciplinary Board:	Mary Kim Wood, Chair; Irene Bustillos; Joan J. LeBarron, Public Member
Disposition:	Violation of DR 1-102(A)(4) and DR 5-105(E). Stipulation for Discipline. 30-day suspension.
Effective Date of Order:	July 26, 2004

ORDER APPROVING STIPULATION FOR DISCIPLINE

This matter having been heard upon the Stipulation for Discipline entered into by the Accused and the Oregon State Bar, and good cause appearing,

IT IS HEREBY ORDERED that the stipulation between the parties is approved and the Accused is suspended from the practice of law, effective July 26, 2004, for violation of DR 1-102(A)(4) and DR 5-105(E).

DATED this 9th day of June 2004.

/s/ Michael R. Levine
Michael R. Levine, Esq.
State Disciplinary Board Chairperson

/s/ Jill A. Tanner
Jill A. Tanner, Esq., Region 6
Disciplinary Board Chairperson

STIPULATION FOR DISCIPLINE

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

1.

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

2.

The Accused was admitted by the Oregon Supreme Court to the practice of law in Oregon on September 21, 1981, and has been a member of the Oregon State Bar continuously since that time, having his office and place of business in Marion County, Oregon.

3.

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

4.

On February 12, 2004, a Second Amended Formal Complaint was filed against the Accused pursuant to the authorization of the State Professional Responsibility Board (hereinafter "SPRB") alleging violations of the following provisions of the Code of Professional Responsibility: DR 1-102(A)(4) and DR 5-101(A) in the Selvaggi matter, DR 1-102(A)(4) in the Johnnie matter, DR 5-101(A) and DR 5-105(E) in the Ruffcorn matter, and DR 1-102(A)(4) in the Tokarski matter. Upon further factual inquiry, the parties agree that the alleged violation of DR 1-102(A)(4) in the Selvaggi and Johnnie matters, and DR 5-101(A) in the Ruffcorn matter should be and, upon the approval of this stipulation for discipline, are dismissed. The parties intend that this stipulation set forth all relevant facts, violations, and the agreed-upon sanction as a final disposition of this proceeding.

Selvaggi Matter

(Case No. 02-165)

Facts

5.

In the spring of 1998, Coldwell Banker Mountain West Real Estate Inc. (hereinafter "Coldwell Banker") assessed and appraised a piece of property owned by Barbara Selvaggi (hereinafter "Selvaggi"). Selvaggi then listed the piece of

property for sale. Shortly thereafter, the Accused, on behalf of himself and his business partner, purchased the piece of property.

6.

Sometime prior to March 2000, the Accused undertook to represent Selvaggi in a lawsuit against Coldwell Banker for negligently assessing and appraising the piece of property the Accused had purchased on behalf of himself and his business partner from her in 1998.

7.

Beginning on March 29, 2000, the lawyer representing Coldwell Banker informed the Accused that he wanted to depose the Accused, and his business partner, that they would be witnesses as to the value of the property, and that he was considering naming them as third-party defendants to void the sale as to them.

8.

At an October 9, 2000 status conference the court believed that the Accused needed to withdraw from his representation of Selvaggi because he would likely be a witness in the case. The Accused agreed to withdraw from representing Selvaggi, and offered to assist her in finding a new lawyer. On October 12, 2000, the court scheduled another status conference for January 10, 2001.

9.

Between October 10, 2000, and January 8, 2001, the Accused did not withdraw from representing Selvaggi.

10.

On January 9, 2001, the Accused contacted another lawyer about representing Selvaggi. By March 3, 2001, the Accused knew that the other lawyer would not be undertaking to represent Selvaggi.

11.

By the January 10, 2001 status conference the Accused had not yet withdrawn from representing Selvaggi. Another status conference was scheduled for May 11, 2001.

12.

By the May 11, 2001 status conference the Accused had still not withdrawn from representing Selvaggi. At that conference, the Accused agreed to withdraw from representing Selvaggi, effective June 11, 2001. A stipulated order to that effect was signed by the court on June 4, 2001.

Violations

13.

The Accused admits that, by engaging in the conduct described in paragraphs 5 through 12, he violated DR 1-102(A)(4) of the Code of Professional Responsibility.

Ruffcorn Matter

(Case No. 03-115)

Facts

14.

In 1995, the court appointed Donald Ruffcorn conservator of his brother, Larry Ruffcorn, for the purpose of preserving and applying property he had acquired through his mother's estate. At the time, Larry Ruffcorn had disappeared.

15.

In early 2002, Robert Campbell (hereinafter "Campbell"), Larry Ruffcorn's stepbrother, found Larry Ruffcorn living on the streets. On January 30, 2002 the Accused, on behalf of Campbell, petitioned the court to become successor conservator of Larry Ruffcorn. In support of that petition, the Accused attached a statement by Larry Ruffcorn in which he asserted that he was not aware his brother had opened a conservatorship, that he did not want his brother to be the conservator, and that he wanted Campbell to replace his brother as conservator.

16.

As of January 30, 2002, the Accused was also representing Larry Ruffcorn in the conservatorship matter. In connection with that representation, the Accused prepared an affidavit, which Larry Ruffcorn executed on February 12, 2002. In relevant part, the affidavit stated that he did not want his brother to be the conservator, that he wanted control over his own assets, and that he wanted the conservatorship terminated. The affidavit further stated that it was still his choice to have Campbell appointed conservator, if the court would not terminate the conservatorship.

17.

The interests of Larry Ruffcorn, as protected person, and Campbell, as potential successor conservator, were or were likely to be adverse. Insofar as it was possible for them to consent to the Accused representing them both simultaneously, the Accused failed to obtain their consent to the multiple representation after full disclosure.

18.

The Accused withdrew from representing Campbell on February 21, 2002.

Violations

19.

The Accused admits that, by engaging in the conduct described in paragraphs 14 through 18, he violated DR 5-105(E) of the Code of Professional Responsibility.

Tokarski Matter

(Case Nos. 03-114 and 03-116)

Facts

20.

On February 25, 2002, the Accused filed a lawsuit against Larry Tokarski (hereinafter "Tokarski") on behalf of Hans and Ursel D'Alessio (hereinafter "the D'Alessios").

21.

At the time the lawsuit was served on Tokarski, the Accused served him with a request for production seeking certain documents. The Accused also served him with subpoenas duces tecum requesting essentially the same documents from two companies in which Tokarski had an interest. The subpoenas were not accompanied by the statutorily mandated fees.

22.

On March 6, 2002, counsel for Tokarski informed the Accused that the subpoenas were invalid because they were not accompanied by the statutorily mandated fees, and because of the D'Alessios' pending bankruptcies. Thereafter, the Accused did not forward the statutorily mandated fees, but nonetheless continued to pursue production of documents through the subpoenas.

23.

At the time the Accused filed the lawsuit referenced in paragraph 20, he knew the D'Alessios were debtors in pending bankruptcy proceedings, and knew that he needed to obtain permission from the bankruptcy trustee in order to file a lawsuit. On March 8, 2002, the Accused received oral permission from the bankruptcy trustee to proceed with the lawsuit he had previously filed.

24.

Between March 6, 2002, and April 3, 2002, counsel for Tokarski requested documentation from the Accused that he had been authorized by the bankruptcy trustee to file the lawsuit. The Accused did not provide that documentation or otherwise respond to that lawyer's requests.

25.

On April 8, 2002, counsel for Tokarski filed a motion to dismiss the lawsuit based, in part, on the argument that the Accused did not have authority from the bankruptcy trustee to pursue the lawsuit. On May 8, 2002, counsel for Tokarski filed a motion for sanctions based, in part, on the argument that the Accused did not have authority from the bankruptcy trustee to pursue the lawsuit. On May 15, 2002, counsel for Tokarski filed a motion to have requests for admissions deemed admitted.

26.

On May 17, 2002, a hearing to consider all three motions described in paragraph 25 was scheduled for June 6, 2002.

27.

In the meantime, on or about April 16, 2002, the Accused received, signed, and returned to the bankruptcy trustee an application to be employed as special counsel to represent the D'Alessios in the lawsuit. The order approving the application was not signed by the court until May 24, 2002.

28.

The Accused sent responses to the motion for sanctions and motion to have requests for admissions deemed admitted by facsimile to Tokarski's lawyer on May 31, 2002. He did not file those responses with the court until June 4, 2002. On that same day, the Accused filed an amended complaint in the lawsuit referenced in paragraph 20, in which he added the bankruptcy trustee as a plaintiff.

29.

At the June 6, 2002, hearing, the court orally granted the motion to dismiss, and found that the Accused, and the D'Alessios should pay reasonable attorney fees incurred by Tokarski in connection with the motion to dismiss. The court concluded that even if the amended complaint referenced in paragraph 28 had been authorized and duly filed, it did not relate back to the date the lawsuit was originally filed.

30.

On July 29, 2002, the court signed an order dismissing the lawsuit, and approving the terms of an agreement with Tokarski in which the Accused would pay some attorney fees to resolve the matter.

Violations

31.

The Accused admits that by engaging in the conduct described in paragraphs 20 through 30, he violated DR 1-102(A)(4) of the Code of Professional Responsibility.

Sanction

32.

The Accused and the Bar agree that in fashioning an appropriate sanction in this case, the Disciplinary Board should consider the ABA *Standards for Imposing Lawyer Sanctions* (hereinafter "*Standards*"). The *Standards* require that the Accused's conduct be analyzed by considering the following 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 Violated.* The Accused violated his duty to avoid conflicts of interest and his duty to avoid conduct prejudicial to the administration of justice. *Standards*, §§ 4.3, 6.1.

B. *Mental State.* "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.

The Accused acted knowingly in the Selvaggi matter. As of October 9, 2000, he acceded to the court's belief that he needed to withdraw from representing Selvaggi. For many months thereafter, the Accused knowingly failed to withdraw in a timely fashion.

The Accused also acted knowingly in the Tokarski matter. At the time the Accused filed the lawsuit on behalf of the D'Alessios, he knew that he had not received permission from the bankruptcy trustee to do so. He thereafter obtained oral permission from the bankruptcy trustee, but knowingly failed to inform Tokarski's lawyer until after orders were signed by the bankruptcy court.

The Accused knew that Larry Ruffcorn wanted the conservatorship terminated at the same time a motion was pending to have Campbell appointed successor conservator in lieu of Donald Ruffcorn. The Accused negligently failed to recognize that these adverse interests raised a conflict of interest.

C. *Injury.* Injury can be either actual or potential under the ABA *Standards*. *In re Williams*, 314 Or 530, 840 P2d 1280 (1992).

In the Selvaggi matter, the court and Coldwell Banker sustained actual injury as a result the Accused's delay in withdrawing. The court spent additional time and resources conducting numerous status conferences before the Accused finally withdrew from representing Selvaggi. Coldwell Banker incurred additional attorney fees.

In the Tokarski matter, the court and Tokarski sustained actual injury as a result of the Accused's conduct. The court spent additional time and resources dealing with the Accused's failure to obtain permission from the bankruptcy trustee

before he filed the lawsuit and failure to timely inform Tokarski's lawyer that he subsequently obtained permission to pursue the lawsuit. Tokarski incurred additional attorney fees, although the Accused ultimately paid some portion of those fees pursuant to a settlement agreement approved by the court.

Larry Ruffcorn and Campbell sustained potential injury. Because of the undisclosed conflict of interest, they did not understand the Accused's possible divided loyalty.

D. *Aggravating Circumstances.* The following aggravating circumstances exist:

1. Multiple offenses. *Standards,* § 9.22(d).

2. Substantial experience in the practice of law; the Accused has been a licensed Oregon attorney since 1981. *Standards,* § 9.22(i).

E. *Mitigating Circumstances.* The following mitigating circumstances exist:

1. Absence of a prior disciplinary record. *Standards,* § 9.32(a).

2. Absence of a dishonest or selfish motive. *Standards,* § 9.32(b).

3. Cooperative attitude toward the proceeding. *Standards,* § 9.32(e).

33.

The *Standards* provide that suspension is generally appropriate when a lawyer knowingly engages in conduct prejudicial to the administration of justice. *Standards,* § 6.12. Suspension is also 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. *Standards,* § 4.32.

34.

Although no Oregon case contains the exact facts described herein, various cases provide guidance for the appropriate sanction that should be imposed when a lawyer's conduct unnecessarily burdens the court or litigants, and when a lawyer fails to obtain consent after full disclosure where a patent conflict of interest is present. *See In re Wyllie*, 331 Or 606, 19 P3d 338 (2001) (by itself, a patent violation of DR 5-105 would justify a 30-day suspension); *In re Meyer*, 328 Or 211, 970 P2d 652 (1999) (90-day suspension of lawyer who caused additional burden on the court when he appeared too intoxicated to participate in a hearing); *In re Thompson*, 325 Or 467, 940 P2d 5112 (1997) (63-day suspension of lawyer who confronted judge regarding a matter pending before the judge); *In re Gresham*, 318 Or 162, 864 P2d 360 (1993) (91-day suspension of lawyer whose failure to timely complete a probate resulted in additional and unnecessary burden on the judicial system); *In re Rochat*, 295 Or 533, 668 P2d 376 (1983) (35-day suspension of lawyer who harassed court personnel in order to secure court appointments).

35.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be suspended from the practice of law for 30 days for violation of DR 1-102(A)(4) and DR 5-105(E), the sanction to be effective July 26, 2004.

36.

In addition, on or before the last date of the suspension, the Accused shall pay to the Oregon State Bar its reasonable and necessary costs in the amount of $1,329.50, incurred for depositions. Should the Accused fail to pay $1,329.50 in full by that date, the Bar may thereafter, without further notice to the Accused, apply for entry of a judgment against the Accused for the unpaid balance, plus interest thereon at the legal rate to accrue from the date the judgment is signed until paid in full.

37.

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. 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 28th day of May 2004.

/s/ Terrence Kay
Terrence Kay
OSB No. 81437

EXECUTED this 1st day of June 2004.

OREGON STATE BAR

By: /s/ Stacy J. Hankin
Stacy J. Hankin
OSB No. 86202
Assistant Disciplinary Counsel

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re	)	
	)	
Complaint as to the Conduct of	)	Case No. 04-13
	)	
JERRY K. BROWN,	)	
	)	
Accused.	)	

Counsel for the Bar:	Martha M. Hicks
Counsel for the Accused:	None
Disciplinary Board:	None
Disposition:	Violation of DR 6-101(B). Stipulation for Discipline. Public reprimand.
Effective Date of Order:	June 9, 2004

ORDER APPROVING STIPULATION FOR DISCIPLINE

This matter having been heard upon the Stipulation for Discipline entered into by the Accused and the Oregon State Bar, and good cause appearing,

IT IS HEREBY ORDERED that the stipulation between the parties is approved and the Accused is publicly reprimanded for violation of DR 6-101(B).

DATED this 9th day of June 2004.

/s/ Michael R. Levine
Michael R. Levine, Esq.
State Disciplinary Board Chairperson

/s/ Jill A. Tanner
Jill A. Tanner, Esq., Region 6
Disciplinary Board Chairperson

STIPULATION FOR DISCIPLINE

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

1.

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

2.

The Accused was admitted by the Oregon Supreme Court to the practice of law in Oregon on September 18, 1979, and has been a member of the Oregon State Bar continuously since that time, having his office and place of business in Yamhill County, Oregon.

3.

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

4.

On April 7, 2004, a Formal Complaint was filed against the Accused pursuant to the authorization of the State Professional Responsibility Board (hereinafter "SPRB"), alleging violation of DR 6-101(B). The parties intend that this Stipulation for Discipline set forth all relevant facts, violations, and the agreed-upon sanction as a final disposition of the proceeding.

Facts

6.

In about May 1998, the Accused undertook to represent Patrick Lillard as personal representative in the probate of the estate of Michael L. Lillard. Between March 1999 and February 2001, the Accused took no substantial action to administer or close the estate. Between February 2001 and March 2003, when he resigned from employment by Lillard, the Accused engaged in a course of neglectful conduct as follows:

A. He failed to timely provide sufficient information to the estate's accountant to enable the accountant to prepare the estate's tax returns;

B. He mailed documents to an address for Lillard he knew was not current;

C. He failed to promptly affect the transfer of property in another state to the beneficiaries of Lillard's estate or initiate an ancillary probate;

D. He misplaced the estate's tax refund checks; and

E. He failed to close the estate.

Violations

7.

The Accused admits that, by engaging in the conduct described in this stipulation, he violated DR 6-101(B) of the Code of Professional Responsibility.

Sanction

8.

The Accused and the Bar agree that in fashioning an appropriate sanction in this case, the Disciplinary Board should consider the ABA *Standards for Imposing Lawyer Sanctions* (hereinafter "*Standards*"). The *Standards* require that the Accused's conduct be analyzed by considering the following 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 Violated.* The Accused violated his duty of diligence to his client. *Standards,* § 4.4.

B. *Mental State.* The Accused's failures to act and to take timely action in the Lillard estate were knowing, i.e., he was consciously aware of the nature or attendant circumstances of his conduct, but he did not have the conscious objective to accomplish a particular result.

C. *Injury.* The Accused's client suffered frustration as a result of his inaction. The Accused's inaction also interfered with the court's ability to oversee and effect the prompt administration of the Lillard estate and delayed distribution of a portion of the estate assets to the beneficiaries.

D. *Aggravating Factors.* Aggravating factors include:

1. The Accused has a prior disciplinary record, having been publicly reprimanded for violation of DR 1-102(A)(4), DR 5-101(A), and DR 5-104(A) in 1997. *In re Brown*, 11 DB Rptr 111 (1997). *Standards,* § 9.22(a).

2. The Accused displayed a pattern of neglectful conduct extending over a period of approximately four years. *Standards,* § 9.22(c).

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

E. *Mitigating Factors.* Mitigating factors include:

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

2. The Accused was experiencing personal financial problems and depression. *Standards,* § 9.32(c).

3. The Accused has made full and free disclosure to Disciplinary Counsel's Office and has displayed a cooperative attitude toward these proceedings. *Standards*, § 9.32(e).

4. The Accused is remorseful for his conduct. *Standards*, § 9.32(*l*).

5. The Accused wound up his law practice and voluntarily transferred to inactive membership in the Bar when he realized that his emotional condition was such that he could not practice law competently. At that time, the Accused transferred his Lillard estate file to another lawyer and requested that lawyer to contact Lillard to assist in completing the necessary services or transferring the file to substitute counsel.

9.

ABA *Standards* § 4.43 suggests:

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.

10.

Oregon case law is in accord. See *In re Cohen*, 330 Or 489, 8 P3d 953 (2000), where the Supreme Court reprimanded a lawyer for violation of DR 6-101(B) when he neglected a domestic relations matter over a 14-month period by allowing the matter to be dismissed by the court, failing to reinstate it, and failing to communicate with his client regarding the status of her case. See also *In re Taylor*, 16 DB Rptr 75 (2002), where the lawyer was publicly reprimanded for violation of DR 6-101(B) when she neglected an estate matter over an 18-month period by taking insufficient action to close the estate, communicate with the heirs, or respond to her client's telephone contacts.

11.

Consistent with the *Standards* and Oregon case law, and taking into consideration the aggravating and mitigating factors set forth in paragraph 7 herein, the parties agree that the Accused shall be publicly reprimanded for violation of DR 6-101(B).

12.

This stipulation is subject to approval by the Disciplinary Counsel of the Oregon State Bar. The sanction provided for herein was approved by the State Professional Responsibility Board on February 11, 2004. 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 24th day of May 2004.

/s/ Jerry K. Brown
Jerry K. Brown
OSB No. 79171

EXECUTED this 28th day of May 2004.

OREGON STATE BAR

By: /s/ Martha M. Hicks
Martha M. Hicks
OSB No. 75167
Assistant Disciplinary Counsel

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re	)	
	)	
Complaint as to the Conduct of	)	Case No. 03-22
	)	
JIM VAN LOON,	)	
	)	
Accused.	)	

Counsel for the Bar:	David B. Mills; Jane E. Angus
Counsel for the Accused:	None
Disciplinary Board:	Laurence E. Thorp, Esq., Chair; Jens Schmidt, Esq.; Peter W. Bergreen, Public Member
Disposition:	Violation of DR 1-102(A)(3) and DR 1-102(A)(4). Trial Panel Opinion. Six-month suspension.
Effective Date of Opinion:	June 13, 2004

OPINION OF TRIAL PANEL

A hearing on the Bar's complaint against Jim Van Loon was convened at 1011 Harlow Road, Suite 300, Springfield, Lane County, Oregon 97477, at 8:30 a.m. on March 4, 2004, before a Trial Panel composed of Peter W. Bergreen, M.D., Jens Schmidt, Esq., and Laurence E. Thorp, Esq. The proceedings were recorded by court reporter, Capri O'Neal. In attendance was the Accused, Bar counsel David B. Mills, Esq. and assistant disciplinary counsel representing the Bar, Jane Angus, Esq.

I.

Preliminary Matters

At the commencement of the hearing, the Accused raised two objections to the proceeding. The first was that the hearing violated Bar Rule 5.3(a), which requires that the hearing "be held in either the County in which the person charged maintains his or her office for the practice of law or other business, in which he or she resides, or in which the offense was alleged to be committed. . . ." The second objection was based upon the failure of Accused to receive the Bar's proposed exhibits prior to the hearing.

A. Bar Rule 5.3(a). The Accused stated that his residence and office were in Douglas County, Oregon, and that is where the offense occurred. His record

address with the Bar is 621 Westlog, P.O. 1452, Cottage Grove, Oregon 97424. Mr. Van Loon indicated that there is no street by the name of Westlog in Cottage Grove. He stated his residence is at 621 Westlog in Yoncalla, which is in Douglas County and that he uses a mailing address in Cottage Grove in Lane County. The Accused moved to dismiss the proceeding due to the alleged violation of the Bar Rule. The panel took the motion under advisement. The panel denies the Accused motion for the following reasons:

1. The Accused Answer admitted paragraph 2 of the Complaint, which alleges "his office and place of business" is in Lane County.

2. It is the opinion of the trial panel that BR 5.3(a) deals with venue and not with jurisdiction and the Accused waived any objection to venue in Lane County.

The chair of the trial panel sent a letter to the Accused, the trial panel members, and Bar counsel on December 9, 2003, indicating that the hearing would be conducted at the office of the chair in Lane County and requesting the Accused and other individuals involved in the hearing to advise him of their dates of availability during the month of March 2004. The Accused failed to respond to the letter. The trial panel chair sent a second letter on January 7, 2004, to the Accused indicating dates of availability in March for the hearing and asking the Accused if he was available for the hearing on those dates. The Accused failed to respond. On January 9, 2004, the trial panel chair sent another letter to the Accused indicating that if he failed to receive a response from the Accused, he would set the date of the hearing and notify the Accused of the date. The Accused failed to respond. As a result, by letter dated January 16, 2004, the trial panel chair sent a letter to the Accused and the other parties to the proceeding indicating that the hearing would be convened at his office in Springfield, Lane County, Oregon, on March 4, 2004, at 8:30 a.m. No objection or other response was received from the Accused.

When asked at the hearing why he failed to respond regarding convenient dates for the hearing, the Accused stated that all dates were convenient for him and that there was no need to respond. The Accused clearly waived any objection he had to the location of the hearing.

3. Finally, even if the Accused didn't waive his right to object to venue, he failed to show any prejudice as a result of the hearing being convened in Lane County rather than Douglas County. The Accused's motion to dismiss is denied.

B. Bar's Proposed Exhibits. It is the practice of the Bar disciplinary counsel's office to send all parties to a disciplinary hearing a notebook prior to the hearing containing copies of the exhibits the Bar proposes to introduce at the hearing. That practice was followed in this case. A notebook containing the exhibits was shipped by courier to all of the parties, including the Accused, the week prior to the hearing. The Bar used the address on record with the Bar, 621 Westlog, P.O. Box 1452, Cottage Grove, Oregon. When the courier was unable to locate the street address of 621 Westlog in Cottage Grove, it contacted the Accused by telephone and

asked where he was located. The Accused testified that he told the courier that he was located in Yoncalla, Oregon. He stated that the courier indicated that it did not deliver to Yoncalla. The Accused also stated that he knew the delivery was from the Oregon State Bar. He made no further attempt to pick up what the courier was attempting to deliver. The Accused moved to dismiss the proceeding on the grounds that he had not received the delivery.

The proposed exhibits were provided by the Bar as a courtesy to all parties to the proceeding in an effort to make the proceeding more efficient. The Accused failed to make a reasonable effort to obtain the proposed exhibits. However, no authority has been cited, and the trial panel knows of none, that requires the Bar to provide the proposed exhibits in advance, and even if there were such a rule, the trial panel finds that the Accused waived his right by not making reasonable efforts to obtain the documents from the courier when the courier. Furthermore, the Accused did not establish that he was prejudiced in any way by failure to receive the documents prior to the hearing. The motion to dismiss is denied.

II.

Factual Setting

This case arises out of a single incident involving the Accused's representation of the mother of a child involved in a domestic relations dispute over custody. The father was represented by attorney Wells. Depositions were taken of the parties in Mr. Wells's office on Wednesday, July 3, 2002. The father testified that he would be moving from Douglas County to Hillsboro, Oregon. He testified concerning his new work schedule in Hillsboro and made known the changes he desired in the shared custody arrangement. At the conclusion of the hearing, the Accused delivered to Mr. Wells a motion to modify the existing parenting plan. The Accused testified that when he handed the motion to Mr. Wells, he advised Mr. Wells that he would be presenting the motion to modify the parenting plan ex parte in "two days." Mr. Wells testified that the Accused advised him that he would be presenting it ex parte on "Tuesday."

On July 5, the Accused arranged an ex parte hearing in which he presented an affidavit from the mother, who testified, and he obtained a change in the parenting plan. Neither Mr. Wells nor his client attended the hearing. The Accused testified that both he and the court clerk attempted to notify Mr. Wells on July 5 of the hearing time after the court specified the time for the hearing.[1] Mr. Wells acknowledged that his office was closed on that date. The complaint alleges that the Accused violated DR 7-110(B) by communicating as to the merits of the cause with the judge before whom the mater was pending without adequate notice to Mr. Wells.

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[1] Mr. Wells maintains offices in Eugene and Roseburg. It is unclear which office was contacted.

At the hearing, the Accused's client made various factual representations to the court. The Accused affirmed those representations and did not advise the court that the father had testified in his deposition inconsistently with the statements that the mother made to the court concerning his employment arrangement and hours at work at his new job in Hillsboro. Based upon those representations, the court approved a change in the parenting plan. The complaint alleges that the Accused violated DR 1-102(A)(3) by misleading the court as to the circumstances related to the father's job and working arrangements in Hillsboro.

The Accused presented to the court an order following the hearing changing the parenting plan. The Accused testified that he immediately deposited a copy of the proposed order in the mail addressed to Mr. Wells.[2] The Bar contends that presentation of the order to the court also violated DR 7-110(B).

Mr. Wells testified that he did not discover that the Accused appeared at ex parte on July 5, 2002, and obtained a modification of the parenting plan until July 9, 2002. At that time, another hearing was convened in which the order obtained by the Accused was set aside. The complaint alleges that the Accused conduct in obtaining the ex parte order was prejudicial to the administration of the justice and a violation of DR 1-102(A)(4).

III.

Analysis of Charges

A. Violation of DR -110(B).

(1) The Bar alleges that the ex parte appearance of the Accused and his client on July 5, 2002,violated DR 7-110(B). That rule provides that it is unethical for a lawyer to communicate with the court orally on the merits of a matter except "upon adequate notice to opposing counsel." The Accused testified that he gave adequate notice by advising Mr. Wells that he would be presenting the motion "in two days." Mr. Wells testified that he did not understand the Accused to say "two days" but instead understood the Accused to say "Tuesday."

The Accused presented evidence that Mr. Wells had previously acknowledged that the Accused was unavailable for court appearances on Tuesday. In addition, Mr. Wells acknowledged that the Accused speaks rapidly and is sometimes difficult to understand. The trial panel also observed the Accused during the hearing and concurs that he speaks rapidly and is sometimes difficult to understand. The trial panel finds that the Bar failed to prove by clear and convincing evidence that that Accused violated DR 7-110(B) by appearing at ex parte on July 5 without adequate notice to opposing counsel.

2. The Bar also contends that the Accused is guilty of a separate violation of DR 7-110(B) for presenting the order to the court on July 5 after the hearing

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[2] It is not clear to which of Mr. Wells's offices the order was mailed.

without "promptly" delivering a copy of the order to opposing counsel. The Accused testified that he mailed a copy of the order to opposing counsel immediately following the hearing. No evidence was presented to contrary. Mr. Wells testified that he did not receive the Order until July 9. July 5 was a Friday. It is not clear to which of Mr. Wells's offices the order was mailed. The trial panel finds that the Bar has failed to prove by clear and convincing evidence that the Accused failed to promptly deliver the order to Mr. Wells.

B. DR 1-102(A)(3). The father testified during his deposition that he would be working 12 hours shifts on Sunday, Monday, Tuesday, and every other Wednesday at his new job. (Exhibit 102, pages 15–16.) He requested custody of the child on the Wednesdays that he was not working and on Thursday, Friday, and Saturday. In her affidavit, and in testimony elicited by the Accused at the ex parte hearing, the mother testified in such a manner that the court was reasonably lead to believe that the father would be working 12 hour days when he was requesting custody. The Accused made statements to the court to the same effect (Exhibit 7, pages 7–8.) Any reasonable reading of the transcript of the hearing and the Accused deposition makes it clear that the information presented to the court was clearly misleading. When asked in his deposition why the Accused did not advise the court that the father testified in his deposition inconsistently with the statements made by the Accused and his client, he stated that the father's testimony was "not relevant." (Exhibit 16, page 31.)

The trial panel finds that the Accused violated DR 1-102(A)(3) by misleading the court regarding the father's hours of availability to spend with the child.

C. DR 1-102(A)(4). Because of the Accused's conduct, the court granted a change to the parenting plan following its hearing on July 5, 2002, that resulted in an additional hearing being required on July 9, 2002, to set aside that order. That resulted in additional attorney fees payable by the father. The Accused's Answer to the Bar's complaint admitted section 9 of the complaint, which alleged, "The Accused knew the representations contained in Mother's Motion and Affidavit were contrary to Father's July 3, 2002, deposition testimony, Father's June 14, 2002, Motion to Modify Temporary Parenting Order and other representations by Father." The Accused's conduct before the court on July 5, 2002, and the resulting consequences violated DR 1-102(A)(4).

IV.

Sanctions

A. Factors. The following factors are to be considered in determining the appropriate sanctions.

1. *Ethical Duty Violated.* The trial panel finds that the Accused violated his duty as an officer of the court to be candid with the court and not mislead the court.

2. *The Accused's Mental State.* The Accused is clearly combative and angry. He made clear to the trial panel that in his opinion the disciplinary proceeding was nothing more then an attempt by Mr. Wells to hurt or get back at the Accused. The Accused obviously dislikes Mr. Wells. Unfortunately, his attitude toward Mr. Wells appears to have interfered with his judgment and his ability to distinguish between zealous advocacy and his duty of candor and honesty as an officer of the court. The trial panel believes that the Accused allowed his distain for Mr. Wells to interfere with his good judgment. The Accused clearly did not have a selfish motive nor was he attempting to obtain any type of personal gain through his misconduct.

3. *Actual or Potential Injury.* The Accused's conduct did cause some actual injury by forcing an additional hearing and the expense associated with it. However, his conduct did not have a significant impact on the overall disposition of the underlying custody dispute.

4. *Aggravating Factors.* The Accused has a prior disciplinary history. In April 2001, he was reprimanded for violation of DR 6-101(A) and DR 1-102(A)(4) in connection with securing a default judgment in a custody matter involving another member of his family. The Accused indicated at the hearing that he accepted the reprimand, which he felt was unfounded, merely to avoid the expense and hassle of dealing with the Bar.

As noted above, the Accused did not appear to have a dishonest or selfish motive for his conduct. Instead, he let his dislike for opposing counsel and his overzealous advocacy interfere with the performance of his duties as an officer of the court to be candid. Unfortunately, the Accused still does not appear to appreciate the gravity of his misconduct.

5. *Mitigation Factors.* The only mitigating factor appears to be the Accused's cooperation with the Bar. However, he was not cooperative in attempting to establish a hearing date.

B. Case Law. The Bar cites *In re Dugger*, 334 Or 602, 54 P3d 595 (2002), as authority for determining the appropriate sentence. That case involved violations of DR 1-102(A)(3), DR 1-102(A)(4), and DR 7-110(B). The lawyer had substantial experience and also a prior disciplinary record. In that case, the Accused was suspended from practice of law for nine months. The Bar also cites *In re Hiller*, 298 Or 526, 694 P2d 540 (1985), in which the Accused was suspended for four months for a single violation of DR 1-102(A)(3) and a related statute; *In re Claussen*, 322 Or 466, 909 P2d 862 (1996), in which a lawyer was suspended for 12 months for multiple disciplinary violations, including DR 1-102(A)(3) and DR 1-102(A)(4); and *In re Gustafson*, 327 Or 636, 968 P2d 367 (1988), in the lawyer was suspended for six months for the violation of DR 1-102(A)(3) for making misrepresentations to the court. The trial panel believes this case is more like *Gustafson* and *Hiller* than *Dugger* and *Claussen*.

V.

Conclusion

The trial panel finds that the Accused violated DR 1-102(A)(3) and DR 1-102(A)(4) and recommends that the Accused be suspended from the practice of law for six months.

DATED this 9th day of April 2004.

/s/ Laurence E. Thorp, Esq.
Laurence E. Thorp, Esq.
Trial Panel Member

/s/ Peter W. Bergreen, MD
Peter W. Bergreen, MD
Trial Panel Member

/s/ Jens Schmidt, Esq.
Jens Schmidt, Esq.
Trial Panel Member

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re	)	
	)	
Complaint as to the Conduct of	)	Case No. 02-170
	)	
MARK R. HUMPHREY,	)	
	)	
Accused.	)	

Counsel for the Bar:	Stephen R. Frank; Stacy J. Hankin
Counsel for the Accused:	Andrew P. Ositis
Disciplinary Board:	Susan G. Bischoff, Esq., Chair; Michael C. Zusman, Esq.; Charles H. Martin, Public Member
Disposition:	Violation of DR 2-110(A)(2) and DR 6-101(B). Trial Panel Opinion. 145-day suspension.
Effective Date of Opinion:	June 16, 2004

OPINION OF TRIAL PANEL

Introduction

On October 22, 2003, this matter came before a trial panel consisting of Susan G. Bischoff, Chair, Michael C. Zusman, Esq., and public member Charles H. Martin. Stacy J. Hankin, Assistant Disciplinary Counsel, and Stephen R. Frank represented the Oregon State Bar.[1] Andrew P. Ositis represented the Accused.

The Complaint. The Bar charged the Accused with violations of DR 2-110(A)(2) (improper withdrawal) and DR 6-101(B) (neglect of a legal matter). The cause of complaint surrounds the Accused's representation of Kurt Williams ("Williams") and a lawsuit filed on William's behalf in the Multnomah County Circuit Court in early November 2000. The suit was transferred to mandatory arbitration in January 2001, and an arbitration hearing was scheduled for September 27, 2001. The Bar alleges that after June 28, 2001, the Accused took no substantive action to pursue Williams's case and also failed to maintain adequate communication with Williams. Furthermore, the Accused was suspended from the practice of law for

[1] Paul R. Duden was originally assigned to try the case for the Oregon State Bar. Due to an unanticipated scheduling conflict, Stephen ("Skip") Frank was substituted as Bar counsel to prosecute.

90 days beginning on July 7, 2001, and failed to take any reasonable steps to avoid prejudice to Williams's right.

The Accused's Answer. The Accused denied the substantive allegations and affirmatively claimed that to pursue representation of Williams after July 7, 2001, would constitute "an ethical violation" due to his stipulated suspension from practice; that he had taken steps to protect Williams' interest, including associating replacement counsel; and that the Bar's complaint was too vague and conclusory to permit him to answer further.

Witnesses, Exhibits, and Transcript. The Bar called Kurt Williams, Douglas Raab, Esq., Eric Fjelstad, Esq., and the Accused to support its case. Bar Exhibits 1 through 26 and Exhibit 17A were offered and received into evidence. The Accused also testified on his own behalf. The Accused's Exhibits 101 through 132 were offered and received. Court reporting services were provided by Capri and Associates, and the Order Settling the Transcript was signed on December 16, 2003.

Posthearing Matters. On or about April 1, 2004, the panel reopened the trial of this matter to consider arguments on the impact, if any, of the Board of Bar Governors' decision to defer consideration of the Accused's November 2003 application for reinstatement from active pro bono status to fully active status pending the decision in the present case. The issue presented was whether the BOG's decision to defer the Accused's reinstatement application amounted to a de facto suspension and, if so, whether the panel must offset any suspension time imposed or otherwise consider the BOG's decision in the imposition of any sanction. The parties provided written argument on the issue, which have been received into the record of this case.

The trial panel considered the stipulations, pleadings, exhibits, testimony, trial memoranda, and arguments of counsel and offers the following finding of facts, conclusions, and disposition.

Findings of Fact

The Accused graduated from the George Washington Law School and was admitted to the practice of law in Oregon by the Oregon Supreme Court on September 21, 1990. The Accused worked as an associate in the Portland, Oregon, law firm of Black Helterline when he first began the practice of law. After about 14 months with the firm, he and another associate were laid off. Thereafter, he operated as a sole practitioner in the Portland area handling primarily employment cases and wage claims. He has also handled hundreds of criminal cases and a few personal injury matters. He has arbitrated many cases under the Multnomah County arbitration rules. It should be noted that the Accused has not continuously practiced law on a full-time basis since his admission. Rather, he has been involved in non-law-related business endeavors and practiced law only on a part-time or intermittent basis. At the time of the hearing on this matter, the Accused was on "active pro bono" status with the Bar.

In the mid to late 1990s, the Accused was friends and business associates to some degree with Kurt Williams ("Williams"), Bruce Terrill ("Terrill"), and Christopher Clarke ("Clarke"). This relationship led to a business venture involving a martial arts project and the sale of certain martial arts equipment. Although the Accused did not act as the attorney for this venture, he was involved with negotiations between the parties and was to be a corporate officer or marketing director in the business entity when it was formed. A year or two prior to the summer of 2000, it became apparent that the business ventures between these individuals would not come to fruition.

After failure of the business venture, the Accused agreed to represent Williams in his effort to recover money due from Clarke. The representation was to be at no cost to Williams. In and around this time, the Accused was working primarily as a mortgage broker. The Williams matter was one of only about two law related matters he was involved with. On November 2, 2000, the Accused filed a lawsuit in Multnomah County Circuit Court entitled *Williams v. Clarke*. The damages alleged in the suit were significantly higher than the amount of money claimed to be due from Clarke. The Accused testified that the sole reason for filing the lawsuit was to leverage the maximum settlement for Williams. The dollar amount at issue in the litigation rendered the case subject to mandatory court-annexed arbitration. On December 26, 2000, Clarke's attorney, Robert Deveny of the Brownstein Rask firm, notified the Accused that because the Accused had been involved in the underlying business venture he would likely be a witness at trial and therefore unable to act as trial counsel. Deveny cited the relevant disciplinary rule, DR 5-102. The Accused responded by refusing to withdraw and indicating that the rule did not require his withdrawal unless and until the case went to trial.

In late January 2001, the court notified the Accused that the *Williams v. Clarke* case had been transferred to arbitration and provided a list of possible arbitrators. The court arbitration rules require that an arbiter be selected within 21 days from the time a case is transferred to arbitration and the hearing held within 49 days. The notice required the Accused to select an arbitrator and notify the court of the hearing date no later than February 22, 2001. The Accused failed to take the action identified in the court's notice and took no action at all on the matter until March 28, 2001, when he contacted the court to secure an updated list of arbiters.[2] The court forwarded the new list to the Accused on that same date—March 28. This

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[2] The trial panel notes that the Accused indicates that he contacted Eric Fjelstad, Esq. and discussed the Williams case in and around this time. This assertion is contrary to the testimony of Fjelstad who testified that when he spoke with the Accused in the spring of 2001, it was a generic discussion dealing with the Accused's desire to pass off a few cases to Fjelstad. It was not until mid-September that the Accused actually contacted Fjelstad to transfer the Williams case. The panel also notes that the Accused testified that Fjelstad has an exceptional memory and that his recollection of events should be viewed as more reliable than the Accused's.

court correspondence indicated that an arbitrator should be selected by April 21, 2001, to avoid dismissal of the action. The Accused took no action in response to this court notice.

On May 11, 2001, the court informed the Accused that he had again failed to comply with the arbitration rules and a judgment of dismissal would be entered without further notice if the Accused failed to notify the court of the arbitrator selected and the hearing date by June 15. No action was taken until June 7, when the Accused faxed a letter to Deveny requesting he select an arbitrator and identify available hearing dates no later than June 11. The Accused's June 7 letter also indicated his desire to work toward settlement and requested an opening settlement offer. Douglas Raab responded by voice mail to the Accused on June 11. Mr. Raab, one of the firm's trial attorneys, had taken over the *Williams v. Clarke* case from Deveny. The Accused did not take action before the June 15 deadline. Rather, he waited until June 28 at which time he mailed a "selection of arbitrator" pleading to the court. The Accused did not contact the court to determine the status of the case before mailing this June 28 pleading. In this document, the Accused identified the arbiter and hearing date selected (September 27, 2001—well beyond the 49-day hearing deadline), and also informed the court that he would need to withdraw from the case because he was a potential witness and due to his "retirement" from the practice of law effective July 7, 2001. Williams received a copy of this June 28 document. (Although the Accused gave the court notice that he would have to withdraw from the case, he took no steps to do so as required by the trial court rules prior to July 7, 2001.) The court did not receive the pleading mailed by the Accused on June 28 until July 2. Moreover, pursuant to its May 11 notice, the court already dismissed the case without additional notice to the Accused. The dismissal occurred on June 29. On July 2, 2001, the court rejected the Accused's June 28 "selection of arbitrator" pleading and notified the Accused that (1) the hearing had been set outside the required time period and (2) the case would require reinstatement before any further action could or would be taken.

It should be noted that during this same general time period the Accused was engaged in negotiations with the Bar to resolve a pending disciplinary case. More specifically, on April 6, 2001, the Accused signed a stipulation for discipline with the Bar agreeing to a 90-day suspension from practice upon approval by the State Professional Responsibility Board.[3] One of the rules the Accused agreed that he had violated was neglect of a client legal matter. On May 17, 2001, the Bar notified the Accused that the stipulation for discipline had been approved and that the 90-day suspension would begin on July 7, 2001, and end on October 5, 2001. This letter also

[3] At the time the Accused signed the stipulation for discipline, he did not know the precise date on which the suspension would begin. He had requested, however, that the suspension correspond with an out of state vacation that he had planned for mid-July so that the vacation could run concurrent with the suspension, at least in part.

set forth the obligation to take all reasonable steps necessary to avoid foreseeable harm or prejudice to the interests of all clients.

The Accused left on a two-week vacation immediately after he mailed the June 28 "selection of arbitrator" pleading. He did not let Williams know that he was going on vacation, that he would be suspended from practice on July 7, or that the suspension would still be effect on September 27, the date on which the arbitration was to be held. He took no steps to formally withdraw from representing Williams in the pending court action or otherwise before his suspension commenced on July 7, 2001. He did not arrange alternate counsel for Williams before the suspension, nor did he advise Williams that Williams should take steps to find counsel on his own.[4] He took no steps to advise Raab that he was suspended for 90 days or that he would be otherwise unavailable to engage in the settlement negotiations he himself had demanded. Moreover, at the time of his suspension the Accused shared a business address with Terrill—a nonlawyer. The Accused made no specific arrangements with Terrill or anyone else regarding how his mail or law related phone calls were to be handled while he was on vacation or during his suspension. The failure to take such steps resulted in the Accused not receiving the correspondence from the court rejecting his June 28 pleading and advising that reinstatement of the case would be required until "two or three" months later when he, for the first time since his return from vacation in mid-July, went through the box of "legal stuff" that Terrill had set aside during the Accused's absence.[5] Although he did not go so far as to expressly blame Terrill for his not receiving the court's July notice of rejection and dismissal, the Accused did attempt to excuse his own actions (or lack of action) by claiming Terrill was not as "organized had he had thought" and further, that Terrill had gone on a "cleaning frenzy" during his absence and did not separate current legal mail from other law related materials.

In early August 2001, the arbitrator that had been selected by the parties in June to hear the Williams matter (Mr. Buehler) noticed in the Bar Bulletin that the Accused had been suspended from the practice of law and that the suspension would still be in effect on the then-scheduled September 27 hearing date. Thereafter on

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[4] The panel notes that the Accused and Williams discussed early on in the litigation that the Accused could not represent Williams at trial. The upshot of this discussion was that if the case did not settle before trial, the Accused would secure alternate counsel at no cost to Williams—the Accused would contact someone who owed him a favor.

[5] Throughout the trial of this case, the Accused and his counsel made a number of references to the court's apparent (and intermittent) use of an incorrect business address. The trial panel notes that while there may have been some confusion on the court's part, there was no evidence offered to indicate that this confusion played any role in the Accused's failure to timely respond to the court. The panel also notes that the Accused took no steps to notify the court of his proper address during the pendency of the arbitration at issue.

August 8, Buehler notified counsel for both parties that the hearing would be removed from his hearing calendar. He also requested counsel take some action to notify the court that the case would not be heard on September 27. The Accused took no action in response to the Buehler letter and failed to notify Williams that the arbitration had been cancelled.

In early and mid-September, Williams attempted to contact the Accused on a number of occasions to discuss preparation needs for the upcoming arbitration.[6] The Accused did not return Williams's voice mail messages.[7] After repeated efforts to contact the Accused, Williams sought the help of the Accused's friend and business associate Bruce Terrill. It was during a phone conversation with Terrill that Williams first learned that the Accused had been suspended from the practice of law. Terrill arranged a meeting between Williams and the Accused on or about September 17, 2001. During the course of this meeting, the Accused contacted Eric Fjelstad by phone in an effort to determine his interest in stepping in to handle the *Williams v. Clarke* case. Fjelstad expressed his willingness to help, and following a meeting with Williams on September 18, agreed to take the case.[8] The record is void of any evidence to indicate what steps the Accused took or did not take to assist in the transition of the Williams matter to Fjelstad.

On or about September 19, 2001, Fjelstad learned that the court had dismissed the case in June. Williams was understandably upset when he learned his case had been dismissed. On September 20, Fjelstad filed a motion to reinstate the case and substitute himself as Williams's attorney of record. Raab opposed this motion on behalf of Clarke. Following oral argument on the matter, the case was reinstated, another arbitrator was selected, and a new hearing date set. The case settled prior to the scheduled arbitration. A final judgment of dismissal was entered on or about April 19, 2002. Williams paid Fjelstad for his time associated with the case, including the fees associated with the motion and oral argument necessitated by the court's June 29 dismissal of the case.

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[6] At this time apparently neither Williams nor the Accused was aware that the court had dismissed the case on June 29, 2001. The panel notes that the Accused took no steps upon his return from vacation to contact the court to determine the status of the arbitration. Given the late mailing of the June 28 pleading, this would have been a reasonable course of conduct to ensure Williams's rights were protected during the period of suspension.

[7] It is also noteworthy that Williams believes he also attempted to contact the Accused after his receipt of the Accused's June 28 pleading that announced his July 7 retirement. At the time of the trial on this case, however, Williams could not recall with certainty whether he had called the Accused at this time. Although the trial panel believes it more probable than not that Williams attempted to reach the Accused during this time, it does not meet the clear and convincing standard found in BR 5.2.

[8] Although Fjelstad was willing to take over as Williams's counsel, he was not willing to do so at no charge to Williams.

Discussion and Conclusions of Law

In a single cause of complaint, the Bar has charged the Accused with violation of two separate disciplinary rules. The first is DR 2-110(A)(2), which relates to a lawyer's obligation when withdrawing from employment. It provides:

> . . . [A] lawyer shall not withdraw from employment until the lawyer has taken reasonable steps to avoid foreseeable prejudice to the rights of the lawyer's client, including giving due notice to the lawyer's client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules.

The second rule alleged to have been violated relates to the duty of competence and diligence a lawyer owes to his or her clients. The specific rule alleged to have been violated is DR 6-101(B). It provides that "[a] lawyer shall not neglect a legal matter entrusted to the lawyer."

At the outset of our discussion, we note that the Bar bears the burden of establishing the misconduct of the Accused, and must do so by clear and convincing evidence. BR 5.2. Clear and convincing evidence, in turn, means evidence that establishes that the truth of the facts asserted is highly probable. *In re Johnson*, 300 Or 52, 55, 707 P2d 573 (1985). We have utilized this standard in evaluating the facts of this case and in reaching our conclusions.

Withdrawal from Employment. As pointed out by the Bar in its trial memorandum, DR 2-110(B)(2) requires a lawyer to withdraw from continued employment when the lawyer knows or it is obvious that continued employment will result in violation of a disciplinary rule. The Bar has not alleged violation of this rule; therefore, the panel has determined that the Accused's withdrawal from representing Williams was not mandatory.[9] This position is generally supported by Jeff Sapiro's May 17, 2001, notice of suspension letter to the Accused. The May 17 letter identifies the Accused's responsibilities under BR 6.3 during the term of his suspension. The principal obligation is to stop practicing law. As part and parcel of this obligation, a lawyer has the duty to *immediately* take all reasonable steps to avoid foreseeable prejudice to a client's interests. BR 6.3(b) (emphasis added). The methods or procedures employed to satisfy this duty may vary depending on the nature of the lawyer's practice, the number of files, whether the lawyer's clients are involved in litigation, etc. Withdrawal from employment may be one of the methods utilized.

When withdrawal from employment is undertaken by a lawyer and/or is a prudent course of conduct to protect a client's interests during suspension, the steps necessary to properly withdraw must be taken. It is DR 2-110(A)(2) that sets forth

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[9] The panel chair is of the opinion that because of the timing of the arbitration vis a vis the Accused's suspension, that withdrawal was mandatory under DR 2-110(B)(2).

the minimum requirements or steps that a lawyer must take. The plain language of the rule prohibits a lawyer from withdrawing until certain steps have been taken—a lawyer shall not withdraw from employment until he or she has taken reasonable steps to avoid prejudice to a client, including giving due notice to the client, allowing sufficient time for the client to secure alternate counsel, providing the client all relevant file materials and property, and complying with applicable laws and rules.

The Accused was aware in May that his suspension would be in effect from July 7 through October 5. Despite this, on or about June 11, the Accused scheduled the Williams arbitration to take place during the suspension period. At about this same time, the Accused invited Clarke's attorney to participate in settlement negotiations. Although the Accused indirectly gave Williams notice of his *need* to withdraw from employment in the June 28 "notice of selection" that was filed with the court,[10] at no time prior to the suspension did he directly inform Williams that he could not act as his lawyer. Prior to the suspension, he took no steps to provide Williams with his litigation file, he did not comply with the trial court rule that requires him to secure the permission of the court prior to withdrawing from the *Williams v. Clarke* case, he took no steps to secure substitute counsel for Williams, and he made no arrangements whatsoever regarding how his law related business would be handled during his suspension. Rather, after mailing the June 28 pleading, the Accused took off on an out of state vacation and did not return until after his suspension had commenced. Upon return from vacation, the Accused took no immediate steps to refer Williams to another lawyer, did not check on the status of the case, did not notify Williams when the arbitrator cancelled the arbitration, and failed to return Williams' phone calls.[11] It was only after Terrill interceded on Williams's behalf in mid-September that the Accused took any substantive steps to avoid prejudice to Williams.

Withdrawal from employment does not always require an affirmative, intentional act. *In re Coe*, 302 Or 553, 569, 731 P2d 1028 (1987) (DR 2-110(A)(2) was violated when a lawyer closed up his office and left the area where he had been practicing, leaving his client "high and dry"). It is the panel's opinion that the

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[10] The panel does not find persuasive the Accused's argument that he gave Williams notice of withdrawal early on in the course of the attorney-client relationship. While it is undisputed that the Accused and Williams discussed the possibility that the Accused could not represent Williams at the trial because he was a likely witness, the panel is of the opinion that "due notice" under DR 2-110(A)(2) contemplates a more timely or proximate notice.

[11] During the period of suspension the Accused's father-in-law was suffering from cancer. This resulted in the Accused being frequently called to the Seattle area to provide support to family members. While we sympathize with the Accused and his family, we must note that this provides further support for the need to ensure his clients' interests would be protected during his suspension.

suspension in the present case together with the actions of the Accused amounts to a de facto withdrawal from employment and gives rise to the duties found in DR 2-110(A)(2).[12] The panel finds and concludes by clear and convincing evidence that the Accused violated DR 2-110(A)(2) by failing to take reasonable steps to avoid foreseeable prejudice to Williams's rights before withdrawing from employment.[13]

Neglect of a Legal Matter. DR 6-101(B) expressly provides that a lawyer shall not neglect a legal matter entrusted to the lawyer. This rule also encompasses a lawyer's duty to actively pursue a client's case and the duty to maintain adequate communications with a client. *In re Bourcier II*, 325 Or 429, 939 P2d 604 (1997); *In re McKee*, 316 Or 114, 849 P2d 509 (1993); *In re Purvis*, 306 Or 522, 760 P2d 254 (1988). The duty to communicate with a client will arise even in those instances where the client does not him- or herself inquire about the status of the representation or their legal matter. *Id.* As pointed out by both the Bar and the Accused, a discrete or isolated act of negligence will not typically give rise to a violation of this rule. Rather, we must determine whether the action—or inaction—of the Accused amounts to a course of neglectful conduct. *In re Magar II*, 335 Or 306, 66 P3d 1014 (2003). The course of neglectful conduct need not occur over a long period of time. *In re Meyer II*, 328 Or 220, 225, 970 P2d 647 (1999); *In re Purvis*, *supra.* A determination of neglect requires that we make a "fact-specific inquiry." *In re Magar*, *supra.* We have done so.

The evidence presented in the case at bar shows that between November 2000 when the Accused filed the *Williams v. Clarke* case, and June 28, 2001, when the Accused left on vacation, he failed to comply with the arbitration rules and timely respond to at least three separate court notices that requested or required affirmative action on behalf of the Accused's client. During this time, no discovery was undertaken. There was no communication between the Accused and Williams from November 2, 2000, to January 7, 2001, when the Accused copied Williams on a letter to Clarke's attorney; no communication between January 7 and June 11 when the Accused again copied Williams on a letter to opposing counsel; no communication between June 11 and June 28 when the Accused copied Williams on the "selection of arbitrator" pleading which included a statement that the Accused would need to withdraw from the case because he would likely be a witness at trial

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[12] Notwithstanding our position on this issue, the panel notes that care should be taken by the Bar when evaluating cases that involve withdrawal from employment where the Accused has not taken some affirmative or intentional action. Failure to closely evaluate the facts of such cases could turn virtually every neglect case into a case of improper withdrawal.

[13] The panel is also concerned that the affirmative actions by the Accused to schedule an arbitration and invite settlement discussions during a time when he knew he would be suspended from practice may have actually caused harm to Williams in the nature of delays, anxiety, and increased attorney fees.

and also intended to "retire" from the practice of law on July 7, 2001[14]—coincidentally also the date on which his suspension was to begin.

The Accused did not communicate with Williams after June 28 until he was corralled by Terrill to meet with Williams on or about September 17. During this same time, the Accused did nothing to check on the status of the court case or otherwise attempt to determine whether the court had accepted his untimely June 28 filing. He failed to inform Williams that on August 8 arbitrator Buehler had canceled the September 27 arbitration due to the Accused's suspension, and he failed to return Williams's calls attempting to check on the status of the case beginning in early September.

The failure to act in a timely manner to the court's May 11, 2001, notice resulted in dismissal of the Williams case without notice to the Accused. The Accused argued that the arbitration rules in Multnomah County are rather loose, are often ignored, that reinstatement of cases that had been dismissed is commonplace, and finally that the Williams case was reinstated. The panel recognizes the truth of these arguments, but does not subscribe to the theory that the court arbitration rules are made to be broken, nor does the panel find the "everyone else ignores the rules and misses the deadlines" argument a viable defense to neglect in this case. Moreover, the dismissal delayed the resolution of the case by several months and caused Williams significant anxiety. Because reinstatement was opposed and Williams's new attorney was not working for free, Williams also suffered a financial detriment.

Applying the law noted above to the specific facts of this case, the panel finds and concludes, based upon clear and convincing evidence, that the Accused violated DR 6-101(B). He repeatedly ignored the court prior to June 28, 2001, and for all intents and purposes, completely abandoned Williams after June 28. While he reappeared on the scene in mid-September and took affirmative steps to secure substitute counsel at that time, these are steps that should have been taken before the commencement of his suspension. The Accused's neglect of the Williams matter is exacerbated by the fact that during the relevant time period the Williams case was one of only two or three legal matters for which the Accused was responsible and

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[14] The specific language in the pleading filed by the Accused is, in relevant part, as follows: "The scheduling (of the arbitration) may be further complicated because Plaintiff's counsel will need to withdraw prior to an arbitration, due to (1) the likelihood of being called as a witness at the arbitration, and (2) retirement, for the time being, from legal practice, in favor of other pursuits, as of July 7, 2001." At no time did the Accused "retire" from practice in the commonly accepted sense of the word. The panel finds this representation to the court troublesome in the sense it is misleading to all concerned and potentially damaging to Williams.

that pending at the same time, was a multiple cause disciplinary complaint in which neglect of a client's legal matters formed the basis of two of the charges.[15]

Sanctions

In considering an appropriate sanction in this proceeding, we refer to the American Bar Association *Standards for Imposing Lawyer Sanctions* ("ABA *Standards*") and Oregon case law. *In re Kluge*, 335 Or 326, 66 P3d 492 (2003). The ABA *Standards* require us to consider four factors: (1) the duty violated; (2) the Accused's mental state; (3) the actual or potential injury caused by the Accused's conduct; and (4) the existence of aggravating or mitigating circumstances.

Duty. The Accused's actions violate the duty to his client to act with reasonable diligence and in a prompt and timely manner, ABA *Standards*, § 4.4, and the duty to properly withdraw from employment, which is owed to both his client and the profession. ABA *Standards*, § 7.0.

Mental State. The panel finds that the Accused acted knowingly when he violated both DR 2-110(A)(2) and DR 6-101(B). The Accused was aware of the arbitration rules and that his failure to communicate with the court violated those rules and was not in the best interests of his client. As of at least May 17, 2001, the Accused was aware of his responsibility to immediately take all reasonable steps to avoid foreseeable prejudice to his clients prior to and during the term of his suspension. He also knew or should have known that if and when withdrawal was prudent or necessary, various steps were required to ensure proper withdrawal.

Actual or Potential Injury. As to the injury factor, the panel finds that Williams sustained actual injury in the form of unanticipated attorney fees as well as frustration and anxiety occasioned by the Accused's failure to communicate with him and dismissal of his lawsuit. Williams also suffered potential injury to his legal interests when he was not timely informed that his lawsuit had been dismissed, when substitute counsel was not arranged in a timely manner, and when the Accused left town (and the practice) without taking any affirmative steps to protect Williams' interests.

Aggravating or Mitigating Factors. The panels notes, as did the Bar, that without consideration of aggravating or mitigating factors, the ABA *Standards* § 4.42 provides that suspension is generally appropriate in those instances where (A) a lawyer knowingly fails to perform services for a client and thereby causes the client actual or potential injury or (B) a lawyer engages in a pattern or course of neglect

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[15] It is noted by the public member of the panel, Charles Martin, that the Accused lacked any reasonable system to maintain communication with his clients or track file activity or significant deadlines. He believes this is something the public expects to exist in the practice of law. Upon return to the practice of law, the Accused may wish to confer with the PLF regarding effective office organization systems that are designed to minimize the kinds of risks raised by this case.

that causes injury or potential injury to a client. Suspension is also appropriate when a lawyer knowingly engages in conduct that violates a duty owed to the legal profession, and causes injury to a client, the public, or the legal system. ABA *Standards*, § 7.2.

Aggravating circumstances are factors or considerations that may justify an increase in the degree of discipline to be imposed. *See* ABA *Standards*, § 9.22. In the present case, these include:

(1) Prior disciplinary offenses. The Accused was previously suspended from the practice of law for 90 days for violation of DR 1-103(C) (failure to cooperate in a disciplinary investigation); DR 6-101(B) (two counts) (neglect of a legal matter entrusted to a lawyer); and DR 9-101(A), DR 9-101(C)(3), and DR 9-101(C)(4) (failure to preserve the identity of funds and property of a client).

In determining the weight to give this prior discipline, the panel must consider the timing of the current action in relation to the prior offenses and sanctions, the similarity of prior charges to those now at issue, the number of prior offenses, and the relative recency. *In re Jones*, 326 Or 195, 200, 951 P2d 149 (1997); *In re Cohen*, 330 Or 489, 8 P3d 953 (2000). Given that the prior discipline was 90 days, the panel must conclude that the prior offenses were relatively serious. At least one of the same rules (DR 6-101(B)) was at issue in the prior discipline. The disciplinary proceeding leading to this 90-day suspension was pending during the time the Accused represented Williams. The matter was resolved by stipulation in April 2001 and the suspension ran from July 7, 2001, to October 5, 2001. Given these factors, we give substantial weight to the Accused's prior record and note that given the timing of the prior discipline, the Accused certainly should have been aware of the disciplinary process and the rules at issue, and adapted his conduct accordingly.

(2) Multiple offenses. The Accused was found to have violated two separate disciplinary rules. Although the panel agrees that this is an aggravating factor in the present case, we also note that the violations involve only a single client and stem from the same general course of inaction by the Accused. *See* ABA *Standards*, § 9.22(d).

(3) Substantial experience in the practice of law. The Accused has been licensed to practice law in Oregon since 1990. *See* ABA *Standards*, § 9.22(i).

(4) Failure to acknowledge the wrongful nature of the conduct. *See* ABA *Standards*, § 9.22(g).[16]

[16] Panel member Michael Zusman strongly opposes inclusion of this item as an aggravating factor. He believes it is unreasonable to expect the Accused to mount a vigorous defense to ethical charges as is expected in an adversarial proceeding, and simultaneously express contrition for the very acts of misconduct that he had denied committing.

Mitigating circumstances are factors or considerations tending to justify a reduction in the degree of discipline to be imposed. *See* ABA *Standards*, § 9.31. The panel finds no mitigating circumstances in the present case.

Conclusion and Disposition

Having found by clear and convincing evidence that the Accused violated DR 2-110(A)(2) and DR 6-101(B) and considered the Oregon case law and relevant ABA *Standards* as applied to the Accused and present case, the panel makes the following disposition:

The Accused is suspended from the practice of law for a period of 145 days.[17]

IT IS SO ORDERED.

DATED this 13th day of April 2004.

/s/ Susan G. Bischoff
Susan G. Bischoff
Trial Panel Chair

/s/ Michael C. Zusman
Michael C. Zusman, Esq.
Trial Panel Member

/s/ Charles H. Martin
Charles H. Martin
Trial Panel Public Member

[17] As noted above, the record in this case was reopened to consider whether the BOG's November 2003 decision to defer consideration of the Accused's application for reinstatement to fully active status amounted to a de facto suspension, and, if so, whether we should consider the "suspension" in connection with our decision. The Accused argues that the BOG's "de facto suspension" is exacerbated by the extension of time granted to us to complete this opinion. Because this presents a probable issue of first impression involving action by the governing body of the Bar, and the Accused has provided little, if any, factual evidence regarding the circumstances surrounding his decision to leave active practice during the pendency of this case or his decision to return to practice at the present, we believe the question is best resolved by the Supreme Court should either party seek review. We, therefore, decline to rule on the issue and have not factored it into the sanction imposed.

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re	)	
	)	
Complaint as to the Conduct of	)	Case Nos. 01-24, 01-25, 03-66, 03-67
	)	
STEPHEN E. ANDERSEN,	)	
	)	
Accused.	)	

Counsel for the Bar:	Robert Bonaparte; Amber Bevacqua-Lynott
Counsel for the Accused:	None
Disciplinary Board:	None
Disposition:	Violation of DR 1-103(F), DR 6-101(B), DR 7-102(A)(2), DR 9-101(A), and DR 9-101(C)(4). Stipulation for Discipline. Four-month suspension with formal reinstatement requirement.
Effective Date of Order:	July 24, 2004

ORDER APPROVING STIPULATION FOR DISCIPLINE

This matter having been heard upon the Stipulation for Discipline entered into by the Accused and the Oregon State Bar, and good cause appearing,

IT IS HEREBY ORDERED that the stipulation between the parties is approved and the Accused is suspended for four months, effective 30 days after the date of this Order Approving Stipulation, for violations of DR 1-103(F) (failure to participate in and comply with a remedial program established by SLAC); DR 6-101(B) (neglect of a legal matter) (two counts); DR 7-102(A)(2) (knowingly advancing an unwarranted claim or defense); DR 9-101(A) (failure to deposit client funds in trust); and DR 9-101(C)(4) (failure to promptly provide client funds upon request).

IT IS FURTHER ORDERED that the Accused shall be required to seek formal reinstatement pursuant to BR 8.1, at such time as he is eligible to seek reinstatement.

DATED this 25th day of June 2004.

/s/ Michael R. Levine
Michael R. Levine, Esq.
State Disciplinary Board Chairperson

/s/ Jill A. Tanner
Jill A. Tanner, Esq., Region 6
Disciplinary Board Chairperson

STIPULATION FOR DISCIPLINE

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

1.

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

2.

The Accused was admitted by the Oregon Supreme Court to the practice of law in Oregon on September 10, 1974, and has been a member of the Oregon State Bar continuously since that time, having his office and place of business, at all relevant times, in Clackamas County, Oregon.

3.

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

4.

On August 22, 2003, an Amended Formal Complaint was filed against the Accused pursuant to the authorization of the State Professional Responsibility Board (hereinafter "SPRB"), alleging violations of DR 1-103(F) (failure to participate in and comply with a remedial program established by the State Lawyers Assistance Committee (hereinafter "SLAC"); DR 1-102(A)(3) (conduct involving dishonesty or misrepresentation); DR 6-101(B) (neglect of a legal matter) (two counts); DR 7-102(A)(1) (action taken solely to harass); DR 9-101(A) (failure to deposit client funds in trust); DR 9-101(C)(4) (failure to promptly provide client funds upon request). The parties intend that this Stipulation for Discipline set forth all relevant

facts, violations, and the agreed-upon sanction as a final disposition of the proceeding.

Ralph Hughes Matter

(Case No. 01-24)

Facts

5.

In July 1999, Ralph Hughes (hereinafter "Hughes") paid the Accused $400 to prepare and file a bankruptcy petition for him. Thereafter, the Accused failed and neglected to take any action to prepare and file the bankruptcy petition or communicate with Hughes, despite efforts by Hughes to contact the Accused.

6.

On October 4, 1999, Hughes met with attorney James Simpson (hereinafter "Simpson") who called the Accused concerning the bankruptcy. The Accused promised to file Hughes's bankruptcy petition within a few days but failed and neglected to do so.

7.

On October 13, 1999, Hughes met again with Simpson who called the Accused. The Accused told Simpson that he would file Hughes's bankruptcy petition on October 19, 1999. The Accused finally filed the bankruptcy petition on November 20, 1999.

Violations

8.

The Accused admits that, in handling of Hughes's bankruptcy, his conduct constituted neglect of a legal matter in violation of DR 6-101(B).

Swenson Matter

(Case No. 01-25)

Facts

9.

At all material times, the Accused represented the plaintiffs in litigation against Craig and Cheryl Swenson (hereinafter the "Swensons") and had in his possession bank records and rental files belonging to the Swensons. During the course of the litigation, the Accused sent the Swensons a letter indicating that if they settled the underlying litigation on the terms he proposed, the Accused would return their documents. The Accused had no legal right to hold the Swensons' documents.

Violations

10.

The Accused stipulates that, by engaging in the aforesaid conduct, the Accused advanced a claim or defense that was unwarranted under existing law in violation of DR 7-102(A)(2). Upon further factual inquiry, the parties agree that the alleged violations of DR 1-102(A)(3) and DR 7-102(A)(1) should be and, upon approval of this stipulation, are dismissed.

Garrison Matter

(Case No. 03-66)

Facts

11.

In February 2002, Shay Garrison (hereinafter "Garrison") hired the Accused to assist her in preparing a pro se dissolution petition. Pursuant to an oral fee agreement, in April 2002 Garrison sent the Accused a retainer of $400. The Accused failed to deposit Garrison's money into his lawyer trust account.

12.

Thereafter, the Accused failed and neglected to take any action to prepare the pro se dissolution petition, to transmit it to Garrison for filing or otherwise communicate with Garrison, despite efforts by Garrison to contact him.

13.

After several months, Garrison requested the return of her retainer, but the Accused did not respond or return her money until March 2003.

Violations

14.

The Accused admits that his conduct in connection with Garrison's representation constituted neglect of a legal matter, failure to deposit client funds in a lawyer trust account, and a failure to promptly return client funds upon request in violation of DR 6-101(B), DR 9-101(A), and DR 9-101(C)(4).

SLAC Matter

(Case No. 03-67)

Facts

15.

Sometime prior to October 2002, the Accused was referred to the State Lawyers Assistance Committee (hereinafter "SLAC") regarding concerns about possible alcohol impairment. The Accused participated in the evaluation process,

including meeting with the program doctor. In or about October 2002, SLAC directed the Accused to participate in a remedial program of monitoring, treatment, and counseling. The Accused declined to participate in a monitored treatment program, but did not articulate an applicable right or privilege that would otherwise excuse his participation.

16.

While the subject of a referral to SLAC, the Accused failed to participate in and comply with a remedial program established by SLAC.

Violations

17.

The Accused stipulates that, by failing to participate in a remedial program as directed by SLAC, he violated DR 1-103(F).

Sanction

18.

The Accused and the Bar agree that in fashioning an appropriate sanction in this case, the Supreme Court should consider the ABA *Standards for Imposing Lawyer Sanctions* (hereinafter "*Standards*"). The *Standards* require that the Accused's conduct be analyzed by considering the following 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 Violated.* The Accused violated a duty to his clients to act with reasonable diligence and promptness in their representation when he neglected legal matters and failed to promptly tender client property. *Standards,* § 4.4. The Accused also violated a duty to his client when he failed to deposit client funds in trust. *Standards,* § 4.1. The *Standards* provide that the most important ethical duties are those obligations that a lawyer owes to clients. *Standards,* p. 5.

The Accused violated his duty to the legal system to avoid abuse to the legal process in advancing an unmeritorious claim (*Standards,* § 6.2) and violated his duty to the profession to cooperate with the SLAC directives. *Standards,* § 7.0.

B. *Mental State.* The Accused acted knowingly with respect to all violations. "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. *Standards,* p. 7.

C. *Injury.* "Injury" is harm to a client, the public, the legal system, or the profession which results from a lawyer's misconduct. *Standards,* p. 7. Injury can be actual or potential. The Accused caused actual injury to Hughes and Garrison by delaying the completion of their legal matters. He also caused actual injury to Garrison in not timely remitting her retainer and caused her potential injury by failing

to deposit her funds in trust. The Accused caused actual injury to the Swensons in claiming an unfounded right to their property. Finally, the Accused caused actual injury to the profession by failing to cooperate with the program established for him by SLAC.

D. *Aggravating Factors.* "Aggravating factors" are considerations that increase the degree of discipline to be imposed. *Standards,* § 9.22. Those applicable here are as follows:

1. The Accused has a prior record of discipline, having received an admonition for violating DR 6-101(B) (neglect of a legal matter) in October 1993. *Standards,* § 9.22(a). Letters of admonition are to be considered as evidence of past misconduct for purposes of aggravating any sanction, if the misconduct that gave rise to the letter was of the same or similar type as the misconduct at issue in the present matter. *In re Cohen,* 330 Or 489, 501, 8 P3d 953 (2000).

2. Multiple offenses. *Standards,* § 9.22(d).

3. The Accused has substantial experience in the practice of law, having been admitted in 1974 and practiced continuously since that time. *Standards,* § 9.22(i).

E. *Mitigating Factors.* The *Standards* also recognize mitigating factors. *Standards,* § 9.32. The only mitigating factor applicable here is remoteness of the Accused's prior offense. *Standards,* § 9.32(m). The Accused received his admonition more than 10 years ago.

19.

The *Standards* provide that a period of suspension is appropriate in this matter. A suspension is recommended by the *Standards* for each of the Accused's knowing violations. *See Standards,* §§ 4.12, 4.42(a), 6.22, 7.2.

20.

Although no Oregon case contains the exact violations described herein, various cases provide guidance in each of the areas of violation. When the various violations committed by the Accused are taken together as a whole, Oregon case law suggests suspension is an appropriate sanction in this case. *See In re LaBahn,* 335 Or 357, 67 P3d 381 (2003) (attorney suspended for 60 days for violating DR 6-101(B) following letter of admonition for similar conduct); *In re Meyer,* 328 Or 220, 970 P2d 647 (1999) (attorney with prior discipline was suspended for one year for violating DR 6-101(B)); *In re Eakin*, 334 Or 238, 48 P3d 147 (2002) (attorney suspended for 60 days where she mistakenly removed client funds from a trust account, failed to maintain adequate trust account records, and failed to return to the client the unearned portion of a retainer in violation of DR 9-101(A), DR 9-101(C)(3), and DR 9-101(C)(4)); *In re Hedges,* 313 Or 618, 836 P2d 119 (1992) (attorney suspended for 63 days for neglecting a legal matter, failing to account for

client funds, and failing to return them on request in violation of DR 6-101(B), current DR 9-101(C)(3) and (4), and for misrepresenting reasons for delay to client in violation of DR 1-102(A)(3) and failing to cooperate with Bar investigation in violation of DR 1-103(C)); *In re Wyllie*, 326 Or 447, 952 P2d 550, *reh'g denied*, 326 Or 622 (1998) (attorney was suspended for one year when he refused to participate in and comply with a remedial program established for alcoholism, in violation of DR 1-103(F) and also continued to appear in court while impaired by the use of alcohol in violation of DR 1-102(A)(4)); *In re Chandler*, 306 Or 422, 700 P2d 243 (1988) (attorney with prior discipline was suspended for two years for neglecting legal matters and failing to return client property in violation of DR 6-101(B) and DR 9-101(C)(4), and for failing to cooperate with the Bar's investigation and failing to respond or cooperate with the SLAC in violation of DR 1-103(C) and DR 1-103(F)).

21.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be suspended for four months for violations of DR 1-103(F) (failure to participate in and comply with a remedial program established by SLAC); DR 6-101(B) (neglect of a legal matter) (two counts); DR 7-102(A)(2) (knowingly advancing an unwarranted claim or defense); DR 9-101(A) (failure to deposit client funds in trust); and DR 9-101(C)(4) (failure to promptly provide client funds upon request). The parties further agree that the Accused shall be required to seek formal reinstatement pursuant to BR 8.1, at such time as he is eligible to seek reinstatement. The sanction is to be effective 30 days after this stipulation is approved by the Disciplinary Board.

22.

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. 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 2nd day of June 2004.

/s/ Stephen E. Andersen
Stephen E. Andersen
OSB No. 74013

EXECUTED this 4th day of June 2004.

OREGON STATE BAR

By: /s/ Amber Bevacqua-Lynott
Amber Bevacqua-Lynott
OSB No. 99028
Assistant Disciplinary Counsel

Cite as 337 Or 167 (2004)

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re	)
	)
Complaint as to the Conduct of	)
	)
ANTHONY L. WORTH,	)
	)
Accused.	)

(OSB No. 02-34; SC S50682)

En Banc

On review of the decision of a trial panel of the Disciplinary Board.

Submitted on the record April 21, 2004. Decided July 1, 2004.

Anthony L. Worth, Pendleton, filed the brief for himself.

Jane E. Angus, Assistant Disciplinary Counsel, Lake Oswego, filed the briefs for the Oregon State Bar. With her on the briefs was Thomas C. Howes.

PER CURIAM

The Accused is suspended from the practice of law for 120 days, effective 60 days from the date of the filing of this decision.

SUMMARY OF SUPREME COURT OPINION

The Oregon State Bar alleged that the Accused violated several Code of Professional Responsibility rules in his handling of a client's landlord-tenant dispute. A trial panel of the Disciplinary Board concluded that the Accused violated DR 6-101(A), DR 6-101(B), and DR 1-102(A)(4). The trial panel also concluded that the Accused had not violated DR 1-102(A)(3). The trial panel suspended the Accused from the practice of law for 90 days. The Bar sought review, arguing that, in addition to violating DR 6-101(A), DR 6-101(B), and DR 1-102(A)(4), the Accused violated DR 1-102(A)(3). The Bar also argued that the Accused should be suspended from the practice of law for one year. *Held:* In addition to the violations found by the trial panel, the Accused violated DR 1-102(A)(3) by making knowing misrepresentations to the court. The Accused is suspended from the practice of law for 120 days, effective 60 days from the date of the filing of this decision.

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re	)	
	)	
Complaint as to the Conduct of	)	Case Nos. 01-95, 01-217, 03-04
	)	
MARY W. JOHNSON,	)	
	)	
Accused.	)	

Counsel for the Bar:	Richard A. Weill; Jane E. Angus
Counsel for the Accused:	Peter R. Jarvis
Disciplinary Board:	None
Disposition:	Violation of DR 1-102(A)(4). Stipulation for Discipline. 30-day suspension.
Effective Date of Order:	July 16, 2004

ORDER APPROVING STIPULATION FOR DISCIPLINE

This matter having been heard upon the Stipulation for Discipline entered into by Mary W. Johnson and the Oregon State Bar, and good cause appearing,

IT IS HEREBY ORDERED that the stipulation between the parties is approved. The Accused is suspended from the practice of law for 30 days for violation of DR 1-102(A)(4) (three counts), effective July 16, 2004.

DATED this 6th day of July 2004.

/s/ Michael R. Levine
Michael R. Levine
State Disciplinary Board Chairperson

/s/ Jill A. Tanner
Jill A. Tanner, Region 6
Disciplinary Board Chairperson

STIPULATION FOR DISCIPLINE

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

1.

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

2.

The Accused was admitted by the Oregon Supreme Court to the practice of law in Oregon on September 14, 1984, and has been a member of the Oregon State Bar continuously since that time, having her office and place of business in Clackamas County, Oregon.

3.

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

4.

At the direction of the State Professional Responsibility Board, on February 19, 2003, the Bar filed a Second Amended Formal Complaint against the Accused for alleged violations of DR 1-102(A)(3), DR 1-102(A)(4), DR 1-103(C), and DR 7-102(A)(5) of the Code of Professional Responsibility. The parties intend that this stipulation set forth all relevant facts, violations, and the agreed-upon sanction as a final disposition of this proceeding.

Sinio Matter

(Case No. 01-95)

Facts

5.

In or about October 1996, the Accused agreed to represent Bess K. Sinio (hereinafter "Sinio") concerning the conduct of Frank and Teresa Bledsoe. Sinio, a widow in her late seventies, was the beneficiary of the Sibyl J. Keirsey trust. Frank Bledsoe was the trustee.

On or about November 4, 1996, the Accused filed a lawsuit on Sinio's behalf against the Bledsoes concerning the administration of the trust and handling of trust assets, alleging fraud, breach of fiduciary duty, and other claims in the Circuit Court of the State of Oregon for the County of Clackamas (hereinafter "Trust Action").

6.

ORS 128.155 required Sinio to post an undertaking or other security in the Trust Action for costs, disbursements, and reasonable attorney fees that may be ordered against her if she did not prevail and the court found that the action was filed in bad faith, or that the petition was frivolous.

7.

In or about October 1996, the Accused prepared a Motion, Affidavit, and Order for Waiver of Posting of Bond (hereinafter "Motion to Waive Bond"). The Accused prepared the affidavit for Sinio's signature. Sinio signed the affidavit on October 31, 1996. The Accused signed the motion on November 4, 1996. The affidavit contained the following statement:

Because I have never received any significant amount of money, and no money at all for over a year from the Trust, I do not have sufficient assets to post a bond in this case.

8.

On or about November 4, 1996, the Accused filed the Motion to Waive Bond with the court. At the time the Accused filed and the court considered the Motion to Waive Bond, Sinio had approximately $60,000 to $70,000 in assets. The Accused failed to make sufficient inquiry about Sinio's assets to make or have Sinio make representations about them to the court.

9.

On or about November 19, 1996, the court considered the Motion to Waive Bond. The court relied on the Accused's and Sinio's representations and granted the motion. On or about January 6, 1997, the court reconsidered its decision to waive the bond. The court ordered that a bond be filed in the amount of $25,000. Thereafter, the Bledsoes filed a motion for sanctions against the Accused. The court found that the affidavit the Accused prepared for Sinio's signature failed to satisfy the requirements of ORCP 17 and that the affidavit gave the impression that Sinio had no significant funds. The court granted the motion and imposed sanctions against the Accused. The court of appeals affirmed the trial court's decision.

Kasinger Matter

(Case No. 01-217)

Facts

10.

In or about January 1999, the court entered a judgment of dissolution in the *Matter of the Marriage of Leslie Kasinger and Michael Kasinger*, Wasco County Circuit Court Case No. 9800098D. In or about September 1999, the Accused agreed

to represent Leslie Kasinger (hereinafter "Kasinger") concerning postdissolution child visitation and custody issues.

11.

On or about September 8, 2000, the court held a telephone conference with the Accused and counsel for Kasinger's husband to schedule a hearing concerning the issues to be decided by the court. The court identified two potential dates for the hearing. On or about September 8, 2000, the Accused notified Kasinger that the court had two potential dates for the hearing.

12.

Late in the day on September 8, 2000, Kasinger terminated the attorney-client relationship with the Accused. On or about September 11, 2000, the court issued a written notice scheduling the hearing for October 19, 2000. The Accused received the hearing notice on September 12, 2000.

13.

On or about September 27, 2000, the Accused signed a motion to withdraw as attorney of record for Kasinger and supporting affidavit, which she submitted to the court. The Accused negligently stated in the affidavit supporting the motion to withdraw: "There are no hearings currently pending in this matter."

14.

The Accused mailed a copy of the motion to withdraw to Kasinger. Kasinger received a copy of the Accused's motion and affidavit. On October 19, 2000, the court held the hearing on the post dissolution custody and visitation issues. Kasinger did not appear or otherwise present evidence on her behalf.

Woolridge Matter

(Case No. 03-04)

Facts

15.

In and after October 1999, the Accused represented Glenn Woolridge (hereinafter "Woolridge") in a marital dissolution proceeding, *Glenn Scott Woolridge, Petitioner, and Katherine Woolridge, Respondent*, Clackamas County Circuit Court Case No. DR 99-10-112 (hereinafter "Dissolution Case"). In April 2000, the parties and their counsel signed and approved the terms of a stipulated judgment and decree of dissolution (hereinafter "Decree). On May 5, 2000, the court signed and filed the Decree.

16.

The Decree required each of the parties to maintain life insurance on his or her own life in an amount not less than $100,000, naming the other as the sole irrevocable beneficiary in trust for the benefit of the parties' children as long as there was an obligation to support a minor child; and that a constructive trust would be imposed over all assets owned or controlled by either party immediately prior to that party's death, including the proceeds of any insurance owned by that party at the time of death if the party failed to maintain the required insurance.

17.

On or about May 22, 2000, Woolridge signed and submitted a change of beneficiary form to Farmers New World Life Insurance Company (hereinafter "Farmers"), which designated the Woolridge children as the beneficiaries of his life insurance, rather than his ex-wife in trust for the benefit of the parties' children as required by the Decree. On or about September 21, 2000, Woolridge died in a motor vehicle accident. At the time of Woolridge's death, his daughter was 18, but his son was a minor.

18.

Following Woolridge's death, the Accused represented Woolridge's daughter personally and as personal representative of Woolridge's estate. On or about September 22, 2000, Woolridge's daughter presented the Accused with a copy of the request for change of beneficiary form, which Woolridge signed on May 22, 2000. Thereafter, the Accused requested information from Farmers concerning the distribution of the insurance proceeds. On or about October 3, 2000, Farmers representatives provided the Accused with information concerning the requirements for distribution of insurance proceeds and to whom proceeds could be distributed.

19.

On October 19, 2000, the Accused filed a motion for order to show cause why the Decree should not be modified to require a nonparent trustee be appointed as custodian to receive and account for life insurance proceeds for the minor child. In an affidavit that accompanied the motion, the Accused negligently misstated Farmers' position concerning the requirements for distribution and to whom insurance proceeds could be distributed.

Violations

20.

Based on the foregoing, the Accused admits that she engaged in conduct prejudicial to the administration of justice in violation of DR 1-102(A)(4) in the Sinio matter, Case No. 01-95; DR 1-102(A)(4) in the Kasinger matter, Case No. 01-217; and DR 1-102(A)(4) in the Woolridge matter, Case No. 03-04. Upon further factual

inquiry, the parties agree that the alleged violations of DR 1-102(A)(3), DR 1-103)(C), and DR 7-102(A)(5) as set forth in the Bar's Second Amended Formal Complaint, upon the approval of this stipulation, are dismissed.

Sanction

21.

The Accused and the Bar agree that in fashioning an appropriate sanction in this case, the ABA *Standards for Imposing Lawyer Sanctions* (hereinafter "*Standards*") are considered. The *Standards* require that the Accused's conduct be analyzed by the following 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.* The Accused violated her duties to her clients, the legal system, and the profession. *Standards,* §§ 6.1, 4.6, 7.0.

B. *State of Mind.* The Accused's conduct demonstrates negligence. *Standards*, p. 7. The Accused failed to exercise the care and attention that lawyers are required to exercise when they make statements, written or oral, to the court, to clients and other persons. The Accused should have known that her statements in each of the matters were not accurate or complete, or that she had failed to make sufficient inquiry to assure that they were accurate or complete before making them.

C. *Injury*. There was actual and potential injury to the court and to the Accused's clients. In the Sinio matter, the court relied on the Accused's statements. If the Accused had made adequate inquiry concerning the client's assets and notified the court of the requirements of ORS 128.255 at the time she presented the motion to waive bond to the court, the court would not have granted the motion to waive bond and would have avoided the need to devote additional court time to the issue to set aside the order. In the Kasinger matter, the client did not attend the hearing concerning postdecree custody and visitation issues, which resulted in the court entering an order without an opportunity for her to be heard. In the Woolridge matter, the Accused's statement incorrectly identified the insurance company's position, which gives rise to potential injury if relied on by others.

D. *Aggravating Factors.* Aggravation or aggravating circumstances are any considerations or factors that may justify an increase in the degree of discipline to be imposed. Aggravating factors include:

1. There is a pattern of misconduct. *Standards,* § 9.22(c).

2. There are multiple rule violations. *Standards,* § 9.22(d).

3. In the Sinio matter, the client was elderly and was not fully aware of her financial condition. The client required the assistance of others to handle her financial affairs. In the Kasinger matter, the client was vulnerable in that she should have been able to rely on the Accused's statements. Also, the court was vulnerable

in that it is expects and is entitled to expect that lawyers have assured the accuracy and completeness of statements made to the court. *Standards*, § 9.22(h).

4. The Accused was admitted to practice in 1984 and has substantial experience in the practice of law. *Standards*, § 9.22(i).

E. *Mitigating Factors*. Mitigation or mitigating circumstances are any considerations or factors that may justify a reduction in the degree of discipline to be imposed. Mitigating factors include:

1. The Accused has no prior record of formal discipline. *Standards*, § 9.32(a).

2. The Accused cooperated with the disciplinary authorities during the investigation of her conduct. *Standards*, § 9.32(e).

3. Other penalties or sanctions were imposed in the Sinio matter. *Standards*, § 9.32(k).

22.

Reprimand is appropriate when a lawyer negligently fails to provide a client with accurate or complete information, and causes injury or potential injury to the client. *Standards*, § 4.63. Reprimand is appropriate when a lawyer is negligent in either determining whether statements or documents are false or in taking remedial action when material information is being withheld, 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*, § 6.13. The *Standards* also 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.

Although reprimand may be appropriate when there is single violation of DR 1-102(A)(4), this matter involves three cases involving three separate clients for which a period of suspension is the appropriate sanction. See, e.g., *In re Roberts*, 335 Or 476, 71 P3d 71 (2003); *In re Thompson*, 325 Or 467, 940 P2d 512 (1997); and *In re Smith*, 316 Or 55, 848 P2d 612 (1993), where the court imposed short-term suspensions for violation of DR 1-102(A)(4) and other rules.

23.

Consistent with the *Standards* and Oregon case law, the Bar and the Accused agree that the Accused shall be suspended for 30 days for violation of DR 1-102(A)(4), Case No. 01-95; DR 1-102(A)(4), Case No. 01-217; and DR 1-102(A)(4), Case No. 03-04, the sanction effective July 16, 2004, or two days after the date this stipulation is approved by the Disciplinary Board, whichever is later.

24.

This Stipulation for Discipline has been reviewed by the Disciplinary Counsel of the Oregon State Bar; the sanction was approved by the chairperson of the State Professional Responsibility Board, and shall be submitted to the Disciplinary Board for consideration pursuant to the terms of BR 3.6.

DATED this 2nd day of July 2004.

/s/ Mary W. Johnson
Mary W. Johnson
OSB No. 84384

OREGON STATE BAR

By: /s/ Jane E. Angus
Jane E. Angus
OSB No. 73014
Assistant Disciplinary Counsel

Cite as 337 Or 183 (2004)

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re	)
	)
Complaint as to the Conduct of	)
	)
JAMES E. LEUENBERGER,	)
	)
Accused.	)

(OSB No. 98-59; SC S50178)

On review of the decision of a trial panel of the Disciplinary Board.

Argued and submitted January 12, 2004. Decided July 15, 2004.

Terrance L. McCauley, Estacada, argued the cause and filed the brief for the Accused.

Richard A. Weill, Bar Counsel, Troutdale, argued the cause for the Oregon State Bar. Mary A. Cooper, Assistant Disciplinary Counsel, Lake Oswego, filed the brief for the Oregon State Bar.

Before Carson, Chief Justice, and Gillette, Durham, Riggs, De Muniz, and Balmer, Justices. (Kistler, J., did not participate in the consideration or decision of this case.)

PER CURIAM

The Accused is reprimanded.

SUMMARY OF SUPREME COURT OPINION

The Oregon State Bar alleged that the Accused had violated Code of Professional Responsibility Disciplinary Rule (DR) 7-102(A)(1) (knowingly taking action that served merely to harass or maliciously injure another (two counts); DR 7-102(A)(2) (knowingly advancing legally unwarranted claim or defense (three counts); DR 7-106(C)(7) (intentionally violating established procedural rule) (two counts); DR 7-110(B)(2) and (3) (communicating with judge as to merits of cause, without promptly delivering copy of written communication to opposing counsel or providing adequate notice of oral communication to opposing counsel (two counts); DR 1-102(A)(4) (engaging in conduct prejudicial to administration of justice (two counts); and DR 5-101(A)(1) (continuing employment, except with client's consent after full disclosure, when lawyer's own interests reasonably may affect exercise of

professional judgment). A trial panel of the Disciplinary Board determined that the Accused had violated the rules as charged, with the exception of two counts of DR 7-102(A)(2) and one count of DR 7-106(C)(7). For those violations, the trial panel imposed a 90-day suspension. *Held:* (1) With the exception of DR 5-101(A)(1), the Bar has failed to prove by clear and convincing evidence that the Accused violated the disciplinary rules at issue; and (2) a public reprimand is the appropriate sanction for the Accused's violation of DR 5-101(A)(1). The Accused is reprimanded.

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re	)	
	)	
Complaint as to the Conduct of	)	Case No. 04-01
	)	
KITTY ARAIYAMA,	)	
	)	
Accused.	)	

Counsel for the Bar:	Amber Bevacqua-Lynott
Counsel for the Accused:	None
Disciplinary Board:	None
Disposition:	Violation of DR 1-102(A)(2), DR 1-102(A)(3), and ORS 9.527(2). Stipulation for Discipline. Six-month suspension.
Effective Date of Order:	August 15, 2004

ORDER APPROVING STIPULATION FOR DISCIPLINE

This matter having been heard upon the Stipulation for Discipline entered into by the Accused and the Oregon State Bar, and good cause appearing,

IT IS HEREBY ORDERED that the stipulation between the parties is approved and the Accused is suspended for six months, effective 30 days after the date of this Order, for violation of DR 1-102(A)(2), DR 1-102(A)(3), and ORS 9.527(2).

DATED this 16th day of July 2004.

/s/ Michael R. Levine
Michael R. Levine, Esq.
State Disciplinary Board Chairperson

/s/ Gregory E. Skillman
Gregory E. Skillman, Esq., Region 2
Disciplinary Board Chairperson

STIPULATION FOR DISCIPLINE

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

1.

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

2.

The Accused was admitted by the Oregon Supreme Court to the practice of law in Oregon on April 20, 1981, and has been a member of the Oregon State Bar continuously since that time, having her office and place of business in Lane County, Oregon.

3.

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

4.

On January 10, 2004, the State Professional Responsibility Board authorized formal disciplinary proceedings against the Accused for alleged violations of DR 1-102(A)(2) (criminal conduct reflecting adversely on honesty, trustworthiness or fitness to practice law); DR 1-102(A)(3) (conduct involving dishonesty, fraud, deceit, or misrepresentation) of the Code of Professional Responsibility; and ORS 9.527(2) (conviction of a misdemeanor involving moral turpitude). The parties intend that this stipulation set forth all relevant facts, violations, and the agreed-upon sanction as a final disposition of this proceeding.

Facts

5.

From approximately March 1998 through July 2000, the Accused provided personal care for Len Torvinen ("Torvinen"), who was a recipient of Social Security disability benefits.

6.

The Social Security Administration became suspicious that Torvinen was exaggerating his claims and began surveillance of Torvinen and the Accused, both in public and at their residence.

7.

While the investigation of Torvinen was pending, the Accused participated in an interview with an investigator in 2000, wherein the Accused falsely reported that Torvinen could not stand or walk without help. She also reported that he was unable to prepare meals that required both hands and that his ability to attend to his personal hygiene was substantially limited. The Accused also stated that Torvinen did not leave the house frequently and did not drive. In actuality, Torvinen was able to stand and walk unassisted, use both hands, and fix simple meals. Torvinen was able to drive, and was often seen by the Accused's coworkers transporting the Accused to and from work.

8.

As a result of the Social Security Administration investigation, Torvinen ultimately pled guilty to federal charges for theft and was required to pay restitution of approximately $50,000. State charges were then brought against the Accused because she had received funds from the State of Oregon for the care of Torvinen.

9.

In August 2003, the Accused was convicted of one count of Theft I, a felony, in *State of Oregon v. Kitty Araiyama*, Lane County Case No. 20-02-23366. The charge was later reduced to a misdemeanor.

Violations

10.

The Accused admits that, by engaging in criminal conduct resulting in a criminal conviction for theft and making affirmative misrepresentations in connection with government benefits, she violated DR 1-102(A)(2) (criminal conduct reflecting adversely on honesty, trustworthiness or fitness to practice law); ORS 9.527(2) (conviction of a misdemeanor involving moral turpitude); and DR 1-102(A)(3) (conduct involving dishonesty, fraud, deceit, or misrepresentation).

Sanction

11.

The Accused and the Bar agree that in fashioning an appropriate sanction in this case, the Disciplinary Board should consider the ABA *Standards for Imposing Lawyer Sanctions* (hereinafter "*Standards*"). The *Standards* require that the Accused's conduct be analyzed by considering the following 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 Violated.* The Accused violated her duty to the public to maintain personal integrity. *Standards,* § 5.1.

B. *Mental State.* The Accused acted intentionally. "Intent" is the conscious objective or purpose to accomplish a particular result. *Standards,* p. 7. The circuit court convicted the Accused of theft, which, by definition requires the "intent to deprive another of property or to appropriate property to the person or to a third person." ORS 164.015. The Accused was aware that her responses regarding the nature and extent of Torvinen's disability were not accurate and nevertheless provided them for the purpose of obtaining benefits for herself or Torvinen.

C. *Injury.* An injury need not be actual, but only potential to support the imposition of sanctions. *In re Williams,* 314 Or 530, 840 P2d 1280 (1992). However, the Accused did cause actual injury to the state by accepting benefits to which she was not entitled.

D. *Aggravating Factors.* Aggravating factors include:

1. Evidence of a dishonest or selfish motive. *Standards,* § 9.22(b).

2. Multiple offenses insofar as the Accused's conduct violated more than one disciplinary rule. *Standards,* § 9.22(d).

3. Substantial experience in the practice of law, the Accused having been admitted in 1981. *Standards,* § 9.22(i).

E. *Mitigating Factors.* Mitigating factors include:

1. No prior record of discipline. *Standards,* § 9.32(a).

2. Personal and emotional problems. *Standards,* § 9.32(c).

3. Restitution, in that the Accused has repaid the state and completed her community service—within approximately three months of her plea. *Standards,* § 9.32(d).

4. A cooperative attitude with the Bar and these proceedings. *Standards,* § 9.32(e).

5. The imposition of other penalties and sanctions as a result of her conduct. The Accused now has a criminal record and was terminated from her job as an administrative law judge. *Standards,* § 9.32(k).

6. Remorse. *Standards,* § 9.32(*l*).

12.

The *Standards* provide that disbarment is generally appropriate when a lawyer engages in serious criminal conduct a necessary element of which includes misrepresentation, fraud, or theft; or a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice. A suspension is generally appropriate when a lawyer knowingly engages in criminal conduct that seriously

adversely reflects on the lawyer's fitness to practice, and that a reprimand is generally appropriate for other conduct involving dishonesty, fraud, deceit, or misrepresentation that adversely reflects on the lawyer's fitness to practice. *Standards,* §§ 5.11, 5.12, 5.13.

13.

Taken as a whole, those factors in mitigation outweigh those in aggravation and act to reduce the otherwise presumptive sanction. Nevertheless, the level of misconduct suggests that a period of substantial suspension is appropriate.

14.

Oregon case law is in accord. In *In re Unrein*, 323 Or 285, 917 P2d 1022 (1996), an attorney was suspended for 120 days for applying for and receiving unemployment compensation benefits on four separate occasions while knowing that she was ineligible for such benefits. The lawyer in *Unrein* was not convicted of any crimes in connection with her receipt of state funds.

In *In re Kimmell*, 332 Or 480, 31 P3d 414 (2001), the court determined that a six-month suspension was appropriate for an attorney's theft of a jacket—a criminal violation—under DR 1-102(A)(2) and DR 1-102(A)(3).

15.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be suspended for six months for violations of DR 1-102(A)(2), DR 1-102(A)(3), and ORS 9.527(2), the sanction to be effective 30 days after this stipulation is approved.

16.

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 June 2004.

/s/ Kitty Araiyama
Kitty Araiyama
OSB No. 81043

EXECUTED this 14th day of June 2004.

OREGON STATE BAR

By: /s/ Amber Bevacqua-Lynott
Amber Bevacqua-Lynott
OSB No. 99028
Assistant Disciplinary Counsel

Cite as 337 Or 226 (2004)

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re	)
	)
Complaint as to the Conduct of	)
	)
JIM CARPENTER,	)
	)
Accused.	)

(OSB No. 02-32; SC S50321)

En Banc

On review of the decision of a trial panel of the Disciplinary Board.

Argued and submitted November 7, 2003. Decided July 29, 2004.

Ryan S. Joslin, Carpenter & Joslin, P.C., John Day, argued the cause and filed the brief for the Accused.

Mary A. Cooper, Assistant Disciplinary Counsel, Lake Oswego, argued the cause for the Oregon State Bar. On the briefs was Stacy J. Hankin, Assistant Disciplinary Counsel.

PER CURIAM

The Accused is publicly reprimanded.

Balmer, J., dissented and filed an opinion in which Kistler, J., joined.

SUMMARY OF SUPREME COURT OPINION

The Oregon State Bar charged the Accused with violating DR 1-102(A)(3) (conduct involving dishonesty, fraud, deceit, or misrepresentation) when the Accused posted a message on an Internet site in the name of a high school teacher and implied in that message that the teacher had engaged in sexual relationships with students. A trial panel of the Disciplinary Board dismissed the complaint, concluding that the reach of DR 1-102(A)(3) did not extend to the conduct in this case. *Held:* The Bar proved by clear and convincing evidence that the Accused acted dishonestly, in violation of DR 1-102(A)(3), because the Accused's conduct demonstrated that the Accused lacks aspects of trustworthiness and integrity that are relevant to the practice of law. The Accused is publicly reprimanded.

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re	)	
	)	
Complaint as to the Conduct of	)	Case No. 04-44
	)	
KENNETH W. McWADE,	)	SC S51559
	)	
Accused.	)	

ORDER OF SUSPENSION

Upon consideration by the court.

This matter is before the court on the notice of discipline in another jurisdiction with a recommendation by the Disciplinary Board Counsel on behalf of the Oregon State Bar's State Professional Responsibility Board that the accused be suspended for two years from the practice of law in Oregon. The court accepts the recommendation and orders that Kenneth W. McWade (OSB no. 70089) be suspended from the practice of law in Oregon for two years, effective 30 days from the date of this order.

DATED this 10th day of August 2004.

/s/ Wallace P. Carson, Jr.
Wallace P. Carson, Jr.
Chief Justice

SUMMARY

Effective September 9, 2004, the Supreme Court suspended Kenneth W. McWade of Hawaii for two years, pursuant to BR 3.5 (reciprocal discipline). The United States Tax Court had previously imposed the same sanction.

McWade represented the Internal Revenue Service in a number of cases brought against a large number of individual taxpayers. Among other things, McWade (1) engaged in a scheme to mislead the court and manipulate some of the cases in order to enhance the likelihood that his client would prevail in all of the cases, and then, in subsequent hearings, attempted to conceal from the court what he had done, (2) entered into agreements with some of the taxpayers, failed to disclose those agreements to the court and the other taxpayers, and intentionally mislead the court about the status of those cases, and (3) allowed a witness to offer misleading testimony to the court.

For engaging in the above referenced misconduct, McWade was found to have violated rules 3.1, 8.4(a), 8.4(c), and 8.4(d) of the American Bar Association Model Rules of Professional Conduct, which are applicable in the U.S. Tax Court.

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re	)	
	)	
Complaint as to the Conduct of	)	Case No. 03-28
	)	
J. MICHAEL SMITH,	)	
	)	
Accused.	)	

Counsel for the Bar:	John Klor; Stacy J. Hankin
Counsel for the Accused:	David J. Elkanich
Disciplinary Board:	None
Disposition:	Violation of DR 1-102(A)(3), DR 3-101(B), and ORS 9.160. Stipulation for Discipline. 180-day suspension.
Effective Date of Order:	October 23, 2004

ORDER APPROVING STIPULATION FOR DISCIPLINE

This matter having been heard upon the Stipulation for Discipline entered into by the Accused and the Oregon State Bar, and good cause appearing,

IT IS HEREBY ORDERED that the stipulation between the parties is approved and the Accused is suspended from the practice of law for 180 days, effective 60 days after the date of this order for violation of DR 1-102(A)(3), DR 3-101(B), and ORS 9.160.

DATED this 24th day of August 2004.

/s/ Michael R. Levine
Michael R. Levine, Esq.
State Disciplinary Board Chairperson

/s/ Jill A. Tanner
Hon. Jill A. Tanner, Region 6
Disciplinary Board Chairperson

STIPULATION FOR DISCIPLINE

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

1.

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

2.

The Accused was admitted by the Oregon Supreme Court to 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 Marion County, Oregon.

3.

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

4.

On June 20, 2003, a Formal Complaint was filed against the Accused pursuant to the authorization of the State Professional Responsibility Board (hereinafter "SPRB"), alleging violation of DR 1-102(A)(3) and DR 3-101(B) of the Code of Professional Responsibility, and ORS 9.160. The parties intend that this Stipulation for Discipline set forth all relevant facts, violations, and the agreed-upon sanction as a final disposition of the proceeding.

Facts

5.

In December 2001, the Bar sent a notice to the Accused that his membership dues were payable on or before January 31, 2002. The Accused failed to timely pay those dues. On February 22, 2002, the Bar sent the Accused a 2002 Membership Fee Statement (hereinafter "Fee Statement") informing him that if he did not pay his dues by July 1, 2002, he would be suspended from the practice of law.

6.

On May 3, 2002, the Bar sent a letter to the Accused reiterating that his dues were payable by July 1, 2002. The letter further informed the Accused that if he did not pay by that date, that he would be automatically suspended from the practice of law, and that if he was suspended for nonpayment that he would be reinstated only

after he complied with the Rules of Procedure of the Bar and the Supreme Court. The Accused acknowledged receipt of that letter on May 7, 2002.

7.

The Accused failed to pay his dues by July 1, 2002, and on July 2, 2002, he was automatically suspended from the practice of law, pursuant to ORS 9.200.

8.

On July 2, 2002, the Bar sent a letter informing the State Court Administrator's Office that the Accused was suspended from the practice of law effective that date. The Accused acknowledged receiving a copy of that letter on July 18, 2002.

9.

On July 18, 2002, after he received the letter referenced in paragraph 8 above, the Accused completed the credit card payment section of the Fee Statement, and sent it to the Bar by facsimile. The Accused mistakenly believed that in sending the Fee Statement with authorization to use his credit card to pay his dues, he was reinstated to the practice of law.

10.

On July 18, 2002, after the Bar received the Fee Statement from the Accused, Bar staff left a message with the Accused's answering service stating that the Fee Statement he had sent was insufficient, and asking him to call back.

11.

On July 19, 2002, Bar staff left another message with the Accused's answering service reiterating that the Fee Statement he had sent in was insufficient, and urging him to call back.

12.

On July 23, 2002, the Accused called Bar staff. At that time he was told that he was suspended from the practice of law, and that he could not practice law until he completed the reinstatement process. He was also told what he needed to do in order to be reinstated, including the fees he needed to pay, and that he needed to complete a BR 8.4 Reinstatement affidavit (hereinafter "reinstatement affidavit"). The Accused told Bar staff that he would obtain, complete, and send in the reinstatement affidavit.

13.

At that time, the Accused failed to send the reinstatement affidavit to the Bar, and otherwise failed to complete the reinstatement process.

14.

The reinstatement affidavit requires the person seeking reinstatement to swear that he or she has not engaged in the practice of law except where authorized to do so during the period of suspension.

15.

Sometime after July 23, 2002, the Accused obtained and signed the reinstatement affidavit. At the time he signed it, he knew that it was false as he had practiced law during the period of his suspension.

16.

On November 6, 2002, the Bar received a complaint that the Accused was practicing law while suspended. The Accused received notice of that complaint, and sent the completed reinstatement affidavit to the Bar. At the time the Accused sent the reinstatement affidavit to the Bar, he knew that it was false as he had practiced law during the period of his suspension. Based upon the reinstatement affidavit, the Accused was reinstated to the practice of law as of November 7, 2002.

Violations

17.

The Accused admits that, by engaging in the conduct described in paragraphs 5 through 16, he violated DR 1-102(A)(3) and DR 3-101(B) of the Code of Professional Responsibility, and ORS 9.160.

Sanction

18.

The Accused and the Bar agree that in fashioning an appropriate sanction in this case, the Disciplinary Board should consider the ABA *Standards for Imposing Lawyer Sanctions* (hereinafter "*Standards*"). The *Standards* require that the Accused's conduct be analyzed by considering the following 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 Violated*. The Accused violated his duty to avoid the unlawful practice of law, and his duty to maintain his personal integrity. *Standards,* §§ 7.0, 5.1.

B. *Mental State*. "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. *Standards*, p. 7.

The Accused acted knowingly when he engaged in the unlawful practice of law. Based upon notices from the Bar, the Accused knew that he would be automatically suspended on a date certain if he did not pay his membership dues.

Based upon the July 23, 2002 telephone conversation with Bar staff, the Accused knew that he had not been reinstated and was still suspended from the practice of law. Despite that knowledge, the Accused continued to practice law.

The Accused acted knowingly when he falsely represented to the Bar that he had not engaged in the practice of law during his suspension. On July 23, 2002, Bar staff informed the Accused that he was suspended from the practice of law and could not practice law until he was reinstated. The Accused continued to practice law and sometime after that date, signed and then submitted the reinstatement affidavit to the Bar swearing that he had not engaged in the practice of law.

C. *Injury*. Injury can be either actual or potential under the ABA *Standards*. *In re Williams*, 314 Or 530, 840 P2d 1280 (1992). "Potential injury" is 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. *Standards*, p. 7.

At least one client sustained actual injury as the court rejected the documents filed by the Accused on that client's behalf because he was not an active member of the Bar. Other clients were exposed to potential injury for the same reason. The Accused's misrepresentation also caused actual injury to the public and the legal profession as the Bar must be able to rely on the candor, honesty, and integrity of the lawyers it licenses.

D. *Aggravating Circumstances*. The following aggravating circumstances are present:

1. Dishonest or selfish motive. The Accused knowingly misrepresented his activities during his suspension in order to avoid the personal and professional consequences arising from his unlawful practice of law. *Standards*, § 9.22(b).

2. Multiple offenses. *Standards*, § 9.22(d).

3. Substantial experience in the practice of law as the Accused has been licensed to practice law in Oregon since 1976. *Standards*, § 9.22(i).

E. *Mitigating Circumstances*. The following mitigating circumstances are present:

1. Absence of a prior relevant disciplinary record. *Standards*, § 9.32(a).

2. Personal or emotional problems. The Accused was experiencing financial difficulties and was diagnosed with depression. *Standards*, § 9.32(c).

3. Cooperative attitude toward the proceedings. *Standards*, § 9.32(e).

4. Remorse. *Standards*, § 9.32(*l*).

19.

The *Standards* provide that a period of suspension is 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 a client, the public, or the legal system. *Standards*, § 7.2.

20.

Oregon case law suggests that a suspension is appropriate when a lawyer practices law while suspended, and makes misrepresentations with regard to their activities or status during the period of suspension. *See In re Koliha*, 330 Or 402, 9 P3d 102 (2000) (lawyer who violated DR 1-102(A)(3), DR 1-102(A)(4), DR 3-101(B), and ORS 9.160 when she represented a client in court proceeding at a time when she knew she was suspended from practice of law for nonpayment of malpractice insurance premium was suspended for one year); *In re Elissa Ryan*, 16 DB Rptr 19 (2002) (lawyer who violated DR 1-102(A)(3), DR 3-101(B), DR 7-102(A)(5), ORS 9.160, and ORS 9.527(4) when she was suspended for failing to pay her malpractice insurance premium, and thereafter knowingly engaged in practice of law, and falsely swore in her reinstatement application that she had not engaged in the practice of law was suspended for 18 months).

This case is not as egregious as those two cases. The lawyer in *Koliha, supra*, also failed to cooperate in the Bar investigation, in violation of DR 1-103(C). The lawyer in *Ryan, supra*, also engaged in willful deceit, in violation of ORS 9.527(4), and, unlike the Accused here, never genuinely believed that she was authorized to practice law.

This case is more like *In re Ryan*, 15 DB Rptr 87 (2001), where a lawyer who continued to practice law even after he knew he was suspended for nonpayment of his malpractice insurance premium was suspended for 180 days.

21.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be suspended for 180 days for violation of DR 1-102(A)(3), DR 3-101(B), and ORS 9.160, the sanction to be effective 60 days after the stipulation is approved.

22.

The Accused's reinstatement shall not be effective until he has paid to the Bar its reasonable and necessary costs in the amount of $229.75, incurred for deposition costs. Should the Accused fail to pay $229.75 in full by the 180th day of the suspension, the Bar may thereafter, without further notice to the Accused, apply for entry of a judgment against the Accused for the unpaid balance, plus interest thereon at the legal rate to accrue from the date the judgment is signed until paid in full.

23.

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 August 2004.

/s/ J. Michael Smith
J. Michael Smith
OSB No. 76333

EXECUTED this 17th day of August 2004.

OREGON STATE BAR

By: /s/ Stacy J. Hankin
Stacy J. Hankin
OSB No. 86202
Assistant Disciplinary Counsel

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re	)	
	)	
Complaint as to the Conduct of	)	Case No. 02-118
	)	
GERSHAM GOLDSTEIN,	)	
	)	
Accused.	)	

Counsel for the Bar:	Eric J. Neiman; Stacy J. Hankin
Counsel for the Accused:	Peter R. Jarvis
Disciplinary Board:	None
Disposition:	Violation of DR 5-105(C) and DR 5-105(E). Stipulation for Discipline. Public reprimand.
Effective Date of Order:	August 29, 2004

ORDER APPROVING STIPULATION FOR DISCIPLINE

This matter having been heard upon the Stipulation for Discipline entered into by the Accused and the Oregon State Bar, and good cause appearing,

IT IS HEREBY ORDERED that the stipulation between the parties is approved and the Accused is publicly reprimanded, for violation of DR 5-105(C) and DR 5-105(E).

DATED this 29th day of August 2004.

/s/ Michael R. Levine
Michael R. Levine, Esq.
State Disciplinary Board Chairperson

/s/ Susan G. Bischoff
Susan G. Bischoff, Esq., Region 5
Disciplinary Board Chairperson

STIPULATION FOR DISCIPLINE

Gersham Goldstein (the "Accused") and the Oregon State Bar (the "Bar") hereby stipulate as follows pursuant to Oregon State Bar Rule of Procedure 3.6(c).

1.

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

2.

The Accused was admitted by the Oregon Supreme Court to the practice of law in Oregon in September 1963, and has been a member of the Oregon State Bar continuously since that time, presently having his office and place of business in Multnomah County, Oregon.

3.

The Accused freely and voluntarily enters into this stipulation for discipline subject to the restrictions of Bar Rule of Procedure 3.6(h).

4.

On July 22, 2004, the Bar filed an Amended Formal Complaint against the Accused in which the Accused was charged with violations of DR 5-105(E) and DR 5-105(C) of the Code of Professional Responsibility. The parties intend that this stipulation set forth all relevant facts, violations, and agreed-upon sanction in final disposition of this proceeding.

Facts

5.

Beginning in June 1991, the Accused represented Daryl Kollman ("Daryl") and Marta Kollman ("Marta"), who were then married, and their jointly owned business, Cell Tech, with regard to certain tax matters.

6.

On July 13, 1995, Daryl and Marta were indicted on certain criminal charges relating primarily to tax matters.

7.

With respect to the indictment, the interests of Daryl and Marta were adverse.

8.

After the indictment, the Accused provided oral disclosures to Daryl and Marta regarding the likely conflict between them. However, the Accused continued to

represent Daryl and Marta in the criminal matter without contemporaneously confirming the oral disclosure in writing.

9.

On November 30, 1995, the prosecutor presented a plea offer to the Accused in which Daryl would plead guilty to one charge, while all charges against Marta would be dismissed.

10.

After the plea offer was presented, the Accused arranged for Daryl to be represented by another lawyer, and Daryl ultimately chose to accept the plea offer while represented by that lawyer. However, after November 30, 1995, at the request of Daryl's new lawyer, the Accused continued to perform some work for both Daryl and Marta in the criminal matter. At the same time, the Accused continued to represent Daryl in other matters. The Accused failed to comply with the requirements of DR 10-101(B).

11.

Sometime after December 18, 1995, the Accused stopped performing work for Daryl in the criminal matter, but continued to represent Marta in that matter.

12.

The criminal matter in which the Accused continued to represent Marta was the same as the criminal matter in which the Accused had previously represented Daryl, and the interests and Daryl and Marta with respect to that matter were adverse. Before continuing to represent Marta in the criminal matter, the Accused failed to comply with the requirements of DR 10-101(B).

13.

After August 6, 1999, Daryl was no longer an officer or director of Cell Tech, but he continued to be an employee.

14.

On or about August 17, 1999, another lawyer in the Accused's firm undertook to represent Marta and Cell Tech with respect to issues concerning Daryl's continued employment at Cell Tech. With regard to that matter, Daryl's interests were adverse to the interests of Marta and Cell Tech. After August 17, 1999, the Accused continued to represent Daryl in other matters without obtaining consent after full disclosure from Daryl, Marta, and Cell Tech.

Violations

15.

The Accused admits that by engaging in the conduct described in paragraphs 5 through 14, he violated DR 5-105(C) and DR 5-105(E) of the Code of Professional Responsibility.

Sanction

16.

The Accused and the Bar agree that in fashioning an appropriate sanction, the Disciplinary Board should consider the ABA *Standards for Imposing Lawyer Sanctions* (1992) (the "*Standards*"). The *Standards* require that the Accused's conduct be analyzed by considering the following 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 Violated.* The Accused violated his duty of loyalty to current and former clients. *Standards,* § 4.3.

B. *Mental State*. "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. *Standards,* p. 7.

The Accused recognized that there was a conflict of interest between Daryl and Marta with regard to the indictment in the criminal matter, but negligently failed to contemporaneously confirm in writing the oral disclosures he had made to them regarding that conflict. The Accused acted negligently in failing to recognize that there were subsequent conflicts of interest between Daryl, Marta, and Cell Tech.

C. *Injury.* Injury can be either actual or potential. In this case, there was potential injury to Daryl, Marta, and Cell Tech in that as a result of nondisclosure of conflicts of interest in the manner required by DR 10-101(B), they may not fully have understood or consented to the Accused's divided loyalty.

D. *Aggravating Factors*. The following aggravating circumstances exist:

1. Multiple offenses. *Standards,* § 9.22(d).

2. Substantial experience in the practice of law as the Accused has been a licensed Oregon lawyer since 1963. *Standards,* § 9.22(i).

E. *Mitigating Factors*. The following mitigating circumstances exist:

1. Absence of a prior disciplinary record. *Standards,* § 9.32(a).

2. Absence of a dishonest motive. *Standards,* § 9.32(b).

3. Cooperative attitude toward the proceedings. *Standards,* § 9.32(e).

4. Good character and reputation. *Standards,* § 9.32(g).

17.

The *Standards* provide that a 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.

18.

Prior Oregon authority suggests that a reprimand or a short suspension is appropriate. *See, e.g.*, *In re Knappenberger II*, 337 Or 15, 90 P3d 614 (2004) (90-day suspension, 30 of which resulted from violation of DR 5-101(A)(1)); *In re Howser*, 329 Or 404, 413, 987 P2d 496 (1999) (reprimand); *In re Cohen*, 316 Or 657, 664, 853 P2d 286 (1993) (reprimand); *In re Trukositz*, 312 Or 621, 634, 825 P2d 1369 (1992) (reprimand); *In re Hockett*, 303 Or 150, 734 P2d 877 (1987) (63-day suspension, 30 of which resulted from violation of DR 5-105); *In re Harrington*, 301 Or 18, 33–34, 718 P2d 725 (1986) (reprimand).

19.

Consistent with the *Standards* and Oregon case law, and because the mitigating circumstances outweigh the aggravating circumstances, the Accused will be publicly reprimanded.

20.

The Accused shall also pay to the Bar its reasonable and necessary costs in the amount of $923.16, incurred for deposition and other costs. Should the Accused fail to pay $923.16 in full by the 60th day after approval of the stipulation by the Disciplinary Board, the Bar may thereafter, without further notice to the Accused, apply for entry of a judgment against the Accused for the unpaid balance, plus interest thereon at the legal rate to accrue from the date the judgment is signed until paid in full.

21.

This Stipulation for Discipline is subject to review by Disciplinary Counsel of the Oregon State Bar and to approval by the 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 24th day of August 2004.

/s/ Gersham Goldstein
Gersham Goldstein
OSB No. 63029

EXECUTED this 25th day of August 2004.

OREGON STATE BAR

By: /s/ Stacy J. Hankin
Stacy J. Hankin
OSB No. 86202
Assistant Disciplinary Counsel

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re	)	
	)	
Complaint as to the Conduct of	)	Case No. 03-121
	)	
ROBERT S. SHATZEN,	)	
	)	
Accused.	)	

Counsel for the Bar:	Stacy J. Hankin
Counsel for the Accused:	Robert S. Shatzen
Disciplinary Board:	Pamela E. Yee, Chair; Craig A. Crispin; Allen M. Gabel, Public Member
Disposition:	Violation of DR 1-102(A)(3), DR 1-103(C), DR 2-101(A)(1), and DR 2-102(A). Trial Panel Opinion. 120-day suspension with BR 8.1 reinstatement required.
Effective Date of Opinion:	September 8, 2004

OPINION OF TRIAL PANEL

Section One: Introduction

***Date and Nature of Charge*:** By Formal Complaint dated December 19, 2003, the Oregon State Bar ("OSB") has charged the Accused with violation of DR 1-102(A)(3), DR 2-101(A)(1), DR 2-102(A), and DR 1-103(C) of the Code of Professional Responsibility.

DR 1-102. Misconduct; Responsibility for Acts of Others.

(A) It is professional misconduct for a lawyer to:

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

DR 2-101. General Rules Regarding Communications about a Lawyer or Law Firm.

(A) A lawyer shall not make or cause to be made any communication about the lawyer or the lawyer's firm, whether in person, in writing, electronically, by telephone or otherwise, if the communication

> (1) Contains a material misrepresentation of fact or law, or omits a statement of fact or law necessary to make the communication considered as a whole not materially misleading.

DR 2-102. Special Rules Regarding Firm Names and Letterheads.

> (A) A lawyer may use professional announcement cards, office signs, letterheads, telephone and electronic directory listings, legal directory listings or other professional notices so long as the information contained therein complies with DR 2-101 and other applicable disciplinary rules.

DR 1-103. Disclosure of Information to Authorities; Duty to Cooperate.

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

The Accused. The Accused is Robert S. Shatzen, OSB #93102, having an office and place of business in Washington County, Oregon.

Summary of Complaint. The Accused held a valid Certified Public Accountant (CPA) certificate and permit which lapsed June 30, 1983. Although the certificate and permit lapsed, the Accused continued to advertise in various telephone directories that he was a CPA, he listed himself as a CPA in the OSB Membership Directory and he advised his clients that he was a CPA.

The Oregon Board of Accountancy (the "Board") issued a Notice of Proposed Civil Penalty, License Revocation and Notice of Right to Hearing on April 23, 2003, which was delivered to the Accused by regular and certified mail. The Accused did not request a hearing. The Board revoked the Accused's license and assessed civil penalties of $52,000. The Board provided the Board's conclusions on August 27, 2003, to the OSB, which was forwarded to the Accused. A response was requested by September 24, 2003. The Accused made no response. A response was subsequently requested by October 10, 2003, but the Accused did not respond.

Default. The Accused was served by first-class mail on December 19, 2003, with the Formal Complaint and Notice to Answer. A Notice of Intent to Take Default was served on the Accused by first-class mail on March 30, 2004, specifically stating that the OSB intended to apply for a default if an Answer was not filed by April 12, 2004. The Accused has failed to appear within the time provided by the OSB Rules of Procedure.

An Order of Default was entered of record by the Disciplinary Board Chairperson on April 20, 2004. The Disciplinary Counsel's Office submitted a Memorandum Re: Sanction on May 28, 2004, which was mailed to the Accused. No responsive memorandum was received by the Trial Panel from the Accused.

Section Two: Findings of Fact

When an Order of Default is entered, the allegations in the Formal Complaint are deemed true. BR 5.8(a). Therefore, the Accused is found to have represented to clients that he was a CPA when his certificate and permit had expired and subsequently when his license was revoked. The Accused advertised in various telephone directories that he was a CPA when he did not hold a valid certificate and permit or license. The Accused indicated he was a CPA in the OSB Membership Directory when his certificate and permit had lapsed. The Accused violated ORS 673.320(3) when he used the title or designation of CPA when he did not hold a valid certificate and permit.

Furthermore, the Accused is found to have failed to respond to the Disciplinary Counsel's Office after (1) the Accused was sent a letter from the OSB asking for a response concerning the Board's conclusions, and (2) the complaint was sent to the Accused.

Section Three: Conclusions of Law

DR 1-102(A)(3). See Section One for verbatim of the rule. The Accused was a CPA and an attorney and is permitted to operate both businesses, but the non-law-related business is still subject to the ABA *Model Rules of Professional Conduct.* The Accused can be disciplined for dishonest conduct in his CPA practice if the conduct reflects on his fitness to practice law.

The OSB must establish by clear and convincing evidence that the Accused's misconduct violated the standards governing professional responsibility. Since the Accused did not respond, the facts as alleged are deemed true and the violations are admitted. The charges of dishonesty, fraud and deceit are serious matters as pointed out in various Oregon Supreme Court analyses of violations of DR 1-102(A) and (B). *In re Erlandson*, 290 Or 465, 622 P2d 727 (1981); *In re Houchin*, 290 Or 433, 622 P2d 723 (1981).

The ABA *Model Rules of Professional Conduct*, Rule 7.1, sets forth that a lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. To contain in the communications representations that are not the case make it false. Furthermore, ABA *MRPC* 7.4(d) states that the lawyer shall not state they are certified unless so certified by an organization that is approved by state authority.

DR 2-101(A)(1) and DR 2-102(A). See Section One for verbatim of the rules. The focus on violations of these disciplinary rules centers on deceiving the public. The purpose is to prohibit misleading information. *See Michael v. Bare*, 230 F Supp2d 1147, 1156 (D Nev 2002). ABA *MRPC* 7.5(a) states that a lawyer shall not use professional designations that violate § 7.1. The ABA *Standards* in Section

5.0 addresses violation of duties owed to the public, and states that any intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice law warrants disbarment. A reprimand is appropriate when other conduct, not involving criminal conduct, that is dishonest is engaged in by the lawyer.

The misrepresentation under DR 2-101(A)(1) does not need to be intentional. *In re Yacob*, 318 Or 10, 15, 860 P2d 811 (1993). If the consumer of legal services could be misled or misinformed by the communication, then there is a violation of the disciplinary rule.

The Accused knew that his certificate and permit had lapsed and that his license was revoked, but he continued to advertise and hold himself out as a CPA. It does not appear that the Accused tried to rectify the situation and get his certificate and permit reinstated. This action by the Accused violates DR 1-102(A)(3).

The Accused continued to advertise and hold himself out to the public as a CPA in various phone directories and the OSB Membership Directory. These listings were not accurate which is prohibited under DR 1-102(A)(3) and 2-101(A)(1).

There is a distinction under Oregon law between a misrepresentation occurring negligently and an affirmative act of dishonest or intentional misrepresentation. *Id*. at 20. Due to the fact that the Accused did not respond, there are no facts before us that would indicate anything other than the Accused acted intentionally to deceive, especially since the deception continued over six years.

Although there were no cases found directly on point, there are cases, in addition to those already cited, that are instructive: *In re Devers*, 328 Or 230, 974 P2d 191 (1999), and *In re Jones*, 312 Or 611, 825 P2d 1365 (1992). Based on the Accused's actions, the Trial Panel finds violations of DR 1-102(A)(3), 2-101(A)(1), and 2-102(A).

DR 1-103(C). See Section One for verbatim of the rule. The Accused failed to respond to the Formal Complaint and to the Disciplinary Counsel's Office's repeated requests to respond, and has violated his duty owed as a professional. *In re Kluge*, 335 Or 326, 66 P3d 492, 507 (2003). A lawyer under investigation must respond fully and truthfully to inquiries and requests from OSB disciplinary authorities, subject only to right or privilege. *In re Bourcier*, 325 Or 429, 939 P2d 604 (1997); *see In re Jaffee*, 331 Or 398, 15 P3d 533 (2000).

The mental state required for a violation of DR 1-103(C) is not clear from the rule, but there are no facts nor evidence before the Trial Panel which would indicate anything other than that the Accused's failure to respond was knowing and intentional. The failure to respond has caused actual injury to the legal profession and the public. *In re Parker*, 330 Or 541, 547, 9 P3d 107 (2000). The Accused has violated DR 1-103(C).

Section Four: Sanctions

Under the ABA *Standards for Imposing Lawyer Sanctions* (1991) (amended 1992), there are three factors to use to determine the appropriate sanction: (1) the duty violated; (2) the Accused's mental state; and (3) the actual or potential injury caused by the misconduct. ABA *Standards*, § 3.0; *In re Conduct of Kluge*, *supra*, 66 P3d at 507. The primary purpose of disciplinary proceedings is protection of the public. *In re Houchin, infra.*

The duty violated was the obligation to remove the CPA designation when the Accused was no longer properly licensed as a CPA. The advertising and listings were misleading since they contained false information which violated the Accused's duty to the profession and to the public under DR 1-102(A)(3) and 2-101(A)(1). *See In re Kimmell*, 10 DB Rptr 177 (1996); ABA *Standards*, §§ 4.0, 5.0, 7.0.

The Accused's mental state was intentional. The Accused held himself out as a properly licensed CPA when he was not eligible to do so and by not disclosing that he was suspended by the Board. *See In re Devers, supra*, 328 Or at 242 (accused held himself out as a currently licensed attorney).

In light of the primary purpose of the disciplinary proceedings to protect the public, there need not be actual injury. In the instant case, two people did file complaints due to lack of the Accused preparing returns as a CPA.

As for violation of DR 1-103, the failure to respond to the requests of the Disciplinary Counsel's Office during the investigation is a further violation of the Accused's duty to the public. ABA *Standards*, § 5.0; *In re Parker, supra*, 330 Or at 547.

After considering the three factors to determine the appropriate sanction, any aggravating or mitigating circumstances are examined for adjusting the sanction. ABA *Standards* § 9.2 sets forth the factors that may be considered for aggravation. Mitigating factors are set forth at § 9.3.

The only mitigating factor applicable is that the Accused has no prior disciplinary record. The aggravating factors are the following: a pattern of misconduct (six years); multiple offenses (yellow page advertising, OSB directory, business cards, and letterhead); and refusal to acknowledge wrongful conduct (failed to respond to OSB Disciplinary Counsel and has not paid anything on the $52,000 fine imposed by the Board). The OSB contends that the aggravating factors of dishonest or selfish motive and substantial experience in the practice of law are present. The Trial Panel does not have any facts before it to make these two determinations. There is no evidence of motive nor the extent to which the Accused practiced law and his experience.

In weighing the aggravating and mitigation circumstances, the sanction can be adjusted. The sanction can be reprimand, suspension, or disbarment. ABA *Standards* § 7.1 provides:

> Disbarment is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another and causes serious or potentially serious injury to a client, the public, or the legal system.

ABA *Standards* § 7.2 provides:

> Suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional, and causes injury or potential injury to a client, the public, or the legal system.

The Oregon court has viewed acts involving fraud, dishonesty, and misrepresentation to be serious matters. *In re Erlandson, supra,* 290 Or at 729; *In re Devers, supra,* 328 Or at 242. It is the intentional misrepresentation coupled with the Accused's failure to respond to the OSB's investigation that warrant suspension. *In re Jones*, 312 Or 611, 825 P2d 1365 (1992). The Accused had a duty to the public that he violated when he failed to respond to requests from the Disciplinary Counsel's Office during the investigation. ABA *Standards*, § 5.0; *In re Parker, supra.* 330 Or at 547. The lack of response unnecessarily delayed the disciplinary investigation, which is an actual injury to the public and the Oregon State Bar. *In re Kluge, supra,* 66 P3d at 507.

Due to the seriousness of the matter and actual injury, the Trial Panel finds suspension is warranted for the Accused. The court in *In re Miles*, 324 Or 218, 224, 923 P2d 1219 (1996), found a 120-day suspension when the lawyer failed to respond to the OSB and LPRC inquiries. Although the Accused's violations are not as egregious as *Miles, Yacob,* or *Devers, supra*, the conduct, when coupled with the failure to respond to the disciplinary proceedings, warrants a 120-day suspension.

Section Five: Disposition

It is the decision of the Trial Panel that the Accused be suspended for 120 days for violation of DR 1-102(A)(3), DR 2-101(A)(1), DR 2-102(A), and DR 1-103(C) of the Code of Professional Responsibility.

Furthermore, the Trial Panel finds that it would be in the best interest of the public to require the Accused to be subject to formal reinstatement under BR 8.1 at such time as he elects to return to active status with the OSB.

DATED this 6th day of July 2004.

/s/ Pamela E. Yee
Pamela E. Yee
OSB No. 87372
Trial Panel Chair

CONCURRING MEMBERS:

/s/ Al Gabel
Al Gabel, Public Member

/s/ Craig A. Crispin
Craig A. Crispin
OSB No. 82485

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re	)	
	)	
Complaint as to the Conduct of	)	Case No. 04-29
	)	
GARRY L. BRECKON,	)	
	)	
Accused.	)	

Counsel for the Bar:	Linn D. Davis
Counsel for the Accused:	Christopher R. Hardman
Disciplinary Board:	None
Disposition:	Violation of DR 6-101(A). Stipulation for Discipline. Public reprimand.
Effective Date of Order:	September 13, 2004

ORDER APPROVING STIPULATION FOR DISCIPLINE

This matter having been heard upon the Stipulation for Discipline entered into by the Accused and the Oregon State Bar, and good cause appearing,

IT IS HEREBY ORDERED that the stipulation between the parties is approved and the Accused is publicly reprimanded for violation of DR 6-101(A).

DATED this 13th day of September 2004.

/s/ Michael R. Levine
Michael R. Levine, Esq.
State Disciplinary Board Chairperson

/s/ Arnold S. Polk
Arnold S. Polk, Esq., Region 4
Disciplinary Board Chairperson

STIPULATION FOR DISCIPLINE

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

1.

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

2.

The Accused was admitted by the Oregon Supreme Court to the practice of law in Oregon on September 15, 1997, and has been a member of the Oregon State Bar continuously since that time. At the time of the events described herein, the Accused's office and place of business was located in Washington County, Oregon.

3.

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

4.

On April 16, 2004, the State Professional Responsibility Board authorized formal disciplinary proceedings against the Accused for alleged violation of DR 6-101(A) of the Code of Professional Responsibility. The parties intend that this stipulation set forth all relevant facts, violations, and the agreed-upon sanction as a final disposition of this proceeding.

Facts

5.

The Accused represented Terry Lee White in a dissolution of marriage proceeding involving child custody and the disposition of assets. Although the Accused had performed legal work in dissolution matters on previous occasions, the Accused had no previous experience with a dissolution in which significant real property issues existed regarding the disposition of assets. After the custody issue was resolved on July 14, 2003, the court set October 13, 2003, for trial of the remaining issues regarding the disposition of assets. The chief asset at issue was the former marital home. Although White was strongly opposed to any disposition that required selling the home, the court advised the Accused in July that the division of assets would almost certainly require selling the home. The Accused was also informed that a market assessment of the home was required for the trial.

6.

On October 13, 2003, the Accused arrived at trial without the knowledge, skill, thoroughness, or preparation reasonably necessary to thoroughly represent the interests of White in the distribution of property issues. As a result of inexperience the Accused believed that opposing counsel would arrange an appraisal of the value

of the home on behalf of the parties. The Accused also failed to collect necessary documents from White for court presentation in a timely fashion. The Accused failed to premark or provide copies of his exhibits to opposing counsel. The Accused was not adequately prepared to represent White's position that the marital home should not be sold and was unprepared to assert White's interests concerning the issue of the sale of the home as part of the equitable distribution of the property. As a result of the foregoing, the Accused neglected to elicit evidence at trial regarding the value of the home or the costs of sale which might offset that value. The Accused also neglected to offer exhibits into evidence until prompted by the court.

Violations

7.

The Accused admits that, by engaging in the conduct described in this stipulation, he violated DR 6-101(A).

Sanction

8.

The Accused and the Bar agree that in fashioning an appropriate sanction in this case, the Disciplinary Board should consider the ABA *Standards for Imposing Lawyer Sanctions* (hereinafter "*Standards*"). The *Standards* require that the Accused's conduct be analyzed by considering the following 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 Violated*. The Accused violated his duty to provide competent representation to his client. *Standards,* § 4.0.

B. *Mental State.* The Accused acted negligently, i.e., he failed to be aware of a substantial risk that circumstances existed or that a result would follow, which failures were a deviation from the standard of care that a reasonable lawyer would exercise in the situation, in that he failed to recognize his lack of competence to properly represent his client regarding the chief remaining issue in the dissolution, the disposition of the marital home, and as a result failed to properly prepare or become competent to represent his client.

C. *Injury*. The Accused's client suffered actual injury as a result of the failure of the Accused to obtain and elicit on behalf of his client an appraisal of the marital home and the estimated cost of selling the marital home. The client suffered potential injury as a result of the failure of the Accused to obtain and elicit evidence regarding the value of the marital home from a witness called on behalf of the client.

D. *Aggravating Factors.* There are no aggravating factors.

E. *Mitigating Factors.* Mitigating factors include:

1. The Accused has no record of prior discipline. *Standards,* § 9.32(a).

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

3. The Accused has displayed a cooperative attitude toward these proceedings and has made full and free disclosure to Disciplinary Counsel's office. *Standards*, § 9.32(e).

4. The Accused has expressed remorse for his conduct. *Standards*, § 9.32(*l*).

9.

Standards § 4.53 suggests that reprimand is generally appropriate when a lawyer either demonstrates a failure to understand relevant legal doctrines or procedures or is negligent in determining whether the lawyer is competent to handle a legal matter and thereby causes injury or potential injury to a client. Oregon case law is in accord. *See In re Magar*, 296 Or 799, 681 P2d 93 (1984) (reprimand was appropriate sanction when lawyer failed to obtain sufficient information from client to represent client in bankruptcy matter); *In re Deguc*, 11 DB Rptr 201 (1997) (reprimand when lawyer failed to present or use information favorable to client, failed to communicate with client, and failed to place client funds in trust account).

10.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be publicly reprimanded for violation of DR 6-101(A).

11.

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

EXECUTED this 24 day of August 2004.

/s/ Garry Breckon
Garry L. Breckon
OSB No. 97221

EXECUTED this 25th day of August 2004.

OREGON STATE BAR

By: /s/ Linn D. Davis
Linn D. Davis
OSB No. 03222
Assistant Disciplinary Counsel

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re	)	
	)	
Complaint as to the Conduct of	)	Case No. 02-117
	)	
EILEEN DRAKE,	)	
	)	
Accused.	)	

Counsel for the Bar:	Eric J. Neiman; Stacy J. Hankin
Counsel for the Accused:	Bradley F. Tellam
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 22, 2004

ORDER APPROVING STIPULATION FOR DISCIPLINE

This matter having been heard upon the Stipulation for Discipline entered into by the Accused and the Oregon State Bar, and good cause appearing,

IT IS HEREBY ORDERED that the stipulation between the parties is approved and the Accused is publicly reprimanded, for violation of DR 5-105(C) and DR 5-105(E).

DATED this 22nd day of September 2004.

/s/ Michael R. Levine
Michael R. Levine, Esq.
State Disciplinary Board Chairperson

/s/ Susan G. Bischoff
Susan G. Bischoff, Esq., Region 5
Disciplinary Board Chairperson

STIPULATION FOR DISCIPLINE

Eileen Drake (the "Accused") and the Oregon State Bar (the "Bar") hereby stipulate as follows pursuant to Oregon State Bar Rule of Procedure 3.6(c).

1.

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

2.

The Accused was admitted by the Oregon Supreme Court to the practice of law in Oregon in 1984, and has been a member of the Oregon State Bar continuously since that time, presently having her office and place of business in Multnomah County, Oregon. The Accused ceased private practice in September 2001.

3.

The Accused freely and voluntarily enters into this stipulation for discipline subject to the restrictions of Bar Rule of Procedure 3.6(h).

4.

On August 28, 2002, the Bar filed a Formal Complaint against the Accused in which the Accused was charged with violations of DR 5-105(C) and DR 5-105(E) of the Code of Professional Responsibility. The parties intend that this stipulation set forth all relevant facts, violations, and agreed-upon sanction in final disposition of this proceeding.

Facts

5.

Beginning in June 1991, a lawyer in the Accused's law firm represented Daryl Kollman ("Daryl") and Marta Kollman ("Marta"), who were then married, and their jointly owned business, Cell Tech, with regard to certain tax matters.

6.

After August 6, 1999, Daryl was no longer an officer or director of Cell Tech, but he continued to be an employee.

7.

On August 17, 1999, the Accused began providing advice to Cell Tech regarding a letter Daryl sent to Cell Tech concerning his continued employment relationship ("employment matter"). With regard to that employment matter, Daryl's interests were adverse to the interests of Marta and Cell Tech. At the time, the Accused mistakenly believed that the law firm's representation of Daryl had ended in December 1995, and that Daryl had separate counsel on legal matters related to him after that time. In fact, the firm was still providing legal representation to Daryl. The Accused undertook to represent Cell Tech in the employment matter without obtaining consent after full disclosure from Daryl, Marta, and Cell Tech.

8.

On August 24, 1999, the Accused conducted a conflict check which revealed that the original 1991 tax matter concerning Daryl was still shown as an open matter. Sometime after that date, but before she performed any further work on the employment matter, the Accused made further inquiry about Daryl's status as a current client and was advised by another lawyer in the firm that there was no conflict.

9.

Sometime after August 17, 1999, Daryl ceased being a client of the Accused's law firm. After Daryl ceased being a firm client, the Accused continued to represent Cell Tech in the employment matter. To the extent that matter was significantly related to the matters in which another lawyer in the Accused's firm had previously represented Daryl, the Accused failed to obtain consent after full disclosure from Daryl, Marta, and Cell Tech.

Violations

11.

The Accused admits that the conduct described in paragraphs 5 through 9 violates DR 5-105(C) and DR 5-105(E) of the Code of Professional Responsibility.

Sanction

12.

The Accused and the Bar agree that in fashioning an appropriate sanction, the Disciplinary Board should consider the ABA *Standards for Imposing Lawyer Sanctions* (1992) (the "*Standards*"). The *Standards* require that the Accused's conduct be analyzed by considering the following 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 Violated*. The Accused violated her duty of loyalty to a current and former client. *Standards,* § 4.3.

B. *Mental State*. "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. *Standards,* p. 7.

In August 1999, the Accused had a good faith belief that the firm no longer represented Daryl, and that the employment matter was not significantly related to the matter in which another lawyer had previously represented Daryl. However, the Accused acted negligently in failing to conduct a more diligent effort to determine whether a conflict of interest existed.

C. *Injury.* Injury can be either actual or potential. In this case, there was potential injury to Daryl, Marta, and Cell Tech in that, as a result of nondisclosure of conflicts of interest in the manner required by DR 10-101(B), they may not fully have understood or consented to the Accused's divided loyalty.

D. *Aggravating Factors.* The following aggravating circumstances exist:

1. Multiple offenses. *Standards,* §9.22(d).

2. Substantial experience in the practice of law. *Standards,* § 9.22(i).

E. *Mitigating Factors.* The following mitigating circumstances exist:

1. Absence of a prior disciplinary record. *Standards,* § 9.32(a).

2. Absence of a dishonest motive. *Standards,* § 9.32(b).

3. Cooperative attitude toward the proceedings. *Standards,* § 9.32(e).

4. Good character and reputation. *Standards,* § 9.32(g).

13.

The *Standards* provide that a 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.

14.

Prior Oregon authority suggests that a reprimand or a short suspension is appropriate. *See, e.g., In re Knappenberger II*, 337 Or 15, 90 P3d 614 (2004) (90-day suspension, 30 of which resulted from violation of DR 5-101(A)(1)); *In re Howser*, 329 Or 404, 413, 987 P2d 496 (1999) (reprimand); *In re Cohen*, 316 Or 657, 664, 853 P2d 286 (1993) (reprimand); *In re Trukositz*, 312 Or 621, 634, 825 P2d 1369 (1992) (reprimand); *In re Hockett*, 303 Or 150, 734 P2d 877 (1987) (63-day suspension, 30 of which resulted from violation of DR 5-105); *In re Harrington*, 301 Or 18, 33–34, 718 P2d 725 (1986) (reprimand).

15.

Consistent with the *Standards* and Oregon case law, and because the mitigating circumstances outweigh the aggravating circumstances, the Accused will be publicly reprimanded.

16.

The Accused shall also pay to the Bar its reasonable and necessary costs in the amount of $1,181.76, incurred for deposition and other costs. Should the Accused fail to pay $1,181.76 in full by the 60th day after approval of the stipulation by the Disciplinary Board, the Bar may thereafter, without further notice to the Accused, apply for entry of a judgment against the Accused for the unpaid balance, plus

interest thereon at the legal rate to accrue from the date the judgment is signed until paid in full.

17.

This Stipulation for Discipline has been reviewed by Disciplinary Counsel of the Oregon State Bar and is subject to approval by the 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 17th day of September 2004.

/s/ Eileen Drake
Eileen Drake
OSB No. 84040

EXECUTED this 20th day of September 2004.

OREGON STATE BAR

By: /s/ Stacy J. Hankin
Stacy J. Hankin
OSB No. 86202
Assistant Disciplinary Counsel

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re	)	
	)	
Complaint as to the Conduct of	)	Case No. 04-62
	)	
DAVID E. FENNELL,	)	SC S51634
	)	
Accused.	)	

ORDER IMPOSING RECIPROCAL DISCIPLINE

Upon consideration by the court.

The Oregon State Bar's recommendation that the Accused be suspended from the practice of law for one year is allowed. David E. Fennell (OSB No. 84459) is suspended from the practice of law in Oregon for one year, effective the date of this order.

DATED this 28th day of September 2004.

/s/ Wallace P. Carson, Jr.
Wallace P. Carson, Jr.
Chief Justice

SUMMARY

By order dated September 28, 2004, the supreme court suspended David E. Fennell of Washington for one year pursuant to BR 3.5 (reciprocal discipline). The Washington Supreme Court had suspended Fennell for one year in May 2004.

In May 2004, the Washington court had approved a recommendation by the Washington State Bar Association Disciplinary Board ("WSBA"), which had found that Fennell had violated Washington Rules of Professional Conduct ("RPCs") that prohibit attorneys from transacting business with a client without full disclosure (RPC 1.8(a)); engaging in conduct involving dishonesty, fraud, deceit or misrepresentation (RPC 8.4(c)); and failing to advise a client of the factors involved in determining his charges for legal services (RPC 1.5(b)).

The violations arose from Fennell's practice of marking up invoices received from outside vendors who provided notice-posting services in nonjudicial foreclosures initiated by Fennell's law firm. After marking up these invoices by approximately 100%, Fennell billed his firm's clients (or, in the case of borrowers who reinstated their trust deeds, the borrowers) for the larger amounts. Fennell accomplished this

mark up through what the WSBA concluded was a dummy shell corporation, which Fennell apparently used solely to contract with existing outside vendors and to receive their incoming invoices for set fees for services. The shell corporation did not add any value to the services provided by the outside vendors that could justify marking up the posting fees before passing the inflated costs (in the form of new invoices from the shell corporation) on to Fennell's clients or their borrowers.

Cite as 337 Or 450 (2004)

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re	)
	)
Complaint as to the Conduct of	)
	)
PAULA J. LAWRENCE,	)
	)
Accused.	)

(OSB No. 99-85; SC S50543)

En Banc

On review of the decision of a trial panel of the Disciplinary Board.

Argued and submitted March 9, 2004. Decided September 30, 2004.

Jane E. Angus, Assistant Disciplinary Counsel, Lake Oswego, argued the cause and filed the brief for the Oregon State Bar. With her on the brief was J. Michael Dwyer, Bar Counsel.

J. Mark Lawrence, of Lawrence & Lawrence, P.C., McMinnville, argued the cause and filed the briefs for the Accused.

PER CURIAM

The Accused is suspended from the practice of law for a period of 90 days, commencing 60 days from the filing of this decision.

SUMMARY OF SUPREME COURT OPINION

The Oregon State Bar charged the Accused with violating DR 1-102(A)(3), DR 1-102(A)(4), DR 1-103(C), DR 7-102(A)(3), and DR 7-104(A)(2) when she gave legal advice to the unrepresented wife of one of her firm's criminal defense clients, when she failed to disclose the nature and extent of her contacts with the wife to the trial court judge at a hearing on a matter involving the client and the client's wife and in a subsequent letter to the judge, and when she later failed to disclose those contacts to the Bar in the ensuing disciplinary proceeding. A trial panel of the Disciplinary Board found that the Accused committed those violations and ordered that the Accused be suspended for a period of six months. *Held:* The Accused is guilty of violating all of the disciplinary rules except for DR 1-102(A)(4) and DR 7-102(A)(3). The Accused is suspended from the practice of law for 90 days, commencing 60 days from the filing of the court's decision.

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re	)	
	)	
Complaint as to the Conduct of	)	Case Nos. 03-59, 03-60, 03-61, 03-62,
	)	03-63, 03-76, 03-77, 03-78, 03-79,
DANIEL Q. O'DELL,	)	03-105, 03-106, 03-107, 03-108, 04-20,
	)	04-21
Accused.	)	

Counsel for the Bar:	Amber Bevacqua-Lynott
Counsel for the Accused:	None
Disciplinary Board:	Anthony A. Buccino, Esq., Chair; Norman Wapnick, Esq.; Howard Freedman, Public Member
Disposition:	Violation of DR 1-103(C), DR 6-101(B), DR 9-101(A), DR 9-101(C)(3), and DR 9-101(C)(4). Trial Panel Opinion. Three-year suspension.
Effective Date of Opinion:	October 18, 2004

OPINION OF TRIAL PANEL

Introduction

Date and Nature of the Charges: By Amended Formal Complaint dated 12 April 2004, the Oregon State Bar ("the Bar") charged the Accused with 15 Causes of Complaint, constituting violations of DR 1-103(C), DR 6-101(B), DR 9-101(A), DR 9-101(C)(3), and DR 9-101(C)(4).

> *DR 1-103. Disclosure of Information to Authorities; Duty to Cooperate*
>
> (C) A lawyer who is the subject of a disciplinary investigation shall respond fully and truthfully to inquiries from and comply with reasonable requests of a tribunal or other authority empowered to investigate of act upon the conduct of lawyers, subject only to the exercise of any applicable right or privilege.
>
> *DR 6-101. Competence and Diligence*
>
> (B) A lawyer shall not neglect a legal matter entrusted to the lawyer.

DR 9-101. Preserving Identity of Funds and Property of a Client

(A) All funds of clients paid to a lawyer or law firm, including advances for costs and expenses, . . . shall be deposited and maintained in one or more identifiable trust accounts in the state in which the law office is situated. . . . No funds belonging to the lawyer or law firm shall be deposited therein except as follows:

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

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

(C) A lawyer shall:

(3) Maintain complete records of all funds, securities and other properties of a

Client coming into the possession of the lawyer and render appropriate accounts to the lawyer's client regarding them. . . .

(4) Promptly pay or deliver to a client as requested by the client the funds, securities or other properties in the possession of the lawyer which the client is entitled to receive. Under circumstances covered by DR 9-101(A)(2), the undisputed portion of the funds held by the lawyer shall be disbursed to the client.

THE ACCUSED: The Accused is Daniel Q. O' Dell, OSB No. 89102, having had an office in Oregon City, Clackamas County, Oregon, and a last known mailing address in care of his mother, Celeste O'Dell, 6732 NE Hancock Street, Portland, OR 97213.

DEFAULT: The Accused accepted service of the Formal Complaint on December 22, 2003, and the Amended Formal Complaint was served by mail on the Accused on April 12, 2004. A Notice of Intent to Take Default was mailed to the Accused on May 6, 2004. The Accused has failed to appear. An Order of Default was entered on June 3, 2004, nunc pro tunc May 28, 2004.

SUMMARY OF COMPLAINT: Many of the 15 causes of complaint involve similar acts of misconduct. In general, the Accused was appointed to assist criminal defendants with the appeal of their convictions or with postconviction relief. The Accused frequently failed to communicate with his clients after the initial contact. He failed or neglected to properly handle their legal matters. In one case, involving a private retainer, he failed to deposit a retainer received for fees and costs in an identifiable client trust account. In almost all cases, the Accused failed to respond to inquiries from the Bar relating to client complaints.

Findings of Fact

When an Order of Default is entered, the allegations in the Complaint are deemed true. BR 5.8(a). The Accused is found to have failed to take any action after the initial filing on behalf of his clients. This conduct served to deny the clients their rights to state and federal relief. In all cases he failed to communicate with the clients to their satisfaction and in many cases he failed to notify them of his appointment as their attorney. In seven cases , the Accused failed to respond to clients requests to provide them copies of their briefs or other materials pertinent to their cases and to which they were entitled. In one case (*Thompson*), the Accused failed to provide an accounting for any of the moneys received ($4,500) as a retainer against fees and costs and failed to deposit the retainer into an identifiable client trust account. The Accused failed to respond to a majority of the 15 complaints and failed to respond to additional inquiries of the Bar.

Conclusions of Law

DR 6-101(B)

The determination whether a lawyer has neglected a legal matter is a fact of specific inquiry. *In re Magar*, 335 Or 306, 66 P3d 1014 (2003). The allegations of the Complaint are deemed true. The Complaint sets forth 15 causes , many of which set forth conduct establishing neglect of client's legal matters. The Bar has established a course of negligent conduct by the Accused. *In re Eadie*, 333 Or 42, 64, 36 P3d 468 (2001); DR 9-101(A); DR 9-101(C)(3), (C)(4). The Accused had a duty to return or deliver client property and client files to the client upon request. *In re Parker*, 330 Or 541, 9 P3d 107 (2000); *In re Devers*, 317 Or 261, 855 P2d 617 (1993). Many of the allegations of the Complaint establish a course of conduct by the Accused that clearly violates these rules.

DR 1-103

In 14 matters alleged by the Bar, the Accused failed to fully respond to the complaints filed by clients and to the inquiries of the Bar. This conduct established a course of conduct in violation of this rule. *In re Schaffner II*, 325 Or 421, 939 P2d 39 (1997).

Sanctions

In imposing sanctions in this case, the trial panel has considered the *ABA Standards for Imposing Lawyer Sanctions* ("*Standards*"). The *Standards* establish the frame work to analyze the Accused's conduct, including (1) the ethical duty violated; (2) the attorney's mental state; (3) the actual or potential injury; and (4) the existence of aggravating or mitigating circumstances. *Standards*, § 3.0.

1. *Duty Violated.* The most important ethical duty is that owed to a client. Here, the Accused failed to act with reasonable diligence, failed to communicate, failed to return files and property to clients and, in some cases, failed to protect and

preserve their legal rights. The Accused also failed to respond fully and timely to client complaints and to inquiries of the Bar.

2. *Mental State.* The mental state of the Accused can only be determined from the Amended Formal Complaint, the allegations of which are deemed true. The Accused knowingly and intentionally failed to perform services for his clients, to communicate with them, to return their files or property, and to account to them. He also knowingly and intentionally failed to respond to the inquiries of the Bar.

3. *Actual or Potential Injury.* Injury can be either actual or potential under the *Standards. In re Williams*, 314 Or 530, 840 P2d 1280 (1992). Although there is no allegation of specific injury to a client, the client deserves the opportunity to exercise his/her rights. Injury to the profession is also evidenced by the failure of the Accused to communicate with clients and the Bar.

4. *Existence of Aggravating or Mitigating Circumstances.* The *Standards* set forth factors to be considered in determining an appropriate sanction. The applicable factors in this case are:

Aggravating.

A. *Prior record of discipline.* The Accused received a reprimand in August 2002 for DR 5-101(A) (personal interest conflict) and DR 6-101(B) (neglect of a legal matter). The Accused was also admonished in January 2000 for violating DR 9-101(C)(4) (failure to promptly return client property).

B. *A Pattern of Misconduct.* The conduct alleged covers the years 2001 through 2003, a substantial period of time.

C. *Multiple Offenses.* Fifteen complaints is multiple.

D. *Substantial Experience in the Practice of Law*. The Accused has been admitted since 1989.

Mitigating.

A. *Absence of a Dishonest or Selfish Motive.* There is no indication that the Accused was dishonest or exhibited a selfish intent. There is no indication of conduct that cheated clients or created personal financial rewards at client expense.

B. *Personal or Emotional Problems.* Affidavits in the file indicate that the Accused was experiencing personal and emotional distress during the periods involved in the Complaint. These problems may be remedied by appropriate treatment in the future.

Conclusion

It is the decision of the Trial Panel that he Accused be suspended from the practice of law for three years.

DATED this 13th day of August 2004.

/s/ Anthony A. Buccino
Anthony A. Buccino
OSB No. 75057
Trial Panel Chair

CONCURRING MEMBERS

/s/ Howard Freedman
Howard Freedman, Public Member

/s/ Norman Wapnick
Norman Wapnick
OSB No. 60087

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re	)	
	)	
Complaint as to the Conduct of	)	Case No. 03-87
	)	
DAVID B. PETERS,	)	
	)	
Accused.	)	

Counsel for the Bar:	Bruce A. Rubin; Stacy J. Hankin
Counsel for the Accused:	Stephen A. Houze
Disciplinary Board:	None.
Disposition:	Violation of DR 1-102(A)(3) and DR 5-110(A). Stipulation for Discipline. 180-day suspension.
Effective Date of Order:	December 25, 2004

ORDER APPROVING STIPULATION FOR DISCIPLINE

This matter having been heard upon the Stipulation for Discipline entered into by the Accused and the Oregon State Bar, and good cause appearing,

IT IS HEREBY ORDERED that the stipulation between the parties is approved and the Accused is suspended from the practice of law for 180 days, effective 60 days from the date of this order for violation of DR 1-102(A)(3) and DR 5-110(A) with the Accused's reinstatement following his term of suspension governed by BR 8.1.

DATED this 26th day of October 2004.

/s/ Michael R. Levine
Michael R. Levine, Esq.
State Disciplinary Board Chairperson

/s/ Susan G. Bischoff
Susan G. Bischoff, Esq., Region 5
Disciplinary Board Chairperson

STIPULATION FOR DISCIPLINE

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

1.

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

2.

The Accused was admitted by the Oregon Supreme Court to the practice of law in Oregon on September 14, 1981, and has been a member of the Oregon State Bar continuously since that time, except as noted herein, having his office and place of business in Multnomah County, Oregon.

3.

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

4.

On October 14, 2003, a Formal Complaint was filed against the Accused pursuant to the authorization of the State Professional Responsibility Board (hereinafter "SPRB"), alleging violation of DR 1-102(A)(3) and DR 5-110(A). The parties intend that this Stipulation for Discipline set forth all relevant facts, violations, and the agreed-upon sanction as a final disposition of the proceeding.

Facts

5.

In July 2001, the Accused was working at a law firm. On July 24, 2001, the law firm was appointed to represent Stephanie Tucker (hereinafter "Tucker") in connection with an alleged probation violation. The Accused was assigned by the firm to pursue Tucker's legal matter.

6.

On August 12, 2001, at a time when the Accused was representing Tucker, he had sexual relations with her.

7.

On August 13, 2001, as part of her probation, Tucker entered a work release program. Sometime after August 13, 2001, Tucker absconded from that program.

Detective Eric Smith (hereinafter "Smith") was assigned to investigate Tucker's disappearance.

8.

On November 6, 2001, Detective Smith interviewed the Accused regarding Tucker's whereabouts. In the course of that interview, the Accused falsely denied that he had a personal relationship with Tucker. At the time, the Accused knew that his relationship with Tucker was material to Smith.

Violations

9.

The Accused admits that, by engaging in the conduct described in paragraphs 5 through 8, he violated DR 1-102(A)(3) and DR 5-110(A) of the Code of Professional Responsibility.

Sanction

10.

The Accused and the Bar agree that in fashioning an appropriate sanction in this case, the Disciplinary Board should consider the ABA *Standards for Imposing Lawyer Sanctions* (hereinafter "*Standards*"). The *Standards* require that the Accused's conduct be analyzed by considering the following 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 Violated.* The Accused violated his duty to avoid an improper conflict of interest. *Standards,* § 4.3. He also violated his duty to the public to maintain his personal integrity. *Standards,* § 5.1.

B. *Mental State*. "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.

The Accused acted with intent when he made a false representation to Detective Smith. The Accused acted knowingly when he had sexual relations with Tucker.

C. *Injury*. Injury can be either actual or potential. *In re Williams,* 314 Or 530, 840 P2d 1280 (1992). In this case, there was the potential that the Accused would act in his own interest to the detriment of Tucker. There also was the potential that the Accused's false representation to Detective Smith would impede Smith's investigation of the underlying matter.

D. *Aggravating Circumstances*. The following aggravating circumstances exist:

1. Prior disciplinary offenses. The Accused was suspended for 120 days in 1998, in part for false representations to a lawyer enforcement official. *In re Peters*, 12 DB Rptr 40 (1998); *Standards*, § 9.22(a).

2. Selfish motive. *Standards*, § 9.22(b).

3. Multiple offenses. *Standards*, § 9.22(d).

4. Substantial experience in the practice of law; the Accused has been a lawyer in Oregon since 1981. *Standards*, § 9.22(i).

E. *Mitigating Circumstances.* The following mitigating circumstances exist:

1. Personal or emotional problems. The Accused's sexual relationship with Tucker resulted in part from problems in the Accused's personal relationship with his wife. *Standards*, § 9.32(c).

2. Timely effort to rectify consequences of misconduct. On November 7, 2001, the day following his interview with Detective Smith, the Accused informed Detective Smith that the Accused was having a personal relationship with Tucker. *Standards*, § 9.32(d).

3. Cooperative attitude toward the proceedings. *Standards* § 9.32(e).

4. Remorse. *Standards*, § 9.32(*l*).

11.

The *Standards* provide 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. *Standards*, § 4.32. Disbarment is generally appropriate when a lawyer engages in intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice law. *Standards*, § 5.11(b). Reprimand is generally appropriate when a lawyer knowingly engages in any other conduct that involves dishonesty, fraud, deceit, or misrepresentation and that adversely reflects on the lawyer's fitness to practice law. *Standards*, § 5.13.

12.

In the absence of a prior disciplinary record, Oregon case law suggests that a short suspension would be appropriate. *See In re Hubbard*, 12 DB Rptr 53 (1998) (90-day suspension where a lawyer had sexual relationship with existing client and continued to represent client after she got pregnant); *In re Peters*, *supra* (120-day suspension for lawyer who, among other things, made false representations to law enforcement regarding his involvement in purchasing controlled substances); *In re Hiller*, 298 Or 526, 694 P2d 540 (1985) (lawyers who failed to disclose material facts in response to motion for summary judgment were suspended for four months).

13.

Consistent with the *Standards* and Oregon case law, and because of the Accused's prior disciplinary record, the Accused will be suspended from the practice of law for 180 days, effective 60 days after the approval of the stipulation by the Disciplinary Board. Furthermore, the Accused must apply for reinstatement, following his term of suspension, under the provisions of BR 8.1.

14.

In addition, on or before the 180th day of the Accused's suspension, the Accused shall pay to the Oregon State Bar its reasonable and necessary costs in the amount of $727.50, incurred for deposition and transcription services. Should the Accused fail to pay $727.50 in full by the 180th day of his suspension, the Bar may thereafter, without further notice to the Accused, apply for entry of a judgment against the Accused for the unpaid balance, plus interest thereon at the legal rate to accrue from the date the judgment is signed until paid in full.

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. 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 12th day of October 2004.

/s/ David B. Peters
David B. Peters
OSB No. 81335

EXECUTED this 12th day of October 2004.

OREGON STATE BAR

By: /s/ Stacy J. Hankin
Stacy J. Hankin
OSB No. 86202
Assistant Disciplinary Counsel

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re	)	
	)	
Complaint as to the Conduct of	)	Case Nos. 03-109, 04-93, 04-94
	)	
GREG NOBLE,	)	SC S51867
	)	
Accused.	)	

Counsel for the Bar:	Jane E. Angus
Counsel for the Accused:	None
Disciplinary Board:	None
Disposition:	Violation of DR 1-102(A)(4), DR 1-103(C), and DR 6-101(B). Stipulation for Discipline. 18-month suspension.
Effective Date of Order:	November 25, 2004

ORDER APPROVING STIPULATION FOR DISCIPLINE

Upon consideration by the court.

The court approves the Stipulation for Discipline. The Accused is suspended from the practice of law in the State of Oregon for 18 months, effective 30 days from the date of this order.

DATED this 26th day of October 2004.

/s/ Wallace P. Carson, Jr.
Wallace P. Carson, Jr.
Chief Justice

STIPULATION FOR DISCIPLINE

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

1.

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

2.

The Accused was admitted by the Oregon Supreme Court to the practice of law in Oregon on September 23, 1993, and has been a member of the Oregon State Bar continuously since that time, having his office and place of business in Linn County, Oregon.

3.

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

4.

On April 16, 2004, the State Professional Responsibility Board authorized a formal disciplinary proceeding against the Accused for alleged violations of DR 6-101(B) and DR 1-103(C) concerning Case No. 03-109. On July 17, 2004, the State Professional Responsibility Board authorized a formal disciplinary proceeding against the Accused for alleged violations of DR 6-101(B) and DR 1-103(C) concerning Case Nos. 04-93 and 04-94. The SPRB also directed that all three matters be consolidated into one proceeding. The parties intend that this stipulation set forth all relevant facts, violations, and the agreed-upon sanction as a final disposition of this proceeding.

Olson Matter

(Case No 03-109)

Facts and Violations

5.

Prior to March 2000, Rolf T. Olson (hereinafter "Olson") retained the Accused to pursue a civil claim. On or about May 15, 2000, the Accused filed a civil complaint in the Marion County Circuit Court, *Rolf Olson v Century Showrooms, Inc. and Century Furniture Industries, Inc.*, Marion County Circuit Court Case No. 00C12683 (hereinafter "Court Action").

6.

On or about November 7, 2002, the court entered judgment in favor of Olson and against Century Showrooms, Inc. In and after November 2002, the Accused (a) failed to take action to collect the judgment; (b) failed to communicate with and

respond to Olson's inquiries concerning the Court Action and the status of the Accused's efforts to collect the judgment; and (c) failed to actively pursue Olson's objectives.

7.

Olson brought his concerns to the attention of the Bar, and on September 29, 2003, the matter was referred to Disciplinary Counsel for investigation. On October 1, 2003, Disciplinary Counsel requested the Accused's explanation by October 22, 2003. The Accused did not respond. On October 24, 2003, Disciplinary Counsel again requested the Accused's explanation. The Accused did not respond and on November 13, 2003, the matter was referred to the Local Professional Responsibility Committee (hereinafter "LPRC") for investigation.

8.

In and about December 2003 through March 2004, the LPRC attempted on numerous occasions to communicate with the Accused by telephone and by letter. The Accused did not respond. On or about February 25, 2004, the LPRC issued a subpoena commanding the Accused to appear and to produce his complete file concerning any and all representation of Olson on March 12, 2004. On March 9, 2004, the Accused was personally served with the subpoena. On March 12, 2004, the Accused did not appear, did not produce any documents, and did not then or since that time communicate with the LPRC investigator.

9.

The Accused admits that the aforesaid conduct constituted neglect of a legal matter entrusted to him, and failure to cooperate and respond to the inquiries and requests of the authorities empowered to investigate and act on the conduct of lawyers in violation of DR 6-101(B) and DR 1-103(C) of the Code of Professional Responsibility.

Lindsey Matter

(Case No. 04-93)

Facts and Violations

10.

Donald Lindsey (hereinafter Lindsey") retained the Accused to pursue a workers' compensation claim for hearing loss. On March 13, 2003, the Hearings Division of the Workers' Compensation Board held a hearing concerning Lindsey's workers' compensation claim. At the time of the hearing, compensability was not an issue. The only issue was the responsibility of the various insurance carriers for Lindsey's hearing loss.

11.

At the conclusion of the March 13, 2003 hearing, the administrative law judge allowed the record to remain open to allow the parties to take the deposition of three persons and to submit written closing arguments. After March 13, 2003, the depositions of the three witnesses were scheduled and taken by the defendants' counsel. The Accused did not appear for the deposition of one of the witnesses or communicate with defendants' counsel concerning his appearance. The Accused attended the depositions of the other witnesses.

12.

On or about May 29, 2003, counsel for one of the defendants advised the administrative law judge and the Accused that compensability would then be an issue in the workers' compensation claim. As a result, Lindsey's right to benefits was at risk.

13.

On or about June 5, 2003, the administrative law judge requested response from the Accused and defendants' counsel concerning the need for additional time for the hearing to be able to close the record. Defendants' counsel responded to the inquiry. The Accused did not respond and took no other action. On or about June 27, 2003, the administrative law judge notified the Accused and defendants' counsel that the record would be closed and established a briefing schedule for closing arguments.

14.

On or about July 21, 2003, the Accused notified the administrative law judge that he was not prepared to close the record and requested that the record be reopened and a new hearing date be scheduled. On August 8, 2003, the administrative law judge granted the Accused's request to reopen the record and allowed the Accused until August 28, 2003, to file additional documents and to schedule time to present additional testimony for the workers' compensation claim. On September 8, 2003, the administrative law judge set a schedule for the submission of written arguments concerning the workers' compensation claim. The Accused took no action and on October 9, 2003, the administrative law judge formally closed the record.

15.

Between about March 13, 2003, and October 9, 2003, the Accused (a) failed to communicate with defendants' counsel concerning the workers' compensation claim; (b) failed to communicate with and respond to the inquiries of the administrative law judge concerning the workers' compensation claim; (c) failed to submit additional evidence concerning the workers' compensation claim; (d) failed to submit a written closing argument concerning the workers' compensation claim; (e) failed to communicate with and respond to Lindsey's inquiries concerning the

workers' compensation claim; (f) failed to provide Lindsey with copies of correspondence and orders, and failed to keep Lindsey informed concerning the status of the workers' compensation claim; and (g) failed to take action to protect and advance Lindsey's objectives concerning the workers' compensation claim.

16.

After October 9, 2003, the Accused did not communicate with the administrative law judge or take action to advance Lindsey's objectives concerning the workers' compensation claim. On or about November 28, 2003, the administrative law judge entered an opinion and order denying Lindsey's workers' compensation claim, with notice of rights to request review by the Workers' Compensation Board, and mailed copies thereof to the Accused and other persons. After November 28, 2003, the Accused did not request review of the decision of the administrative law judge and did not communicate with Lindsey concerning the decision.

17.

On or about December 8, 2003, a complaint was filed with the Bar concerning the Accused's conduct. On December 16, 2003, the matter was referred to Disciplinary Counsel for investigation. On December 19, 2003, Disciplinary Counsel requested the Accused's explanation by January 8, 2004. The Accused did not respond. On February 6, 2004, Disciplinary Counsel again requested the Accused's explanation on or before February 13, 2004.

18.

On February 13, 2004, Disciplinary Counsel notified the Accused that it would allow him an extension of time to respond to the Bar's inquiries. Thereafter, the Accused did not respond or otherwise communicate with the Bar.

19.

The Accused admits that the aforesaid conduct constituted neglect of a legal matter entrusted to him, and failure to cooperate and respond to the inquiries and requests of the authorities empowered to investigate and act on the conduct of lawyers in violation of DR 6-101(B) and DR 1-103(C) of the Code of Professional Responsibility.

Young Matter

(Case No. 04-94)

Facts and Violations

21.

On or about May 15, 2002, Curtis Young (hereinafter "Young") filed a workers' compensation claim for hearing loss against his employer Willamette University (hereinafter "Willamette"). Willamette's workers' compensation insurance

carrier denied Young's claim. Thereafter, Young retained the Accused to pursue the claim against Willamette and Young's previous employers, and their respective workers' compensation insurance carriers. Young's previous employers' workers' compensation insurance carriers denied Young's claim.

22.

The Accused requested a hearing concerning Young's workers' compensation claim with the Hearings Division of the Workers' Compensation Board. Between about mid-2003 and late December 2003, the Accused (a) failed to communicate with Young concerning his workers' compensation claim; (b) failed to communicate with defendants' counsel concerning Young's workers' compensation claim; (c) failed to respond to inquires from and failed to communicate with the administrative law judge concerning Young's workers' compensation claim; (d) failed to provide discovery concerning Young's workers' compensation claim; (e) failed to respond to motions to dismiss filed by defendants' counsel concerning the Young's workers' compensation claim; (f) failed to provide Young with copies of correspondence and orders, and failed to keep Young informed concerning the status of his workers' compensation claim; (g) caused the hearing on Young's workers' compensation claim to be delayed; and (h) failed to take action to protect and advance Young's objectives concerning the workers' compensation claim.

23.

On or about December 22, 2003, the administrative law judge entered an order of dismissal concerning Young's workers' compensation claim, concluding that the Accused had caused unjustified delay of the hearing for more than 60 days.

24.

On and after December 22, 2003, the Accused (a) failed to notify Young that his workers' compensation claim had been dismissed and the hearing date had been cancelled; (b) failed to provide Young with a copy of the order of dismissal; (c) failed to communicate with Young concerning the workers' compensation claim; (d) failed to file a request for review by the Workers' Compensation Board; and (e) failed to take action to protect and advance Young's objectives concerning the workers' compensation claim.

25.

On or about February 13, 2004, Young brought his concerns to the attention of the Bar. On February 20, 2004, the matter was referred to Disciplinary Counsel for investigation. On March 1, 2004, Disciplinary Counsel requested the Accused's explanation by March 22, 2004. The Accused did not respond. On March 24, 2004, Disciplinary Counsel again requested the Accused's explanation on or before March 31, 2004. Again, the Accused did not respond.

26.

The Accused admits that the aforesaid conduct constituted conduct prejudicial to the administration of justice; neglect of a legal matter entrusted to him; and failure to cooperate and failure to respond to the requests of the authorities empowered to investigate and act on the conduct of lawyers in violation of DR 1-102(A)(4), DR 6-101(B), and DR 1-103(C) of the Code of Professional Responsibility.

Sanction

27.

The Accused and the Bar agree that in fashioning an appropriate sanction in this case, the ABA *Standards for Imposing Lawyer Sanctions* (hereinafter "*Standards*") are considered. The *Standards* require that the Accused's conduct be analyzed by the following 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. *Standards*, § 3.0.

A. *Duty.* In violating DR 1-102(A)(4), DR 1-103(C), and DR 6-101(B), the Accused violated duties to clients, the legal system, and the profession. *Standards*, §§ 4.4, 6.2, 7.0.

B. *Mental State.* "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 to accomplish a particular result. *Standards*, p. 7. The Accused knew that he was responsible for each of the clients' cases. He also knew that his responses concerning his clients' legal matters were required, but took no action. The Accused also knew that the disciplinary authorities made numerous requests for his explanations and documents. The Accused ignored the requests of the disciplinary authorities and the subpoena directing his appearance.

C. *Injury*. The *Standards* define "injury" as harm to the client, the public, the legal system or the profession that results from a lawyer's conduct. "Potential injury" is harm to the client, the public, the legal system, or the profession that is reasonably foreseeable at the time of the lawyer's conduct, and which, but for some intervening factor or event, would probably have resulted from the lawyer's misconduct. *Standards*, p. 7.

The Accused caused actual injury to each of his clients. The Accused did not complete the work he agreed to perform for each of the clients. The Accused took little or no action to collect Olson's judgment, which remains unsatisfied. Young and Lindsey did not prevail on their claims. A different disposition of the claims may have resulted if the Accused had actively pursued the clients' claims. All of the clients were frustrated because the Accused failed to communicate with them. The legal system was also injured. The Lindsey and Young cases were delayed because of the Accused's conduct. The disciplinary authorities also devoted valuable

additional time and resources to investigate the complaints because the Accused did not respond. The Accused also caused injury to the profession. The profession is judged by what lawyers do.

D. *Aggravating Factors*. "Aggravating factors" are considerations that increase the degree of discipline to be imposed. S*tandards*, § 9.22. There are several aggravating factors in this case. There are multiple offenses and a pattern of misconduct. *Standards*, § 9.22(d)–(c). The Accused delayed the regulatory process by his failures to respond and disregard of a subpoena commanding his appearance for deposition by the LPRC. *Standards*, § 9.22(e). The Accused has substantial experience in the practice of law. He was admitted to practice in Oregon in 1993. *Standards*, § 9.22(i). The clients were vulnerable in that they relied on the Accused to advance and protect their interests and to keep them informed concerning their legal matters. *Standards*, § 9.22(h). In addition, the Accused has a prior record letter of admonition in 1998 for violation of DR 6-101(B), a violation that is present in this proceeding. *Standards*, § 9.22(a).

E. *Mitigating Factors*. There are no mitigating factors to be considered.

28.

The *Standards* provide suspension is generally appropriate when a lawyer fails to perform services for a client and causes injury or potential injury to a client; or engages in a pattern of neglect and causes injury or potential injury to a client. *Standards*, § 4.42. Suspension is also appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional, and causes injury or potential injury to a client, the public, or the legal system. *Standards*, § 7.2. Case law is in accord. *See, e.g.*, *In re Miles*, 324 Or 218, 923 P2d 1219 (1996); *In re Parker*, 330 Or 541, 9 P3d 107 (2000); *In re Chandler*, 306 Or 422, 760 P2d 243 (1988).

29.

Consistent with the *Standards* and case law, the Bar and the Accused agree that the Accused shall be suspended from the practice of law for 18 months for violation of DR 1-102(A)(4), DR 1-103(C) (three counts), and DR 6-101(B) (three counts).

30.

This Stipulation for Discipline has been reviewed by the Disciplinary Counsel of the Oregon State Bar, the sanction was approved by the State Professional Responsibility Board, and shall be submitted to the Disciplinary Board for consideration pursuant to the terms of BR 3.6.

DATED this 4th day of October 2004.

/s/ Greg Noble
Greg Noble
OSB No. 93382

OREGON STATE BAR

By: /s/ Jane E. Angus
Jane E. Angus
OSB No. 73014
Assistant Disciplinary Counsel

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re	)	
	)	
Complaint as to the Conduct of	)	Case No. 03-58
	)	
MATTHEW W. DERBY,	)	
	)	
Accused.	)	

Counsel for the Bar:	Martha M. Hicks
Counsel for the Accused:	None
Disciplinary Board:	None
Disposition:	Violation of DR 1-103(C), DR 6-101(B), DR 9-101(A), and DR 9-101(C)(3). Stipulation for Discipline. 60-day suspension.
Effective Date of Order:	November 15, 2004

ORDER APPROVING STIPULATION FOR DISCIPLINE

This matter having been heard upon the Stipulation for Discipline entered into by the Accused and the Oregon State Bar, and good cause appearing,

IT IS HEREBY ORDERED that the stipulation between the parties is approved and the Accused is suspended from the practice of law for 60 days, effective on November 15, 2004, or on the third day after the Stipulation for Discipline is approved, whichever is later, for violation of DR 6-101(B), DR 9-101(A), DR 9-101(C)(3), and DR 1-103(C).

DATED this 27th day of October 2004.

/s/ Michael R. Levine
Michael R. Levine, Esq.
State Disciplinary Board Chairperson

/s/ R. Paul Frasier
R. Paul Frasier, Esq., Region 3
Disciplinary Board Chairperson

STIPULATION FOR DISCIPLINE

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

1.

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

2.

The Accused was admitted by the Oregon Supreme Court to the practice of law in Oregon on September 23, 1994, and has been a member of the Oregon State Bar continuously since that time, having his office and place of business in Douglas County, Oregon.

3.

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

4.

On December 16, 2003, a Formal Complaint was filed against the Accused as authorized by the State Professional Responsibility Board (hereinafter "SPRB"), alleging violation of DR 6-101(B), DR 9-101(A), DR 9-101(C)(3), and DR 1-103(C). The parties intend that this Stipulation for Discipline set forth all relevant facts, violations, and the agreed-upon sanction as a final disposition of the proceeding.

Facts

5.

On September 9, 2002, pursuant to a written fee agreement, the Accused undertook to represent Lilan Tsai (hereinafter "Tsai") and, on September 10, 2002, accepted a retainer of $400 from Tsai. The Accused did not deposit Tsai's retainer in a lawyer trust account, and during the course of his employment, did not render appropriate accounts to Tsai regarding her retainer.

6.

Between October 23, 2002, and January 2003, the Accused failed to take any action on Tsai's legal matter. Between October 23, 2002, and January 2003, the Accused failed to communicate with Tsai regarding the status of her legal matter and failed to respond to Tsai's attempts to communicate with him. Tsai terminated the Accused's employment in January 2003.

7.

The Oregon State Bar received a complaint from Tsai concerning the Accused's conduct on February 10, 2003, and received further correspondence from Tsai thereafter. On May 7, 2003, Disciplinary Counsel's Office requested the Accused's response to Tsai's complaint by May 28, 2003. The Accused made no response. On June 3, 2003, Disciplinary Counsel's Office again requested the Accused's response to the complaint by June 13, 2003. The Accused made no response. On June 24, 2003, Disciplinary Counsel's Office again requested the Accused's response to the complaint by July 1, 2003. The Accused made no response.

Violations

8.

The Accused admits that, by engaging in the conduct described in this stipulation, he violated DR 6-101(B), DR 9-101(A), DR 9-101(C)(3), and DR 1-103(C).

Sanction

9.

The Accused and the Bar agree that in fashioning an appropriate sanction in this case, the Disciplinary Board should consider the ABA *Standards for Imposing Lawyer Sanctions* (hereinafter "*Standards*"). The *Standards* require that the Accused's conduct be analyzed by considering the following 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 Violated*. The Accused violated his duty owed to his client to represent her diligently. *Standards*, § 4.4. The Accused also violated his duty as a professional to communicate with the Bar in response to a disciplinary inquiry. *Standards*, § 7.0.

B. *Mental State.* The Accused acted knowingly, that is, with the conscious awareness of the nature or attendant circumstances of his conduct, but without the conscious objective or purpose to accomplish a particular result. *Standards*, p. 7.

C. *Injury*. Lilan Tsai's legal position was not harmed by the Accused's inactivity or trust accounting problems. A client's frustration and anxiety caused by a lawyer's misconduct can, however, constitute actual injury, and Tsai suffered anxiety and frustration as a result of her inability to contact the Accused and learn about the status of her legal matter. *In re Cohen*, 330 Or 489, 496, 8 P3d 953 (2000) (citing *In re Schaffner*, 325 Or 421, 426–437, 939 P2d 39 (1997)). The Bar also suffered actual injury in that the Accused's failure to respond to its inquiries complicated and delayed its investigation of his conduct.

Even though both the Bar and Tsai suffered some actual injury, there was also potential for harm to Tsai's substantive interests in the Accused's failure to pursue those interests. Similarly, there was the potential for injury to Tsai in not being afforded the immediate protection against loss or misuse of her retainer that DR 9-101 is intended to provide. The Accused had earned the money he received from Tsai at the time he negotiated her retainer check.

D. *Aggravating Factors*. The aggravating factors properly attributable to the Accused include:

1. He has prior disciplinary offenses. *Standards,* §9.22(a). In March 2002, the Accused was publicly reprimanded for neglect of a legal matter and for failing to promptly refund an unearned retainer (DR 6-101(B) and DR 9-101(C)(4)). *In re Derby*, 16 DB Rptr 82 (2002).

2. Tsai was a vulnerable victim. *Standards,* § 9.22(h). She did not read or speak English well.

E. *Mitigating Factors*. The mitigating factors properly attributed to the Accused include:

1. That he acted without a dishonest or selfish motive. *Standards,* § 9.32(b).

2. That he was affected by a mental disability at the time of the conduct. The Accused suffered from depression and anxiety that caused him to be unable to act on Tsai's legal matter because he did not know what to do to accomplish her goals. These conditions also interfered with the Accused's ability to respond to the Bar's letters because he was afraid of what they contained. The Accused is undergoing mental health treatment. The Accused has also participated in the Oregon Attorney Assistance program sponsored by the Professional Liability Fund. He has also limited his practice to an area of law with which he is more familiar. *Standards,* § 9.32(i).

10.

Suspension is generally appropriate when

(a) a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client, or

(b) a lawyer engages in a pattern of neglect and causes injury or potential injury to a client. *Standards,* § 4.42.

Suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional, and causes injury or potential injury to a client, the public, or the legal system. *Standards,* § 7.2.

11.

Oregon case law is in accord and also suggests that a period of suspension is appropriate for the Accused's conduct. *In re Schaffner*, 323 Or 472, 918 P2d 803 (1996) (120-day suspension for violation of DR 6-101(B) and DR 1-103(C)); *In re Knappenberger*, 337 Or 15, 90 P3d 614 (2004) (90-day suspension for violation of DR 6-101(B) and DR 5-101(A)); *In re LaBahn*, 335 Or 357, 67 P3d 381 (2003) (60-day suspension for violation of DR 6-101(B)).

12.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be suspended for 60 days for violation of DR 6-101(B), DR 9-101(A), DR 9-101(C)(3), and DR 1-103(C), the sanction to be effective on the 15th day of November 2004, or on the third day after this stipulation is approved, whichever is later.

13.

This Stipulation for Discipline is subject to review by Disciplinary Counsel of the Oregon State Bar. The sanction provided for herein was approved by the Chair of the SPRB on October 18, 2004. 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 18th day of October 2004.

/s/ Matthew W. Derby
Matthew W. Derby
OSB No. 94291

EXECUTED this 22nd day of October 2004.

OREGON STATE BAR

By: /s/ Martha M. Hicks
Martha M. Hicks
OSB No. 75167
Assistant Disciplinary Counsel

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re	)	
	)	
Complaint as to the Conduct of	)	Case Nos. 01-05, 01-47
	)	
DANIEL T. BROWN,	)	
	)	
Accused.	)	

Counsel for the Bar:	Michael J. Gentry; Amber Bevacqua-Lynott
Counsel for the Accused:	Bradley F. Tellam
Disciplinary Board:	Jack A. Gardner, Esq., Chair; Gregory E. Skillman, Esq.; Audun Sorenson, Public Member
Disposition:	Violation of DR 1-102(A)(3), DR 5-101(A), and DR 5-105(E). Trial Panel Opinion. 30-day suspension.
Effective Date of Opinion:	November 25, 2004

OPINION OF TRIAL PANEL

Introduction

The Accused is Eugene attorney Daniel T. Brown (the "Accused"). The hearing in this matter was held on May 25, 2004, in Eugene, Oregon. The Oregon State Bar (the "Bar") was represented by Michael Gentry, and Assistant Disciplinary Counsel Amber Bevacqua-Lynott. The Accused was present and was represented by Bradley F. Tellam.

The Bar charged the Accused in its Amended Formal Complaint with four causes of complaint, and they will be discussed in the order in which they were charged.

To the Amended Formal Complaint the Accused filed his answer. In his answer he admitted violations of DR 5-101(A) and DR 6-101(A) and denies any other violations. The Accused's admission to violating DR 5-101(A) pertained to the Second Cause of Complaint in that he failed to comply with the full disclosure requirements contained in DR 10-101(B). His admission to violating DR 6-101(A) had reference to the Third Cause of Complaint.

The Accused is a lawyer with significant experience in the practice of law, having been admitted by the Supreme Court of the State of Oregon to practice law

in this state and having been a member of the Oregon State Bar since 1976, with his office and place of business in Lane County, Oregon.

First Cause of Complaint

(The Fall Creek Development Case)

The Bar contended that the Accused represented Stepina's Deli, Inc. ("the Deli"); Richard Stepina ("Stepina"), personally; and Fall Creek Development Company ("Fall Creek"), in negotiating, drafting, and finalizing a stock option agreement that granted the Deli the right to borrow up to $35,000 from Fall Creek in exchange for the Deli granting Fall Creek the option to purchase 50% of its stock. The Accused's brother had an ownership interest in Fall Creek. Stepina signed the agreement individually and on behalf of the Deli.

The Accused testified that he did perform a number of legal services for Stepina and the Deli but contended this was not a multiple client conflict because he was performing these services to assist Fall Creek in recovering its investment in the Deli.

Stepina testified that he did not consider that the Accused represented him personally. The trial panel did not find him credible, and his testimony was inconsistent with the report of the Bar investigator who discussed the Accused's relationship with him in June 2002.

It should be noted that the stock option agreement prepared by the Accused specifically stated that he represented only Fall Creek in the matter. However, the trial panel concludes that the Accused represented all three: the Deli, Stepina individually, and Fall Creek. Except for the disclosure made in the stock option agreement, there was no other written disclosure.

The Accused violated DR 5-105(E) as defined in DR 10-101(B).

The trial panel finds it significant that no complaint was made by any of the three affected parties—the Deli, Stepina, or Fall Creek—and that there was no injury to any of them.

Second Cause of Complaint

(The Larry Weiss Matters)

For its Second Cause of Complaint the Bar alleged that beginning in the 1980s and continuing for several years the Accused represented Larry Weiss ("Weiss") in many business and personal matters; and, that in 1992 the Accused represented Beverly Pratt ("Pratt") in the incorporation of Rock& Roll Crushing, Inc. ("Rock, Inc. 1") with Weiss and Faye Farley ("Farley"). The Accused drafted Articles of Incorporation for Rock, Inc. 1 and at various times thereafter represented Rock, Inc. 1. Weiss, with Farley's assistance, built and contributed a rock crusher to Rock, Inc. 1. Weiss served as a full-time employee of the corporation for a time.

The Accused later purchased Pratt's shares of Rock, Inc. 1 for $35,000, and the assets of Rock, Inc. 1 were transferred to Rock and Roll Contract Crushing Company ("Rock, Inc. 2") in which the Accused, Weiss and Farley held 45%, 45%, and 10% of the shares respectively. At various times thereafter the Accused represented Rock, Inc. 2 and Weiss personally.

From 1995 to 1997 the Accused loaned money to Rock, Inc. 2 and became a creditor of Rock, Inc. 2 and continued to be a shareholder.

In March, 1997, the Accused, Weiss and Larry Covert ("Covert") entered into an agreement to form a corporation under the name of Jasper Rock Quarry, Inc. ("Rock, Inc. 3"); and in entering into the agreement with Rock, Inc. 3 the Accused continued to represent Weiss in other matters as well.

There was no written disclosure made to Weiss at any time when the Accused had a personal interest as a creditor of one or more of the corporations.

The Accused admits he failed to make written disclosure and thus violated DR 5-101(A). He admitted failing to confirm in writing the verbal disclosures he testified he made to Weiss when setting up Rock, Inc. 2 and loaning the company money.

The trial panel finds there was no injury to Weiss or to other affected parties because of the Accused's failure to make written disclosure regarding the corporation matters.

Third Cause of Complaint

(Competent Representation of Weiss or Rock, Inc. 2)

The trial panel concludes that the Bar has failed to prove, by clear and convincing evidence, the allegations of its Third Cause of Complaint.

Although the Accused admitted the allegations of paragraph 17 A, C, D, and E, the trial panel did not find, by clear and convincing evidence, that his failure to perform those tasks was a failure by the Accused to provide competent representation to Weiss and Rock, Inc. 2. The trial panel further concludes that the Bar has failed to prove the remaining allegations of the Third Cause of Complaint.

Fourth Cause of Complaint

(The Accused Taking Proceeds of Sale of Rock Crusher)

The Bar alleges for its Fourth Cause of Complaint that the rock crusher which was developed by Weiss and Farley was sold to Valley Equipment Company ("Valley") for $133,453.86, that Valley paid the Accused all of the proceeds, rather than Rock, Inc. 2, which then owned the crusher, and that the Accused on June 19, 1998, without the knowledge of or authority from Rock, Inc. 2, or its other officers, directors, or shareholders, took $122,000 of the proceeds of the rock crusher sale for a return to him of advances he had made to the ventures. The Bar claimed this violated DR 1-102(A)(3) as conduct involving dishonesty or misrepresentation.

Over time, according to the evidence, additional significant infusions of money were required by Rock, Inc. 2 and the Accused provided most of the funds, including small infusions of cash of $500 and $1,000 each time, and three major loans ($24,000, $60,000, and $29,000). The Accused's first major loan was $24,000 for a jaw. The Accused then loaned $60,000 to Rock, Inc. 2 for it to invest in Rock, Inc. 3. The Accused's last major loan was for a $29,000 loader. The Accused's testimony was that Weiss acknowledged they were loans and that the Accused would be paid back for all these advances when the equipment was sold or the company had money to do so. The trial panel found that Weiss's testimony on these issues was at times inconsistent, perhaps because of age or faulty memory.

At the time of the sale of the crusher to Valley, Rock, Inc. 2's shareholders and directors were Weiss, the Accused, and Farley. There was no documentation of any corporate action supporting or approving the Accused's withdrawal of $122,000 from the sale funds.

Weiss knew the crusher proceeds were coming in and wanted to make sure $10,000 of the proceeds were available for an outside creditor. Although the outside creditor was paid the $10,000, Weiss was not informed until later that the Accused took $122,000 of the funds to repay his loans.

The trial panel does not find the Accused's actions in taking the funds from the sale proceeds, without prior consent from the other shareholders and directors of the corporation, as fraudulent or dishonest. The trial panel also finds that, at the time the Accused withdrew the funds from the sale of the crusher, Rock, Inc. 2 and/or Rock, Inc. 3 owed him more than $122,000. From the evidence it appears that the Accused is still entitled to receive further sums of money from either Rock, Inc. 2 or Rock, Inc. 3; and that Weiss and Farley have received all funds they are entitled to receive from liquidation of the corporate assets. However, the trial panel concludes that the Accused intended to repay himself for his advances to the corporations without any consultation with other interested parties, and that this action constituted a misrepresentation, in violation of DR 1-102(A)(3). The Accused used improper means to remove the funds to benefit himself, even though he had entitlement to that amount of money.

Sanction

The Oregon Supreme Court has stated that in determining appropriate sanctions and disciplinary proceedings it will rely upon the American Bar Association's *Standards for Imposing Lawyer Sanctions* (1991) (amended in 1992) ("*Standards*") as well as cases decided in Oregon and other jurisdictions for guidance in determining the appropriate sanction for lawyer misconduct. In applying the standards the trial panel is to determine (1) the duty violated; (2) the Accused's mental state; (3) the actual or potential injury; and (4) the existence of aggravating or mitigating circumstances.

1. *First And Second Causes of Complaint.*

(a) *The Duty Violated*. The Accused owed a duty to the public, the legal system, and the profession. *Standards,* §§ 5.0, 6.0, 7.0.

(b) *The Accused's Mental State*. The Accused admitted he failed to comply with the full disclosure requirements contained in DR 10-101(B). He testified that he did give multiple verbal disclosures. The other interested parties were friends and/or coventurers with the Accused, but his failure to make written disclosure was neglectful of his duty as an attorney.

(c) *The Actual or Potential Injury*. The trial panel found no injury to any affected parties, although there was potential for injury. The injury does not have to be actual, but only potential to support the imposition of sanctions. *In re Williams,* 314 Or 530, 840 P2d 1280 (1992).

(d) *The Existence of Aggravating or Mitigating Circumstances.* The Accused has substantial experience in the practice of law, and particularly in commercial matters. He was admitted to practice law in Oregon in 1976, and has been in active practice since that time. There is an absence of any prior disciplinary record; and full and free disclosure and a cooperative attitude toward these proceedings was evident; and, as indicated by the testimony of attorneys Robert A. Miller and George A. Morris, his character and reputation are of the highest.

Sanction Recommended. In determining an appropriate sanction it is also recognized that the purpose is not to penalize the Accused, but rather than to protect the public and the intergrity of the legal profession. *In re Glass,* 308 Or 297, 304, 779 P2d 612 (1989). Because the mitigating circumstances outweigh the aggravating circumstances in the First and Second Causes of Complaint, the trial panel finds the Accused should receive a public reprimand for violation of DR 5-101(A) and DR 5-105(E).

2. *Third Cause of Complaint.*

The trial panel finds this Cause of Complaint should be dismissed.

3. *Fourth Cause of Complaint.*

(a) *The Duty Violated.* The Accused owed a duty to the public, the legal system, and the profession. *Standards,* §§ 5.0, 6.0, 7.0.

(b) *The Accused's Mental State*. The Accused acted knowingly and intentionally in taking $122,000 from the sale proceeds of the rock crusher to repay himself, without prior consultation and consent from his coventurers. It is likely, particularly in view of Weiss's testimony, that Weiss would have objected had he been asked for his consent.

(c) *The Actual or Potential Injury*. The *Standards* define "injury" as harm to a client, the public, the legal system, or the profession that results from a lawyer's conduct. "Potential injury" is a harm to a client, the public, the legal system, or the

profession that is reasonably foreseeable at the time of the lawyer's conduct, and which, but for some intervening factor or event, would have resulted from the lawyer's misconduct. *Standards,* p. 7. An injury does not have to be actual, but only potential to support the imposition of sanctions. *In re Williams,* 314 Or 530 840 P2d 1280 (1992). The trial panel found that the Accused has not recovered all of his advances to the corporations, but Weiss and other interested parties eventually recovered their investments from the liquidation of corporate assets. However, the potential for injury to the other coventurers was there when the Accused took the funds from the sale proceeds, without consulting his coventurers.

(d) *The Existence of Aggravating or Mitigating Circumstances*.

i. *Aggravating Factors:* The Accused has substantial experience in the practice of law, particularly in commercial matters. His actions in taking the funds as he did, even though the corporations owed him the money, was intentional and improper.

ii. *Mitigating Factors:* There is an absence of any prior disciplinary record; and the Accused has made full and free disclosure and evidenced a cooperative attitude during these proceedings. His character and reputation are of the highest as evidenced by the testimony of two respected Eugene attorneys.

In determining the appropriate sanction, it is also recognized that the purpose is not to penalize the Accused, but rather to protect the public and the integrity of the legal profession. *In re Glass*, 308 Or 297, 304, 779 P2d 612 (l989).

Sanction Recommended. The trial panel's analysis, under the ABA *Standards*, supports imposing a suspension for the Accused's misconduct.

The trial panel does not view the Accused's conduct as being onerous as argued by the Bar.

The Bar has recommended either a substantial period of suspension, or disbarment.

The Accused is at the other end of the spectrum, recommending a public reprimand.

Weighing applicable aggravating factors against applicable mitigating factors, the Accused has not overcome the presumption that a period of suspension is warranted.

It is the opinion of the trial panel that the Accused should be suspended from the practice of law for a period of 30 days for the violation of DR 1-102(A)(3).

DATED this 7th day of September 2004.

/s/ Jack A. Gardner
Jack A. Gardner
OSB No. 59035
Trial Panel Chair

/s/ Gregory E. Skillman
Gregory E. Skillman
OSB No. 87346
Trial Panel Member

/s/ Audun Sorenson
Audun Sorenson
Trial Panel Member

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re	)	
	)	Case Nos. 01-5, 01-47
Complaint as to the Conduct of	)	
	)	
DANIEL T. BROWN,	)	ORDER ON COSTS AND
	)	DISBURSEMENTS
Accused.	)	

On or about April 28, 2004, the Bar filed a formal amended complaint against the Accused asserting four causes of complaint: the first, a violation of DR 5-105; the second, a violation of DR 5-101(A); the third, a violation of DR 1-102(A)(2) and DR 6-101(A); and the fourth, a violation of DR 1-102(A)(3). On May 7, 2004 (more than 14 days before the hearing), Mr. Brown proposed to stipulate to a 30-day suspension for violation of DR 5-101(A) and DR 6-101(A). The Bar rejected this proposal. The matter went to hearing on May 25, 2004. The Bar sought a suspension of at least two years and suggested disbarment.

The Trial Panel found against Mr. Brown on the First Cause, finding that he violated DR 5-105(E); against Mr. Brown on the Second Cause, noting his admission to violating DR 5-101(A). The Panel acquitted Mr. Brown of the Third Cause. It found against him in part on the Fourth Cause, finding he violated DR 1-102(A)(3).

As a sanction for the finding on the First and Second Cause, the panel imposed a public reprimand. As a sanction for violation of the Fourth Cause, the panel imposed a 30-day suspension. The Bar now asks for its costs of $2,419.15. The Accused argues that the Bar did not prevail because the sanction imposed, 30 days, was no greater than the sanction he offered to stipulate to. In any event, he argues, the costs of the transcript should be disallowed because neither party sought an appeal so it was not necessary to order a transcript.

The Bar's Request for Costs.

BR 10.7(c) provides that if the Bar rejects the Accused's written offer to enter into a stipulation, "and the matter proceeds to hearing and results in a final decision of the Disciplinary Board or of the court imposing a sanction no greater than that to which the accused was willing to . . . stipulate *based on the charges the accused was willing to concede or admit*, the Bar shall not recover and the accused shall recover actual and necessary costs and disbursements incurred after the date the accused's offer was rejected by the SPRB" (emphasis added).

The Bar reads the italicized words as meaning that the Accused's prehearing offer must encompass all violations later found to be established at trial. Bar Reply

at 2, 4. It argues that the accused lawyer is the prevailing party "only if the final decision with respect *to both the rule violations and the sanctions* is no greater than that to which the accused lawyer was willing to stipulate. Reply at 3 (emphasis in original). However, the Rule does not say this, and I simply do not interpret the Rule to say this. See the Opinion of Michael R. Levine in *In re McGraw* (May 16, 2004). The language of the rule is at best ambiguous. I read the rule as saying simply that, whatever the charges the Accused agrees to concede, he does not pay costs as long as the sanction imposed is no greater than his offer. As the Bar itself points out, Rule 10.7(c) "is intended to encourage accused lawyers to make and the SPRB to accept reasonable and appropriate settlement offers." Reply at 2. I invite the Bar to seek a rewording of the Rule with appropriate input from the Bar and the judiciary.

The Bar has not argued that the public reprimand imposed on Causes One and Two is an additional sanction to the 30-day suspension. The trial panel's decision is not a model of clarity on this issue. In any event, I find that the sanction of the public reprimand merges with the 30-day sanction, and the ultimate sanction of a 30-day suspension is no greater than that the Accused offered to stipulate to.

The Bar argues that *McGraw* was wrongly decided and points to the decision by Justice Gillette in *In re Obert*. However, the decision in that case has no reasoning; it merely orders the Accused to pay costs. I do not believe that an unpublished decision by a single Justice of the Oregon Supreme Court without any reasoning is entitled to precedential value. *Cf. U.S. v. Gracidas-Ulibarry*, 231 F3d 1188, 1195 (9th Cir 2000) ("an opinion that that provides no analysis" has no persuasive value); *Chase Manhattan Bank, N.A. v. Turner & Newall, PLC*, 964 F2d 159, 164–165 (2d Cir 1992) ("[t]his unreported decision by a district court in another circuit, which contains an order but no reasoning, has no precedential value"); *Condit v. National Enquirer, Inc.*, 248 F Supp2d 945, 962 (ED Cal 2002) ("Even if the holdings in those cases were binding precedent on the issue of what constitutes a newspaper, they would be of no help here because they contain no analysis or useful discussion [on the issue we must decide]"); *U.S. v. Veon*, 549 F Supp 274, 285 (DC Cal 1982) ("In short, there is no reasoning in the *Finley* opinion for me to follow; there is only the statement of the issue and the bland conclusion").

IT IS HEREBY ORDERED AND ADJUDGED that the Oregon State Bar recover nothing.

DATED: December 23, 2004.

/s/ Michael R. Levine
Michael R. Levine
State Disciplinary Board Chairperson

Cite as 337 Or 548 (2004)

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re	)
	)
Complaint as to the Conduct of	)
	)
MAGAR E. MAGAR,	)
	)
Accused.	)

(OSB Nos. 01-196, 02-128, 02-129; SC S51060)

En Banc

On review of the decision of a trial panel of the Disciplinary Board.

Argued and submitted September 9, 2004. Decided November 4, 2004.

Magar E. Magar, Portland, argued the cause and filed the brief for himself.

Jane Angus, Assistant Disciplinary Counsel, Lake Oswego, argued the cause and filed the brief for the Oregon State Bar.

PER CURIAM

The Accused is suspended from the practice of law for a period of one year, effective 60 days from the date of filing of this decision.

SUMMARY OF SUPREME COURT OPINION

The Oregon State Bar charged the Accused, who was on inactive status with the Bar, with violating ORS 9.160 (holding self out as lawyer without authorization to do so) (two counts); Code of Professional Responsibility Disciplinary Rule (DR) 1-102(A)(3) (engaging in conduct involving dishonesty, deceit, or misrepresentation) (three counts); DR 2-101(A)(1) (making or causing to be made communication containing material misrepresentation about self, or omitting statement of fact necessary to make communication considered as whole not materially misleading) (two counts); DR 7-102(A)(5) (making false statement of fact) (one count); and DR 7-106(C)(7) (intentionally violating established rule of procedure) (one count). The Accused failed to attend the disciplinary hearing before the trial panel of the Disciplinary Board. As a result, the trial panel granted the Bar's motion for a default pursuant to Bar Rule of Procedure (BR) 5.8(a) and deemed the allegations of the Bar's complaint to be true; the trial panel ultimately concluded that those allegations established that the Accused had violated the rules as charged and suspended the

Accused for one year. *Held:* (1) Due to the Accused's default, pursuant to BR 5.8(a), the court deems the allegations in the Bar's formal complaint to be true; (2) the Bar's alleged facts are sufficient to establish that the Accused violated ORS 9.160, DR 1-102(A)(3), DR 2-101(A)(1), DR 7-102(A)(5), and DR 7-106(C)(7); and (3) a suspension of one year is the appropriate sanction for the Accused's misconduct. The Accused is suspended from the practice of law for a period of one year, effective 60 days from the date of filing of this decision.

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re	)	
	)	
Complaint as to the Conduct of	)	Case No. 04-75
	)	
MARTIN FISHER,	)	
	)	
Accused.	)	

Counsel for the Bar:	Lia Saroyan
Counsel for the Accused:	None
Disciplinary Board:	None
Disposition:	Violation of DR 6-101(B). Stipulation for Discipline. Public reprimand.
Effective Date of Order:	November 11, 2004

ORDER APPROVING STIPULATION FOR DISCIPLINE

This matter having been heard upon the Stipulation for Discipline entered into by Martin Fisher (hereinafter "Accused") and the Oregon State Bar, and good cause appearing,

IT IS HEREBY ORDERED that the stipulation between the parties is approved. The Accused is reprimanded for violation of DR 6-101(B) of the Code of Professional Responsibility.

DATED this 11th day of November 2004.

/s/ Michael R. Levine
Michael R. Levine
State Disciplinary Board Chairperson

/s/ Gary L. Hedlund
Gary L. Hedlund, Region 1
Disciplinary Board Chairperson

STIPULATION FOR DISCIPLINE

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

1.

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

2.

The Accused was admitted by the Oregon Supreme Court to the practice of law in Oregon on September 20, 1996, and has been a member of the Oregon State Bar continuously since that time, and at all relevant times had his office and place of business in Deschutes County, Oregon.

3.

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

4.

On June 11, 2004, the State Professional Responsibility Board authorized formal disciplinary proceedings against the Accused for alleged violation of DR 6-101(B) of the Code of Professional Responsibility. The parties intend that this Stipulation set forth all relevant facts, violations, and the agreed-upon sanction as a final disposition of this proceeding.

Facts

5.

In late 2001 or early 2002, Theresa Wallace retained the Accused to file a medical malpractice claim against her podiatrist. The Accused filed a lawsuit in February 2002 and worked on the matter until April 2003. Between April 2003 and November 2003, when Wallace terminated the Accused, the Accused engaged in a course of neglectful conduct as follows:

(a) He failed to conduct an adequate investigation of Wallace's underlying claim or retain an expert witness;

(b) Throughout the spring and summer of 2003, he failed to respond to Wallace's requests for information regarding the status of her legal matter;

(c) He failed to advise Wallace that a trial, scheduled for August 12, 2003, had been continued; and

(d) He failed to advise Wallace of his decision, sometime during the summer of 2003, that he no longer had the financial resources to fund the litigation and that she needed to locate substitute counsel.

Violations

6.

The Accused admits that, by engaging in the conduct described in this Stipulation, he violated DR 6-101(B) of the Code of Professional Responsibility.

Sanction

7.

The Accused and the Bar agree that in fashioning an appropriate sanction in this case, the Disciplinary Board should consider the ABA *Standards for Imposing Lawyer Sanctions* (hereinafter "*Standards*"). The *Standards* require that the Accused's conduct be analyzed by considering the following 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 Violated.* The Accused violated his duty of diligence to his client. *Standards,* § 4.4.

B. *Mental State.* The Accused acted knowingly: He was consciously aware of the nature and circumstances of his conduct, but he did not have the conscious objective to neglect Wallace's matter.

C. *Injury.* Wallace suffered frustration as a result of the Accused's failure to communicate. She was left to wonder about the status of her matter and her case was delayed due to the Accused's failure to continue to move the case along or inform him of his reasons for not doing so.

D. *Aggravating Factors.* There are no aggravating factors.

E. *Mitigating Factors.* Mitigating factors include:

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

2. At the time of the representation the Accused was undergoing personal and emotional problems. *Standards,* § 9.32(c).

8.

ABA *Standards* § 4.43 provides that a 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 is in accord. *See In re Cohen,* 330 Or 489, 8 P3d 953 (2000) (lawyer reprimanded for violating

DR 6-101(B)); *In re Mullen*, 17 DB Rptr 22 (2003) (lawyer reprimanded for violating DR 6-101(B)).

9.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be publicly reprimanded for violation of DR 6-101(B).

10.

This Stipulation for Discipline is subject to the approval of Disciplinary Counsel of the Oregon State Bar and the approval of the State Professional Responsibility Board. If so approved, 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 26th day of October 2004.

/s/ Martin Fisher
Martin Fisher
OSB No. 96284

EXECUTED this 26th day of October 2004.

OREGON STATE BAR

By: /s/ Lia Saroyan
Lia Saroyan
OSB No. 83314
Assistant Disciplinary Counsel

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re	)	
	)	
Complaint as to the Conduct of	)	Case No. 02-09
	)	
WILLIAM O. BASSETT,	)	
	)	
Accused.	)	

ORDER APPROVING MOTION TO VACATE AND DISMISS

This matter having been heard upon the Motion to Vacate and Dismiss submitted by the Oregon State Bar, and good cause appearing,

IT IS HEREBY ORDERED that the motion to vacate the reprimand imposed upon the Accused by the board's order in this proceeding dated August 1, 2002, is approved and this proceeding is dismissed in its entirety effective the date of this order.

DATED this 9th day of November 2004.

/s/ Michael Robert Levine
Michael Robert Levine
State Disciplinary Board Chairperson

/s/ Jill A. Tanner
Honorable Jill A. Tanner, Region 6
Disciplinary Board Chairperson

MOTION TO VACATE REPRIMAND AND TO DISMISS

The Oregon State Bar moves the Disciplinary Board to vacate the reprimand imposed upon the Accused by the board's order in this proceeding dated August 1, 2002, and to dismiss the proceeding in its entirety. This motion is based on the following points and authorities:

POINTS AND AUTHORITIES

1. On August 1, 2002, the board issued its order in *In re Bassett*, 16 DB Rptr 190 (2002), reprimanding the Accused. A copy of the board's order and the parties' stipulation for discipline are attached to this petition as Exhibits A and B, respectively.

2. The discipline imposed upon the Accused in this proceeding was based solely on charges that the Accused practiced law during a period when he was suspended from bar membership due to a failure to pay the Professional Liability Fund ("PLF") assessment in 2001. For this conduct, the Accused was disciplined for violation of DR 3-101(B) and ORS 9.160.

3. On December 26, 2003, the Supreme Court decided the case of *In re Leisure*, 336 Or 244, 82 P3d 144 (2003). In that case, the court determined that the notice procedures followed by the PLF in seeking to suspend a lawyer for failure to pay her PLF assessment installment were deficient under ORS 9.200(1), and therefore the resulting suspension of that lawyer was void.

4. Following the decision in *In re Leisure*, *supra*, the Bar's Board of Governors undertook a study and determined that the notice procedures found deficient by the court were also used for many other PLF suspensions from 1984–2003. Applying the holding of the *Leisure* case, these suspensions, too, are void.

5. The disciplinary action initiated by the Bar through this proceeding, which resulted in the discipline imposed on the Accused, was predicated on a PLF suspension that suffers from the same deficient notice procedures identified in *In re Leisure* and, hence, is void.

6. Because the Accused's PLF suspension is void, he did not engage in misconduct when he practiced law during the period of the suspension.

7. On September 25, 2004, the State Professional Responsibility Board authorized Disciplinary Counsel to petition the board to vacate the discipline imposed in this proceeding.

In summary, the Bar asks the Disciplinary Board to vacate the reprimand imposed upon the Accused in this proceeding and to dismiss the proceeding in its entirety.

Respectfully submitted this 4th day of November 2004.

OREGON STATE BAR

By: /s/ Jeffrey D. Sapiro
Jeffrey D. Sapiro
OSB No. 78362
Disciplinary Counsel

EXHIBIT A

ORDER APPROVING STIPULATION FOR DISCIPLINE

This matter having been heard upon the Stipulation for Discipline between William O. Bassett and the Oregon State Bar, and good cause appearing,

IT IS HEREBY ORDERED that the stipulation entered into between the parties is approved. William O. Bassett is publicly reprimanded for violation of ORS 9.160 and DR 3-101(B) of the Code of Professional Responsibility.

DATED this 1st day of August 2002.

/s/ Paul E. Meyer
Paul E. Meyer
State Disciplinary Board Chairperson

/s/ Mary E. James
Mary Mertens James, Region 6
Disciplinary Board Chairperson

EXHIBIT B

STIPULATION FOR DISCIPLINE

William O. Bassett, attorney at law (hereinafter "Accused"), and the Oregon State Bar (hereinafter "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 O. Bassett, was admitted by the Oregon Supreme Court to the practice of law in Oregon on September 12, 1969, and has been a member of the Bar continuously since that time, having his office and place of business in Clackamas County, Oregon.

3.

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

Facts and Violations

4.

ORS 9.080(2)(a) and §15.1 and §15.2 of the Bylaws of the Oregon State Bar require active members of the Oregon State Bar who are engaged in the private practice of law to carry professional liability insurance through the Professional Liability Fund (hereinafter "PLF").

5.

The Accused elected to make installment payments for the PLF insurance. The PLF notified the Accused that his fourth-quarter PLF installment for 2001, had to be received by the PLF not later than 5:00 p.m. on October 10, 2001. The PLF also notified the Accused that payments received after that time, no matter when mailed, would be rejected, the lawyer's name would be included on the suspension list submitted to the Bar on October 11, 2001, that the suspension was automatic, and that no further notice would be provided. The Accused received this notice.

6.

On October 10, 2001, during regular business hours, the Accused delivered a check to the PLF for the installment payment. About October 17, 2001, the Accused's bank notified the Accused that his check to the PLF had been dishonored.

The Accused notified the PLF. On October 24, 2001, the PLF notified the Bar that the Accused's check for his fourth-quarter installment for the 2001 assessment had been returned as "unpaid," and that the deadline for payment was October 10, 2001. On October 25, 2001, the Bar sent a letter to the State Court Administrator in which it notified that the Accused was suspended from the practice of law for failure to pay his PLF assessment, effective October 11, 2001.

7.

On October 26, 2001, the Accused received a copy of the Bar's letter to the court, which notified that he was suspended, effective October 11, 2001. Later the same day, the Accused paid the fourth-quarter PLF installment, submitted an application for reinstatement (BR 8.4), and was reinstated as an active member of the Bar. The application disclosed that the Accused practiced law between October 11, 2001, and October 26, 2001.

8.

The Accused admits that he practiced law from October 11, 2001, until October 26, 2001, when he was not authorized to do because he had not paid his fourth-quarter PLF installment.

9.

The Accused admits that the above-described conduct constituted violation of ORS 9.160 and DR 3-101(B) of the Code of Professional Responsibility.

Sanction

10.

In determining an appropriate sanction, the ABA *Standards for Imposing Lawyer Sanctions* (hereinafter "*Standards*") are considered. *In re Sousa*, 323 Or 137, 145, 915 P2d 408 (1996). The *Standards* require that the Accused's conduct be analyzed by considering the following factors: (1) ethical duty violated; (2) the attorney's mental state; (3) the actual or potential injury; and (4) the existence of aggravating or mitigating circumstances.

A. *Duty Violated.* By practicing law when he was not authorized to do so, the Accused violated his duty to the profession. *Standards,* § 7.0.

B. *Mental State.* The Accused acted negligently. "Negligence" is a failure to heed a substantial risk that circumstances exist or a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in this situation. *Standards,* p. 7. The Accused was negligent in selecting a check he used for payment of the PLF installment, and in not confirming his suspended status after he was notified by his bank that the check had been dishonored.

C. *Injury*. The *Standards* and case law provide that injury may be actual or potential. *Standards*, p. 7; *In re Williams,* 314 Or 530, 840 P2d 1280 (1992). The Accused caused potential injury to the clients for whom he performed legal services when he did not have malpractice insurance.

D. *Aggravating Factors*. Aggravating factors include:

1. The Accused has a prior record of discipline. *In re Bassett,* 12 DB Rptr 14 (1998).

2. This stipulation involves two rule violations. *Standards,* § 9.22(d).

3. The Accused was admitted to practice in 1969 and has substantial experience in the practice of law. *Standards,* § 9.22(i).

E. *Mitigating Factors*. Mitigating factors include:

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

2. The Accused cooperated in the investigation and in resolving this disciplinary proceeding. *Standards,* § 9.32(e).

3. The Accused acknowledges his misconduct and promptly sought reinstatement as an active member of the Bar. *Standards,* § 9.32(*l*).

11.

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. Case law is in accord. *See, e.g., In re Black,* 10 DB Rptr 25 (1996) (lawyer reprimanded for violation of ORS 9.160 and DR 3-101(B)).

12.

Consistent with the *Standards* and case law, the Bar and the Accused agree that the Accused shall be publicly reprimanded for violating ORS 9.160 and DR 3-101(B).

13.

This Stipulation for Discipline has been reviewed by the Disciplinary Counsel of the Oregon State Bar, the sanction was approved by the State Professional Responsibility Board, and shall be submitted to the Disciplinary Board for consideration pursuant to the terms of BR 3.6.

DATED this 25th day of March 2002.

/s/ William O. Bassett
William O. Bassett
OSB No. 69013

OREGON STATE BAR

By: /s/ Jane E. Angus
Jane E. Angus
OSB No. 73014
Assistant Disciplinary Counsel

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re	)	
	)	
Complaint as to the Conduct of	)	Case No. 01-10
	)	
WILLIAM J. STATER,	)	
	)	
Accused.	)	

ORDER APPROVING MOTION TO VACATE AND DISMISS

This matter having been heard upon the Motion to Vacate and Dismiss submitted by the Oregon State Bar, and good cause appearing,

IT IS HEREBY ORDERED that the motion to vacate the suspension imposed upon the Accused by the board's order in this proceeding dated October 26, 2001, is approved and this proceeding is dismissed in its entirety effective the date of this order.

DATED this 18th day of November 2004.

/s/ Michael Robert Levine
Michael Robert Levine
State Disciplinary Board Chairperson

/s/ Gregory E. Skillman
Gregory E. Skillman, Region 2
Disciplinary Board Chairperson

MOTION TO VACATE REPRIMAND AND TO DISMISS

The Oregon State Bar moves the Disciplinary Board to vacate the suspension imposed upon the Accused by the board's order in this proceeding dated October 26, 2001, and to dismiss the proceeding in its entirety. This motion is based on the following points and authorities:

POINTS AND AUTHORITIES

1. On October 26, 2001, the board issued its order in *In re Stater*, 15 DB Rptr 216 (2001), suspending the Accused for 60 days. A copy of the board's order and the parties' stipulation for discipline are attached to this petition as Exhibit A and B, respectively.

2. The discipline imposed upon the Accused in this proceeding was based solely on charges that the Accused practiced law during a period when he was suspended from bar membership due to a failure to pay the Professional Liability Fund ("PLF") assessment in 2000, and that the Accused failed to disclose his suspended status at an administrative hearing at which he appeared on behalf of a client. For this conduct, the Accused was disciplined for violation of DR 1-102(A)(3) and DR 3-101(B).

3. On December 26, 2003, the Supreme Court decided the case of *In re Leisure*, 336 Or 244, 82 P3d 144 (2003). In that case, the court determined that the notice procedures followed by the PLF in seeking to suspend a lawyer for failure to pay her PLF assessment installment were deficient under ORS 9.200(1), and therefore the resulting suspension of that lawyer was void.

4. Following the decision in *In re Leisure*, *supra*, the Bar's Board of Governors undertook a study and determined that the notice procedures found deficient by the court were also used for many other PLF suspensions from 1984–2003. Applying the holding of the *Leisure* case, these suspensions, too, are void.

5. The disciplinary action initiated by the Bar through this proceeding, which resulted in the discipline imposed on the Accused, was predicated on a PLF suspension that suffers from the same deficient notice procedures identified in *In re Leisure* and, hence, is void.

6. Because the Accused's PLF suspension is void, he did not engage in misconduct when he practiced law during the period of the suspension and did not make a misrepresentation by omission when he failed to disclose the suspension at his client's administrative hearing.

7. On September 25, 2004, the State Professional Responsibility Board authorized Disciplinary Counsel to petition the board to vacate the discipline imposed in this proceeding.

In summary, the Bar asks the Disciplinary Board to vacate the suspension imposed upon the Accused in this proceeding and to dismiss the proceeding in its entirety.

Respectfully submitted this 4th day of November 2004.

OREGON STATE BAR

By: /s/ Jeffrey D. Sapiro
Jeffrey D. Sapiro
OSB No. 78362
Disciplinary Counsel

EXHIBIT A

ORDER APPROVING STIPULATION FOR DISCIPLINE

This matter having been heard upon the Stipulation for Discipline entered into by the Accused and the Oregon State Bar, and good cause appearing,

IT IS HEREBY ORDERED that the stipulation between the parties is approved and the Accused is suspended for 60 days, effective the date of this order for violation of DR 1-102(A)(3) and DR 3-101(B).

DATED this 26th day of October 2001.

/s/ Paul E. Meyer
Paul E. Meyer
State Disciplinary Board Chairperson

/s/ Gregory E. Skillman
Gregory E. Skillman, Region 2
Disciplinary Board Chairperson

EXHIBIT B

STIPULATION FOR DISCIPLINE

William J. Stater, 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 J. Stater, 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 Lane County, Oregon.

3.

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

4.

On January 20, 2001, the State Professional Responsibility Board authorized formal disciplinary proceedings against the Accused for alleged violations of DR 1-102(A)(3) and DR 3-101(B) of the Code of Professional Responsibility. The parties intend that this stipulation set forth all relevant facts, violations, and the agreed-upon sanction as a final disposition of this proceeding.

5.

On July 23, 2001, a Formal Complaint was filed and served upon the Accused together with a Notice to Answer. The Accused admits the allegations of the Formal Complaint, a copy of which is attached hereto as Exhibit 1, and that his conduct violated DR 1-102(A)(3) and DR 3-101(B) of the Code of Professional Responsibility.

Sanction

6.

The Accused and the Bar agree that in fashioning an appropriate sanction in this case, the Disciplinary Board should consider the ABA *Standards for Imposing Lawyer Sanctions* (hereinafter "*Standards*"). The *Standards* require that the Accused's conduct be analyzed by considering the following 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 Violated.* In violating DR 1-102(A)(3) and DR 3-101(B), the Accused violated duties owed to the profession. *Standards*, § 7.2.

B. *Mental State.* The Accused acted with "knowledge" or the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result.

C. *Injury.* The Accused caused potential injury to the profession and to his client by his conduct. During the period of suspension and until reinstated, the Accused was not authorized to practice law and was not covered by malpractice liability insurance. The Accused placed at risk the client for whom he performed legal service in the event of a malpractice claim against him.

D. *Aggravating Factors.* The Accused has substantial experience in the practice of law, having been admitted to practice in 1977. *Standards*, § 9.22(i).

E. *Mitigating Factors.* Mitigating factors include:

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

2. The Accused fully cooperated in the Bar's investigation of his conduct. *Standards*, § 9.32(e).

3. The Accused has acknowledged the wrongful nature of his conduct. *Standards*, § 9.32(*l*).

7.

The *Standards* provide that suspension is appropriate when a lawyer knowingly engages in conduct that is a violation of a duty to the profession, and causes injury or potential injury to a client, the public, or the legal system. *Standards*, § 7.2.

8.

Oregon case law is consistent with the *Standards*. *In re Dale*, 10 DB Rptr 73 (1996); *In re Jones*, 312 Or 611, 825 P2d 1365 (1992); *In re Van Leuven*, 8 DB Rptr 203 (1994).

9.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be suspended from the practice of law for 60 days for violation of DR 1-102(A)(3) and DR 3-101(B), the sanction to be effective upon approval of this Stipulation by the Disciplinary Board.

10.

This Stipulation for Discipline has been reviewed by Disciplinary Counsel of the Oregon State Bar and it will be submitted to the State Professional Responsibility Board ("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 15th day of October 2001.

/s/ William J. Stater
William J. Stater
OSB No. 77356

EXECUTED this 18th day of October 2001.

OREGON STATE BAR

By: /s/ Chris L. Mullmann
Chris L. Mullmann
OSB No. 72311
Assistant Disciplinary Counsel

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re	)	
	)	Case Nos. 02-74, 02-75, 02-96, 02-97
Complaint as to the Conduct of	)	02-122, 02-140, 02-175
	)	
NOELLE Y. WILSON,	)	SC S50871
	)	
Accused.	)	

Counsel for the Bar:	Stacy J. Hankin
Counsel for the Accused:	None
Disciplinary Board:	None
Disposition:	Violation of DR 1-103(C), DR 2-106(A), DR 2-110(A)(2), DR 2-110(A)(3), DR 2-110(B)(2), DR 6-101(B), DR 9-101(A), DR 9-101(C)(3), and DR 9-101(C)(4). Stipulation for Discipline. One-year suspension.
Effective Date of Order:	November 23, 2004

ORDER ACCEPTING STIPULATION FOR DISCIPLINE

The court accepts the Stipulation for Discipline. The accused is suspended from the practice of law in the State of Oregon for one year, subject to the terms and conditions set out in the stipulation. The suspension is effective immediately. All pending motions are dismissed as moot.

DATED this 23rd day of November 2004.

/s/ Wallace P. Carson, Jr.
Wallace P. Carson, Jr.
Chief Justice

STIPULATION FOR DISCIPLINE

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

1.

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

2.

The Accused was admitted by the Oregon Supreme Court to the practice of law in Oregon on April 15, 1997. Between April 15, 1997, and June 3, 2002, the Accused was a member of the Oregon State Bar continuously. Since June 4, 2002, the Accused has been suspended from the practice of law for failing to file proof of MCLE compliance. When the Accused practiced law in Oregon, her office and place of business was located in Yamhill County, Oregon.

3.

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

4.

On January 20, 2003, a Third Amended Formal Complaint was filed against the Accused pursuant to the authorization of the State Professional Responsibility Board (hereinafter "SPRB"), alleging violation of DR 1-102(A)(3), DR 1-103(C) (seven counts), DR 2-106(A) (three counts), DR 2-110(A)(2) (three counts), DR 2-110(A)(3), DR 2-110(B)(2), DR 6-101(B) (seven counts), DR 9-101(A), DR 9-101(C)(3) (three counts), and DR 9-101(C)(4). On October 9, 2003, a trial panel issued an opinion regarding this matter. Pursuant to former Bar Rule of Procedure 10.4, this matter is now on appeal before the court. The parties intend that this Stipulation for Discipline set forth all relevant facts, violations, and the agreed-upon sanction as a final disposition of the proceeding.

Oviatt Matter

(Case No. 02-97)

Facts

5.

In January 2000, the Accused was retained by Gordon Oviatt (hereinafter "Oviatt") to represent him in a dissolution of marriage proceeding. At the time, Oviatt was living in Columbia County, Oregon.

6.

On March 21, 2000, Oviatt and the Accused signed a Petition for Dissolution of Marriage. Between March 22, 2000, and May 4, 2000, the Accused took no substantive action to pursue Oviatt's legal matter.

7.

On May 5, 2000, the Accused filed with the court the Petition for Dissolution of Marriage referenced in paragraph 6 above, and other documents. In the summer of 2000, the Accused informed Oviatt that she had inadvertently filed the dissolution proceeding in Yamhill County and further informed him that she would refile the matter in Columbia County within a few weeks. Thereafter, the Accused took no substantive action to pursue Oviatt's legal matter. After November 2000, the Accused failed to maintain adequate communications with Oviatt.

8.

On June 19, 2001, the court sent a Notice of Dismissal to the Accused stating that the matter would be dismissed on July 23, 2001, unless on or before that date she filed an application showing good cause why the matter should be continued. The Accused did not respond to that notice, and did not inform Oviatt that the matter was going to be dismissed. The court thereafter dismissed Oviatt's legal matter on July 24, 2001.

9.

In 2000, Oviatt paid the Accused a sum of money to be applied toward her fees which the Accused deposited in her lawyer trust account. Thereafter, the Accused earned some, but not all, of those fees. The Accused failed to refund to Oviatt the unearned fees until May 12, 2004, at which time, as an accommodation to him, she voluntarily refunded all of the funds Oviatt had previously paid to her.

10.

In March 2002, the Bar obtained information regarding the Accused's conduct in the Oviatt matter. The Bar proceeded to investigate the matter and on March 27, 2002, forwarded that information to the Accused and requested her response to it by April 17, 2002. The Accused failed to timely respond to that request, or to a subsequent request on April 18, 2002.

Violations

11.

The Accused admits that, by engaging in the conduct described in paragraphs 5 through 10, she violated DR 1-103(C), DR 2-106(A), and DR 6-101(B) of the Code of Professional Responsibility.

Harker Matter

(Case No. 02-96)

Facts

12.

Jessie Harker (hereinafter "Harker") was the petitioner in a pending dissolution of marriage proceeding. On September 21, 2000, the Accused, on behalf of Harker, and lawyer Mark Bierly (hereinafter "Bierly"), on behalf of the respondent, entered a settlement on the record. The Accused was instructed by the court to prepare and submit a proposed judgment. Between September 22, 2000, and February 26, 2001, the Accused failed to take any substantive action to pursue Harker's legal matter and failed to prepare or submit a proposed judgment.

13.

On February 27, 2001, the Accused sent a proposed judgment to Bierly. On March 27, 2001, the court sent a letter to the Accused asking about the judgment, and informing her that the matter would be dismissed on April 27, 2001, if the court did not receive a form of judgment by that date. On March 30, 2001, Bierly sent a letter to the Accused asking that she make a number of changes to the proposed judgment. On May 9, 2001, the court sent a judgment of dismissal to the Accused. On May 22, 2001, Bierly sent another letter to the Accused inquiring about the status of the judgment, and insisting that the Accused make the necessary changes and submit the judgment to the court. Thereafter, the Accused failed to respond to the correspondence from the court or Bierly because she believed the parties had reconciled. In September 2001, at Bierly's request, the court reinstated the matter, and signed a judgment.

14.

In March 2002, the Bar obtained information regarding the Accused's conduct in the Harker matter. On March 15, 2002, the Bar forwarded that information to the Accused and requested her response to it by April 5, 2002. The Accused failed to timely respond to that request or to a subsequent request on April 9, 2002.

Violations

15.

The Accused admits that, by engaging in the conduct described in paragraphs 12 through 14, she violated DR 1-103(C) and DR 6-101(B) of the Code of Professional Responsibility.

Givens Matter

(Case No. 02-122)

Facts

16.

On July 7, 2000, Samuel Givens (hereinafter "Givens") retained the Accused to represent him in connection with a child custody matter. Givens agreed to pay the Accused $225 upfront to cover filing fees, followed by monthly payments of $100. On August 10, 2000, Givens paid the Accused $225. On August 22, 2000, Givens paid the Accused $100, but thereafter failed to make any additional payments to her.

17.

On August 12, 2000, Givens signed a Petition for Custody and Certificate of Residency which the Accused filed with the court on August 22, 2000. On August 24, 2000, the Accused filed an ex parte motion for a Status Quo Order and an Order to Show Cause with a supporting affidavit.

18.

After August 24, 2000, the Accused failed to take any substantive action to pursue Givens' legal matter. After September 20, 2000, the Accused failed to adequately communicate with Givens about the status of his legal matter. In April 2001, Givens retained another lawyer to represent him.

19.

In June 2002, the Bar obtained information regarding the Accused's conduct in the Givens matter. On June 21, 2002, the Bar forwarded that information to the Accused and requested her response to it by July 12, 2002. The Accused failed to timely respond to that request or to a subsequent request on July 15, 2002.

Violations

20.

The Accused admits that, by engaging in the conduct described in paragraphs 16 through 19, she violated DR 1-103(C) and DR 6-101(B) of the Code of Professional Responsibility.

Torres Matter

(Case No. 02-140)

Facts

21.

On or about July 3, 2000, Benilda Torres (hereinafter "Torres") retained the Accused to pursue a child custody matter. In October 1998, a California court

awarded custody of Torres' child to her former husband (hereinafter "California order").

22.

Torres agreed to pay the Accused $120 per hour and she deposited a $500 retainer with the Accused. On July 21, 2000, Torres paid another $360 to the Accused. The Accused did not provide Torres with an appropriate accounting regarding the funds she received in the child custody matter until May 12, 2004.

23.

In July 2000, Torres and her former husband executed an agreement prepared by the Accused regarding custody of their child. At the same time, Torres and her former husband executed a stipulated order modifying custody.

24.

Sometime after July 2000, the Accused obtained a certified copy of the California order. The Accused informed Torres that she would file the stipulation referenced in paragraph 23 above with the court. Sometime thereafter, the Accused determined that she could not file the stipulation referenced in paragraph 23 above with the court. The Accused failed to inform Torres regarding her determination, and that she would not be filing the stipulation referenced in paragraph 23 above with the court.

25.

On or about July 10, 2001, the Accused agreed to represent Torres in a dissolution of marriage proceeding (hereinafter "dissolution"). On August 16, 2001, the Accused filed a petition for dissolution of marriage on behalf of Torres. The Accused provided Torres with a copy of the petition and other documents so that she could serve her husband. In February 2002, Torres requested another copy of the petition and other documents because the original set had been misplaced. The Accused failed to respond to Torres' request and failed to take any substantive action to pursue the dissolution matter.

26.

On February 27, 2002, the court issued a notice that the dissolution matter would be dismissed for want of prosecution. On April 1, 2002, the dissolution matter was dismissed by the court. The Accused did not respond to those notices, and failed to inform Torres that the dissolution matter would be dismissed or had been dismissed.

27.

In late October 2001, because of concerns for her personal safety, the Accused closed her practice in Oregon and moved to California. She intended to complete the

dissolution matter once she had settled there, but failed to do so, and failed to maintain adequate communication with Torres.

28.

In July 2002, the Bar obtained information regarding the Accused's conduct in the Torres matter. On July 25, 2002, the Bar forwarded that information to the Accused and requested her response to it by August 15, 2002. The Accused failed to make a timely response to that request or to a subsequent request on August 16, 2002.

Violations

29.

The Accused admits that, by engaging in the conduct described in paragraphs 21 through 28, she violated DR 1-103(C), DR 6-101(B), and DR 9-101(C)(3) of the Code of Professional Responsibility. Upon further factual inquiry, the parties agree that the charge of an alleged violation of DR 2-106(A) should be and, upon the approval of this stipulation, is dismissed.

Olberding Matter

(Case No. 02-75)

Facts

30.

On or about April 19, 2001, the Accused was retained by Michael and Angela Olberding (hereinafter "the Olberdings") to pursue a stepparent adoption. The Olberdings agreed to pay the Accused $120 per hour, and deposited a retainer of $400 with the Accused, $200 of which was to be used for filing fees. They agreed to pay the Accused $100 per month, but did not make any payments.

31.

On or about April 20, 2001, the Accused prepared the appropriate documents to begin the adoption proceeding and sent the documents to the Olberdings for their signature. In May 2001, the Olberdings returned the executed documents to the Accused. Thereafter, the Accused failed to file the documents with the court and failed to take any action on the Olberdings' legal matter.

32.

After May 2001, the Olberdings left numerous telephone messages for the Accused inquiring about the status of the legal matter. The Accused failed to respond to those inquiries.

33.

In late October 2001, because of concerns for her personal safety, the Accused closed her law practice in Oregon and moved to California. She intended to complete the Olberdings' legal matter once she had settled there, but failed to do so, and failed to take reasonable steps to avoid foreseeable prejudice to the Olberdings' rights.

34.

Beginning in January 2002, the Olberdings left numerous telephone messages for the Accused requesting the return of the $400, and their file. The Accused failed to respond to these inquiries and failed to return the funds or the file to the Olberdings. The Accused also did not render an appropriate accounting to the Olberdings regarding the funds they had paid to her until August 2004.

35.

The Accused voluntarily refunded the $200 filing fee to the Olberdings in August 2004.

36.

On January 23, 2002, the Bar received a complaint from the Olberdings concerning the Accused's conduct. On January 25, 2002, the Bar forwarded a copy of the Olberdings' complaint to the Accused and requested her response to that complaint by February 15, 2002. The Accused failed to timely respond to that request or to a subsequent request on February 21, 2002.

Violations

37.

The Accused admits that, by engaging in the conduct described in paragraphs 30 through 36, she violated DR 1-103(C), DR 2-110(A)(2), DR 6-101(B), DR 9-101(C)(3), and DR 9-101(C)(4) of the Code of Professional Responsibility.

Juarez Matter

(Case No. 02-175)

Facts

38.

On April 20, 2001, Francisco Juarez (hereinafter "Juarez") retained the Accused to assist him in adopting one of his grandchildren. Juarez paid the Accused $500 on that day. The Accused failed to deposit those funds into her lawyer trust account because she mistakenly believed that she had earned those fees.

39.

In late October 2001, because of concerns for her personal safety, the Accused closed her law practice in Oregon and moved to California. At the time the Accused closed her law practice, she had done little work in connection with the adoption, but planned to complete that matter after she had settled in California.

40.

Shortly after the Accused moved to California, she realized that she would be unable to complete Juarez's legal matter. Thereafter, she failed to take reasonable steps to avoid foreseeable prejudice to Juarez's rights, and failed to withdraw from representing him when she knew it was obvious that her continued employment would result in a violation of a disciplinary rule.

41.

At the time the Accused closed her practice in October 2001, she mistakenly believed she had earned the $500 she received from Juarez, when in fact she had not. In 2004, Juarez received a refund of the unearned fees.

42.

In July 2002, the Bar obtained information regarding the Accused's representation of Juarez in the adoption matter. On October 10, 2002, the Bar forwarded that information to the Accused and requested her response to it by October 31, 2002. The Accused made no response to that request or to a subsequent request on November 4, 2002.

Violations

43.

The Accused admits that, by engaging in the conduct described in paragraphs 38 through 42, she violated DR 1-103(C), DR 2-106(A), DR 2-110(A)(2), DR 2-110(A)(3), DR 2-110(B)(2), and DR 9-101(A) of the Code of Professional Responsibility. Upon further factual inquiry, the parties agree that the charge of an alleged violation of DR 1-102(A)(3) should be and, upon the approval of this stipulation, is dismissed.

Cederwall Matter

(Case No. 02-174)

Facts

44.

In August 2001, Anastasia Cederwall (hereinafter "Cederwall") retained the Accused to represent him in a dissolution of marriage proceeding. On August 15, 2001, the Accused filed and served a Petition for Dissolution of Marriage and related

motions. On October 23, 2001, the Accused submitted a motion, affidavit, and proposed order for default which the court signed on October 25, 2001.

45.

After October 23, 2001, the Accused failed to take any further action in Cederwall's legal matter, and failed to respond to numerous telephone messages from Cederwall inquiring about the status of the legal matter.

46.

In late October 2001, because of concerns for her personal safety, the Accused closed her law practice and moved to California. The Accused planned to complete Cederwall's legal matter after she had settled there.

47.

Shortly after the Accused moved to California, she realized that she would be unable to complete Cederwall's legal matter. Thereafter, she failed to take reasonable steps to avoid foreseeable prejudice to Cederwall's rights.

48.

Cederwall agreed to pay the Accused $100 per hour, and deposited $1,000 with the Accused. The Accused did not render an appropriate accounting to Cederwall regarding the funds he had paid to her until May 12, 2004, at which time the Accused, as an accommodation to Cederwall, voluntarily refunded to him all fees he had paid to her.

49.

On December 4, 2001, the Bar received a complaint from Cederwall concerning the Accused's conduct. On December 10, 2001, the Bar forwarded a copy of Cederwall's complaint to the Accused and requested her response to that complaint by December 31, 2001. The Accused made no written response to that letter or to a subsequent letter sent on January 8, 2002.

Violations

50.

The Accused admits that, by engaging in the conduct described in paragraphs 44 through 49, she violated DR 1-103(C), DR 2-110(A)(2), DR 6-101(B), and DR 9-101(C)(3) of the Code of Professional Responsibility.

Sanction

51.

The Accused and the Bar agree that in fashioning an appropriate sanction in this case, the Supreme Court should consider the ABA *Standards for Imposing*

Lawyer Sanctions (hereinafter "*Standards*"). The *Standards* require that the Accused's conduct be analyzed by considering the following 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 Violated.* The most important ethical duties are those obligations a lawyer owes to clients. *Standards,* p. 5. In this case, the Accused violated her duty to properly handle client property in three matters (Olberding, Juarez, and Cederwall), her duty to act with reasonable diligence and promptness in representing all seven clients, and her duty to promptly return client property in one matter (Olberding). *Standards,* §§ 4.1, 4.4.

The Accused also violated duties she owed to the profession by collecting a clearly excessive fee in two matters, failing to properly withdraw in three matters, and failing to respond fully to inquiries by Disciplinary Counsel's Office in all seven matters. *Standards,* § 7.0.

B. *Mental State.* "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. *Standards,* § 7.0. "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. *Standards,* § 7.0.

The Accused negligently failed to make a timely refund to Oviatt. Initially, she acted negligently in failing to pursue Oviatt's legal matter. Her conduct became knowing after she received correspondence from the court.

Initially, the Accused acted negligently in failing to pursue Harker's legal matter. Her conduct became knowing after she received correspondence from the court and Bierly.

The Accused acted negligently in failing to pursue Givens' legal matter.

The Accused negligently failed to pursue Torres' child custody matter. Initially, she acted negligently in failing to pursue the dissolution matter. Her conduct became knowing after she received correspondence from the court.

The Accused negligently failed to make a timely refund to the Olberdings, Juarez, and Cederwall. Initially, the Accused negligently failed to pursue these legal matters. Her conduct became knowing after she moved to California and realized that she would be unable to complete them.

The Accused failed to respond to the Bar's inquiries because she was concerned for her personal safety. Nonetheless, the Accused acted knowingly.

C. *Injury*. Injury can be either actual or potential under the *Standards*. *In re Williams*, 314 Or 530, 840 P2d 1280 (1992).

Oviatt sustained actual injury because for four years the Accused did not timely refund to him funds to which he was entitled. He sustained additional injury because the dissolution of marriage proceeding was dismissed and he had to expend additional funds to begin another proceeding.

Harker sustained potential injury in that the Accused's failure to act delayed the completion of his legal matter.

Givens sustained potential injury in that his legal matter was delayed.

Torres sustained actual injury because the dissolution of marriage proceeding was dismissed and she would have to expend additional funds to begin another proceeding.

The Olberdings sustained actual injury because the Accused did not make a timely refund to them. The Olberdings sustained potential injury in that their legal matter was delayed.

Juarez sustained actual injury because the Accused did not timely refund to him funds to which he was entitled. He also sustained potential injury in that his legal matter was delayed.

Cederwall sustained potential injury in that his legal matter was delayed.

The Accused's failure to cooperate with the Bar's investigation of her conduct caused actual harm to both the legal profession and to the public, because it delayed the Bar's investigation and, consequently, the resolution of the complaints against her. *In re Miles*, 324 Or 218, 322, 923 P2d 1219 (1996).

D. *Aggravating Circumstances*. The following aggravating circumstances are present in this case:

1. Pattern of misconduct. *Standards*, § 9.22(c).

2. Multiple offenses. *Standards*, § 9.22(d).

3. Nonresponsiveness to the Bar. *Standards*, § 9.22(e).

4. Vulnerability of victim. *Standards*, § 9.22(h).

E. *Mitigating Circumstances*. The following mitigating circumstances are present in this case:

1. Absence of a prior disciplinary record. *Standards*, § 9.32(a).

2. Personal or emotional problems. During some of the relevant time periods, the Accused was suffering from posttraumatic stress disorder, depression, and anxiety. *Standards*, § 9.32(c).

3. Restitution. The Accused made restitution to clients as described above. *Standards*, § 9.32(d).

4. Inexperience in the practice of law. At the time the Accused represented the seven clients at issue, she had been licensed to practice law only since 1997. *Standards*, § 9.32(f).

5. Remorse. *Standards*, § 9.32(*l*).

52.

The *Standards* provide that a period of suspension or disbarment is appropriate in this matter. *Standards*, §§ 4.41, 4.42, 7.2.

53.

Although no Oregon case contains the exact violations at issue in this proceeding, when the violations committed by the Accused are taken together as a whole, Oregon case law suggests that a lengthy suspension is appropriate. *In re Koessler*, 18 DB Rptr 105 (2004) (six-month suspension for lawyer who violated multiple disciplinary rules in multiple matters over the course of a number of years where the lawyer experienced significant personal and emotional problems); *In re Boomhower*, 15 DB Rptr 25 (2001) (one-year suspension of lawyer who violated DR 1-102(A)(4), DR 1-103(C), DR 2-110(A)(2), DR 6-101(B), and DR 7-101(A)(2) in one matter where lawyer was being treated for depression); *In re Barrow*, 13 DB Rptr 126 (1999) (two-year suspension of lawyer who violated multiple disciplinary rules in multiple matters over the course of a number of years where lawyer experienced mental disability or chemical dependency during relevant period of time).

54.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be suspended from the practice of law for a period of one year for violation of DR 1-103(C), DR 2-106(A), DR 2-110(A)(2), DR 2-110(A)(3), DR 2-110(B)(2), DR 6-101(B), DR 9-101(A), DR 9-101(C)(3), and DR 9-101(C)(4), the sanction to be effective immediately.

55.

In addition, the Accused's reinstatement shall not be effective until she has paid to the Bar its reasonable and necessary costs in the amount of $350, incurred for service. Should the Accused fail to pay $350 in full by 365th day of the suspension, the Bar may thereafter, without further notice to the Accused, apply for entry of a judgment against the Accused for the unpaid balance, plus interest thereon at the legal rate to accrue from the date the judgment is signed until paid in full.

56.

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.

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 29th day of October 2004.

/s/ Noelle Y. Wilson
Noelle Y. Wilson
OSB No. 97107

EXECUTED this 29th day of October 2004.

OREGON STATE BAR

By: /s/ Stacy J. Hankin
Stacy J. Hankin
OSB No. 86202
Assistant Disciplinary Counsel

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re	)	
	)	
Complaint as to the Conduct of	)	Case No. 03-97
	)	
CURTIS A. SHELTON,	)	SC S51804
	)	
Accused.	)	

ORDER IMPOSING RECIPROCAL DISCIPLINE

Upon consideration by the court.

The Oregon State Bar's recommendation that the accused be disbarred from the practice of law is allowed. Curtis A. Shelton (OSB No. 79390) is disbarred from the practice of law in Oregon, effective the date of this order.

DATED this 23rd day of November 2004.

/s/ Wallace P. Carson, Jr.
Wallace P. Carson, Jr.
Chief Justice

SUMMARY

By order dated November 23, 2004, the Oregon Supreme Court disbarred Washington lawyer Curtis A. Shelton pursuant to BR 3.5 (reciprocal discipline). At the time of the court's order, a formal disciplinary proceeding was pending against Shelton in Oregon.

On September 15, 2004, the Washington Supreme Court disbarred Shelton for violations of the Washington Rules of Professional Conduct ("RPC"), including RPC 8.4(b) (criminal conduct reflecting adversely on a lawyer's honesty, trustworthiness, or fitness to practice law); RPC 8.4(c) (dishonesty or misrepresentation); RPC 8.4(d) (conduct prejudicial to the administration of justice); RPC 1.7 (lawyer self-interest conflicts); RPC 1.7 (current client conflicts); RPC 1.8(e) (advancing financial assistance to client); RPC 1.8(f) (accepting compensation from other than client); RPC 3.3(a) (making false statements of fact to tribunal); and other rules.

Shelton was admitted to practice in Oregon in 1979. He had no prior record of discipline. Shelton has been suspended from the practice of law in Oregon since July 2, 2004.

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re	)	
	)	Case Nos. 03-71, 04-41, 04-42, 04-43,
Complaint as to the Conduct of	)	04-70, 04-71, 04-72, 04-73, 04-129
	)	
MARY J. GRIMES,	)	SC S52005
	)	
Accused.	)	

Counsel for the Bar:	Jeffrey D. Sapiro
Counsel for the Accused:	Lawrence W. Erwin
Disciplinary Board:	None
Disposition:	Violation of DR 1-102(A)(4), DR 2-110(A)(2), and DR 6-101(B). Stipulation for Discipline. One-year suspension, 10 months stayed during two-year term of probation.
Effective Date of Order:	January 4, 2005

ORDER APPROVING STIPULATION FOR DISCIPLINE

Upon consideration by the court.

The court approves the Stipulation for Discipline. The accused is suspended from the practice of law in the State of Oregon for a period of one year, with 10 months of the suspension stayed during a two-year term of probation, subject to the terms outlined in the stipulation. The sanction, including 60 days of imposed suspension, shall be effective 21 days form the date of this order.

DATED this 14th day of December 2004.

/s/ Wallace P. Carson, Jr.
Wallace P. Carson, Jr.
Chief Justice

STIPULATION FOR DISCIPLINE

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

1.

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

2.

The Accused was admitted by the Oregon Supreme Court to the practice of law in Oregon on April 15, 1988, and has been a member of the Oregon State Bar continuously since that time, having her office and place of business for a number of years in Marion County, Oregon, and later in Umatilla County, Oregon.

3.

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

4.

On June 14, 2004, a Second Amended Formal Complaint was filed against the Accused pursuant to the authorization of the State Professional Responsibility Board (hereinafter "SPRB"), alleging violations of DR 1-102(A)(4), DR 2-110(A)(2), and DR 6-101(B). On November 12, 2004, the SPRB authorized additional allegations for inclusion in this Stipulation for Discipline. The parties intend that this Stipulation for Discipline set forth all relevant facts, violations, and the agreed-upon sanction as a final disposition of the proceeding.

Facts and Violations

5.

During 2001–2002, the Accused accepted court appointments to represent incarcerated persons in the appeal of their criminal convictions, denied petitions for postconviction relief, and denied habeas corpus petitions. Between July 2001 and October 2002, the Accused was appointed to represent the following individuals in such matters: Robert Murphy, Paul Leo Schweitzer, LeVelle Singleton, Roy Wyatt, Fred Roy Caughlin, Joel E. Delzell, Michael R. Ochoa, Michael Rekow, and Latrese Danielle Isom.

6.

In the Robert Murphy habeas corpus appeal, the Accused failed to take action in pursuit of the appeal in violation of DR 6-101(B), and the appeal was dismissed by the Court of Appeals.

7.

In the Paul Leo Schweitzer postconviction relief appeal, after filing several motions for an extension of time in which to file an appellate brief, the Accused moved to withdraw as appellate counsel, but did not serve a copy of the motion on her client, as required by ORAP 8.10(1). The Court of Appeals twice notified the Accused in writing that her motion needed to be accompanied by proof of service on her client and gave the Accused time to correct the deficiency. The Accused either did not see these notices or did not respond to them, and the Court of Appeals thereafter removed the Accused from the appeal. By this conduct, the Accused violated DR 1-102(A)(4) and DR 2-110(A)(2).

8.

In the LeVelle Singleton habeas corpus appeal, the Accused concluded that the appeal had no merit, briefly communicated this to her client, took no further action in the matter, and allowed the appeal to be dismissed. By effectively withdrawing from the representation without taking reasonable steps to avoid foreseeable prejudice to the client, the Accused violated DR 2-110(A)(2).

9.

In the Roy Wyatt habeas corpus appeal, the Accused concluded that the appeal had no merit, was unable to communicate directly with the client about the matter, but understood from a phone message that the client may not have wanted to proceed with the appeal. Without confirming this with the client, the Accused took no further action in the matter and allowed the appeal to be dismissed. By effectively withdrawing from the representation without taking reasonable steps to avoid foreseeable prejudice to the client, the Accused violated DR 2-110(A)(2).

10.

In the Fred Roy Caughlin appeal of a criminal conviction, after filing several motions for an extension of time in which to file an appellate brief, the Accused failed to file a brief for her client when due and the matter was dismissed by the Court of Appeals. Thereafter, the Accused successfully moved to have the appeal reinstated, concluded that the appeal had no merit, briefly communicated this to her client, took no further action in the matter, and allowed the appeal to be dismissed a second time. By failing to act further in the appeal and effectively withdrawing from the representation without taking reasonable steps to avoid foreseeable prejudice to the client, the Accused violated DR 2-110(A)(2) and DR 6-101(B).

11.

In the Joel E. Delzell postconviction relief appeal, after filing several motions for an extension of time in which to file an appellate brief, the Accused failed to file a brief for her client when due and the matter was dismissed by the Court of Appeals. Thereafter, the Accused successfully moved to have the appeal reinstated,

filed several more motions for an extension of time in which to file an appellate brief, concluded that the appeal had no merit, briefly communicated this to her client, took no further action in the matter, and ultimately was removed from the appeal by the Court of Appeals on its own motion. By failing to act further in the appeal and effectively withdrawing from the representation without taking reasonable steps to avoid foreseeable prejudice to the client, the Accused violated DR 2-110(A)(2) and DR 6-101(B).

12.

In the Michael R. Ochoa postconviction relief appeal, after filing motions for an extension of time in which to file an appellate brief, the Accused concluded that the appeal had no merit, briefly communicated this to her client, took no further action in the matter, and ultimately was removed from the appeal by the Court of Appeals on its own motion. By failing to act further in the appeal and effectively withdrawing from the representation without taking reasonable steps to avoid foreseeable prejudice to the client, the Accused violated DR 2-110(A)(2) and DR 6-101(B).

13.

In the Michael Rekow postconviction relief appeal, after filing motions for an extension of time in which to file an appellate brief, the Accused failed to file a brief for her client when due and the matter was dismissed by the Court of Appeals. Thereafter, the court directed that the Accused provide file material in her possession to successor counsel, but she did not do so promptly, resulting in the court thereafter issuing an order to show cause why the Accused should not be held in contempt. By failing to act further in the appeal, effectively withdrawing from the representation without taking reasonable steps to avoid foreseeable prejudice to the client, and causing the court to issue the show cause order, the Accused violated DR 1-102(A)(4), DR 2-110(A)(2), and DR 6-101(B).

14.

In the Latrese Danielle Isom postconviction relief appeal, after filing several motions for an extension of time in which to file an appellate brief, the Accused failed to file a brief for her client when due and the matter was dismissed by the Court of Appeals. Thereafter, the Accused successfully moved to have the appeal reinstated and prepared a brief for her client. However, the Accused did not file the brief because she learned that the client was to be resentenced in circuit court, which may have had an affect on whether the appeal was still viable. Thereafter, the Accused filed additional motions for an extension of time, but eventually allowed the appeal to be dismissed a second time. By failing to act further in the appeal and effectively withdrawing from the representation without taking reasonable steps to avoid foreseeable prejudice to the client, the Accused violated DR 2-110(A)(2) and DR 6-101(B).

Sanction

15.

The Accused and the Bar agree that in fashioning an appropriate sanction in this case, the Supreme Court should consider the ABA *Standards for Imposing Lawyer Sanctions* (hereinafter "*Standards*"). The *Standards* require that the Accused's conduct be analyzed by considering the following 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 Violated.* The Accused violated her duty to her clients to act with reasonable diligence and promptness and, upon withdrawal, to take all reasonable steps to avoid foreseeable prejudice to those clients *Standards*, § 4.4. The Accused's conduct also placed a burden on the court system, particularly in those cases in which the Court of Appeals was required to issue orders compelling the Accused to act or removing the Accused from a case for failing to act. *Standards*, § 6.2.

B. *Mental State.* The Accused did not act with an intentional mental state. Rather, she acted negligently, defined in the *Standards* page 7 as the 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. The Accused took on more work than she reasonably could handle given her professional and personal circumstances at the time. Communication with clients and the court, and follow-up in the various client matters, suffered as a result. The Accused did not have consistent support staff in her office, and at most times relevant to this proceeding, had none at all.

C. *Injury.* For the purposes of determining sanction in a disciplinary case, consideration is given to both actual and potential injury. *In re Williams*, 314 Or 530, 840 P2d 1280 (1992). In this case, there was limited actual injury to the Accused's clients in that dismissed appeals were reinstated and successor counsel was appointed to advice the clients regarding those appeals. Clients experienced frustration over the lack of communication with the Accused and the delay in their legal matters. The potential for injury was present in that the reinstatement of an appeal after dismissal is within the discretion of the court. In addition, the Court of Appeals was unnecessarily burdened by the Accused's conduct.

D. *Aggravating Factors.* Aggravating factors include:

1. Prior disciplinary offenses. *Standards*, § 9.22(a). The Accused was admonished for neglect of a legal matter in February 2001. (See *In re Cohen*, 330 Or 489, 8 P3d 953 (2000), regarding the impact of a letter of admonition as an aggravating factor.) The Accused also was reprimanded in 2001, but not for violations similar to those present in this proceeding. *In re Grimes*, 15 DB Rptr 241 (2001).

2. A pattern of misconduct. *Standards*, § 9.22(c).

3. Multiple offenses. *Standards*, § 9.22(d).

4. Substantial experience in the practice of law. *Standards*, § 9.22(i).

E. *Mitigating Factors.* Mitigating factors include:

1. Absence of a dishonest or selfish motive. *Standards*, § 9.32(b).

2. Personal or emotional problems. *Standards*, § 9.32(c). During the relevant time period, the Accused was distracted by the illness and death of her mother who was in the Accused's care, emotional trauma stemming from an abusive relationship, medical problems later diagnosed as transient ischemic attacks, and the relocation over several months of her practice from Salem to Pendleton with the attendant disruption from the move.

3. Cooperation with the disciplinary inquiry and proceedings. *Standards*, § 9.32(e).

4. Good character and reputation. *Standards*, § 9.32(g).

5. Remorse. *Standards*, § 9.32(*l*).

16.

Under all the circumstances present, the *Standards* suggest that a period of suspension is an appropriate sanction. *Standards*, §§ 4.42, 6.22. Oregon case law is in accord. *In re Worth*, 336 Or 256, 82 P3d 605 (2003); *In re Bourcier*, 322 Or 561, 909 P2d 1234 (1996); *In re Gresham*, 318 Or 162, 864 P2d 360 (1993); *In re Boland*, 288 Or 133, 602 P2d 1078 (1979); *In re Humphrey*, 18 DB Rptr 159 (2004).

Probation, while not favored by the Supreme Court as a sanction in a contested case (*In re Obert*, 336 Or 640, 89 P3d 1173 (2004)), may be appropriate by agreement of the parties in a case in which certain monitored conditions can be imposed to address the cause or causes of a lawyer's misconduct. *Standards*, § 2.7. *See In re Seto*, 16 DB Rptr 10 (2002); *In re Hellewell*, 11 DB Rptr 31 (1997); *In re Brownlee*, 10 DB Rptr 89 (1996).

17.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be suspended for a period of one year, with 10 months of the suspension stayed during a two-year term of probation, for violations of DR 1-102(A)(4), DR 2-110(A)(2), and DR 6-101(B). This sanction, including 60 days of imposed suspension, shall be effective immediately upon the Supreme Court's approval of this stipulation.

18.

During the two-year term of probation, the Accused shall comply with the following conditions:

a. The Accused shall comply with all provisions of this stipulation, the disciplinary rules applicable to Oregon lawyers, and the provisions of ORS Chapter 9.

b. At the expiration of the 60 days of imposed suspension, the Accused shall present to Disciplinary Counsel a written opinion from a qualified medical professional acceptable to the Bar that the Accused is fit to practice law and able to adequately perform the duties of a lawyer.

c. At the expiration of the 60 days of imposed suspension, the Accused also shall submit a compliance affidavit and applicable reinstatement fee, and comply with the provisions of BR 8.3 before again commencing the practice of law.

d. Dennis A. Hachler of Pendleton, or such other person acceptable to the Bar, shall supervise the Accused's probation (hereinafter "Supervising Attorney"). The Accused agrees to cooperate with the Supervising Attorney and shall comply with all reasonable requests of the Supervising Attorney and Disciplinary Counsel's Office that are designed to achieve the purpose of the probation and the protection of the Accused's clients, the profession, the legal system, and the public. The Accused acknowledges that the Supervising Attorney is required to provide Disciplinary Counsel with periodic reports concerning the Accused's compliance with his probation and consents to the Supervising Attorney providing such information.

e. At least 14 days prior to the effective date of the imposed suspension, the Accused shall meet with the Supervising Attorney to review the Accused's existing caseload and shall take all appropriate measures to conclude or to refer all cases to other counsel during the period of her suspension if reasonably necessary to protect the clients.

f. After the Accused is reinstated from the term of imposed suspension, the Accused shall diligently and timely tend to her clients' legal matters and communicate with the clients so they are adequately informed about the status of the matters the Accused is handling on their behalves.

g. After the Accused is reinstated from the term of imposed suspension, she shall meet no less than quarterly with the Supervising Attorney for the purpose of reviewing the status of the Accused's law practice and caseload, and the performance of legal services on behalf of clients. The Accused shall respond, while preserving client confidences, to all reasonable requests from the Supervising Attorney for information that will allow the Supervising Attorney to evaluate the Accused's performance of legal services for her clients and her compliance with the terms of this probation.

h. The Accused presently is employed in a public defender law office with support staff and practice management systems maintained by others in the office. In the event the Accused leaves this employment and returns to private practice, she shall, within 30 days, consult with the practice management program at the Professional Liability Fund for advice concerning office management systems in a law office, and shall adopt for her law practice all reasonable recommendations made by the PLF for such systems.

i. No less than quarterly, the Accused shall submit to Disciplinary Counsel a written report, approved as to substance by the Supervising Attorney, advising whether she is in compliance with the terms of her probation. In the event the Accused has not complied with any term of probation, the quarterly report shall describe the noncompliance and the reason for it.

j. The Accused shall bear the financial responsibility for the cost of all professional services required under the terms of this stipulation and the terms of probation.

k. In the event the Accused fails to comply with the conditions of her probation, the Bar may initiate proceedings to revoke the Accused's probation pursuant to BR 6.2(d) and impose the stayed period of suspension. In the event the Accused successfully completes her probation, she shall be reinstated unconditionally after the expiration of the probationary term, without further order of the Disciplinary Board or the Supreme Court.

l. The Accused's reinstatement after the 60 days of imposed suspension shall not become effective until the Accused pays to the Bar its reasonable and necessary costs in the amount of $100, incurred for reporting and transcription of the Accused's deposition and other costs. Should the Accused fail to pay said sum in full by the 60th day of the imposed suspension, the Bar may thereafter, without further notice to the Accused, apply for entry of a judgment against the Accused for the unpaid balance, plus interest thereon at the legal rate to accrue from the date the judgment is signed until paid in full.

19.

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. 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 18th day of November 2004.

/s/ Mary J. Grimes
Mary J. Grimes
OSB No. 88052

EXECUTED this 23rd day of November 2004.

OREGON STATE BAR

By: /s/ Jeffrey D. Sapiro
Jeffrey D. Sapiro
OSB No. 78362
Disciplinary Counsel

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re	)	
	)	
Complaint as to the Conduct of	)	Case No. 04-47
	)	
RONALD D. SCHENCK,	)	
	)	
Accused.	)	

Counsel for the Bar:	Martha M. Hicks
Counsel for the Accused:	None
Disciplinary Board:	None
Disposition:	Violation of DR 7-101(A)(3). Stipulation for Discipline. Public reprimand.
Effective Date of Order:	December 16, 2004

ORDER APPROVING STIPULATION FOR DISCIPLINE

This matter having been heard upon the Stipulation for Discipline entered into by the Accused and the Oregon State Bar, and good cause appearing,

IT IS HEREBY ORDERED that the stipulation between the parties is approved and the Accused is publicly reprimanded for violation of DR 7-101(A)(3).

DATED this 9th day of December 2004.

/s/ Michael R. Levine
Michael R. Levine, Esq.
State Disciplinary Board Chairperson

/s/ Gary L. Hedlund
Gary L. Hedlund, Esq., Region 1
Disciplinary Board Chairperson

STIPULATION FOR DISCIPLINE

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

1.

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

2.

The Accused was admitted by the Oregon Supreme Court to the practice of law in Oregon on May 1, 1979, and has been a member of the Oregon State Bar continuously since that time, having his office and place of business in Wallowa County, Oregon.

3.

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

4.

On May 8, 2004, the State Professional Responsibility Board authorized formal disciplinary proceedings against the Accused for alleged violation of DR 7-101(A)(3) of the Code of Professional Responsibility. The parties intend that this stipulation set forth all relevant facts, violations, and the agreed-upon sanction as a final disposition of this proceeding.

Facts

5.

Prior to May 2003, the Accused undertook to represent Gail Egan in litigation to recover damages for injuries Egan asserted that she sustained when she tripped over a ladder at a car wash. The case was tried in Wallowa County Circuit Court in early May 2003, and resulted in a jury verdict in favor of the defendants.

6.

On May 8, 2003, within days after the Egan trial, an article describing the trial was published in the Wallowa County *Chieftain* newspaper. Also published in the May 8, 2003 edition of the Wallowa County *Chieftain* was the following letter to the editor written and submitted to the newspaper by the Accused:

> "Last week I represented the plaintiff in a personal injury lawsuit in circuit court in Enterprise.
>
> "I apologize to the court and, especially to the jury, for the performance of my client on the witness stand.
>
> "I was surprised, stunned and embarrassed by it.

> "Unfortunately, I could not ethically walk out. In over 40 years of practice, I have never been so embarrassed."

7.

The Accused's comments in his letter to the newspaper cast his client in a negative light and were not required to be made by the Accused under any provision of law or procedure.

Violations

8.

The Accused admits that, by engaging in the conduct described in this stipulation, he violated DR 7-101(A)(3).

Sanction

9.

The Accused and the Bar agree that in fashioning an appropriate sanction in this case, the Disciplinary Board should consider the ABA *Standards for Imposing Lawyer Sanctions* (hereinafter "*Standards*"). The *Standards* require that the Accused's conduct be analyzed by considering the following 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 Violated.* The Accused violated his duty to his client not to take action harmful to her interests. *Standards*, § 4.0.

B. *Mental State.* The Accused acted with intent, i.e., he intended that the letter be published in the local newspaper and was aware that it would cast his client in a negative light. *Standards,* p. 7.

C. *Injury.* The identity of the client to whom the Accused referred in his letter to the editor was obvious from the newspaper article, the Accused's letter published in the same issue of the Wallowa County *Chieftain* and the limited number of civil trials that are heard in Wallowa County. Egan was injured by the Accused's public implication that she had lied in her testimony at trial.

D. *Aggravating Factors.* Aggravating factors include:

1. The Accused has a prior record of disciplinary offenses. He was reprimanded in 1991 for violation of DR 5-105(E) (current client conflict of interest) and reprimanded for violation of DR 7-104(A)(1) (communicating with a represented party) and DR 7-110(B) (ex parte communication with the court) in 1994. *In re Schenck*, 5 DB Rptr 83 (1991); *In re Schenck*, 320 Or 94, 879 P2d 863 (1994); *Standards,* § 9.22(a).

2. The Accused had substantial experience in the practice of law, having been admitted to the Oregon State Bar in 1979 and in another jurisdiction(s) before that. *Standards,*§ 9.22(i).

E. *Mitigating Factors.* Mitigating factors include:

1. The Accused has displayed a cooperative attitude toward the disciplinary proceedings. *Standards,* § 9.32(e).

2. The Accused's prior disciplinary offenses are remote in time. *Standards,* § 9.32(m).

10.

While the *Standards* do not directly address the conduct prohibited by DR 7-101(A)(3), when taken together, several sections suggest that a public reprimand is the appropriate sanction in this case. *See Standards* §§ 4.23, 4.63, 6.33.

11.

Oregon case law is in accord. See *In re Schroeder*, 15 DB Rptr 1 (2001), where the lawyer was reprimanded for violation of DR 7-101(A)(3), DR 4-101(B)(1), and DR 4-101(B)(3) when, after advising one party to a proposed lease, she wrote a letter to the other party in which she challenged the legality of the proposed lease and described the advice she had given to her former client regarding the lease. The lawyer also published her letter to several of her current clients whose interests were generally adverse to those of her former client.

12.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be publicly reprimanded for violation of DR 7-101(A)(3).

13.

This Stipulation for Discipline is subject to review by Disciplinary Counsel of the Oregon State Bar. The sanction provided for herein was authorized by the State Professional Responsibility Board ("SPRB") on July 17, 2004. 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 17th day of September 2004.

/s/ Ronald D. Schenck
Ronald D. Schenck
OSB No. 79130

EXECUTED this 27th day of September 2004.

OREGON STATE BAR

By: /s/ Martha M. Hicks
Martha M. Hicks
OSB No. 75167
Assistant Disciplinary Counsel

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re	)	
	)	
Complaint as to the Conduct of	)	Case No. 04-140
	)	
SONA JEAN JOINER,	)	
	)	
Accused.	)	

Counsel for the Bar:	Linn D. Davis
Counsel for the Accused:	None
Disciplinary Board:	None
Disposition:	Violation of DR 9-101(A). Stipulation for Discipline. Public reprimand.
Effective Date of Order:	December 22, 2004

ORDER APPROVING STIPULATION FOR DISCIPLINE

This matter having been heard upon the Stipulation for Discipline entered into by the Accused and the Oregon State Bar, and good cause appearing,

IT IS HEREBY ORDERED that the stipulation between the parties is approved and the Accused is publicly reprimanded, for violation of DR 9-101(A).

DATED this 22nd day of December 2004.

/s/ Michael R. Levine
Michael R. Levine, Esq.
State Disciplinary Board Chairperson

/s/ Susan G. Bischoff
Susan G. Bischoff, Esq., Region 5
Disciplinary Board Chairperson

STIPULATION FOR DISCIPLINE

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

1.

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

2.

The Accused was admitted by the Oregon Supreme Court to the practice of law in Oregon on January 16, 1984. The Accused began a two-year period of disciplinary suspension on October 31, 1995. The Accused has been an active member of the Oregon State Bar continuously since her BR 8.1 formal reinstatement on May 19, 1998. At the time of the events described herein, the Accused's office and place of business was located in Multnomah County, Oregon.

3.

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

4.

On November 20, 2004, the State Professional Responsibility Board authorized formal disciplinary proceedings against the Accused for alleged violation of DR 9-101(A) of the Code of Professional Responsibility. The parties intend that this stipulation set forth all relevant facts, violations, and the agreed-upon sanction as a final disposition of this proceeding.

Facts

5.

The Accused was retained by Shirley Lamb to represent Lamb's interests after Lamb was suspended from her place of employment. Lamb's interests potentially ranged from reinstatement at the place of employment to the filing of lawsuits seeking money damages against the employer. On October 24, 2002, the Accused and Lamb entered into a written fee agreement which provided that Lamb would pay a $2,000 retainer for the Accused's legal work, that the Accused would receive a one-third contingency fee upon any recovery of money on behalf of Lamb, and that to the extent the Accused received a contingent fee, the retainer would be refunded to Lamb. The fee agreement further provided that the retainer was not refundable in the event that the attorney-client relationship was terminated. The Accused accepted from Lamb a $2,000 check dated October 24, 2002, as a retainer. The Accused deposited the entire retainer directly into the Accused's general business account on or about October 30, 2002.

6.

At the time the Accused deposited the retainer into her general business account, the Accused was not entitled to collect the entire retainer. The Accused erroneously believed that her fee agreement provided that the retainer constituted a nonrefundable flat fee earned upon receipt.

Violations

7.

The Accused admits that, by engaging in the conduct described in this stipulation, she violated DR 9-101(A).

Sanction

8.

The Accused and the Bar agree that in fashioning an appropriate sanction in this case, the Disciplinary Board should consider the ABA *Standards for Imposing Lawyer Sanctions* (hereinafter "*Standards*"). The *Standards* require that the Accused's conduct be analyzed by considering the following 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 Violated.* The Accused violated her duty to properly maintain client property. *Standards,* § 4.1.

B. *Mental State.* The Accused acted negligently, i.e., she negligently believed her written fee agreement provided that the retainer was a nonrefundable fee earned upon receipt.

C. *Injury.* While a potential for injury exists whenever a lawyer mishandles client funds, Lamb suffered little or no actual injury since the Accused was eventually entitled to collect the retainer.

D. *Aggravating Factors.* Aggravating factors include:

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

2. In 1995, the Accused was suspended from the practice of law for two years as a result of criminal conduct that occurred in 1987. *Standards,* § 9.22(a); *In re Joiner,* 9 DB Rptr 209 (1995).

E. *Mitigating Factors.* Mitigating factors include:

1. The Accused has displayed a cooperative attitude toward these proceedings and has made full and free disclosure to Disciplinary Counsel's Office. *Standards,* § 9.32(e).

2. The Accused has expressed remorse for her conduct and has modified her fee agreement. *Standards,* § 9.32(*l*).

3. Although the Accused's prior offense and sanction were quite serious, the prior conduct has no similarity to the present matter and the conduct occurred over 15 years prior to the present offense. *See In re Jones*, 326 Or 195, 200, 951 P2d 149 (1997); *Standards,* § 9.32(m).

9.

The *Standards* suggest that public reprimand is generally appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury. *Standards,*§ 4.13. Where little or no actual or potential injury is caused, an admonition is generally appropriate. *Standards,* § 4.14. Although the misconduct in the present matter, standing alone, might warrant an admonition, the Accused's prior disciplinary history suggests that a public reprimand is more appropriate. Oregon case law is in accord. *In re Hendershott*, 17 DB Rptr 13 (2003) (public reprimand for violation of DR 5-105(E) and DR 9-101(A) where lawyer was previously admonished for violation of DR 5-105(E), but at a remote time); *In re Poling*, 15 DB Rptr 83 (2001) (lawyer reprimanded for violation of DR 9-101(A) and DR 9-101(C)(3) where lawyer was previously reprimanded for violation of DR 2-110(A) and DR 6-101(B)).

10.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be publicly reprimanded for violation of DR 9-101(A).

11.

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

EXECUTED this 13th day of December 2004.

/s/ Sona Jean Joiner
Sona Jean Joiner
OSB No. 84013

EXECUTED this 15th day of December 2004.

OREGON STATE BAR

By: /s/ Linn D. Davis
Linn D. Davis
OSB No. 03222
Assistant Disciplinary Counsel

TABLE OF CASES

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TABLE OF DISCIPLINARY RULES AND STATUTES

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