

# DISCIPLINARY BOARD REPORTER

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VOLUME 24

*January 1, 2010, to December 31, 2010*

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Report of Lawyer Discipline Cases  
Decided by the Disciplinary Board  
and by the  
Oregon Supreme Court  
for 2010



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## **PREFACE**

This Disciplinary Board Reporter (DB Reporter) contains final decisions of the Oregon Disciplinary Board, stipulations for discipline between accused lawyers and the OSB, summaries of 2010 decisions of the Oregon Supreme Court involving the discipline of lawyers, and related matters. Cases in this DB Reporter should be cited as 24 DB Rptr \_\_\_\_ (2010).

In 2010, 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 39 of the OSB 2010 Membership Directory or [www.osbar.org](http://www.osbar.org), click on Rules, Regs & Policies) 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 the Public Records Coordinator at extension 394, 503-620-0222 or 800-452-8260 (toll-free in Oregon). Final decisions of the Disciplinary Board issued on or after January 1, 2011, are also available at the Oregon State Bar Web site, [www.osbar.org](http://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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IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re:	)	
	)	
Complaint as to the Conduct of	)	Case Nos. 08-163 and 08-164
	)	
CATHERINE DIXON,	)	
	)	
Accused.	)	

Counsel for the Bar:	Jeffrey D. Sapiro
Counsel for the Accused:	None
Disciplinary Board:	Bronson D. James, Chair Walter A. Barnes Joan J. Le Barron, Public Member
Disposition:	Violation of RPC 1.5(a), RPC 1.15-1(d), RPC 1.16(d), and RPC 8.1(a)(2). Trial Panel Opinion. Four-year suspension.
Effective Date of Opinion:	January 20, 2010

**OPINION AND ORDER**

**Background**

This case arises in the posture of a procedural default. The Accused, Catherine Dixon, was admitted to the Oregon State Bar (hereinafter “the Bar”) in 1990. On February 4, 2009, the Bar filed a complaint against the Accused in this matter. The answer to that complaint was due March 17, 2009. The Accused did not file an answer or make an appearance. On May 1, 2009, at the request of the Bar, the Region Six Disciplinary Chair issued an order of default. Pursuant to the Order, the facts as alleged in the complaint are deemed proven. *In re Kluge*, 332 Or 251, 253, 27 P3d 102 (2001). Because the trial panel is not in complete agreement with the Bar as to what facts are deemed proved, nor what constitutes a question of fact as opposed to a question of law, the following are the facts the trial panel deems proved.

### **Factual Findings**

The Accused was an attorney lawfully practicing within the state and a member of the Bar. The accusations that form the basis of this case arise from two separate client representations.

#### **The Arredondo Appeal**

On or about May 2006, Juan Arredondo (hereinafter “Arredondo”) was convicted of a criminal offense in Marion County Circuit Court, Circuit Court No. 06C40323. The trial court imposed a sentence of incarceration. The trial panel takes notice of the public records contained in the Oregon Judiciary’s Appellate Case Management system (ACMS) and finds that Arredondo was deemed indigent and the Office of Public Defense Services (OPDS) was appointed to handle his appeal.

On or about June 20, 2006, Arredondo’s daughter, Martha Arredondo, (hereinafter “daughter”), contacted the Accused to represent her father in the appeal of his criminal conviction. The Accused drafted, and daughter signed, a retainer agreement in which daughter agreed to pay the Accused \$3500.00 as a “flat fee earned on receipt” for “Court of Appeal [*sic*] Brief and argument.” The agreement specified that \$1,500.00 toward the \$3,500.00 was due on the date of signing, June 20, 2006, and the trial panel finds that \$1,500.00 was paid on that date. A second payment of \$1,000.00 was due on August 1, 2006, and a third and final payment of \$1,000.00 was due on September 15, 2006. The panel find those payments were also made.

The retainer agreement further specified that a deposit of \$1,500.00 was due on June 30, 2006, for “transcript and filing fee[s].” The trial panel finds that \$1,500.00 was paid on that date. The agreement specified that the balance of that deposit was refundable. Although the retainer agreement nowhere mentions Juan Arredondo, nor a case number from which the appeal would be filed, we find the retainer agreement was made for the purpose of representing Juan Arredondo on appeal from Marion County Circuit Court Case No. 06C40323. Again taking notice of the records in ACMS, the panel finds that OPDS filed a motion to withdraw from the appeal on or about August 28, 2009.

Between June 20, 2006, and October 2007, the daughter repeatedly attempted to contact the Accused to obtain a status on the appeal. The Accused did not respond. The Accused also did not communicate with Arredondo.

In October 2007, the Accused filed a brief in the Court of Appeals on behalf of Juan Arredondo, in Case No. A132673. The Accused asserts that she sent a copy of the brief to Arredondo. No documentation exists establishing that the brief was, or was not, sent. Arredondo, who was incarcerated at the time, did not receive a copy of the brief.

On April 15, 2008, the Accused was suspended from membership in the Oregon State Bar for failure to pay Professional Liability Fund (PLF) dues. She did not seek reinstatement. On or about that time, the Accused closed her law practice, and disconnected her phone and e-mail. The Accused did not inform Arredondo that she was suspended, that she had closed her practice, or provide him a new and valid contact number.

In May 2008, the Attorney General filed its respondent's brief in A132673. Service of the brief to the Accused was returned as undeliverable. Appellate Commissioner James Nass obtained a new address for the Accused from the Bar, and wrote to her informing her of the respondent's filing and inquiring as to whether the Accused had arranged for substitute counsel. The Accused did not respond.

On June 4, 2008, the Bar wrote to the Accused and asked her to either seek reinstatement or arrange for new counsel. On July 24, 2008, a second letter was sent. The Accused did not arrange for new counsel or withdraw as attorney of record.

On or about July 2008 OPDS substituted as counsel of record in A132673, and resolved the appeal. Again, taking notice of records in ACMS, the panel finds that substitute or amended briefing was not filed, and OPDS submitted the case on the briefs; no oral argument was scheduled.

The Accused did not refund any portion of the \$3,500.00 retainer. The transcript and fee costs incurred by the Accused totaled approximately \$450.00. The Accused did not refund any portion of the \$1,500.00 cost deposit.

#### The Starrett Matter

On or about February 2006, the Accused was appointed to represent Justin Starett (hereinafter "Starett") in a criminal matter in Marion County Circuit Court, Case No. 06C40594. On or about September 2006, a jury convicted Starett on all counts alleged, and the trial court imposed an incarceration sentence.

Through other counsel, Starrett appealed his conviction. Between September 2006 and April 2008, both Starett and his appellate attorney made repeated attempts to communicate with the Accused, specifically to request that she turn over file materials to the appellate attorney. The Accused did not respond to any of those communications.

On September 24, 2007, Starrett filed a pro se motion with the Marion County Circuit Court seeking an order directing the Accused to turn over the file. The Circuit Court issued an order, directing the Accused to "timely" turn over "any and all of the defendant's client file." The Accused did not turn over any materials.

On August 18, 2008, following a complaint by Starrett, the Bar wrote to the Accused seeking a response. Receiving no answer, the Bar wrote to the Accused on September 19, 2008, and October 24, 2008. Those letters were also unanswered.

### **Legal Conclusions**

#### **The Arredondo Appeal**

Arising from the Accused's conduct in the Arredondo appeal, the Bar alleges three violations: RPC 1.4(a), RPC 1.5(a), and RPC 1.16(d).

#### **RPC 1.4(a)**

RPC 1.4(a) provides: "A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information."

The Bar asserts that the Accused violated RPC 1.4(a) in three respects, all of which the trial panel rejects. First, the Bar asserts that the Accused violated RPC 1.4(a) in failing to respond to communications from daughter. The trial panel rejects that argument on the basis that Arredondo, not daughter, was the Accused's client. RPC 1.4(a) imposes an ethical obligation on an attorney to reasonably communicate with clients, not others. The fact that the fee for representation was paid by daughter does not alter the analysis. The Accused's attorney-client relationship existed between herself and Arredondo. As such, the Accused did not violate RPC 1.4(a) based on her conduct toward daughter.

Second, the Bar asserts that the Accused violated RPC 1.4(a) in failing to provide Arredondo with a copy of the brief. The panel finds that the Bar has failed to prove, by clear and convincing evidence, that the Accused did not mail Arredondo the brief. The facts deemed proved establish that the Accused asserts that the brief was mailed. The Bar has offered no evidence that the brief was in fact not mailed, or that the Accused is untruthful in this assertion. The Bar points out that no documentary evidence exists corroborating the assertion by the Accused that the brief was mailed. However, the Accused does not bear the burden of persuasion in this case.

Third, the Bar asserts that the Accused never communicated with Arredondo from the time of accepting the case through the filing of the brief.

RPC 1.4(a) imposes two requirements. Under the first, an attorney is to "keep a client reasonably informed about the status of a matter." By the plain text of the rule, what is "reasonable" is determined only in context of the matter. While some matters may move quickly, demanding frequent and repeated updates, other may move more slowly. This case arises in the context of an appeal, a notoriously slow process often involving years. Likewise, it arises in the context of a proceeding wherein the facts are fixed. No new evidence is introduced in such an appeal, no new investigation is



undertaken, and new arguments different from those raised on the record at trial are strongly disfavored. Finally, the “status” of an appeal varies little. There are rarely interim hearings, and the Bar has offered no evidence that any such hearings were scheduled in this case.

To the extent that the Bar asserts that the Accused violated RPC 1.4(a) in failing to consult Arredondo about the contents of the brief before filing, the panel rejects that claim.

The United State Supreme Court has noted (in the context of indigent representation) that the selection of issues to be raised on appeal is a tactical choice properly in the realm of the appellate attorney:

The accused has the ultimate authority to make certain fundamental decisions regarding his case, including the decision whether to take an appeal; and, with some limitations, he may elect to act as his own advocate. However, an indigent defendant has no constitutional right to compel appointed counsel to press nonfrivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points. \* \* \* Experienced advocates have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues. Selecting the most promising issues for review has assumed a greater importance \* \* \*.

*Jones v. Barnes*, 463 US 745, 745–746 (1983).

Likewise, the Oregon Supreme Court has stated:

Courts depend on counsel to examine the record, study the applicable law, and analyze the potentially meritorious claims that should be advanced on appeal. The exercise of professional skill and judgment often requires a lawyer to pick and choose among arguments or theories, and a death penalty appeal is no exception to that requirement. See *Smith v. Robbins*, 528 U.S. 259, 288, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000) (appellate counsel “need not (and should not) raise every nonfrivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal”). Effective appellate advocacy requires counsel to make those choices.

*Pratt v. Armenakis*, 335 Or 35, 40, 56 P3d 920 (2002).

While the panel rejects the claim that RPC 1.4(a) creates an obligation to initiate communication with a client about the contents of an appellate brief, the panel does not dispute that appellate counsel has the obligation to communicate with a client about issues to be included in a brief that have been requested by a client. However, that proposition implicates the second aspect of RPC 1.4(a), namely that counsel “promptly comply with reasonable requests for information.” In this case, however, while the Bar presented evidence that daughter sought information from the

Accused, the Bar presented no evidence that Arredondo ever sought to communicate with the Accused. Absent some evidence to that effect, the panel cannot conclude by clear and convincing evidence that Arredondo wanted, or sought, input on the contents of the brief, or that the Accused failed to respond such a request.

Finally, the panel does find that the Accused failed to communicate with Arredondo on the matter of closing her practice; however, that is covered under RPC 1.16(a) below.

RPC 1.5(a)

In its second allegation, the Bar claims that the Accused violated RPC 1.5(a), which provides: “A lawyer shall not enter into an agreement for, charge or collect and illegal or clearly excessive fee or a clearly excessive amount for expenses.”

The Bar asserts that the express terms of the flat-fee retainer agreement specified “Court of Appeal brief and argument,” and by virtue of not orally arguing the appeal, the fee of \$3,500.00 is necessarily excessive. Although the Bar’s reasoning has a certain pull, for the reasons below, the trial panel rejects it.

First, the agreement did not specify *oral* argument. The panel specifically declines to find that the Accused ever expressly stated that she would request oral argument on this appeal. Had the agreement been so precise, we would agree that the Accused would have had an obligation to perform the services specified, or else collect an excessive fee. *In re Gastineau*, 317 Or 545, 551, 857 P2d 136 (1993). But here, the service the Accused agreed to perform was “argument” with no specific reference to the manner in which she would argue. We are left then to interpret that more vague term.

In its plain and ordinary meaning, *argument* means “[a] reason given for or against a matter under discussion; a statement made or a fact presented in support or in opposition to a proposal or opinion.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 117 (unabridged ed 2002).

In the context of a legal case, the generic term *argument* can refer to any number of methods of persuasion. To be sure, argument can mean oral argument. But it can also refer to written arguments in briefs and memoranda, motions, memos, and other documents. In this case, then, for the Bar to prevail, it must establish by clear and convincing evidence that in an appeal such as Arredondo’s, a reasonable appellate lawyer would necessarily utilize oral argument to complete the more general contracted obligation of “argument.” Only then can the panel say that “a lawyer of ordinary prudence would be left with a definite and firm conviction” that a failure to orally argue the case rendered the flat fee clearly excessive.

To this end, the Bar has presented no evidence as to the complexity of the appeal or the issues raised in the brief from which the panel might infer that a reasonable attorney would find it necessary to docket the case for oral argument. No opinion evidence of other appellate attorneys has been presented, either with regards to this decision, or the general standard for setting cases for argument. With no other facts before the panel, we cannot find by clear and convincing evidence that a failure to orally argue the case was a clearly excessive fee when the fee agreement specified only “argument” in general.

In the second part of its RPC 1.5 claim, the Bar asserts that the Accused collected an excessive cost when she failed to return the balance of the \$1,500.00. The panel agrees, and finds a violation of RPC 1.5 by clear and convincing evidence with respect to the Accused’s failure to remit the balance of the unused costs.

RPC 1.16(a)

The Bar alleges that the accused violated RPC 1.16(a) when she failed to communicate to Arredondo concerning the closing of her practice, and when she failed to take steps to protect the client’s interests. The panel agrees. It is undisputed that the Accused never notified Arredondo of her suspension, the closing of her practice, nor a new contact number. She did not respond to court inquiries, and failed to withdraw from the case. We find the violation intentional, and an act which put her client in considerable jeopardy.

The Starrett Matter

Arising from the Accused’s conduct in the Starrett matter, the Bar alleges two violations: RPC 1.15-1(d) and RPC 8.1(a)(2).

The panel finds that the Bar has proven both violations by clear and convincing evidence. The Accused had possession of Starrett’s trial court file, property to which Starrett had a right. *In re Arbuckle*, 308 Or 135, 775 P2d 832 (1989). The facts proved clearly show that the Accused ignored repeated requests over 19 months to obtain that file. From those repeated requests, coupled with the Circuit Court order to which the Accused did not respond, the panel finds this violation intentional.

Likewise, the evidence clearly establishes that the Accused failed to respond to repeated requests by the Bar for information. This, too, the panel finds to be intentional.

**Aggravation and Mitigation**

The intent of sanctions are to “protect the public and the administration of justice from lawyers who have not discharged, will not discharge, or are unlikely to

discharge their professional duties to clients, the public, the legal system, and the legal profession.” *Standards*, § 1.1; *In re Stauffer*, 327 Or 44, 66, 956 P2d 967 (1998).

In determining the sanction in this case, the panel finds several aggravating factors. First, the Accused has a substantial past disciplinary history—no less than six previous incidents. *Standards*, § 9.22(a). These cases concern multiple offenses. *Standards*, § 9.22(d). Taken together, we find a pattern of misconduct. *Standards*, § 9.22(c). Finally, we note that these incidents each arose in representation of incarcerated individuals. There can be no more momentous litigation than that over a liberty interest, and the incarcerated client is a particularly vulnerable one. *Standards*, § 9.22(h).

The Accused has presented no mitigating evidence.

In sum, the panel is deeply troubled by the repeated and chronic violations by the Accused. She demonstrates a patent disregard of the needs of clients, coupled with an inexplicable refusal to address those deficiencies when called upon by the court and the Bar, and topped off by a complete failure to comply with the investigatory process. This panel debated, at great length, whether to impose the ultimate sanction of disbarment. In the end, the panel elected to stop short of disbarment and afford the Accused the opportunity to rehabilitate her career in the future.

### **ORDER**

For the foregoing reasons, IT IS HEREBY ORDERED that the Accused, Catherine Dixon, be suspended from the practice of law in the State of Oregon for a period of four (4) years, to commence immediately.

It is also the recommendation of this panel that should the Accused ever seek reinstatement, the reinstatement board require the Accused pass a legal ethics course as a precondition.

DATED: November 17, 2009

/s/ Bronson D. James

Bronson D. James

OSB No. 03349

Panel Chair

/s/ Walter A. Barnes

Walter A. Barnes

OSB No. 690119

Panel Member

/s/ Joan LeBarron

Joan LeBarron

Public Member

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
 )  
Complaint as to the Conduct of ) Case No. 09-142  
 )  
ANN B. WITTE, )  
 )  
Accused. )

Counsel for the Bar: Amber Bevacqua-Lynott  
Counsel for the Accused: None  
Disciplinary Board: None  
Disposition: Violation of RPC 1.3, RPC 1.4(a), RPC 1.16(a),  
and RPC 1.16(d). Stipulation for Discipline. Public  
reprimand.  
Effective Date of Order: January 11, 2010

**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 violations of RPC 1.3, RPC 1.4(a), RPC 1.16(a), and RPC 1.16(d).

DATED this 11th day of January 2010.

/s/ Gilbert B. Feibleman  
Gilbert B. Feibleman  
State Disciplinary Board Chairperson

/s/ William B. Crow  
William B. Crow, Region 5  
Disciplinary Board Chairperson

## **STIPULATION FOR DISCIPLINE**

Ann B. Witte, attorney at law (hereinafter “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 21, 1977, and has been a member of the Oregon State Bar continuously since that time, having her office and place of business in Multnomah County, Oregon.

3.

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

4.

On November 21, 2009, the State Professional Responsibility Board (hereinafter “SPRB”) authorized formal disciplinary proceedings against the Accused for alleged violations of RPC 1.3 (neglect of a legal matter); RPC 1.4(a) (duty to keep a client reasonably informed of the status of a case); RPC 1.16(a) (duty to withdraw when a lawyer’s mental condition materially impairs the lawyer’s ability to represent a client); and RPC 1.16(d) (duty to take steps upon withdrawal to protect a client’s interests), of the Oregon Rules of Professional Conduct. 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 October 2008, Shaun Croxford (hereinafter “Croxford”) hired the Accused to appeal a denial of his unemployment claim. The Accused prevailed at hearing on Croxford’s behalf and he was able to obtain benefits. In October 2008, the State claimed that Croxford had benefited from an overpayment, so his present

benefits were halted. Croxford again hired the Accused to dispute the cessation of unemployment benefits.

6.

An initial telephone hearing was set for November 4, 2008. The notice of hearing was sent to Croxford as his home address, with a copy to the Accused at an incorrect address. Upon his receipt of the notice, Croxford informed the Accused of the hearing date. The November 4, 2008, hearing date was subsequently rescheduled by the Accused because she was not available at that date and time, and because she required additional records from Croxford's employer, which she had requested but not received.

7.

A second telephone hearing date was set for November 20, 2008. The notice of hearing was sent to Croxford at his home address, with a copy to the Accused at an incorrect address. Upon his receipt of the notice, Croxford informed the Accused of the hearing date. On November 20, 2008, as the telephone hearing was set to begin, the Accused again requested a postponement to complete discovery. Croxford was frustrated because he had driven over an hour to get to the Accused's office without notice of the need to postpone, but ultimately joined the Accused's request to reset the hearing. Croxford and the Accused were told at that time that they would again be notified by mail of the new hearing date. After the appearance, the Accused discussed with Croxford her belief that the overpayment order would ultimately be sustained.

8.

A third telephone hearing date was set for December 15, 2008. The notice of hearing was sent to Croxford in care of the Accused's correct address with a copy to the Accused at the same address. The Accused received this notice, but did not recognize that Croxford's copy had also been sent to her. Croxford did not receive advance notice of the December 15, 2008, hearing and the Accused did not contact him to advise him of the date or prepare him for the December hearing.

9.

Having no notice, Croxford did not appear at the Accused's office in person or by telephone for the December 15, 2008, hearing. When Croxford did not appear, the Accused thought he had probably either been delayed by inclement weather or downed phone lines, or he had simply given up based on her prior discussion with him about the likely merits of his claim. The Accused did not attempt to contact Croxford at the time of the hearing or thereafter, nor did she initiate the hearing call and appear on Croxford's behalf. When neither Croxford nor the Accused appeared



for the December 15, 2008, hearing, the hearings officer dismissed and closed the case. The Accused decided not to do anything further on Croxford's matter, and did not notify him or the State of this fact or return Croxford's file materials to him.

10.

In early December 2008, the Accused recognized that she was not well and was subsequently diagnosed and treated for clinical depression.

11.

In early January 2009, Croxford called the unemployment office to inquire about the delay in resetting the hearing in his matter, and learned that the case had been dismissed and closed due to his failure to appear at the December hearing. Croxford immediately called the Accused to ask her if she had received notice of the December hearing. The Accused told Croxford that she had gotten the notice and apologized for not contacting him. The Accused informed Croxford that he had 20 days to appeal the decision. The Accused told Croxford that she did not believe that an appeal would be successful. The Accused decided that she was not willing to pursue the appeal for Croxford, but did not tell him this or return file materials to him so he could pursue the appeal on his own. Croxford formed the belief that the Accused would handle his appeal.

12.

A few weeks later, Croxford telephoned the unemployment office to check on the status of his paperwork and was told that no forms had been filed, nor had the office received any requests related to his claim.

13.

Croxford again contacted the Accused and, then recognizing that she was not going to handle the appeal, demanded his file materials. The Accused immediately sent Croxford's file materials to him. Croxford tried on his own to get the matter reopened, but time had expired and the State refused his requests.

### **Violations**

14.

The Accused admits that her failure to recognize that the notice for the December hearing had not been sent directly to Croxford, her failure to consult with Croxford prior to the hearing date, her failure to make any effort after the December hearing to determine why Croxford had failed to appear, and her failure to take any subsequent action on Croxford's behalf after the December hearing, including

notifying Croxford or the State that she no longer represented Croxford in his claim, violated RPC 1.3 and RPC 1.4(a).

The Accused further admits that this same conduct, along with the Accused's failure to return Croxford's documents when she determined that she would no longer represent him, violated RPC 1.16(d).

Finally, the Accused admits that her failure to withdraw from representing Croxford during a time when she recognized that her personal problems were inhibiting her ability to communicate and effectively represent him violated RPC 1.16(a).

### Sanction

#### 15.

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 client. *Standards*, § 4.4. The *Standards* presume that the most important ethical duties are those obligations which a lawyer owes to clients, including diligence. *Standards*, at 5. The Accused also violated her duty as a professional to properly withdraw from Croxford's matter. *Standards*, § 7.0
- b. **Mental state.** The Accused acted negligently in failing to recognize that Croxford had not received notice of the December 15, 2008, hearing date, and in failing to communicate with him about this appearance. 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*, at 9.

The Accused was also negligent in failing to timely and properly notify Croxford and the State of her withdrawal and return Croxford's file documents to him.

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

It is difficult to assess the extent of actual injury to Croxford because his case had limited chance of success, even if pursued appropriately. However, the Supreme Court has held that there is actual injury to a client where an attorney fails to actively pursue the client's case. *See, e.g., In re Parker*, 330 Or 541, 547, 9 P3d 107 (2000). In addition, the Accused's failure to communicate caused actual injury in the form of client anxiety and frustration. *See In re Cohen*, 330 Or 489, 496, 8 P3d 953 (2000) (client anxiety and frustration as a result of the attorney neglect can constitute actual injury under the *Standards*); *In re Schaffner II*, 325 Or 421, 426–427, 939 P2d 39 (1997); *In re Arbuckle*, 308 Or 135, 140, 775 P2d 832 (1989).

- d. **Aggravating circumstances.** Aggravating circumstances include:
  - 1. The Accused was previously reprimanded for neglect of a legal matter in 2001. *In re Witte*, 15 DB Rptr 67 (2001). *Standards*, § 9.22(a).
  - 2. The Accused has substantial experience in the practice of law, having been admitted to the Bar in 1977. *Standards*, § 9.22(i).
- e. **Mitigating circumstances.** Mitigating circumstances include:
  - 1. The Accused did not act with a dishonest or selfish motive. *Standards*, § 9.32(b).
  - 2. The Accused was experiencing personal or emotional problems at the time of her conduct in this matter. *Standards*, § 9.32(c). In particular, she was undergoing a family crisis and experiencing depression that required therapy. Both of these problems reportedly inhibited her ability to effectively communicate with clients, including Croxford.
  - 3. The Accused has fully and freely cooperated with the Bar in its investigation of her conduct. *Standards*, § 9.32(e).
  - 4. The Accused has acknowledged and expressed remorse for her misconduct. *Standards*, § 9.32(l).

16.

Under the *Standards*, 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. *Standards*, § 4.43. Similarly, a reprimand is generally appropriate when a lawyer negligently engages in conduct that is a

violation of a duty owed as a professional and causes injury or potential injury to a client. *Standards*, § 7.3.

17.

Oregon cases also hold that a reprimand is appropriate. *See, e.g., In re Bottoms*, 23 DB Rptr 13 (2009) (reprimand for violations of RPC 1.4(a), RPC 1.4(b), and RPC 1.16(a)(2)); *In re Rose*, 20 DB Rptr 237 (2006) (reprimand for violation of DR 6-101(B) (*current* RPC 1.3), RPC 1.3, RPC 1.16(d)); *In re Koch*, 18 DB Rptr 92 (2004) (reprimand for violation of DR 2-110(A) and (B) (*current* RPC 1.16), DR 6-101(B), DR 9-101(C)(4)); *In re Russell*, 18 DB Rptr 98 (2004) (reprimand for violation of DR 6-101(B)); *In re Cohen*, 330 Or 489, 8 P3d 953 (2000) (reprimand for violation of DR 6-101(B) when lawyer had prior record of neglect and significant mitigating factors present).

18.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be publicly reprimanded for her violations of RPC 1.3, RPC 1.4(a), RPC 1.16(a), and RPC 1.16(d), the sanction to be effective upon approval by the Disciplinary Board.

19.

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 7th day of January 2010.

/s/ Ann B. Witte

Ann B. Witte

OSB No. 770776

EXECUTED this 8th day of January 2010.

OREGON STATE BAR

By: /s/ Amber Bevacqua-Lynott

Amber Bevacqua-Lynott

OSB No. 990280

Assistant Disciplinary Counsel

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re:	)	
	)	
Complaint as to the Conduct of	)	Case Nos. 09-95 and 09-96
	)	
WILLIAM E. CARL,	)	SC S058149
	)	
Accused.	)	

Counsel for the Bar:	Susan Roedl Cournoyer
Counsel for the Accused:	Walter J. Todd
Disciplinary Board:	None
Disposition:	Violation of RPC 8.4(a)(2) and ORS 9.527(2). Stipulation for Discipline. One-year suspension, all but 30 days stayed, three-year probation.
Effective Date of Order:	January 28, 2010

**ORDER ACCEPTING STIUPLATION FOR DISCIPLINE**

Upon consideration by the court.

The court accepts the Stipulation for Discipline. The Accused is suspended from the practice of law in the State of Oregon for a period of one year, effective one week from the date of this order, all but 30 days of which will be stayed pending completion of a three-year probation.

January 21, 2010  
DATE

/s/ Paul J. De Muniz  
CHIEF JUSTICE

**STIPULATION FOR DISCIPLINE**

William E. Carl, attorney at law (hereinafter “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 March 30, 2002, 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, 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.

On September 18, 2009, the State Professional Responsibility Board (hereinafter “SPRB”) authorized formal disciplinary proceedings against the Accused for alleged violations of ORS 9.527(2) and RPC 8.4(a)(2) of the Oregon Rules of Professional Conduct. 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 January 2, 2009, the Accused knowingly possessed 2.72 ounces of marijuana in his home, where he lived with his wife and their two young children. The Accused was aware that his wife sometimes sold marijuana to others from their home. The Accused and his wife used money from her marijuana sales to purchase more marijuana for their use.

6.

On May 12, 2009, the Accused pled guilty to and was convicted of one charge of knowingly or intentionally possessing one ounce or more of marijuana, a Class B felony. ORS 475.864(2). The Accused also entered guilty pleas to and was convicted of two charges of endangering the welfare of a minor, a Class A misdemeanor. ORS 163.575(2).

## Violations

7.

The Accused admits that, by engaging in the conduct described in paragraphs 5 and 6, he committed criminal acts that reflect adversely upon his honesty, trustworthiness, or fitness to practice law in other respects and was convicted of a felony, in violation of RPC 8.4(a)(2) and ORS 9.527(2).

## Sanction

8.

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.** By committing criminal acts, the Accused breached his duty to the public to maintain his personal integrity. *Standards*, § 5.1.
- b. **Mental state.** The Accused acted intentionally, or with a conscious objective or purpose to accomplish a particular result when he possessed more than one ounce of marijuana. With respect to endangering the welfare of his children, the Accused acted with knowledge or the conscious awareness of the nature of his conduct, but without a conscious objective or purpose to accomplish a particular result. *Standards*, at 7.
- c. **Injury.** The Accused’s criminal acts caused harm to the legal profession in that his conviction reflects poorly upon attorneys and exposed his young sons to potential harm.
- d. **Aggravating circumstances.** Aggravating circumstances include:
  1. A pattern of misconduct. *Standards*, § 9.22(c);
  2. Vulnerability of victims. *Standards*, § 9.22(h); and
  3. Substantial experience in the practice of law. The Accused has seven years of experience as a criminal defense attorney in Marion and Polk Counties. *Standards*, § 9.22(i).
- e. **Mitigating circumstances.** Mitigating circumstances include:
  1. Absence of a prior disciplinary record. *Standards*, § 9.32(a).

2. Timely good faith effort to rectify the consequences of misconduct. The Accused promptly notified the Marion County and Salem Municipal courts of his arrest and voluntarily removed his name from the Marion County Association of Defenders and the Salem Municipal Court appointments lists. The Accused found new attorneys to take his pending appointed cases and explained the circumstances to his clients in order to ensure an orderly transfer of responsibilities. *Standards*, § 9.32(d);
3. Good character and reputation. Several members of the Marion and Polk County legal communities have submitted letters describing the Accused's good reputation for preparedness and excellent advocacy for his clients. Three nonlawyer members of the Accused's community have submitted letters describing the Accused's good reputation as a neighbor, community volunteer, and former adjunct professor. *Standards*, § 9.32(g);
4. Imposition of other penalties. The Accused served seven days in jail, has completed 80 hours of community service, and is currently serving an 18-month probation supervised by Polk County Community Corrections. *Standards*, § 9.32(k); and
5. Remorse. The Accused has demonstrated remorse for his conduct. *Standards*, § 9.32(l).

9.

Under the *Standards*, a suspension is generally appropriate when a lawyer knowingly engages in criminal conduct that seriously adversely reflects on his fitness to practice law. *Standards*, § 5.12. 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 the Accused achieved sobriety in January 2009 and has to date abstained from using alcohol, marijuana, and other illegal substances. In addition, the Accused completed a parenting program in April 2009; completed and was discharged from a nine-month outpatient drug addiction program in September 2009; currently attends regular meetings of Narcotics Anonymous; and currently cooperates with the State Lawyers Assistance Committee. Probation is intended to assist the Accused in maintaining his sobriety and continued compliance with the laws of this state.



10.

Oregon cases involving drug convictions or illegal drug-related activity have resulted in sanctions of suspensions, public reprimands, or probations.

(a) *In re Allen*, 326 Or 107, 949 P2d 710 (1997), resulted in a one-year suspension for violations of ORS 9.527(1) and DR 1-102(A)(2) (the predecessor rule to RPC 8.4(a)(2)). Allen provided money to a friend to purchase heroin for the friend's use. The friend died of a heroin overdose. Allen was convicted of attempted possession of a controlled substance, a Class C felony, which was reduced to a misdemeanor pursuant to ORS 161.705(1). Allen's misconduct was an isolated act and was not motivated by dishonesty or self-interest. Allen had no prior discipline.

(b) *In re Gudger*, 11 DB Rptr 171, SC No. S43561 (1997), resulted in a seven-month suspension for violation of DR 1-102(A)(2) (the predecessor rule to RPC 8.4(a)(2)). Gudger admitted that he had used cocaine over an extended period of time, which adversely affected his judgment in personal and professional matters and the quality of representation to his clients. Gudger had a prior history of disciplinary violations.

(c) *In re Howlett*, 18 DB Rptr 61, SC No. S051261 (2004), resulted in a six-month suspension, all of which was stayed pending a two-year probation, for violation of DR 1-102(A)(2) (the predecessor rule to RPC 8.4(a)(2)). Although he was never criminally charged, Howlett admitted that he had possessed and used methamphetamines, which constituted a Class C felony.

11.

Consistent with the *Standards* and Oregon case law, the parties have agreed that the Accused shall be suspended from the practice of law for a period of one year, all but 30 days of which will be stayed pending successful completion of a three-year probation. This sanction shall be effective December 19, 2009, or as soon thereafter as possible upon approval by the Oregon Supreme Court.

12.

During the term of the three-year probation, the Accused shall comply with the following conditions.

- a. The Accused shall comply with all provisions of this stipulation, the Rules of Professional Conduct, and ORS chapter 9.
- b. The Accused shall maintain sobriety and shall abstain from using alcohol, marijuana, or any controlled substances not prescribed by a physician.

- c. The Accused shall continue to submit to monitoring by and to comply with all recommendations of the State Lawyers Assistance Committee.
- d. Elmer Dickens, or such other person acceptable to the Bar, shall supervise the Accused's probation (hereinafter "Supervising Attorney"). The Accused agrees to meet with the Supervising Attorney in person one time each month, unless the Supervising Attorney determines that less frequent in-person meetings are appropriate, in which case the Supervising Attorney shall notify the Bar's Office of Disciplinary Counsel (hereafter "Disciplinary Counsel") of this determination. The Accused further agrees to comply with all reasonable requests of the Supervising Attorney that are designed to achieve the purpose of the probation and protection of the Accused's clients, the profession, the legal system, and the public.
- e. The Accused shall attend at least one meeting each week of Narcotics Anonymous (or an equivalent group approved by the Supervising Attorney) or more frequently if recommended by the Supervising Attorney.
- f. The Accused shall submit to random urinalysis screenings for controlled substances at his own expense and at the discretion of Disciplinary Counsel.
- g. The Accused 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 is it alleged that the Accused has possessed or consumed alcohol, marijuana, or other controlled substance not prescribed by a physician.
- h. The Accused shall continue to comply with his criminal probation currently under supervision by Polk County Community Corrections until he has completed that probation.
- i. The Accused shall make regular quarterly written reports to Disciplinary Counsel certifying that he is in compliance with the terms of this disciplinary probation or describing and explaining any noncompliance.
- j. The Accused acknowledges that the Supervising Attorney will also make regular quarterly written reports to Disciplinary Counsel regarding the Accused's compliance or noncompliance with these terms. The Accused further acknowledges that the Supervising Attorney is required immediately to report to Disciplinary Counsel any noncompliance by

the Accused with the terms of this probation. The Accused 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 the Accused's compliance or noncompliance with these probation terms.

13.

If the Accused fails to comply with any term of the probation described in paragraph 12 above, Disciplinary Counsel may petition the Oregon Supreme Court to revoke the probation in accordance with the procedure set forth in Bar Rule of Procedure 6.2(d), which will result in the imposition of the remaining 335 days of the stayed suspension.

14.

The Accused agrees and acknowledges that, in the event the probation is revoked and the remaining 335 days of the stayed suspension are imposed, the Accused will be required to apply for reinstatement after that suspension under BR 8.1.

15.

The Accused acknowledges that he has certain duties and responsibilities under the Rules of Professional Conduct and BR 6.3 to immediately take all reasonable steps to avoid foreseeable prejudice to his clients during the imposed term of his suspension. In this regard, the Accused has arranged for Chris Bocci, an active member of the Oregon State Bar and the Accused's employer, to have ongoing access to the Accused's client files and serve as the contact person for clients in need of the files during the term of the Accused's suspension. The Accused represents that Mr. Bocci has agreed to accept this responsibility.

16.

The Accused acknowledges that reinstatement is not automatic on expiration of the 30-day imposed suspension, and that he is required to comply with Rule 8.3 of the Bar Rules of Procedure in order to be reinstated. The Accused also acknowledges that he cannot hold himself out as an active member of the Bar or provide legal services or advice until he is notified that his license to practice has been reinstated.

17.

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

Cite as *In re Carl*, 24 DB Rptr 17 (2010)

parties agree the stipulation is to be submitted to the Supreme Court for consideration pursuant to the terms of BR 3.6.

EXECUTED this 3rd day of December 2009.

/s/ William E. Carl

William E. Carl

OSB No. 022679

EXECUTED this 3rd day of December 2009.

OREGON STATE BAR

By: /s/ Susan Roedl Cournoyer

Susan Roedl Cournoyer

OSB No. 86338

Assistant Disciplinary Counsel

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
)  
Complaint as to the Conduct of ) Case No. 09-121  
)  
KAREN MISFELDT, )  
)  
Accused. )

Counsel for the Bar: Mary A. Cooper  
Counsel for the Accused: Roy Pulvers  
Disciplinary Board: None  
Disposition: Violations of RPC 1.1, RPC 1.4(a), RPC 1.4(b),  
and RPC 1.7(a). Stipulation for Discipline. Public  
reprimand.  
Effective Date of Order: February 3, 2010

**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 violations of RPC 1.1, RPC 1.4(a) and (b), and RPC 1.7(a).

DATED this 3rd day of February 2010.

/s/ Gilbert B. Feibleman  
Gilbert B. Feibleman  
State Disciplinary Board Chairperson

/s/ R. Paul Frasier  
R. Paul Frasier, Region 3  
Disciplinary Board Chairperson

### **STIPULATION FOR DISCIPLINE**

Karen Misfeldt, attorney at law (hereinafter “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, having her office and place of business in Benton 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.

On November 21, 2009, the State Professional Responsibility Board (hereinafter “SPRB”) authorized formal disciplinary proceedings against the Accused for alleged violations of RPC 1.1, RPC 1.4(a) and (b), and RPC 1.7(a) of the Oregon Rules of Professional Conduct. 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 April 11, 2007, the Accused was contacted by persons (“Welch” and “Tucker”) who told her that they were friends of Goldie Rogers (“Rogers”), an elderly woman then residing in an assisted living facility. The Accused did not know Rogers, but Welch and Tucker informed her that Rogers’ son, Timothy Rogers, was petitioning the court for permission to purchase, for less than it was worth, Rogers’ life estate in the house in which Rogers had previously resided. That life estate was Rogers’ principal asset. At the time, Rogers had a guardian (“Kelly”) but the Accused was initially unaware of Kelly’s existence or involvement. Tucker (who held a power

of attorney (“POA”) that Rogers had given her prior to Kelly’s appointment) and Welch asked the Accused to object to Timothy Rogers’ petition to purchase Rogers’ interest in the house.

6.

Misfeldt filed an objection (which included Rogers’ signature) on Rogers’ behalf on April 12, 2007. Misfeldt subsequently agreed to represent Rogers with respect to the sale of her interest in the real property and also assist her in obtaining the appointment of a new guardian, as Tucker and Welch informed the Accused that Rogers did not like Kelly.

7.

On May 31, 2007, the Accused petitioned the court to be appointed Rogers’ attorney and that petition was granted on June 4, 2007. Timothy Rogers, through his attorney, Don Dickman, stipulated on June 11, 2007, that the real property could be sold through a realtor to a third party for the highest possible price.

8.

On June 24, 2007, an acceptable third-party offer was received for the real property. The Accused signed the sales agreement on Rogers’ behalf. Because she expected that Rogers would soon be receiving sale proceeds, the Accused concluded that Rogers needed to have a conservator appointed for her. Rogers had previously had a temporary conservator appointed and that conservatorship had expired several months before. On June 7, 2007, the Accused filed a petition—purportedly on behalf of Welch—seeking Welch’s appointment as Rogers’ conservator and guardian (replacing Kelly).

9.

The Accused now recognizes—but did not recognize at the time—that when she filed the June 7, 2007, petition and supporting documents, she became attorney of record for Welch (as proposed conservator/new guardian); she was already attorney of record for Rogers (the protected person). This concurrent representation of Welch and Rogers involved a current-client conflict of interest, in that Rogers’ legal interest in preserving autonomy was objectively adverse to Welch’s legal interest in obtaining control over those affairs. This conflict of interest lasted until the Accused withdrew from Rogers’ representation on August 23, 2007.

10.

During the entire period that she represented Rogers, the Accused never met or spoke with Rogers personally. The Accused based her belief that Rogers was mentally

incapable of handling her own affairs on uncontradicted information the Accused received from Tucker, Welch, Rogers' professional caregivers, and also on court orders that had found Rogers to be incompetent. For information about Rogers' objectives, the Accused relied on Rogers' signature on the objection to Timothy Rogers' petition, and also on information received from Tucker, Welch, and other third parties. For authority to act on Rogers' behalf, the Accused relied on the power of attorney that Rogers had given Tucker.

11.

Although the Accused acted in good faith, by undertaking Rogers' representation without making sufficient inquiry into her condition and objectives, the Accused failed to provide Rogers with competent representation under RPC 1.1. *See, e.g., In re Nawalany*, 20 DB Rptr 315 (2006) (attorney found to have acted incompetently by drafting will and power of attorney on an urgent basis for elderly woman without making sufficient inquiry into the testator's mental state or relationship with the beneficiary).

12.

During the entire period of the Accused's representation of Rogers, the Accused had no direct oral communication with Rogers, instead relying on prior court orders and third parties (including Rogers' friends, acquaintances, and professional caregivers) for information about Rogers' condition and objectives, and also relying on third parties to convey the Accused's advice back to Rogers. The Accused sent Rogers copies of letters and pleadings without any reasonable basis to believe that Rogers could read and understand them. Those documents did not reasonably inform Rogers about the status of her matter or explain it to the extent necessary to permit Rogers to make informed decisions. The Accused thereby failed to communicate adequately with Rogers.

### **Violations**

13.

The Accused admits that, by engaging in the conduct described in paragraphs 5 through 12, she violated RPC 1.1, RPC 1.4(a) and (b), and RPC 1.7(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 her duty to Rogers to avoid conflicts of interest, to provide competent representation, and to provide accurate and complete information. *Standards*, §§4.3, 4.5, 4.6.
- b. **Mental state.** The Accused's mental state was negligent in that she failed to heed a substantial risk that circumstances existed or that a result would follow, which failure was a deviation from the standard of care that a reasonable lawyer would exercise in the situation. *Standards*, at 7.
- c. **Injury.** The Accused's conduct involved the risk of potential injury to Rogers. The Accused's reliance on third parties for information about Rogers' objectives, and to convey information between her and Rogers, created a risk that Rogers' objectives would not be accurately conveyed to the Accused or that Rogers would not have a good understanding of the positions the Accused was asserting on her behalf.
- d. **Aggravating circumstances.** Aggravating circumstances include a vulnerable victim (Rogers). *Standards*, § 9.22(h).
- e. **Mitigating circumstances.** Mitigating circumstances include absence of a prior disciplinary record (*Standards*, § 9.23(a)), absence of a dishonest or selfish motive (*Standards*, § 9.23(b)), and full and free disclosure to and cooperation with disciplinary authority (*Standards*, § 9.23(e)).

15.

Under the *Standards*, public reprimand is generally appropriate when a lawyer is negligent in determining whether the representation of a client will adversely affect another client and causes injury or potential injury to a client (*Standards*, § 4.34), when a lawyer negligently fails to understand relevant legal doctrines or procedures and causes injury or potential injury to a client (*Standards*, § 4.54), or when a lawyer negligently fails to provide a client with accurate or complete information, and causes injury or potential injury to the client (*Standards*, § 4.64).

16.

A public reprimand is also appropriate under Oregon case law. In *In re Nawalany*, 20 DB Rptr at 315 (2006), an attorney whose incompetence enabled persons to take advantage of his elderly client caused significant actual injury.

Nawalany was publicly reprimanded. Although the Accused's misconduct in this case resulted in less actual injury, it created the same risk of harm to the client. The Accused also violated the rule against current-client conflict of interests.

In *In re Stevens*, 20 DB Rptr 53 (2006), a lawyer was publicly reprimanded after he was found to have acted incompetently in connection with a conservatorship by failing to submit timely accountings to the court and by filing accountings that were deficient in substance and format.

17.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be publicly reprimanded for violations of RPC 1.1, RPC 1.4(a) and (b), and RPC 1.7(a).

18.

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 25th day of January 2010.

/s/ Karen Misfeldt

Karen Misfeldt

OSB No. 973400

OREGON STATE BAR

By: /s/ Mary A. Cooper

Mary A. Cooper

OSB No. 910013

Assistant Disciplinary Counsel

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re:	)	
	)	
Complaint as to the Conduct of	)	Case No. 09-68
	)	
BENJAMIN M. KARLIN,	)	
	)	
Accused.	)	

Counsel for the Bar:	Amber Bevacqua-Lynott
Counsel for the Accused:	None
Disciplinary Board:	None
Disposition:	Violation of RPC 1.4(a), RPC 1.4(b), RPC 1.15-1(a), RPC 1.15-1(c), and RPC 1.15-1(d). Stipulation for Discipline. 60-day suspension.
Effective Date of Order:	March 5, 2010

**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 March 1, 2010, or 30 days after approval by the Disciplinary Board, whichever is later, for violation of RPC 1.4(a), RPC 1.4(b), RPC 1.15-1(a), RPC 1.15-1(c), and RPC 1.15-1(d).

DATED this 3rd day of February 2010.

/s/ Gilbert B. Feibleman  
Gilbert B. Feibleman  
State Disciplinary Board Chairperson

/s/ Mary Kim Wood  
Mary Kim Wood, Region 6  
Disciplinary Board Chairperson

### **STIPULATION FOR DISCIPLINE**

Benjamin M. Karlin, attorney at law (hereinafter “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, 1982, and has been a member of the Oregon State Bar continuously since that time, having his office and place of business in Clackamas County, Oregon.

3.

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

4.

On September 21, 2009, a Formal Complaint was filed against the Accused pursuant to the authorization of the State Professional Responsibility Board (hereinafter “SPRB”), alleging violation of RPC 1.4(a) (failure to keep a client reasonably informed about the status of a matter), RPC 1.4(b) (failure to explain a matter to the extent reasonably necessary to permit a client to make informed decisions regarding the representation), RPC 1.15-1(a) (failure to hold client property in a lawyer’s possession separate from the lawyer’s own property), RPC 1.15-1(c) (failure to deposit into a lawyer trust account legal fees and expenses paid in advance), and RPC 1.15-1(d) (failure to promptly deliver to a client property that the client was entitled to receive). 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 January 31, 2006, the Accused undertook to represent Sandy Minnich (“Minnich”) to file and prosecute a lawsuit against Sundance Shutters (“Sundance”)

for the return of the sales price of shutters Minnich had purchased for her home. The Accused and Minnich did not execute a written fee agreement, but Minnich paid the Accused a flat fee of \$1,500. The Accused deposited Minnich's \$1,500 directly into his personal checking account, erroneously believing that he had already earned and was entitled to the flat-fee funds.

6.

In late March 2006, after reminders from Minnich, the Accused filed a complaint initiating Minnich's litigation against Sundance. In May 2006, service of the complaint was accomplished on Sundance. Shortly thereafter, Sundance filed an answer and the Accused was notified that Sundance was represented by William Miner ("Miner").

7.

After an arbitrator ruled in favor of Sundance in January 2007, Minnich elected to appeal the arbitrator's decision and have the case reviewed in the circuit court.

8.

Prior to the July 2007 circuit court trial date, the Accused agreed with Miner to dismiss at least one of the claims in Minnich's complaint. The Accused did not notify Minnich of the dismissal of this claim, or explain the significance of its dismissal. When Minnich appeared for trial, she learned for the first time that at least one her claims had been dismissed.

9.

In mid-August 2007, Minnich made a written request that the Accused return certain of her documents and followed that written request with telephone calls to the Accused. The Accused did not provide any documents to Minnich until July 11, 2008, after Minnich complained to the Bar.

### **Violations**

10.

The Accused admits that, by immediately depositing Minnich's funds into his personal account in the absence of a written agreement confirming that he was entitled to do so, the Accused violated RPC 1.15-1(a) and (c). The Accused further admits that his failure to notify Minnich of the dismissal of one of her claims or to explain the potential significance of that dismissal violated RPC 1.4(a) and (b). Finally, the Accused admits that his failure to more timely provide Minnich with requested file materials she was entitled to receive violated RPC 1.15-1(d).

## 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 his duties to his clients to act with reasonable diligence and promptness in representing her and to properly handle and account for client funds and property. *Standards*, §§ 4.1, 4.4. The *Standards* provide that the most important duties a lawyer owes are those owed to clients. *Standards*, at 5.
- b. **Mental state.** The Accused’s mishandling of the funds provided by Minnich was negligent. “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*, at 7. However, the Accused’s failures to communicate and more timely provide Minnich’s file were done knowingly. “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*, at 7.
- c. **Injury.** Injury can either be actual or potential under the *Standards*. *In re Williams*, 314 Or 530, 840 P2d 1280 (1992). Minnich sustained actual injury in that she felt compelled to surrender her appeal (and her claim) in exchange for the costs that had been levied against her without a full understanding of her rights or the process. Minnich sustained additional actual injury in the form of delay, anxiety, and frustration because the Accused failed to communicate with her. *In re Knappenberger*, 337 Or 15, 23, 90 P3d 614 (2004); *In re Obert*, 336 Or 640, 89 P3d 1173 (2004).
- d. **Aggravating circumstances.** Aggravating circumstances include:
  1. *Prior disciplinary offenses.* *Standards*, § 9.22(a). The Accused was previously reprimanded in 2007 for violations of RPC 1.3 (neglect), RPC 1.4(a) (failure to keep a client reasonably informed about the status of a matter or respond to reasonable

requests for information), and RPC 1.4(b) (failure to explain a matter to the extent reasonably necessary to allow the client to make informed decisions about the representation). *In re Karlin I*, 21 DB Rptr 75 (2007). These are some of the same violations at issue in the present case. In *Karlin I*, the Accused stipulated to the neglect of two clients' domestic relations matters and failures to communicate regarding one of them, including his failure to respond to numerous e-mails sent by the client and his failure to notify the client that he could not locate the client's former wife.

The Accused was again reprimanded in 2008 after he was found in contempt of court (RPC 3.4(d)) for failing to comply with a court order regarding the payment of his personal child support obligation. *In re Karlin II*, 22 DB Rptr 346 (2008).

2. *Multiple offenses. Standards*, § 9.22(d); and
  3. *Substantial experience in the practice of law. Standards*, § 9.22(c). The Accused was admitted in Oregon in 1982.
- e. **Mitigating circumstances.** Mitigating circumstances include:
1. *Absence of a dishonest or selfish motive. Standards*, § 9.32(b); and
  2. *Full and free disclosure and cooperative attitude toward the disciplinary proceedings. Standards*, § 9.32(e).

12.

Under the *Standards*, a reprimand or suspension is generally appropriate when a lawyer is negligent or should know that he or she is dealing improperly with client property and causes injury or potential injury to a client. A suspension is generally appropriate when a lawyer knowingly fails to perform services for a client (including communication) 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. A suspension is also generally appropriate when a lawyer has been reprimanded for the same or similar misconduct and engages in further similar acts of misconduct that cause injury or potential injury to a client, the public, the legal system, or the profession. *Standards*, §§ 4.12, 4.13, 4.42, 8.2. After consideration of the applicable aggravating and mitigating factors, a suspension appears to be the appropriate sanction for the Accused's misconduct.

13.

Oregon cases reach a similar result. *See, e.g., In re Koch*, 345 Or 444, 198 P3d 910 (2008) (120-day suspension where lawyer failed to advise her client that another lawyer would prepare a QDRO for the client, and thereafter failed to communicate with the client and that second lawyer when they needed information and assistance from attorney to complete the legal matter. Lawyer had been previously reprimanded for similar misconduct); *In re Fadeley*, 342 Or 403, 153 P3d 682 (2007) (30-day suspension where lawyer relied on oral agreement to treat client funds as his own); *In re Jackson*, 19 DB Rptr 233 (2005) (60-day suspension for a lawyer's failure to adequately communicate with his client and failure to timely provide her file to her new lawyer where he had been previously admonished and reprimanded for similar misconduct); *In re Feest*, 18 DB Rptr 87 (2004) (30-day suspension where lawyer failed to deposit and maintain his client's fees in trust, failed to respond to his client's attempts to communicate with him, and failed to return the client's retainer until after she filed a Bar complaint. Lawyer had been previously admonished for some similar misconduct); *In re Eakin*, 334 O4 238, 48 P3d 147 (2002) (60-day suspension for lawyer's mistaken removal of client funds from trust; failure to maintain adequate trust account records and failure to timely return the unearned portion of the retainer to the client where attorney had substantial experience in the practice of law).

14.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be suspended for 60 days for violation of RPC 1.4(a), RPC 1.4(b), RPC 1.15-1(a), RPC 1.15-1(c), and RPC 1.15-1(d), the sanction to be effective March 1, 2010, or 30 days after approval by the Disciplinary Board, whichever is later.

15.

The Accused acknowledges that he has certain duties and responsibilities under the Rules of Professional Conduct and BR 6.3 to immediately take all reasonable steps to avoid foreseeable prejudice to his clients during the term of his suspension. The Accused represents that he will conclude all active matters prior to the term of his suspension and will have no pending cases requiring attention during the term of his suspension.

16.

The Accused acknowledges that reinstatement is not automatic on expiration of the period of suspension. He is required to comply with the applicable provisions of Title 8 of the Bar Rules of Procedure. The Accused also acknowledges that he cannot hold himself out as an active member of the Bar or provide legal services or advice until he is notified that his license to practice has been reinstated.



17.

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 22nd day of January 2010.

/s/ Benjamin M. Karlin

Benjamin M. Karlin

OSB No. 822965

EXECUTED this 22nd day of January 2010.

OREGON STATE BAR

By: /s/ Amber Bevacqua-Lynott

Amber Bevacqua-Lynott

OSB No. 980280

Assistant Disciplinary Counsel

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
 )  
Complaint as to the Conduct of ) Case No. 09-106  
 )  
SHARON C. STEVENS, )  
 )  
Accused. )

Counsel for the Bar: Amber Bevacqua-Lynott  
Counsel for the Accused: None  
Disciplinary Board: None  
Disposition: Violation of RPC 1.3 and RPC 1.4(a). Stipulation  
for Discipline. 60-day suspension.  
Effective Date of Order: March 5, 2010

**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 March 1, 2010, or 14 days after approval by the Disciplinary Board, whichever is later, for violation of RPC 1.3 and RPC 1.4(a).

DATED this 19th day of February 2010.

/s/ Gilbert B. Feibleman  
Gilbert B. Feibleman  
State Disciplinary Board Chairperson

/s/ Mary Kim Wood  
Mary Kim Wood, Region 6  
Disciplinary Board Chairperson

## **STIPULATION FOR DISCIPLINE**

Sharon C. Stevens, attorney at law (hereinafter “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 24, 1978, and has been a member of the Oregon State Bar continuously since that time, having her 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 October 16, 2009, the State Professional Responsibility Board (hereinafter “SPRB”) authorized formal disciplinary proceedings against the Accused for alleged violations of RPC 1.3 (neglect of a legal matter) and RPC 1.4(a) (failing to keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information) of the Oregon Rules of Professional Conduct. 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 August 25, 2005, the Accused undertook to represent Patrick Gerber (“Gerber”) in pursuing an employment claim against Gerber’s former employer, Curly’s Dairy (“Curly’s”). On August 25, 2005, the Accused file a claim with the Oregon Bureau of Labor and Industry (“BOLI”) on Gerber’s behalf.

6.

On August 29, 2005, attorney Jana Gunn (“Gunn”) filed a Chapter 7 Bankruptcy Petition for Gerber in the U.S. Bankruptcy Court, District of Oregon, Case No. 05-67201-aer7. Ronald Sticka (“Sticka”) was assigned to the case as the bankruptcy trustee. Gerber did not notify Gunn of his employment claim so it was not included in his bankruptcy petition or schedules, nor was it disclosed to Sticka at the creditors’ hearing in late October 2005.

7.

In the fall of 2005, the attorney for Curly’s, Chandra Hatfield (“Hatfield”), requested a settlement demand from the Accused. In late December 2005, the Accused provided Hatfield with an initial demand. A counteroffer from Curly’s and subsequent \$15,000 offer from the Accused were conveyed by early February 2006. Shortly thereafter, the Accused learned of Gerber’s bankruptcy and instructed him to notify Gunn, so that she could add the claim to his petition. Gerber did so.

8.

In mid-March 2006, after Gunn had notified him of the employment claim, Sticka wrote to the Accused, requesting specific information and instructing her that she did not have authority to act on the claim. In a telephone call following the Accused’s receipt of this letter, she notified Sticka that she was waiting for a counteroffer to her \$15,000 demand from Hatfield, and was hoping for something in the range of \$10,000. They agreed that Sticka would send the Accused an application to be appointed as the attorney for the bankruptcy estate to allow her to continue to pursue Gerber’s employment claim. Sticka specifically authorized the Accused to get a counteroffer to her \$15,000 demand.

9.

On approximately March 24, 2006, the Accused received an oral counteroffer from Hatfield of \$7,500. The Accused believes that she immediately telephoned Sticka with this offer. Perhaps in response to this call, Sticka sent the Accused an application for her employment on behalf of the bankruptcy estate that same day. However, the Accused does not believe that she received this application. Nonetheless, from March 24, 2005, through May 1, 2006, the Accused did not inquire of Sticka regarding the promised application or respond to Hatfield’s counteroffer.

10.

On May 1, 2006, Hatfield reiterated her oral offer of \$7,500 to the Accused. The Accused claims that she again conveyed this offer to Sticka and urged him to accept it, but that Sticka stated that he would provide the Accused with an answer

once she became employed. The Accused did not then ask about the status of the employment application she needed from Sticka.

11.

On May 4, 2006, Hatfield reduced the \$7,500 offer to writing in a letter to the Accused and indicated that the offer would expire on May 23, 2006. The Accused did not forward this letter to Sticka or otherwise communicate to him that there was a written offer. The offer expired by its terms on May 23, 2006.

12.

On May 30, 2006, Sticka wrote to the Accused and inquired why she had not responded to his March 24, 2006, correspondence. He enclosed another copy of the employment application and reiterated that the Accused was not authorized to proceed as the attorney in the employment matter unless the application was returned and approved by the bankruptcy court. The Accused received this letter and enclosures.

13.

Between May 30, 2006, and November 6, 2006, the Accused did not respond to Sticka's letter, return the employment application, notify Sticka of the \$7,500 written offer or its expiration, or otherwise communicate with Sticka in any fashion. During this same time period, the Accused also did not communicate with Hatfield or take any other action on the employment claim, despite receiving a copy of a letter dated August 1, 2006, that Hatfield sent to BOLI, indicating that the \$7,500 offer "was still open." The Accused did not forward this letter to Sticka or consult with him regarding it.

14.

In response to Hatfield's letter, BOLI dismissed Gerber's complaint due to the proximity to the end of its jurisdiction over the matter as well as Hatfield's representations about pending settlement negotiations. The Accused did not forward this BOLI notice to Sticka or consult with him regarding it.

15.

In early November 2006, the Accused was prompted to contact Sticka when she received a telephone call from Gerber indicating that he had changed his address. She subsequently sent the completed employment application to Sticka on November 28, 2006. It is disputed whether the Accused thereafter discussed with Sticka the fact that the offer had expired and that she wanted to pursue reviving the offer because she believed it was the best that Gerber would get.

16.

The Accused understood that Sticka wanted to try to contact Hatfield directly to see if the offer could be salvaged; however, the Accused did not confirm her understanding of Sticka's instructions in writing or communicate permission to Hatfield to speak directly with Sticka. In any event, the Accused ceased all work on the employment claim.

17.

In late April 2007, and again in mid-August 2007, Sticka sent letters to the Accused requesting updates on the status of the employment claim. The Accused claims that she did not receive either of these letters, but they were not returned as undeliverable to Sticka. Both of these letters were also copied to Gunn, who was prompted by them to try to contact the Accused, without success.

18.

In October 2007, Sticka sent the Accused an e-mail inquiry to her e-mail address on file with the Bar. The Accused did not respond to this e-mail.

19.

In mid-December 2007, Sticka sent a letter to Gunn, with a copy to the Accused, requesting an update on the employment claim because the Accused had not responded to his inquiries over the prior several months. This letter did not prompt the Accused to contact Sticka.

20.

After she received the December 2007 letter, Gunn made multiple attempts to contact the Accused and was finally able to reach her by telephone in mid-January 2008. Gunn explained to the Accused that Sticka had been attempting to reach her, and the Accused told Gunn that she would contact Sticka. However, the Accused did not do so prior to being terminated by Sticka in May 2008.

### **Violations**

21.

The Accused admits that, by engaging in the conduct described in paragraphs 5 through 20, she neglected a legal matter entrusted to her, in violation of RPC 1.3, and failed to adequately communicate with her client or respond to reasonable requests for information, in violation of RPC 1.4(a).

## Sanction

22.

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 client. *Standards*, § 4.4.
- b. **Mental state.** Knowledge is defined under the *Standards* as 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. *Standards*, at 9.

Although the Accused’s dilatory conduct may have initially been negligent (insofar as she claims she did not receive Sticka’s March 2006 correspondence before May 2006), it was thereafter knowing. In addition, the Accused knowingly failed to communicate important information to Mr. Sticka.

- c. **Injury.** Injury can be either actual or potential under the *Standards*. *In re Williams*, 314 Or 530, 840 P2d 1280 (1992). There is injury in this case due to both the BOLI case being dismissed and the statute of limitations running on Gerber’s employment claim. At minimum, the bankruptcy estate or Gerber is out the \$7,500 that Hatfield offered and which offer was allowed to expire.
- d. **Aggravating circumstances.** Aggravating circumstances include:
  1. *A prior record of discipline.* *Standards*, § 9.22(a). The Accused was previously admonished in 2008 for violations of RPC 1.3 and RPC 1.4(a) as a result of similar misconduct. A letter of admonition is considered as an aggravating factor under the *Standards* only 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). The Accused’s prior admonition was for failing to file a lawsuit

within the timeframe promised to a set of employment clients and for failing to communicate with or respond to inquiries from those clients from February 2006 through September 2006.

In this matter, the Accused's association with Sticka began in March 2006 and ended with her termination in May 2008. The majority of the Accused's misconduct in this case occurred after September 2006—at which time she was at least aware of the Bar's investigation in the prior matter, and on notice that she needed to be diligent on client matters and in responding to client inquiries.

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).* The Accused has been an attorney in Oregon since 1978 and California since 1977.

e. **Mitigating circumstances.** Mitigating circumstances include:

1. *Absence of dishonest or selfish motive. Standards, § 9.33(b).*

23.

Under the *Standards*, given the knowing nature of the violations and the actual injury that resulted, a suspension is presumed to be warranted. *Standards, § 4.42.*

24.

The court has indicated that prolonged periods of neglect similar to the Accused's generally warrant a 60-day suspension. *See In re Knappenberger*, 337 Or 15, 32–33, 90 P3d 614 (2004) (so stating); *see also In re Redden*, 342 Or 393, 153 P3d 113 (2007) (60-day suspension for lawyer's failure to complete a child support arrearage matter for a client for nearly two years); *In re LaBahn*, 335 Or 357, 67 P3d 381 (2003) (60-day suspension for knowing neglect of a client's case, resulting in its dismissal); *In re Schaffner*, 323 Or 472, 918 P2d 803 (1996) (120-day suspension, 60 days of which was attributed to lawyer's knowing neglect of clients' cases for several months by failing to communicate with clients and opposing counsel); *In re Kissling*, 303 Or 638, 740 P2d 179 (1987) (63-day suspension where lawyer failed to investigate and pursue claims for several clients and misled them about his inaction); *In re Dugger*, 299 Or 21, 697 P2d 973 (1985) (63-day suspension when lawyer neglected client's case and misrepresented to the client the status of his case).



25.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be suspended for 60 days for violation of RPC 1.3 and RPC 1.4(a), the sanction to be effective on March 1, 2010, or 14 days after approval by the Disciplinary Board, whichever is later.

26.

The Accused acknowledges that she has certain duties and responsibilities under the Rules of Professional Conduct and BR 6.3 to immediately take all reasonable steps to avoid foreseeable prejudice to her clients during the term of her suspension. In this regard, the Accused has arranged for Michael D. Callahan, an active member of the Oregon State Bar, to either take possession of or have ongoing access to the Accused's client files and serve as the contact person for clients in need of the files during the term of the Accused's suspension. The Accused represents that Michael Callahan has agreed to accept this responsibility.

27.

The Accused acknowledges that reinstatement is not automatic on expiration of the period of suspension. She is required to comply with the applicable provisions of Title 8 of the Bar Rules of Procedure. The Accused also acknowledges that she cannot hold herself out as an active member of the Bar or provide legal services or advice until she is notified that her license to practice has been reinstated.

28.

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 12th day of February 2010.

/s/ Sharon C. Stevens

Sharon C. Stevens

OSB No. 780880

EXECUTED this 16th day of February 2010.

OREGON STATE BAR

By: /s/ Amber Bevacqua-Lynott

Amber Bevacqua-Lynott

OSB No. 990280

Assistant Disciplinary Counsel

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re:	)	
	)	
Complaint as to the Conduct of	)	Case Nos. 09-97 and 09-126
	)	
CRAIG P. COLBY,	)	
	)	
Accused.	)	

Counsel for the Bar:	Martha M. Hicks
Counsel for the Accused:	None
Disciplinary Board:	None
Disposition:	Violations of RPC 1.3, RPC 1.4(a), and RPC 1.4(b). Stipulation for Discipline. 30-day suspension.
Effective Date of Order:	March 3, 2010

**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 thirty (30) days, effective the date of this order for violations of RPC 1.3, RPC 1.4(a), and RPC 1.4(b).

DATED this 3rd day of March 2010.

/s/ Gilbert B. Feibleman  
Gilbert B. Feibleman  
State Disciplinary Board Chairperson

/s/ William B. Crow  
William B. Crow, Region 5  
Disciplinary Board Chairperson

## **STIPULATION FOR DISCIPLINE**

Craig P. Colby attorney at law (hereinafter “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 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 September 18, 2009, the State Professional Responsibility Board (hereinafter “SPRB”) authorized formal disciplinary proceedings against the Accused for alleged violations of RPC 1.3 and RPC 1.4(a) of the Oregon Rules of Professional Conduct in Case No. 09-97. On November 21, 2009, the SPRB authorized formal disciplinary proceedings against the Accused for alleged violations of RPC 1.3, RPC 1.4(a), and RPC 1.4(b) of the Oregon Rules of Professional Conduct in Case No. 09-126. 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**

### **Case No. 09-97**

### **The Walker Matter**

5.

In October 2006, the Accused undertook to represent Leonard Walker (hereinafter “Walker”) in litigation Walker had filed in small claims court. At the time the Accused undertook the representation, the defendant had filed an answer and

affirmative defenses, and the court had ordered the case transferred to arbitration. On October 31, 2006, the Accused filed an amended and supplemental complaint on behalf of Walker.

6.

When Walker's case was ordered to be transferred to arbitration, the transfer order notified Walker that it was his responsibility to contact the defendant to agree on an arbitrator and set a hearing on or before November 16, 2006. The court failed to send the Accused a copy of this order, and in January 2007 continued the time before which Walker was required to set an arbitration hearing. Thereafter, the Accused failed to take steps to have an arbitrator appointed or set an arbitration hearing.

7.

The court entered a judgment of dismissal of Walker's case on May 1, 2007, after having notified the Accused of its intent to do so on March 1, 2007. Thereafter, the Accused failed to reinstate Walker's case, and failed to inform Walker that his case had been dismissed for a period of time after the dismissal.

8.

Throughout his representation of Walker, the Accused failed to respond to Walker's attempts to contact him and otherwise failed to keep Walker reasonably informed about the status of his case.

### **Case No. 09-126**

### **The Abbott Matter**

9.

On October 23, 2007, the Accused agreed to draft a complaint for property damage for Natalie Abbott (hereinafter "Abbott") and to effect service of the complaint on the defendant after Abbott had filed it with the court. At the time the Accused undertook the representation, the case had been removed from small claims court to circuit court, the defendant's attorney had filed an answer and affirmative defenses, and the court had ordered the case transferred to arbitration.

10.

The Accused drafted a complaint and sent it to Abbott for filing on April 12, 2008. Abbott filed the complaint on May 2, 2008, and notified the Accused of the case number. Thereafter, the Accused failed to effect service of the complaint or respond to Abbott's attempts to contact him about the status of her case.

11.

The court dismissed Abbott's case on October 7, 2008, for lack of prosecution after having notified the Accused of its intent to do so on August 25, 2008. The Accused took no steps to avoid dismissal or to reinstate the case after the court had dismissed it. The Accused failed to inform Abbott of the court's intent to dismiss her case or of the dismissal until November 6, 2008.

## VIOLATIONS

12.

The Accused admits that, by engaging in the conduct described in paragraphs 5 through 8, he violated RPC 1.3 and RPC 1.4(a).

13.

The Accused admits that, by engaging in the conduct described in paragraphs 9 through 11, he violated RPC 1.3, RPC 1.4(a), and RPC 1.4(b).

## 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. **Duties violated.** The Accused violated his duties to his clients to represent them diligently.
- b. **Mental state.** The Accused acted negligently in the Walker matter (Case No. 09-97). The Accused knowingly or intentionally failed to communicate with Abbott (Case No. 09-126) or take action on her case because the case had become distasteful to him.
- c. **Injury.** Both Walker and Abbott were actually injured in that they experienced frustration and anxiety when the Accused failed to respond to their attempts to contact him and failed to inform them of the status of their cases. Both were actually injured in that the court dismissed their claims, and they were denied their right to a day in court to seek compensation for the damages they had incurred. Whether either Walker or Abbott would have recovered compensation is unknown.

- d. **Aggravating circumstances.** Aggravating circumstances include:
  - 1. The Accused engaged in a pattern of misconduct. *Standards*, § 9.22(c);
  - 2. The Accused committed multiple offenses. *Standards*, § 9.22(d); and
  - 3. The Accused has substantial experience in the practice of law. *Standards*, § 9.22(i).
- e. **Mitigating circumstances.** Mitigating circumstances include:
  - 1. The Accused has no prior disciplinary record. *Standards*, § 9.32(a);
  - 2. The Accused was experiencing personal health problems at the time of the conduct. *Standards*, § 9.32(c); and
  - 3. The Accused cooperated with the Bar's investigation in both cases. *Standards*, § 9.32(e)

15.

Under the *Standards*, suspension is generally appropriate when a lawyer either knowingly 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 actual or potential injury to a client. *Standards*, § 4.42(a), (b).

16.

Oregon case law is in accord. *See In re Koch*, 345 Or 444, 198 P3d 910 (2008) (120-day suspension for violations of RPC 1.3, RPC 1.4(a), RPC 1.15-1(d), and RPC 8.1(a)(2)); *In re Redden*, 342 Or 393, 153 P3d 113 (2007) (60-day suspension for violation of DR 6-101(B)); and *In re Obert*, 336 Or 640, 89 P3d 1173 (2004) (30-day suspension for violations of DR 6-101(B), DR 5-105(E), DR 1-102(A)(3), and DR 9-101(C)(4)).

17.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be suspended for a period of 30 days for violations of RPC 1.3, RPC 1.4(a), and RPC 1.4(b), the sanction to be effective beginning on the day it is approved by the Disciplinary Board.

18.

The Accused acknowledges that he has certain duties and responsibilities under the Rules of Professional Conduct and BR 6.3 to immediately take all reasonable

steps to avoid foreseeable prejudice to his clients during the term of his suspension. In this regard, the Accused has arranged for Harry Ainsworth, an active member of the Oregon State Bar, to either take possession of or have ongoing access to the Accused's client files and serve as the contact person for clients in need of the files during the term of the Accused's suspension. The Accused represents that Harry Ainsworth has agreed to accept this responsibility.

19.

The Accused acknowledges that reinstatement is not automatic on expiration of the period of suspension. He is required to comply with the applicable provisions of Title 8 of the Bar Rules of Procedure. The Accused also acknowledges that he cannot hold himself out as an active member of the Bar or provide legal services or advice until he is notified that his license to practice has been reinstated.

20.

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 SPRB on February 12, 2010. 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 March 2010.

/s/ Craig P. Colby

Craig P. Colby  
OSB No. 760994

OREGON STATE BAR

By: /s/ Martha M. Hicks

Martha M. Hicks  
OSB No. 751674  
Assistant Disciplinary Counsel



IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re:	)	
	)	
Complaint as to the Conduct of	)	Case No. 09-125
	)	
DANIEL J. LOUNSBURY,	)	
	)	
Accused.	)	

Counsel for the Bar:	Kellie F. Johnson
Counsel for the Accused:	Dayna E. Underhill
Disciplinary Board:	None
Disposition:	Violations of RPC 1.5(a), RPC 1.15-1(c), and RPC 1.16(d). Stipulation for Discipline. Public reprimand.
Effective Date of Order:	March 22, 2010

**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 violations of RPC 1.5(a), RPC 1.15-1(c), and RPC 1.16(d) of the Oregon Rules of Professional Conduct.

DATED this 22nd day of March 2010.

/s/ Gilbert B. Feibleman  
Gilbert B. Feibleman  
State Disciplinary Board Chairperson

/s/ Mary Kim Wood  
Mary Kim Wood, Region 6  
Disciplinary Board Chairperson

### **STIPULATION FOR DISCIPLINE**

Daniel J. Lounsbury, 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, 1993, 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 4, 2010, a Formal Complaint was filed against the Accused pursuant to the authorization of the State Professional Responsibility Board (hereinafter “SPRB”), alleging violations of RPC 1.5(a), RPC 1.15-1(c), and RPC 1.16(d) of the Oregon Rules of Professional Conduct. 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 around October 2008, the Accused undertook to represent Trevor Ferres (hereinafter “Ferres”), the defendant in a criminal prosecution. On or about October 20, 2008, the Accused accepted advance payment of \$5,000, pursuant to a written fee agreement that designated this payment as a “non-refundable flat fee” for representation of Ferres through sentencing in the event that Ferres entered into a plea agreement with the State. The fee agreement did not specify that the \$5,000 was to be earned upon receipt. Paulette Ferres (hereinafter “Ms. Ferres”), mother of Ferres, paid the Accused \$5,000 on Ferres’ behalf. The Accused did not deposit the \$5,000

payment into his lawyer trust account, erroneously believing that the fee agreement provided for an “earned upon receipt” fee.

6.

Due to a concern over the Accused’s services, Ferres terminated the Accused’s services prior to the completion of the work provided for in the fee agreement. Thereafter, the Accused failed to return the unearned portion of the fee he had been paid. After an unsuccessful attempt to use the Bar’s fee arbitration program, Ms. Ferres sued the Accused for the remaining portion of the fee. Ms. Ferres recovered \$983.

### Violations

7.

The Accused admits that, by engaging in the conduct described in this stipulation, he violated RPC 1.5(a), RPC 1.15-1(c), and RPC 1.16(d) of the Oregon Rules of Professional Conduct.

### 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.** Applying the *Standards* to the Accused’s conduct, he violated his duty to his client to preserve his client’s property, *Standards*, § 4.0, and violated his duty as a professional to avoid charging clearly excessive fees, *Standards*, § 7.0.
- 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*, at 7. The Accused acted negligently in that he erroneously believed that his fee agreement provided that Ferres’ fee was earned upon receipt.
- c. **Injury.** Injury can either be actual or potential under the *Standards*. *In re Williams*, 314 Or 530, 840 P2d 1280 (1992). The Accused caused actual injury to Ferres in that the money he failed to refund was

unavailable to pay another lawyer for Ferres' defense. Ms. Ferres also suffered actual injury in that she had to obtain a judgment to recover the money the Accused had not earned.

- d. **Aggravating circumstances.** In aggravation, the Accused committed multiple offenses, and he has substantial experience in the practice of law. *Standards*, § 9.22 (b), (d), (i).
- e. **Mitigating circumstances.** In mitigation, the Accused has no prior disciplinary record and did not act with a dishonest motive. Aside from this conduct, the Accused has a good reputation in the community. He has been recognized for his pro bono advocacy by Marion County Legal Aid. The Accused made full and free disclosure to the Disciplinary Counsel's Office. The Accused also experienced personal challenges, when he was the victim of embezzlement by his office manager which affected his ability to pay back the unearned portion of the Ferres fee. *Standards*, § 9.32 (a), (b), (c), (e), (g).

9.

Under the *Standards*, a public reprimand is generally appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed to the profession, and causes injury or potential injury to a client, the public, or the legal system. *Standards*, § 7.3. Oregon case dispositions are in accord. *See In re Angel*, 22 DB Rptr 351 (2008); *In re Gudger*, 21 DB Rptr 160 (2007); *In re Rose*, 20 DB Rptr 237 (2006).

10.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be publicly reprimanded for violations of RPC 1.5(a), RPC 1.15-1(c), and RPC 1.16(d), the sanction to be effective upon the date of this stipulation.

11.

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 SPRB on November 24, 2009. The stipulation is to be submitted to the Disciplinary Board for consideration pursuant to the terms of BR 3.6.

EXECUTED this 11th day of March 2010.

/s/ Daniel J. Lounsbury

Daniel J. Lounsbury

OSB No. 933469

OREGON STATE BAR

By: /s/ Kellie F. Johnson

Kellie F. Johnson

OSB No. 970688

Assistant Disciplinary Counsel

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re:	)	
	)	
Complaint as to the Conduct of	)	Case Nos. 08-30, 08-31, 08-32,
	)	08-38, and 09-05
	)	
JONATHAN P. SUSHIDA,	)	SC S058382
	)	
Accused.	)	

Counsel for the Bar:	Amber Bevacqua-Lynott
Counsel for the Accused:	Kevin N. Keaney
Disciplinary Board:	None
Disposition:	Violation of RPC 1.1, RPC 1.2(a), RPC 1.3, RPC 1.4(a), RPC 1.4(b), RPC 1.15-1(a), RPC 1.15-1(c), RPC 1.15-1(d), RPC 1.16(a)(2), RPC 1.16(d), RPC 8.1(a)(2), and RPC 8.4(a)(3). Stipulation for Discipline. Three-year suspension.
Effective Date of Order:	April 8, 2010

**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 in the State of Oregon for a period of three years, effective the date of this order.

\_\_\_\_\_  
April 8, 2010

DATE

\_\_\_\_\_  
/s/ Paul J. De Muniz

CHIEF JUSTICE

**STIPULATION FOR DISCIPLINE**

Jonathan P. Sushida, attorney at law (hereinafter “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 23, 2003, and has been a member of the Oregon State Bar continuously since that time, most recently having his office and place of business in Multnomah 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.

On May 19, 2009, a Formal Complaint was filed against the Accused pursuant to the authorization of the State Professional Responsibility Board (hereinafter “SPRB”), alleging violations of RPC 1.1 (failing to provide competent representation); RPC 1.2(a) (failing to abide by a client’s decisions concerning the objects of representation); RPC 1.3 (neglect of a legal matter); RPC 1.4(a) (failing to keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information); RPC 1.4(b) (failing to explain a matter to the extent necessary to permit the client to make informed decisions regarding the representation); RPC 1.15-1(a) (failing to hold property of clients or third persons in a lawyer’s possession separate from the lawyer’s own property); RPC 1.15-1(c) (failing to deposit and maintain advance fees and expenses in trust until earned); RPC 1.15-1(d) (failing to promptly deliver to a client property that the client is entitled to receive); RPC 1.16(a)(2) (failing to withdraw where the lawyer’s mental condition impairs the lawyer’s ability to represent the client); RPC 1.16(d) (failing to take steps to protect a client’s interest upon withdrawal); RPC 8.1(a)(2) (failing to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, and failing to respond to a lawful demand for information from a disciplinary authority); and RPC 8.4(a)(3) (conduct involving fraud, dishonesty, deceit, or misrepresentation). 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.

**Case 08-30**

**Terri Cline Matter**

**Facts**

5.

On January 26, 2007, Disciplinary Counsel's Office ("DCO") received a complaint about the services of the Accused from Terri Cline ("Cline"), who had hired the Accused to assist her in a landlord-tenant matter.

6.

On February 13, 2007, DCO requested that the Accused provide a complete copy of Cline's client file, including all correspondence, internal notes and memoranda, as well as any lawyer trust account ledgers, statements, billing records, or time slips relating to Cline by March 6, 2007. At the Accused's request, he was granted an extension to respond until March 20, 2007.

7.

On March 23, 2007, the Accused responded by letter to Cline's complaint, but did not provide any of the requested file materials. That same date (March 23, 2007), DCO sent an e-mail to the Accused inquiring as to the status of requested file materials.

8.

On March 27, 2007, the Accused faxed two pages to DCO without cover or explanation. One page was a March 10, 2006, letter to Cline indicating that the Accused was in possession of Cline's original documents and other materials and was seeking to confirm her address before returning them. The other page was a letter dated March 1, 2007, addressed to Cline purporting to enclose her original documents and terminating the representation. None of the other requested file materials accompanied these two letters.

9.

On May 11, 2007, DCO made several specific inquiries of the Accused and again requested that he provide a copy of Cline's file materials, and particularly a February 6, 2006, letter that he had reportedly sent to Cline, but which he claimed had been returned undeliverable. The Accused was given until May 25, 2007, to respond. The Accused did not respond.



10.

On July 6, 2007, DCO reminded the Accused of his obligation to respond and gave him until July 13, 2007, to do so. At the Accused's request, DCO granted him an extension until July 17, 2007, to respond. The Accused did not respond.

11.

On August 7, 2007, DCO again requested that the Accused respond to DCO's May 11, 2007, correspondence and gave him until August 14, 2007, to do so. On August 14, 2007, the Accused e-mailed a narrative of the work he had performed for Cline, but did not provide any of the requested documentation or otherwise explain why he could not provide it.

12.

On August 17, 2007, DCO again requested that the Accused provide Cline's file materials, or explain whether any file materials existed, by August 31, 2007. The Accused did not respond. On September 17, 2007, DCO again requested these documents. At the Accused's request, DCO granted him an extension until November 30, 2007, to respond. The Accused did not respond.

13.

On December 6, 2007, DCO contacted a relative of the Accused regarding his status and intent to respond. On or about December 13, 2007, the Accused sent an e-mail to DCO, which was responsive to some of DCO's prior inquiries, but did not contain any of the requested file materials or address their existence. The Accused's e-mail did not explain his failure to respond sooner to DCO.

14.

Between December 13, 2007, and May 8, 2008, the Accused did not provide any of the requested materials or additional explanation to DCO.

15.

On May 8, 2008, Cline's complaint was referred to the Clackamas/Linn/Marion County Local Professional Responsibility Committee ("LPRC") for investigation. The Accused later provided some of the requested file materials to the LPRC.

## **Violation**

16.

The Accused admits that his failure to respond to DCO's lawful demands for information in connection with its investigation of Cline's complaint violated RPC 8.1(a)(2).

## **Case 08-31**

### **Jeffrey Street Matter**

#### **Facts**

17.

On June 21, 2007, Jeff Street ("Street") hired the Accused to file a petition for dissolution of marriage on his behalf. There was no written fee agreement, but Street paid the Accused \$750. The Accused did not deposit this money into his lawyer trust account. Street informed the Accused that he wanted the petition filed promptly and the reasons therefor. The Accused promised to prepare and file the petition for dissolution no later than July 6, 2007. The Accused failed to do so.

18.

On June 24, 2007, July 1, 2007, and again on July 10, 2007, Street e-mailed the Accused with information necessary to complete the petition, and repeatedly e-mailed and phoned the Accused to inquire if the petition had been filed. On July 11, 2007, the Accused sent a draft petition to Street for review. Street made corrections to the draft and returned it to the Accused the following day. In the subsequent weeks, Street made numerous attempts to contact the Accused to find out whether the petition had been filed and served. The Accused failed to respond to these inquiries and failed to attend at least one scheduled appointment with Street.

19.

On July 24, 2007, an administrative child support order was entered against Street, requiring him to pay child support retroactive to June 1, 2007.

20.

At all relevant times herein, ORS 107.085(2)(b)(C) required that a petition for dissolution of marriage state to the extent known whether there was then pending in Oregon or any other jurisdiction any type of support proceeding involving dependents of the marriage. ORS 107.085(3) required the petitioner to include in the petition a certificate regarding any pending support proceeding and any existing support order.

21.

At all relevant times herein, ORS 107.085(4) required that a petition for dissolution of marriage contain specific information concerning the parties and the parties' children including the full names and any former names of the parties.

22.

On July 27, 2007, the Accused prepared and filed a petition for dissolution of marriage on Street's behalf. The petition did not state that an administrative child support proceeding was pending, as required by ORS 107.085. To the contrary, the petition incorrectly stated that there was no "proceeding involving support in this or any state," and did not attach a certificate regarding the support proceeding or the then-existing support order. In addition, the petition did not provide any former names of the parties, including the respondent's former names or maiden name.

23.

When Street learned of and questioned the Accused about the July 27, 2007, filing date, the Accused represented to Street that it had been filed at least a week before that date. This statement was false, and the Accused knew that it was false and material to Street when he made it.

24.

Beginning in July 2007, based upon the Accused's misrepresentation that he had earlier filed the petition, Street repeatedly asked the Accused to correct the court's filing information. Street also requested his file materials and an accounting of the \$750 that he had paid to the Accused with a refund of some or all of that money. The Accused did not respond to or act on these requests or provide Street with an accounting or refund any of his \$750.

25.

On August 15, 2007, the Accused caused the petition to be served on Street's wife. Thereafter, the Accused failed to file the proof of service with the court or take any other substantive action on Street's behalf.

26.

In mid-September 2007, Street hired attorney William Hensley ("Hensley") to determine the status of and complete the dissolution of his marriage. On or about September 14, 2007, Hensley notified the Accused that he would be representing Street and requested certain documents and information from the Accused. The Accused did not respond.

27.

On September 18, 2007, a staff member from Hensley's office contacted the Accused by telephone. The Accused assured Hensley's staff member that he would be mailing Street's file to Hensley's office that day. Hensley did not receive Street's file.

28.

On October 2, 2007, Hensley confirmed the Accused's September 18, 2007, conversation with his staff and requested that the Accused advise him of the status of Street's file. The Accused did not respond or provide the requested file materials.

29.

Between June and September 2007, the Accused was suffering from a mental condition that materially impaired his ability to represent Street in his legal matter. The Accused accepted Street's case in June 2007 and did not thereafter make any efforts to withdraw.

30.

On November 16, 2007, Street complained to the Bar about the Accused's conduct. The Accused was notified of the complaint by mail on or about November 27, 2007. On November 30, 2007, DCO requested that the Accused respond to Street's allegations, provide a copy of Street's client file, and confirm that he had accounted for and refunded the remainder of Street's retainer by December 21, 2007. The Accused did not respond, despite additional requests from DCO on December 18, 2007, and January 11, 2008, that he do so.

31.

On May 8, 2008, DCO referred the matter to the LPRC for investigation. On May 27, 2008, the LPRC members requested that the Accused provide documents and materials responsive to Street's complaint. The Accused did not provide any documents or materials.

32.

On July 24, 2008, the LPRC members interviewed the Accused. The Accused promised to provide a number of items, including general and trust account records, and cellular telephone records. The Accused did not provide these items to the LPRC.

33.

On September 2, 2008, the LPRC members issued a subpoena duces tecum and served it on the Accused. The subpoena requested the documentation the Accused had

promised to provide in his interview. The Accused did not comply with the subpoena or provide any of the requested documentation.

### **Violations**

34.

The Accused admits that he failed to provide Street with competent representation, in violation of RPC 1.1, and failed to abide by Street's decisions concerning the objectives of the representation in violation of RPC 1.2(a). The Accused also admits that he neglected a legal matter entrusted to him, in violation of RPC 1.3, and failed to keep his client reasonably informed about the status of a matter and promptly comply with requests for information, in violation of RPC 1.4(a).

The Accused admits that by failing to deposit Street's retainer into trust, he violated both RPC 1.15-1(a) (failure to hold client property separate from a lawyer's own property) and RPC 1.15-1(c) (failure to deposit and maintain legal fees and expenses that have been paid in advance in trust until earned).

The Accused admits that his failure to provide Hensley with Street's file violated RPC 1.15-1(d) (failure to promptly deliver to a client property that the client is entitled to receive), and that his false statements to Street regarding the filing of his petition constituted misrepresentations in violation of RPC 8.4(a)(3).

The Accused admits that his failure to withdraw from Street's legal matter constituted a failure to withdraw where his mental condition impaired his ability to represent his client, in violation of RPC 1.16(a)(2).

Finally, the Accused admits that his failure to respond to inquiries and lawful demands for information from DCO and the LPRC violated RPC 8.1(a)(2).

### **Case 08-32**

#### **Roger & Carol Williams Matter**

### **Facts**

35.

On December 1, 2006, the Accused undertook to represent Jenny Herren ("Herren") in a dissolution of marriage proceeding. Herren gave the Accused permission to talk to her parents, Roger and Carol Williams ("the Williamses") regarding the case. At the time, the Accused was employed by the firm of Churchill Leonard ("Churchill Firm") in Salem, Oregon. Pursuant to an oral agreement, on or about December 1, 2006, the Williamses paid the Accused \$2,500.

36.

On December 1, 2006, the Accused assisted Herren in completing a pro se petition for dissolution of marriage and related documentation and filed it with the court. There was no real property involved in the marriage, and the parties' only substantial asset was a vehicle. However, Herren and her husband did have two small children. The Accused did not advise Herren that she might be entitled to temporary child support, nor did the Accused file a petition for temporary child support on Herren's behalf.

37.

The Accused recommended to Herren that she leave the state with her children. On this advice, on December 5, 2006, Herren moved with the parties' two children to Georgia to live with the Williamses.

38.

In February 2007, the Accused left the Churchill Firm for employment by Gunn, Cain & Kinney ("Gunn Firm") in Newberg, Oregon. He took Herren's matter with him.

39.

On May 31, 2007, the Accused left the Gunn Firm and opened an office in Woodburn, Oregon. He took Herren's matter with him. On July 18, 2007, the Accused moved locations in Woodburn, changing both his physical and mailing address, as well as his telephone and fax numbers.

40.

On August 6, 2007, the Williamses sent the Accused an additional \$1,700. The Accused did not deposit this money into his lawyer trust account.

41.

In September 2007, the Accused e-mailed and telephoned the Williamses, to advise them the he had been unable to communicate with them due to a 10-day hospitalization and rehabilitation. Before September 2007, the Accused had not informed Herren or the Williamses that he was suffering from any "illness." The Accused never informed Herren or the Williamses that he had a mental condition that materially impaired his ability to represent Herren. Rather, the Accused affirmatively asserted that he had recovered from his condition and would be able to continue to represent Herren. Thereafter, he took no further action on Herren's legal matter and engaged in no substantive communication with Herren or the Williamses.

42.

On October 18, 2007, and November 29, 2007, the Williamses sent the Accused \$850 and \$250, respectively. The Accused did not deposit this money into his lawyer trust account.

43.

From February 2007 through January 2008, the Accused took little substantive action on Herren's legal matter, and consistently failed to respond to the attempts of Herren and the Williamses to contact him.

44.

Effective January 1, 2008, the Accused transferred to inactive status with the Oregon State Bar and was no longer eligible to practice law in Oregon.

45.

On January 10, 2008, the Professional Liability Fund notified Herren that the Accused was closing his practice and would no longer represent her. Before January 10, 2008, the Accused had not notified Herren of his intent to become an inactive member of the Oregon State Bar or of his intent to withdraw from her matter. The Accused did not complete Herren's dissolution of marriage and by January 10, 2008, had not earned the \$5,300 he had received from the Williamses. The Accused did not account for or return any of the funds he had received from the Williamses, despite requests that he do so. The Accused did not make or maintain any records regarding funds he received from or on behalf of Herren.

46.

The Williamses subsequently hired attorney Elaine Smith-Koop ("Smith-Koop") to complete the dissolution of Herren's marriage. Smith-Koop requested that the Accused provide her with Herren's client file. The Accused did not respond or provide the requested materials.

47.

From around April 2007 through January 2008, the Accused was suffering from a mental condition that materially impaired his ability to represent Herren. Despite his knowledge of his condition, the Accused did not make any effort to withdraw from the representation until January 2008.

## **Violations**

48.

The Accused admits that he failed to provide competent representation to Herren, in violation of RPC 1.1. He also admits that his failure to explain the effect of certain matters, such as temporary support and leaving the jurisdiction with the children, to the extent necessary to allow Herren to make informed decisions about those matters violated RPC 1.4(b).

The Accused admits that by failing to deposit funds provided by the Williamses into trust, he violated both RPC 1.15-1(a) (failure to hold client property separate from a lawyer's own property) and RPC 1.15-1(c) (failure to deposit and maintain legal fees and expenses that have been paid in advance in trust until earned).

In addition, the Accused admits that his failure to sooner notify Herren of his need to withdraw and his failure to provide Smith-Koop with Herren's client file violated RPC 1.15-1(d) and RPC 1.16(d) (failure to take reasonable steps upon withdrawal to protect a client's interests).

The Accused admits that his failure to withdraw from Herron's legal matter constituted a failure to withdraw where his mental condition impaired his ability to represent his client, in violation of RPC 1.16(a)(2).

## **Case 08-38**

### **Rita LaBlanc Matter**

#### **Facts**

49.

Prior to April 2007, while the Accused was employed by the Churchill Firm, Rita LaBlanc ("LaBlanc") retained the Accused to assist her with various legal matters, including the postjudgment modification of the custody, parenting time, and child support provisions of the judgment in her dissolution of marriage proceeding. The Accused also assisted LeBlanc with issues related to her ongoing bankruptcy proceeding.

50.

In February 2007, the Accused left the Churchill Firm for the Gunn Firm in Newberg, Oregon. He took LeBlanc's matters with him.



51.

In March 2007, LeBlanc released custody of her son to her former husband on the understanding that her child support obligation would be set at \$100/month. She was thereafter garnished in excess of \$100/month for child support and hired the Accused to correct the discrepancy. At the same time, the Accused agreed he would file suit against her former husband for his share of more than \$8,000 in unpaid medical expenses that had resulted in a lien on LeBlanc's home. The Accused advised LeBlanc not to pay the lien, but did not thereafter take any steps to resolve the support or the lien issues.

52.

On April 10, 2007, the Accused sent LeBlanc a proposed form of fee agreement for his services at the Gunn Firm. LeBlanc signed and return this agreement shortly thereafter. The Accused did not perform any services under this agreement, despite his awareness of LeBlanc's stated desire to reduce her child support and recover unpaid medical costs.

53.

On May 31, 2007, the Accused left the Gunn Firm and opened an office in Woodburn, Oregon. He took LeBlanc's matters with him. On July 18, 2007, the Accused moved locations in Woodburn, changing both his physical and mailing address, as well as his telephone and fax numbers.

54.

From March 2007 through January 2008, LeBlanc tried unsuccessfully to communicate with the Accused on numerous occasions. The Accused did not respond to LeBlanc's messages or otherwise keep her apprised of the status of her matters.

55.

In January 2008, LeBlanc contacted the Churchill Firm for assistance. The Churchill Firm contacted the Accused and requested that he provide LeBlanc's client file for review. The Accused promised to deliver LeBlanc's file but failed to do so.

56.

From around April 2007 through January 2008, the Accused was suffering from a mental condition that materially impaired his ability to represent LeBlanc. During this time, the Accused represented LeBlanc and did not make any effort to withdraw from the representation.

## **Violations**

57.

The Accused admits that he failed to abide by LeBlanc's decisions concerning the objectives of the representation and neglected her legal matter, in violation of RPC 1.2(a) and RPC 1.3. He also admits that he failed to keep LeBlanc reasonably informed about the status of her matters and promptly comply with her reasonable requests for information, in violation of RPC 1.4(a).

The Accused admits that his failure to provide LeBlanc's file to her, as requested, violated RPC 1.15-1(d).

The Accused admits that his failure to withdraw from LeBlanc's legal matter constituted a failure to withdraw where his mental condition impaired his ability to represent his client, in violation of RPC 1.16(a)(2).

## **Case 09-05**

### **Oregon State Bar Investigation**

#### **Facts**

58.

Prior to September 2007, DCO requested documentation related to the Cline complaint. On September 19, 2007, the Accused requested additional time to respond to DCO's inquiries in light of his imminent admission to an in-patient treatment program for a "very serious medical condition." He represented to DCO staff that his condition created periods of time when he was unable to remember things, and it would be detrimental for him to respond before completing an in-patient program beginning in October. The Accused also represented that he would be unable to respond while undergoing in-patient treatment. Based on the Accused's representations, DCO granted his request and extended the deadline for his response to November 30, 2007.

59.

The Accused did not enter an in-patient treatment program in October 2007 and did not notify DCO that he had not done so. Instead, the Accused continued to engage in the practice of law without responding to DCO's pending inquiries.

## Violation

60.

The Accused admits that his failure to notify DCO that he had not entered treatment as he had previously indicated amounted to a failure to disclose a fact necessary to correct a misapprehension known by the person to have arisen in connection with a disciplinary matter, in violation of RPC 8.1(a)(2).

## Sanction

61.

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 his duties to his clients to preserve their property, to act with candor, and to diligently and competently represent them. *Standards*, §§ 4.1, 4.4, 4.5, 4.6. The *Standards* presume that the most important ethical duties are those obligations a lawyer owes to clients. *Standards*, at 5. The Accused also violated his duty to the profession to adequately respond to the Bar. *Standards*, § 7.0.
- b. **Mental state.** The Accused was negligent in evaluating his competency to handle certain client matters and was also negligent in his handling of client funds. 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*, at 9.

However, the Accused’s neglect (including his failures to provide client files) and his failure to adequately communicate with clients were done knowingly, as were his failures to withdraw in the face of his mental illness. 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*, at 9. Similarly, the Accused’s failures to respond to DCO and the LPRC, and his failure to notify DCO that he had not entered in-patient treatment, were all done knowingly.

- c. **Injury.** Injury can be either actual or potential under the Standards. *In re Williams*, 314 Or 530, 840 P2d 1280 (1992). The Accused's clients were potentially injured by the Accused's mishandling of their funds. The Accused's clients suffered actual injury in the form of delay, anxiety, and frustration because the Accused failed to communicate with them. *In re Knappenberger*, 337 Or 15, 23, 90 P3d 614 (2004); *In re Obert*, 336 Or 640, 89 P3d 1173 (2004). Similarly, Street, Herron, and LeBlanc were all actually injured by the delay caused by the Accused's failure to provide their client files.
- d. **Aggravating circumstances.** Aggravating circumstances include:
  - 1. *A pattern of misconduct. Standards, § 9.22(c).*
  - 2. *Multiple offenses. Standards, § 9.22(d).*
- e. **Mitigating circumstances.** Mitigating circumstances include:
  - 1. *Absence of a prior disciplinary record. Standards, § 9.32(a).*
  - 2. *Personal or emotional problems. Standards, § 9.32(c).* During the period in which the conduct in these matters occurred, the Accused was hampered by a mental disability that may have contributed to or exacerbated his misconduct. In particular, the Accused's condition inhibited his ability to diligently attend to client matters or adequately communicate with them.

62.

Under the *Standards*, a suspension is generally appropriate when a lawyer knows or should know that he or she is dealing improperly with client property and causes injury or potential injury to a client. A suspension is also appropriate when a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client, or a lawyer engages in a pattern of neglect and causes injury or potential injury to a client. Finally, a 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*, §§ 4.12, 4.42(a), (b), 7.2.

63.

Oregon case law also supports the imposition of a substantial suspension. *See, e.g., In re Nicholls*, 21 DB Rptr 54 (2007) (three-year suspension for attorney's neglect of three client matters, failure to communicate, and failure to return fees paid); *In re Bertak*, 21 DB Rptr 51 (2007) (four-year suspension primarily for neglect and failing to communicate with four clients, as well as failing to return client documents

and failing to protect their interests when he withdrew); *In re O'Dell*, 18 DB Rptr 233 (2004) (three-year suspension for attorney's failure to pursue postconviction relief for a number of clients and failure to respond to the Bar); *In re Parker*, 330 Or 541, 9 P3d 107 (2000) (four-year suspension for neglect of four client matters, failure to respond to the Bar, and related violations that arose from lawyer's involvement with out-of-state business for a 16-month period); *In re Recker*, 309 Or 633, 789 P2d 663 (1990) (two-year suspension for neglect of two client matters, false statement to the court, and failing to respond to the Bar); *In re Chandler*, 306 Or 422, 760 P2d 243 (1988) (two-year suspension for neglect of a single client matter and failures to cooperate with the Bar where prior discipline for similar violations).

64.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be suspended for three years for violations of RPC 1.1, RPC 1.2(a), RPC 1.3, RPC 1.4(a), RPC 1.4(b), RPC 1.15-1(a), RPC 1.15-1(c), RPC 1.15-1(d), RPC 1.16(a)(2), RPC 1.16(d), RPC 8.1(a)(2), and RPC 8.4(a)(3), the sanction to be effective upon approval by the Supreme Court.

65.

The Accused acknowledges that reinstatement is not automatic on expiration of the period of suspension. He is required to comply with the applicable provisions of Title 8 of the Bar Rules of Procedure. The Accused also acknowledges that he cannot hold himself out as an active member of the Bar or provide legal services or advice until he is notified that his license to practice has been reinstated.

66.

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

Cite as *In re Sushida*, 24 DB Rptr 58 (2010)

EXECUTED this 28th day of February 2010

/s/ Jonathan P. Sushida

Jonathan P. Sushida

OSB No. 031469

EXECUTED this 17th day of March 2010

OREGON STATE BAR

By: /s/ Amber Bevacqua-Lynott

Amber Bevacqua-Lynott

OSB No. 990280

Assistant Disciplinary Counsel

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re:	)	
	)	
Complaint as to the Conduct of	)	Case Nos. 08-69, 08-70, 08-89,
	)	08-126, and 08-127
PETER J. CARINI,	)	
	)	
Accused.	)	

Counsel for the Bar:	Bernard S. Moore, Stacy J. Hankin
Counsel for the Accused:	Lee S. Werdell
Disciplinary Board:	James R. Dole, Chair John L. Barlow Philip D. Paquin, Public Member
Disposition:	Violation of RPC 1.4(a), RPC 3.4(c), and RPC 8.4(a)(4). Trial Panel Opinion. 30-day suspension, all stayed, 90-day probation.
Effective Date of Opinion:	April 24, 2010

**OPINION OF THE TRIAL PANEL**

**Introduction and Nature of the Case**

**A. The Complaint**

In this matter, the Oregon State Bar (hereinafter “the Bar”) asserts that the Accused violated several standards of the Oregon Rules of Professional Conduct (RPCs) in five separate matters:

**1. Darter Matter (Case No. 08-69)**

In this matter, the Bar asserts that the Accused violated RPC 1.5(a), 1.15-1(a), and 1.16(d). The Bar alleges that the Accused collected an excessive fee from his client, failed to deposit client funds in trust and, upon termination of the attorney-client relationship, failed to make a refund of unearned fees.

**2. Newman Matter (Case No. 08-70)**

In this matter, the Bar asserts that the Accused violated RPC 3.4(c) and 8.4(a)(4). The Bar alleges that the Accused knowingly disobeyed an obligation of the

rules of a tribunal, the Josephine County Circuit Court, and engaged in conduct prejudicial to the administration of justice.

**3. Reeder Matter (Case No. 08-89)**

In this matter, the Bar asserts that the Accused violated RPC 1.3, 1.5(a), and 1.16(d). The Bar alleges that the Accused collected an excessive fee and failed to refund unearned fees upon termination of the attorney-client relationship. The Bar further alleges that the Accused neglected a legal matter entrusted to him with respect to his representation.

**4. Shull Matter (Case No. 08-125)**

In this matter, the Bar asserts that the Accused violated RPC 1.3, 1.4(a), 1.5(a), 1.7(a)(2), 8.1(a)(1), and 8.1(a)(2). The Bar alleges that the Accused neglected a legal matter entrusted to him, failed to keep his client reasonably informed about the status of his legal matter and to promptly comply with reasonable requests of the client for information, failed to explain matters to the client to the extent reasonably necessary to permit the client to make informed decisions regarding representation, collected an excessive fee, and engaged in a current client conflict of interest. The Bar further alleges that the Accused knowingly made a false statement of material fact to the Bar in connection with its investigation of this matter and knowingly failed to respond to a lawful demand for information from the Bar.

**5. OSB Matter (Case No. 08-127)**

In this matter, the Bar asserts that the Accused violated RPC 1.15-1(d), 8.4(a)(2), 8.4(a)(3), and 8.1(a)(2). The Bar alleges that the Accused engaged in criminal conduct that reflects on his honesty, trustworthiness, or fitness in other respects, engaged in conduct involving dishonesty and misrepresentations, and failed to promptly deliver funds to a third person. The Bar further alleges that the Accused knowingly failed to respond to lawful demand for information from a disciplinary authority.

**B. The Answer**

The answer, filed by the Accused's former counsel in this matter, makes various admissions, denials, and allegations in response to those in the complaint, and requests dismissal of the complaint.

**1. Darter Matter**

The Accused contends that he and his client had an agreement regarding payment of his fees, which did not require deposit of fees into his trust account. He denies that his fees were excessive and that he owes his client a refund of unearned fees. He denies violation of any of his ethical obligations.



**2. Newman Matter**

The Accused alleges that he did not violate his ethical duties because he tried to advise the court of his scheduling conflict, and that he sent another attorney to appear for him in court.

**3. Reeder Matter**

The Accused alleges that the fee agreement with Reeder had errors in it regarding the scope of his representation. He otherwise denies the Bar's allegations that he violated any ethical obligations to his client.

**4. Shull Matter**

The Accused denies violating any ethical obligations. He alleges that he did not file a motion to suppress because there were no suppression issues. He alleges that he did not return fees to his client because the fees were applied to his fees for appearing at trial.

**5. OSB Matter**

The Accused denies violating any ethical obligations regarding this matter.

**C. The Hearing, Witnesses, Exhibits, and Transcript**

The hearing in this matter commenced on November 9, 2009, at the law offices of Cauble, Dole, Sorenson & Ransom, LLP, in Grants Pass, Oregon. Bar counsel, the Accused, and his counsel appeared. At the commencement of the hearing, the parties stipulated as to the admissibility of all exhibits. Witnesses appeared voluntarily and pursuant to subpoena. Certain witnesses appeared by telephone. On November 10, 2009, the trial panel received a motion to quash subpoenas served on Jackson County Circuit Court Judge Timothy Barnack and DMV hearings judge Dove Gutman. The motion was filed with the Bar by Assistant Oregon Attorney General Thomas Castle on behalf of Judge Barnack and Judge Gutman. The trial panel chair considered the motion and determined that he did not have authority to grant or deny it, finding that under RPC Title 5, 5.3(b), such motions were within the sole jurisdiction of the circuit court. Judge Barnack and Judge Gutman declined to testify. At the conclusion of the hearing, counsel for the Accused requested leave to permit to compel the witnesses' testimony. The request was denied by letter dated November 12, 2009.

The hearing concluded on November 11, 2009. The transcript was settled by order of the trial panel chair on January 6, 2010.

**Findings of Fact**

The Accused is engaged primarily in defending persons charged with criminal violations, primarily driving under the influence of intoxicants (DUI). He also

represents persons subject to associated proceedings before the Oregon Department of Transportation/Motor Vehicles Division relating to suspensions of driving privileges. There is no dispute that the Accused has earned a reputation of competence in this field. He is considered in this region, if not statewide, as a skilled member of the criminal defense bar. During the time that the events occurred which give rise to the Bar's complaint, the Accused's practice was by all accounts burgeoning. At the hearing it was clear that the complaints against the Accused are, in large part, the product of difficulties he had managing his practice, a problem that is not uncommon among members of the Bar.

In 2005, the Accused hired two associate attorneys, Mr. Thornicroft and Ms. Smith-Norton. The Accused's intention was that the three of them would jointly expand the Accused's busy DUII practice. The Accused and Mr. Thornicroft would try cases and make court appearances statewide. Ms. Smith-Norton would have a more office-oriented practice, but would make some court appearances as well. Eventually, both Thornicroft and Smith-Norton left the Accused's firm in the fall of 2006, leaving the Accused with a substantial client base and a demanding schedule of court appearances statewide.

Upon the departure of Thornicroft and Smith-Norton, the Accused was left to manage the entire caseload alone. The five bar complaints here appear to the trial panel to be the result of his attempts to manage this situation.

#### **A. Darter Matter**

In November 2006, Mr. Darter sought the Accused's representation in a pending DUII matter in Clackamas County. Apparently because he could not afford the Accused's customary nonrefundable retainer, Darter and the Accused agreed that Darter would pay the Accused \$250 for every week in which the Accused continued his representation. There was apparently no maximum set on this. While a fee agreement was prepared consistent with that, Darter did not sign it. During the hearing, Darter testified he did not sign it because he was uncomfortable with it. Nevertheless, he made payments, but eventually fell behind. Exhibits indicate that some payments were not made because Darter's debit card was declined, presumably because his account did not have sufficient funds. *State v. Darter* was initially set for trial for January 17, 2007, was later reset for February 23, 2007, and, finally, for May 1, 2007. On February 14, 2007, the Accused caused an e-mail to be sent to Darter advising him that his account was delinquent and that the Accused would not take the matter to trial unless it was current. Darter made substantial payments thereafter but on May 3, 2007, the Accused filed a motion with the court seeking to withdraw, citing Darter's failure to comply with the retainer agreement. The motion was granted. Darter hired another attorney who attempted to postpone the trial. The court denied that motion.

We find that the Bar has not proven by clear and convincing evidence that the Accused violated RPC 1.5(a), 1.15-1(a), and 1.16(d). The Bar contends that the violation results from the fact that Darter did not sign the Accused's flat-fee agreement. Unless there exists a written fee agreement clearly providing that fees are nonrefundable and earned on receipt, client advances must be deposited into the lawyer's trust account. *In re Biggs*, 318 Or 281, 293, 864 P2d 1310 (1994). Exhibit 1A is the fee agreement here and it clearly provides that the fee is nonrefundable. While Darter did not sign it, we find that he consented to it by permitting the Accused to process over 20 such charges on his debit card. Moreover, he never objected to the Accused appearing on his behalf, personally and by court filings. The fee agreement provides that the \$250 charge would apply regardless of whether the Accused worked no hours for Darter during a week or worked many. While the Accused did not maintain time and billing records reflecting precisely what services he rendered during any week, and it is doubtless that there were weeks when the Accused probably did little on Darter's case, the Accused did perform services for him up to his withdrawal in May of 2007. It is a poor office practice for an attorney to allow a fee agreement of this nature to go unsigned. But there is a fee agreement under these circumstances which the client appears to have acquiesced to. We therefore find that the Bar has not sustained its burden of proving the Accused violated the applicable rules.

RPC 1.5(a) prohibits a lawyer from charging an excessive fee. Throughout the matter, Darter paid the Accused a total of \$6,625 through March 1, 2007. The fee agreement provided that the \$250 per week arrangement would continue until the pretrial conference, at which time Darter would apparently have to deposit more with the Accused to pay for the Accused to appear on his behalf at trial. By the pretrial, Darter was delinquent on payments to the Accused, prompting the Accused's withdrawal. In light of our finding that the Accused's fee agreement was not improper, we find that the Accused did not charge and collect an excessive fee.

## **B. Newman Matter**

During the first week of December 2007, the Accused had three cases set for trial: *State v. Alexander*, a Multnomah County case set for trial in Portland on Monday, December 3; *State v. Crawford*, a Josephine County case set for trial in Grants Pass on December 5; and *State v. Shull*, a Crook County case set for trial in Prineville also on December 5. Initially, Thornicroft was to try at least the Shull case. By the time these three cases came to trial, however, Thornicroft and Smith-Norton had left the Accused's employment and the Accused was the only attorney available to handle these cases.

We find that the Bar has proven by clear and convincing evidence that the Accused violated both RPC 3.4(c) and 8.4(a)(4). These rules require attorneys to

refrain from knowingly disobeying the obligations of a tribunal and to refrain from engaging in conduct that is prejudicial to the administration of justice. Here, the Accused knew or should have known of the inevitable scheduling conflict he faced with these three cases, set in three different counties, each in geographically distant parts of Oregon, long before the conflict manifested itself in a way that was irreconcilable. *Alexander* was set to commence December 4 and the Accused testified that he knew it would be a multiday proceeding. *Crawford* and *Shull* were set to both commence in different counties, hundreds of miles apart, on December 5. While the Accused testified that he expected *Alexander* not to be tried, there was no evidence of that other than his opinion. He was in Portland preparing for it on December 3. The Accused had been excused from the previous week's docket-setting appearance in Josephine County when the court advised him and/or his office that *Crawford* was a primary case and was expected to be tried on December 5. Yet the Accused did nothing to address the obvious conflict until the afternoon of December 4, when, on his way from Portland back to his office in Medford, he called Josephine County court staff on his cell phone to advise that, due to the fact that he would need to appear in *Shull*, he would be unable to appear in *Crawford*. He then arranged to have a colleague present a motion to postpone *Crawford* the morning of trial, which the court denied.

At the hearing, Judge Newman, who dealt with this matter in Josephine County Circuit Court, testified that he expected the Accused to appear at trial because the Accused had known that *Crawford* was set as a primary case since the previous week. Judge Newman testified that, based on his experience and practices, had the Accused advised the court of the conflicts he faced at docket call on November 28, the court could have addressed it. One option would have been for Judge Newman to discuss the conflict with his counterpart in Crook County to decide which of the two trials, *Shull* or *Crawford*, should be given priority. Judge Newman's testimony was credible and reliable. Based on the Accused's testimony, the only apparent reasons why the Accused did not take action were that he was too busy with other pressing matters and/or he did not want to have one case set over voluntarily and have another set over involuntarily, leaving him with no cases to try that week.

We find that these reasons are insufficient. The Accused was experienced in Josephine County court practices. He had appeared in Josephine County courts many times and knew that the previous week's docket call was the time to advise the court of scheduling conflicts. The Accused knowingly violated his obligation to the tribunal when he gave the court no indication that he would not be ready for trial when *Crawford* was called and then did not show up when it was called for trial on December 5.

The Accused's defenses to the charges are that he could not be in Crook County and Josephine County at the same time, that he tried to advise the Josephine County court of the conflict on December 4, and that he should be treated no differently than when a prosecutor dismisses a case on the morning of trial because the prosecutor is unprepared or has some other problem that prevents the case from going forward. These fail. The Accused is responsible for allowing the circumstances to arise in which he would have to be in multiple courts at the same time. He could have addressed the potential conflict before the week of December 3. His attempt to resolve the conflict on December 4 was both insufficient and tardy. While it is true that the criminal defense bar does not enjoy some of the same privileges as prosecutors with respect to managing their dockets, that is inherent in the system in which the Accused has developed skill and prominence.

We find by clear and convincing evidence that the Accused's actions and inactions here were prejudicial to the Josephine County courts. Judge Newman testified that had the Accused appeared for trial, the case would have been tried to a jury. The prosecutor testified that she was prepared to proceed and could not consent to postponement. The jury pool had been called and was available. While the evidence was that Josephine County's court docket is particularly crowded, Judge Newman testified that during this week the *Crawford* case could have and would have been tried. The Accused's conduct prevented that.

### **C. Reeder Matter**

Mr. Reeder retained the Accused to represent him in a license suspension proceeding before the Oregon Department of Transportation/Motor Vehicles Division (DMV). The Accused charged and collected from Reeder a flat fee of \$3,500 for this. While there was discussion regarding the Accused representing Reeder in connection with associated DUII charges, they never agreed upon that.

The Accused appeared on Reeder's behalf at a hearing in Eugene on October 26, 2007. The hearing started, but was continued in order for the DMV to call a witness necessary to address a defense raised by Mr. Reeder and the Accused.

On or about December 18, 2007, Reeder terminated the Accused's representation. The DMV matter had not been completed at that time, although the Accused asserts that his work and the DMV hearing was substantially completed by the time the matter was continued at DMV's request. The hearing resumed on January 28, 2008. By then, Mr. Reeder had hired another attorney, Mr. Dennett, to appear in place of the Accused. However, the DMV's final order indicates that Mr. Dennett failed to show up and Mr. Reeder had to participate through the remainder of the hearing without counsel. Even so, the DMV judge rescinded the suspension of Reeder's driving privileges.

The Bar asserts that the Accused failed to refund the unearned portion of the flat fee. The trial panel finds that the Bar has not proven by clear and convincing evidence that the Accused violated RPC 1.3, 1.5(a), and 1.16(d). RPC 1.3 provides that a lawyer shall not neglect a legal matter. The Bar has not sustained its burden of proving that the Accused neglected this matter. The evidence indicates that by the time the Accused took on this case, he had developed extensive experience in DMV hearings and he would not have required the prehearing preparation of a less experienced or less-skilled attorney. Mr. Reeder was the beneficiary of that, for which he agreed to pay the \$3,500 flat fee.

Between October 12, 2007, and commencement of the DMV hearing the Accused was able to identify the issue which resulted in the DMV continuing the hearing—an apparent unlawful entry into Reeder’s dwelling. The Accused traveled from his Medford office to Eugene and met with his client in advance of the October 26 hearing. At the start of the DMV hearing, at least a considerable amount of evidence was taken into the record, as indicated in the DMV’s order. The DMV moved for a continuance, which was granted. After the continued hearing, the DMV’s hearings judge rescinded the suspension of Reeder’s driving privileges. The record does not reflect that the favorable result was in any way due to Mr. Dennett’s representation, who failed to show up at the resumed hearing, leaving Mr. Reeder to appear without counsel. From the testimony during the hearing before this trial panel, it appears likely that the Accused’s legal representation was in large part responsible for an outcome favorable to Mr. Reeder.

The Bar has not proven by clear and convincing evidence that the Accused charged an excessive fee. The evidence appears to be that Reeder’s suspension was rescinded in large part due to the Accused’s work and his experience in hearings of this nature. On short notice, he devoted significant effort toward Reeder’s defense and devoted much of an entire day to the first DMV hearing. It appears that Reeder’s decision to discharge the Accused, preventing him from completing the DMV hearing for the flat \$3,500 fee, was because he thought the Accused had alienated the DMV judge. There is no evidence of that beyond Mr. Reeder’s testimony, and we cannot find that Reeder had a justification for terminating his lawyer in this manner. The ultimate outcome of the hearing was favorable to Mr. Reeder and nothing indicates to us that the result would have been different had he not chosen to discharge the Accused. The Accused testified that he would have continued and completed his representation of Reeder through the hearing’s successful conclusion, and his testimony was credible in this regard.

*In re Gastineau*, 317 Or 545, 857 P2d 136 (1993), is somewhat helpful. While decided under the former rule, the supreme court held that a fee is excessive when the lawyer collects a nonrefundable fee, does not perform or complete the representation,

but fails to remit the unearned portion of the fee. In *Gastineau*, the court found that the Accused “never performed” the work for which he collected the fee. Here, we find that the Bar has not proven that the Accused “never performed” the work Mr. Reeder hired him for. We find that the Accused substantially performed the work prior to the time his client fired him.

#### **D. Shull Matter**

Denton Shull retained the Accused to represent him in a DUII matter in Crook County. The fee agreement provided that Shull would pay a \$2,500 retainer and \$1,000 for each court appearance until the pretrial conference. Shull subsequently signed another flat fee agreement for \$5,000 for the Accused to file a motion to suppress and an additional \$500 for Thornicroft (while he was employed by the Accused) to represent Shull at trial. While Thornicroft told the court he would be filing a motion to suppress and the Crook County court delayed the matter a substantial time in order for that motion, it was never filed.

When Thornicroft left the Accused’s firm, the Accused was left responsible for the Shull matter. The evidence was that Mr. Shull attempted to contact the Accused about the status of his case and that response from the Accused was minimal. By all accounts, the matter was delayed an inordinately long period of time because the court was awaiting a motion to suppress which never came.

The Accused testified that he reviewed the matter after Thornicroft left his employment and it appears he reasonably concluded a motion to suppress would not have merit. However, the Accused understood that Shull was not eager to have his case tried. While there existed a possible argument that the field sobriety test used on Shull was inappropriate because Shull had only one eye, Shull had prior DUII convictions and had admitted to being very drunk in this instance. The Accused testified, credibly, that both he and Shull thought Shull was best served by delaying trial because there was a significant likelihood of conviction and Shull’s sentence would include the permanent loss of driving privileges. However, the Accused testified that he recognized he could not delay trial indefinitely and it was eventually heard on December 5, 2007, the same day as the Accused was to appear in *State v. Crawford* in Josephine County.

Obviously, the Accused did not have considerable opportunity to prepare for trial because of his involvement in *Alexander* and *Crawford*. He did not draft jury instructions, relying instead on the standard instructions requested by the prosecutor. He did not call an expert witness regarding Shull’s monocular vision because, he testified at the hearing, in all likelihood the argument would not succeed. We find this testimony credible. While he made statements in his opening statement suggesting otherwise, he did not call Shull to testify. Shull was convicted.

The trial panel finds that the Bar has not proven by clear and convincing evidence that the Accused violated RPC 1.3, 1.5(a), 1.7(a)(2), 8.1(a)(1), or 8.1(a)(2). We cannot find that the Accused neglected this legal matter. Shull's interests were probably served by delaying his trial because his prospects for an acquittal were not good. We cannot find that the Accused's conduct here in representing Shull this way was inadequate. Mr. Shull appeared to have little in the way of defenses to the charge and upon his probable conviction he was going to permanently lose his driving privileges. In the Accused's terms, trial strategy in difficult cases like this is sometimes "to play for fumbles." That is, perhaps Shull's best hope was to get lucky and be acquitted through a mishap or failure on the part of the prosecutor. On this basis and in light of the Bar's burden of proof, we cannot conclude that the Bar has established that the Accused neglected Mr. Shull's case.

The Bar asserts that the Accused failed to keep Mr. Shull reasonably informed about his case. The record is clear that the Accused did a poor job responding to Mr. Shull's inquiries. Several, including e-mails, appear to have gone completely unanswered. At one point, Mr. Shull contacted Mr. Thornicroft after he had left the Accused's firm to try and get a response. Finally, some months later the Accused resumed contact. The Accused contended that he thought one of the problems with their communication was the lack of current contact information but the record does not support that. His is not an example that an Oregon lawyer should follow in responding to a client's inquiries about the progress of a case. While the *Shull* case was essentially in a state of prolonged suspension, had no trial date or any other pending activity, the Accused still had the obligation to respond to his client's inquiries. When the trial court reactivated the case, the Accused resumed contact with Mr. Shull, but this does not excuse the many instances in which the Accused did little, if anything, to try and communicate with his client. We find that the Bar has proven by clear and convincing evidence that the Accused has violated RPC 1.4(a) by repeatedly failing to return his client's attempts to find out the status of his case.

We find that the Bar has not proven by clear and convincing evidence that the Accused charged or collected an excessive fee. RPC 1.5. The Accused required an initial \$2,500 retainer and an additional \$1,000 per court appearance. Shull eventually agreed to a flat fee of \$5,000 to file a motion to suppress and an additional \$500 for Thornicroft to represent Shull at trial. It appears from the record that the Accused charged and collected a total of \$8,500. While the motion to suppress was not filed because there was no apparent basis for it, the Accused continued to represent Shull on the basis of the existing fee agreement, notwithstanding the fact that this was below the fee he ordinarily received for comparable work. The fact that the motion to suppress was not filed does not render the fee excessive, so long as the Accused earned the fee by rendering services. The Accused performed substantial legal services



for Mr. Shull, representing him in trial on what was undoubtedly a very difficult case for Shull to win. While the Accused apparently did so only after the Bar initiated its investigation, a fee arbitration panel eventually upheld the fee the Accused collected from Shull as reasonable.

While the Second Amended Formal Complaint alleges violation of RPC 1.7(a)(2), the Bar offered no evidence as to any potential current-client conflict of interest.

We find that the Bar has not proven by clear and convincing evidence that the Accused made false statements of material fact to the Bar in its investigation or knowingly failed to respond to a lawful demand for information regarding a disciplinary matter.

#### **E. OSB Matter**

The Bar charges here that the Accused willfully failed to pay withholding federal withholding taxes as required by law and failed to file the required IRS Form 941, in violation of RPC 8.4(a). The Accused admits that withholding taxes were not paid to the taxing authorities and the required forms went unfiled. The evidence at the hearing was that the Accused relied on office staff to make these payments and filings. The Accused is responsible for the malfeasance and nonfeasance of his employees. However, the evidence is that reasonably soon after learning of this problem the Accused saw to it that all the delinquent withholdings payments were brought current. Permitting this to happen is nothing the trial panel condones and is further evidence that the Accused's workload and office conditions were spiraling out of control during this time. But we find that, under these facts, that the Bar has not sustained its burden of proving the Accused violated RPC 8.4(a)(2)**Error! Bookmark not defined.** or 8.4(a)(3).

We find that the Bar has not proven by clear and convincing evidence that the Accused violated RPC 8.1(a)(2). The evidence reflects that the Bar began communicating with the Accused regarding the foregoing complaints discussed in this matter in the winter of 2008, continuing through the summer of that year. The record includes numerous pieces of correspondence by the Bar. The Accused responded numerous times. The trial record includes all of these and several are lengthy and detailed.

The bar's principal allegation appears to be that the Accused did not adequately respond to bar counsel's letters dated August 4 (Exhibit 61C) and August 27 (Exhibit 62) of 2008. The Accused responded to the August 4 letter by his letter dated August 6 (Exhibit 61E). While it is certainly arguable that the Accused's responses to bar counsel's inquiries were not perfect, they were nevertheless substantial. We cannot find that these responses, or, rather, what he omitted from his

responses, constitutes a knowing failure to respond to the Bar's lawful demand for information.

At the hearing, the Accused offered a tape recording of a dictation, supposedly of another attempt to respond to bar counsel's inquires. The Accused allegedly discovered this after the first day of the disciplinary hearing. The trial panel is troubled by this and it adversely affects the Accused's credibility. We do not rely on this evidence at all in support of the Accused because of the circumstances surrounding its presentation at the hearing.

This trial panel also wishes to express its concern regarding the Bar's investigation here. The Accused conducted his law practice by a standard below that which should be expected for Oregon lawyers. He lost control of his caseload and office procedures to the extent that he was double-booked with trials, he was not assuring that his office staff met his financial obligations, and he was failing to respond to clients asking about the status of their cases. He ran himself ragged with travel and work obligations and that undoubtedly contributed to the charges the Bar asserts here.

However, bar counsel's investigation of these circumstances and the fact that the investigation led to alleged violations of RPC 8.1(a) appear to this trial panel as aggressive, perhaps unduly so. We recognize the Bar's important obligation to the judicial system, the legal profession, and the public to conduct its investigations of Oregon attorneys diligently. We believe that the Bar also has an obligation to conduct its investigations with a commitment to objectivity. Evidence in this proceeding reflects that at times the Bar's investigation may have lost sight of that.

### **Conclusions of Law**

#### **1. Darter Case**

We find that the Bar has not sustained its burden of proving that the Accused has violated RPC 1.5(a), 1.15-1(a), or 1.16(d).

#### **2. Newman Case**

We find that the Bar has sustained its burden of proving that the Accused had violated RPC 3.4(c) and 8.4(a)(4).

#### **3. Reeder Case**

We find that the Bar has not sustained its burden of proving that the Accused has violated RPC 1.3, 1.5(a), 1.16(d), 8.1(a)(1), or 8.1(a)(2).

**4. Shull Case**

We find that the Bar has not sustained its burden of proving that the Accused has violated RPC 1.3, 1.5(a), or 1.7(a)(2). We find that the Bar has sustained its burden of proving that the Accused violated RPC 1.4(a).

**5. OSB Case**

We find that the Bar has not sustained its burden of proving that the Accused has violated RPC 1.15-1(d), 8.4(a)(2), 8.4(a)(3), or 8.1(a)(2).

In light of the trial panel's conclusions that the Bar has proven by clear and convincing evidence that the Accused has violated RPC 3.4(c), 8.4(a)(4), and 1.4(a), we discuss the applicable sanction next.

**Sanction**

**A. Duty**

The Accused's actions in the Newman matter violated his duty to the legal process and to the profession. His conduct was prejudicial to the administration of justice and was disobedient to the court's directives. The Accused's actions in the Shull matter violated his duty to the client to keep the client reasonably informed.

**B. Mental State**

The Trial Panel finds that the Accused acted knowingly in the three rule violations.

**C. Actual or Potential Injury**

The Trial Panel finds that the Josephine County Circuit Court sustained actual injury in the form of unanticipated delay in the Accused's case and calling more jurors than were necessary given that the Accused's case could not be tried as scheduled. Although he took measures to let opposing counsel, the deputy district attorney, know that she probably should release her witnesses because he could not be present, the Accused's actions caused the expenditure of time and resources on a scheduling conflict he alone created. The client in the Shull matter sustained actual injury in the form of frustration and anxiety about not being able to communicate with his lawyer about his case.

## **D. Aggravating or Mitigating Factors**

### **1. Newman Matter**

Without consideration of aggravating or mitigating factors, the ABA *Standards for Imposing Lawyer Sanctions* (hereinafter *Standards*), § 6.22, provides that suspension is appropriate when a lawyer knowingly violates a court directive or rule and there is injury or potential injury to a client or a party or the violation causes interference or potential interference with a legal proceeding. A reprimand is appropriate when a lawyer negligently violates a court directive or rule and there is injury or potential injury to a client or a party or the violation causes interference or potential interference with a legal proceeding.

### **2. Shull Matter**

*Standards*, § 4.6, provides that, without consideration of aggravating or mitigating factors, reprimand is appropriate when a lawyer negligently fails to provide a client with accurate or complete information and causes actual or potential injury to the client. Admonition is appropriate when a lawyer engages in an isolated instance of negligence and causes little or no actual or potential injury to the client.

Aggravating circumstances are factors or considerations that may justify an increase in the degree of discipline to be imposed. *Standards*, § 9.22. In the present case, the Bar has proven by clear and convincing evidence the following aggravating circumstances:

#### **(a) Multiple Offenses.**

The Accused has been found to have violated three separate disciplinary rules. This is an aggravating factor in the present case, but because the two of the violations involve a single matter and all stem from the same general course of conduct by the Accused, we give little weight to this factor. *Standards*, § 9.22(d).

#### **(b) Substantial Experience in the Practice of Law.**

The Accused has been licensed to practice law in Oregon since 1993 and is very experienced in trying DUII cases. The plain reading of this factor, *Standards*, § 9.22(i), demonstrates that the measuring standard is the amount of time practicing law, not the amount of experience in a particular area.

#### **(c) Refusal to Acknowledge Wrongful Nature of Conduct.**

The Accused acknowledged his failure to be in court in the Crawford matter, but contended that he did nothing wrong. He also suggested that some “collusion” between the court and the District Attorney’s office might have caused the effects of his unresolved scheduling conflict to be more severe. The trial panel found no other evidence to support that contention.

Mitigating circumstances are factors which may justify a reduction in the degree of discipline to be imposed. *Standards*, § 9.31. The trial panel finds, by clear and convincing evidence, the following mitigating factors:

**(d) Personal Problems.**

During the relevant time frame, the Accused was experiencing great difficulties in staffing his office, compounded by the departure from his office of associate attorneys who handled many of the Accused's clients. These factors contributed to his violations of the disciplinary rules.

**(e) Lack of Dishonest or Selfish Motive.**

The Accused did not have a dishonest motive for his actions. *Standards*, § 9.32(b). The bar did prove by clear and convincing evidence that the Accused had a selfish motive which caused the actual or potential harm in that he took on too many cases without adequate resources and allowed irresolvable scheduling conflicts to develop because of his interest in building a statewide practice.

**(f) Remorse.**

The trial panel has concerns about whether the Accused fully appreciates the effect of his disobedience to his obligation to the courts. The Accused acknowledged that his failure to appear in court ready to try *Crawford* required that matter to be set over. He also acknowledged that his somewhat chaotic office procedures contributed to that failure.

For an Accused to be given the benefit of this mitigating factor, the Accused must show that he has learned that his violations of duty caused real harm to the profession and the courts and take measures to avoid such violations before sanctions are imposed. We do not find that the Accused has done so in this case.

Although the trial panel finds that the Accused's actions in the Newman matter were "knowing," they might be better described as "knowingly negligent." The trial panel finds that the Accused knew that he was violating a directive of the Josephine County Circuit Court, but because of his organizational difficulties he could do nothing more at the time than what he did—try to mitigate the effects by advising the court and opposing counsel that he could not, and would not, appear for trial on the following day.

The same analysis applies to the Shull matter. The Accused knew that he was not communicating with his client, but believed that his failure to do so was not harmful or even remarkable because of the client's interest in delaying the likely outcome of his trial.

Considering the totality of the circumstances, the *Standards*, and Oregon law, the trial panel concludes that a suspension from practice of 30 days is appropriate for the Newman matter and that the Accused should be publicly reprimanded for failing to communicate with his client in the Shull matter.

The trial panel further concludes that the suspension should be stayed, and the Accused placed on probation for 90 days to allow the Accused to adopt measures to avoid the type of scheduling conflict that caused him to violate RPCs 1.4(a), 3.4(c), and 8.4(a)(4). Such measures include: (1) contact by the Accused, within thirty days of the effective date of this order, with the Practice Management section of the Professional Liability Fund (PLF) to set up a complete audit of the Accused's office organization and procedures; (2) implementation in a manner acceptable to the PLF auditor of all recommended remedial procedures, including hiring additional staff if required; and (3) consent by the Accused to additional auditing and monitoring of his office practice and procedures as determined necessary by the PLF. The Accused shall provide proof of each of these probationary steps by composing a statement identifying the date of the audit, the measures recommended, and his implementation of those measures, which shall be signed by a representative of the Practice Management section of the PLF and delivered to the Disciplinary Counsel's office within 90 days of the date of this Opinion.

If the Accused successfully completes probation by adopting the practice modification recommendations and providing proof thereof within the 90-day probationary period, no actual suspension from practice should be imposed. The trial panel believes that this sanction is sufficient to satisfy the interests of the courts and the profession while providing an opportunity for the Accused to adopt corrective efforts that will allow him to practice law without future rule violations.

The trial panel admonishes the Accused to regard the probation as a final opportunity, and specifically advises any future panel evaluating the conduct of the Accused that it should regard the rules violations found in this case to be serious.

### **Conclusion and Disposition**

Having found by clear and convincing evidence that the Accused violated Oregon Rules of Professional Conduct 1.4(a), 3.4(c), and 8.4(a), and considering the Oregon case law and relevant *Standards*, the trial panel makes the following disposition:

The Accused is suspended from the practice of law for a period of 30 days for the Newman matter. The Accused is reprimanded for the Shull matter. The Accused is given probation for 90 days, during which time the suspension is stayed, to adopt recommended practice modifications to prevent future rules violations. The

suspension will not be imposed if all recommended modifications are adopted by the Accused within 90 days and proof of that adoption is provided to Disciplinary Counsel.

ORDERED this 19th day of February 2010.

/s/ James R. Dole

James R. Dole, Trial Panel Chair

/s/ John L. Barlow

John L. Barlow, Panel Member

/s/ Phil Paquin

Phil Paquin, Public Member

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
)  
Complaint as to the Conduct of ) Case No. 09-135  
)  
JAMES N. WELTY, )  
)  
Accused. )

Counsel for the Bar: Amber Bevacqua-Lynott  
Counsel for the Accused: Calon Russell  
Disciplinary Board: None  
Disposition: Violations of DR 9-101(C)(3) and DR 9-101(C)(4).  
Stipulation for Discipline. Public reprimand.  
Effective Date of Order: April 22, 2010

**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 violations of DR 9-101(C)(3) and DR 9-101(C)(4).

DATED this 22nd day of April 2010.

/s/ Gilbert B. Feibleman  
Gilbert B. Feibleman  
State Disciplinary Board Chairperson

/s/ William B. Crow  
William B. Crow, Region 5  
Disciplinary Board Chairperson



### **STIPULATION FOR DISCIPLINE**

James N. Welty, attorney at law (hereinafter “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, 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.

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.

On November 21, 2009, the State Professional Responsibility Board (“SPRB”) authorized formal disciplinary proceedings against the Accused for alleged violations of DR 9-101(C)(3) and (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.

In July 1995, while with the Ashland firm of Davis, Gilstrap, Hearn, Saladoff and Smith (“the firm”), the Accused prepared a sales contract and associated documentation on behalf of certain shareholders in connection with the sale of a publishing company. The firm agreed to provide collection escrow services for the transaction, collecting periodic payments made by the buyers and distributing the proceeds to the shareholder clients.

6.

The sales transaction called for portions of monthly payments on two separate notes to be allocated and distributed among multiple payees in a rather complicated fashion. The firm used the figures set forth in a corporate resolution to make each monthly distribution. Through errors in bookkeeping, the firm failed to distribute as much as it received. In some months, it was only a few cents that were not distributed, but in other months, it was as much as a few hundred dollars. Although the Accused was provided with documentation of the amounts received every month and instructed the bookkeeper on how to distribute those amounts, he failed to notice the accumulation of funds in the firm trust account. Compounded over several months, more than \$4,200 accrued in the trust account. The Accused failed to notice this balance before leaving the firm in July 1998.

7.

The excess funds were eventually discovered by the Accused's successor counsel in 1999, who reported the funds to the clients. Although by this time the Accused was no longer in a position to influence the disposition of these funds, they were not distributed from the firm trust account until March 2009, when the firm filed an impleader action.

### Violations

8.

The Accused admits that his failure to notice the accumulation of funds and timely provide them to the client or clients who were entitled to them constituted a failure to adequately account for and provide client funds or property, in violation of DR 9-101(C)(3) and (4).

### 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 properly handle client property. *Standards*, § 4.1. The *Standards* assume that the most

important ethical duties are those obligations which a lawyer owes to clients. *Standards*, at 5.

- b. **Mental state.** The Accused acted negligently, which means that he failed to heed a substantial risk that circumstances existed or that a result would follow, which failure was a deviation from the standard of care that a reasonable lawyer would exercise in the situation. *Standards*, at 9.
- c. **Injury.** Despite the fact that the clients did not initially realize that they were being shorted funds, they suffered actual injury in being denied access to their funds for a number of years.
- d. **Aggravating circumstances.** Aggravating circumstances include:
  - 1. Substantial experience in the practice of law. *Standards*, § 9.22(i). The Accused was admitted in 1989 and had been practicing between seven and 10 years at the time of this conduct.
- e. **Mitigating circumstances.** Mitigating circumstances include:
  - 1. Absence of a prior disciplinary record. *Standards*, § 9.32(a).
  - 2. Absence of a dishonest or selfish motive. *Standards*, § 9.32(b).
  - 3. Full and free disclosure and cooperative attitude in the Bar's investigation. *Standards*, § 9.32(e).

10.

Under the *Standards*, a reprimand is generally appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client. *Standards*, § 4.13.

11.

The court in *In re Eakin*, 334 Or 238, 258, 48 P3d 147 (2002), stated that a reprimand is generally the appropriate sanction for unintentional mistakes in trust account management. *See also In re Mannis*, 295 Or 594, 668 P2d 1224 (1983) (lawyer reprimanded for commingling office and client funds through mistakes of bookkeeping assistant).

12.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be publicly reprimanded for violations of DR 9-101(C)(3) and (4), the sanction to be effective upon approval by the Disciplinary Board.

13.

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 13th day of April 2010.

/s/ James N. Welty

James N. Welty

OSB No. 893787

EXECUTED this 14th day of April 2010.

OREGON STATE BAR

By: /s/ Amber Bevacqua-Lynott

Amber Bevacqua-Lynott

OSB No. 990280

Assistant Disciplinary Counsel

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
)  
Complaint as to the Conduct of ) Case No. 08-106  
)  
PAULA B. HAMMOND, )  
)  
Accused. )

Counsel for the Bar: Jeffrey D. Sapiro  
Counsel for the Accused: None  
Disciplinary Board: None  
Disposition: Violation of DR 6-101(A)/RPC 1.1, DR 2-110(B)(2)/RPC 1.16(a)(1), and DR 1-102(A)(4)/RPC 8.4(a)(4). Stipulation for Discipline. 30-day suspension.  
Effective Date of Order: June 1, 2010

**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 a period of 30 days, effective June 1, 2010, for violation of DR 6-101(A)/RPC 1.1, DR 2-110(B)(2)/RPC 1.16(a)(1), and DR 1-102(A)(4)/RPC 8.4(a)(4).

DATED this 29th day of April 2010.

/s/ Gilbert B. Feibleman  
Gilbert B. Feibleman  
State Disciplinary Board Chairperson

/s/ Mary Kim Wood  
Mary Kim Wood, Region 6  
Disciplinary Board Chairperson

## **STIPULATION FOR DISCIPLINE**

Paula B. Hammond, attorney at law (hereinafter “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, 1985, 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 August 26, 2009, 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(A)/RPC 1.1, DR 2-110(B)(2)/RPC 1.16(a)(1), and DR 1-102(A)(4)/RPC 8.4(a)(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.

### **Facts**

5.

In or about March 2004, the Accused agreed to serve as cocounsel with Glenda P. Durham, an Oregon lawyer (hereinafter “Durham”), for plaintiffs in a lawsuit Durham had filed in Clackamas County Circuit Court, *Miller, et. al. v. Riggle, et. al.*, No. 03110235 (hereinafter “first lawsuit”) on behalf of certain property owners in a residential subdivision (hereinafter “plaintiffs”) against other subdivision property owners (hereinafter “defendants”). The plaintiffs were opposing efforts by the defendants to partition their properties.

6.

Between March 2004 and March 2006, the Accused remained cocounsel in the first lawsuit and performed certain services at Durham's request in the name of the plaintiffs, or some of them, including but not limited to: filing amended complaints, numerous motions, and other pleadings in the first lawsuit; filing a related mandamus proceeding in or about May 2004 to challenge a municipality's decisions regarding property partitions; appearing at trial of the first lawsuit in or about June 2005; filing a related, second lawsuit in Clackamas County Circuit Court, *Behrend, et. al. v. Riggle, et. al.*, No. 05060459 (hereinafter "second lawsuit") in or about June 2005; filing a related mandamus proceeding with the Oregon Supreme Court in or about August 2005; filing notices of appeal in or about November and December 2005 of the adverse judgment in the first lawsuit; and filing one or more motions in that appeal.

7.

During the course of representing the plaintiffs in the proceedings described herein, the Accused lacked the knowledge, skill, and experience in land use, litigation, and appellate matters that was reasonably necessary for the representation. In addition, the Accused was not prepared to try the first lawsuit in circuit court in June 2005, after the trial judge denied a motion made by the Accused and Durham to postpone trial. At the conclusion of the first lawsuit, the trial court determined that Durham and the Accused had turned the first lawsuit into a protracted procedural morass and the court assessed attorney fees against the plaintiffs, in part, due to actions taken by Durham and the Accused in that litigation.

### **Violations**

8.

The Accused admits that, by engaging in the conduct described in paragraphs 5 through 7, she violated DR 6-101(A)/RPC 1.1 (lack of competent representation), DR 2-110(B)(2)/RPC 1.16(a)(1) (failure to withdraw), and DR 1-102(A)(4)/RPC 8.4(a)(4) (conduct prejudicial to the administration of justice).

### **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 her duty to her clients to render competent representation and her duty to the legal system not to abuse the legal process. *Standards*, §§ 4.5, 6.2.
- b. **Mental state.** The Accused acted knowingly, defined as the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective to accomplish a particular result. *Standards*, at p. 7. Although Durham was the principal actor in the litigation described herein, and the Accused often acted at Durham’s direction, the Accused knew she was not sufficiently experienced in land use, litigation, and appellate matters when she agreed to serve as cocounsel and she failed to investigate the legal and factual foundations for the claims she and Durham were making on behalf of their clients.
- c. **Injury.** Under the *Standards*, “injury” to a client, the public, or the legal system can be either actual or potential. *Standards*, at p. 7. This is also true under Oregon law. *In re Williams*, 314 Or 530, 840 P2d 1280 (1992). In this case, the plaintiffs were assessed attorney fees by the trial court, the defendants incurred attorney fees and costs in their defense, and the courts—particularly the trial court but also the appellate court for the period of time until the Accused withdrew—were required to devote a substantial amount of time to the lawsuits and related proceedings described herein that would not have otherwise been necessary but for the misconduct of Durham and the Accused.
- d. **Aggravating circumstances.** Aggravating circumstances include:
  1. There were multiple offenses. *Standards*, § 9.22(d);
  2. Although not experienced in land use and litigation matters, the Accused has been admitted in Oregon since 1985. *Standards*, § 9.22(i).
- e. **Mitigating circumstances.** Mitigating circumstances 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 fully cooperated with the bar. *Standards*, § 9.32(e);



4. The Accused is embarrassed that she allowed herself to be drawn into the litigation, that she did not withdraw sooner after it became apparent that she was in over her head, and is remorseful. *Standards*, § 9.32(l).

10.

Under the *Standards*, suspension is generally 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. *Standards*, § 4.52. Suspension also is appropriate when a lawyer knowingly engages in conduct that is an abuse of the legal system. *Standards*, § 6.22.

11.

Oregon case law also provides that a suspension is an appropriate sanction in this proceeding. See *In re Paulson*, 341 Or 13, 136 P3d 1087 (2006) (lawyer suspended for six months for cumulative conduct that made litigation more complicated, protracted, and expensive); *In re Bettis*, 342 Or 232, 149 P3d 1194 (2006) (lawyer suspended for 30 days for lack of competence in a criminal defense case); *In re Roberts*, 335 Or 476, 71 P3d 71 (2003) (lawyer suspended for 60 days for lack of competence in a conservatorship); and *In re Gresham*, 318 Or 162, 864 P2d 360 (1993) (lawyer suspended for 91 days for lack of competence, among other violations, in mishandling a probate and a real property matter).

12.

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 thirty (30) days for violation of DR 6-101(A)/RPC 1.1, DR 2-110(B)(2)/RPC 1.16(a)(1), and DR 1-102(A)(4)/RPC 8.4(a)(4), the sanction to be effective June 1, 2010.

13.

The Accused acknowledges that she has certain duties and responsibilities under the Rules of Professional Conduct and BR 6.3 to immediately take all reasonable steps to avoid foreseeable prejudice to her clients during the term of her suspension. In this regard, the Accused has arranged for Gordon J. Evans, an active member of the Oregon State Bar, to either take possession of or have ongoing access to the Accused's client files and serve as the contact person for clients in need of the files during the term of the Accused's suspension. The Accused represents that Gordon J. Evans has agreed to accept this responsibility.

14.

The Accused acknowledges that reinstatement is not automatic on expiration of the period of suspension. She is required to comply with the applicable provisions of Title 8 of the Bar Rules of Procedure. The Accused also acknowledges that she cannot hold herself out as an active member of the Bar or provide legal services or advice until she is notified that her license to practice has been reinstated.

15.

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 21st day of April 2010.

/s/ Paula B. Hammond

Paula B. Hammond

OSB No. 852246

EXECUTED this 22nd day of April 2010.

OREGON STATE BAR

By: /s/ Jeffrey D. Sapiro

Jeffrey D. Sapiro

OSB No. 783627

Disciplinary Counsel

**Cite as 348 Or 325 (2010)**

**IN THE SUPREME COURT  
OF THE STATE OF OREGON**

In re:

Complaint as to the Conduct of

THOMAS J. PETERSON,

Accused.

(OSB 06-109; SC S056480)

En Banc

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

Argued and submitted November 2, 2009. Filed May 27, 2010.

Thomas J. Peterson, Eugene, argued the cause and submitted the brief in propria persona.

Jeffrey D. Sapiro, Disciplinary Counsel, Oregon State Bar, Tigard, 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 60 days, commencing 60 days from the date of this decision.

**SUMMARY OF THE SUPREME COURT OPINION**

In this lawyer disciplinary proceeding, the Oregon State Bar charged the Accused with violating three provisions of the Oregon Rules of Professional Conduct (RPC): RPC 1.15-1(a) (requiring lawyer to account for client funds and to deposit and maintain client funds in trust), RPC 1.15-1(c) (requiring lawyer to withdraw client money only as fees are earned or expenses incurred), and RPC 8.4(a)(3) (prohibiting conduct involving dishonesty, fraud, deceit, or misrepresentation). A trial panel of the Disciplinary Board concluded that the Accused had violated the rules as alleged. As a sanction, a majority of the trial panel disbarred the Accused. A dissenting member of the trial panel would have suspended the Accused for one year and required a two-year period of probation thereafter. The Accused sought review pursuant to ORS

9.536(1) and Bar Rule of Procedure (BR) 10.1. Pursuant to ORS 9.536(2) and BR 10.6, this court reviews a decision of the trial panel de novo. On de novo review, the Bar has the burden of establishing the Accused's misconduct by clear and convincing evidence. BR 5.2. Clear and convincing evidence is evidence establishing that the truth of facts asserted is highly probable. *In re Johnson*, 300 Or 52, 55, 707 P2d 573 (1985). On review, we conclude that the Accused violated RPC 1.15-1(a) and RPC 1.15-1(c) as alleged by the Bar. We suspend the Accused from the practice of law for 60 days.

**Cite as 348 Or 307 (2010)**

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re:

Complaint as to the Conduct of

SCOTT M. SNYDER,

Accused.

(OSB 08-19; SC S056998)

En banc

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

Argued and submitted March 1, 2010. Filed May 27, 2010.

Kevin Keaney, Portland, argued the case and filed the brief for the Accused.

Susan Roedl Cournoyer, Assistant Disciplinary Counsel, Oregon State Bar, argued the cause and filed the brief 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 THE SUPREME COURT OPINION**

In this lawyer disciplinary proceeding, the Oregon State Bar charged the Accused with four violations of the Oregon Rules of Professional Conduct (RPC). A trial panel of the Disciplinary Board found the Accused guilty of three of the charged offenses and imposed a sanction of a 60-day suspension. The Accused seeks review of that decision. ORS 9.536(1) ; Bar Rules of Procedure (BR) 10.1 and 10.3. The Bar, for its part, asks this court to find that the Accused also committed the fourth alleged violation. *See* BR 10.5(c) (permitting the Bar to urge rejection of any part of trial panel decision in answering brief). On de novo review (ORS 9.536(2); BR 10.6), we affirm the trial panel's findings that the Accused committed three of the charged violations. We reject the Bar's contention that it proved by clear and convincing evidence that the Accused committed the fourth charged violation. Finally, we conclude that a 30-day suspension from the practice of law is an appropriate sanction.

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
)  
Complaint as to the Conduct of ) Case No. 09-87  
)  
DONALD R. SLAYTON, )  
)  
Accused. )

Counsel for the Bar: Stacy J. Hankin  
Counsel for the Accused: John Fisher  
Disciplinary Board: None  
Disposition: Violation of RPC 8.4(a)(3) and RPC 8.4(a)(4).  
Stipulation for Discipline. 60-day suspension.  
Effective Date of Order: June 15, 2010

**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 June 15, 2010, for violations of RPC 8.4(a)(3) and RPC 8.4(a)(4).

DATED this 27th day of May 2010.

/s/ Gilbert B. Feibleman  
Gilbert B. Feibleman  
State Disciplinary Board Chairperson

/s/ Jack A. Gardner  
Jack A. Gardner, Region 2  
Disciplinary Board Chairperson

### **STIPULATION FOR DISCIPLINE**

Donald R. Slayton, attorney at law (hereinafter “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 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.

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.

On October 2, 2009, a Formal Complaint was filed against the Accused pursuant to the authorization of the State Professional Responsibility Board (hereinafter “SPRB”), alleging violation of RPC 8.4(a)(3) and RPC 8.4(a)(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.

### **Facts**

5.

On September 18, 2008, the Accused was cited for jaywalking in Eugene. He pled not guilty and a trial was scheduled for October 23, 2008. At the same time, the Accused represented plaintiff in a civil lawsuit pending in Washington County Circuit Court (hereinafter “civil matter”). The civil matter was set for trial on October 22, 2008.

6.

In the weeks leading up to October 22, 2008, the Accused believed that because the defendants in the civil matter were not represented by a lawyer, the trial

would be completed on October 22, 2008, and he would be available to appear at the jaywalking trial on October 23, 2008. On or about October 3, 2008, the Accused received notice that at least one of the defendants in the civil matter had retained a lawyer. The lawyer was unable to agree to a postponement and on October 21, 2008, the Accused filed a motion to postpone the civil matter.

7.

On October 22, 2008, the lawyers appeared before Judge Thomas Kohl to receive their trial assignment in the civil matter. The Accused represented to the court that he was not ready for trial because of a conflict with another matter set for trial in Eugene on October 23, 2008. The Accused represented that the other matter involved vehicular homicide and was pending in Eugene Municipal Court. Judge Kohl explained to the Accused that municipal courts do not have jurisdiction to decide vehicular homicide cases. Nonetheless, the Accused insisted that was the nature of the case. When Judge Kohl asked the Accused to identify his client in the other matter, the Accused represented that he could not recall his client's name. Eventually, after Judge Kohl continued to ask the Accused questions about the other matter, the Accused admitted that he was the client and that the other matter involved jaywalking.

### **Violations**

8.

The Accused admits that by engaging in the conduct described in paragraphs 5 through 7, he violated RPC 8.4(a)(3) and RPC 8.4(a)(4).

### **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. **Duties violated.** The Accused violated his duty to be candid with the court and to avoid conduct prejudicial to the administration of justice. *Standards*, § 6.1.
- b. **Mental state.** The Accused acted intentionally. He made misrepresentations to the court because he did not want the jaywalking trial to be reset.



- c. **Injury.** The court sustained actual injury, at least for a period, because of the Accused's misrepresentations. Fortunately, because the Accused's representations did not make sense, the court continued to ask questions. But for the court's continued questions, it would have sustained significant actual injury.
- d. **Aggravating circumstances.** The following aggravating circumstances exist:
  - 1. Prior disciplinary offenses. In 2004, the Accused was reprimanded for violating RPC 8.4(a)(4). *In re Slayton*, 18 DB Rptr 56 (2004). *Standards*, § 9.22(a).
  - 2. Selfish motive. The Accused made misrepresentations to the court in order to avoid inconvenience to himself in the jaywalking matter. *Standards*, § 9.22(b)
  - 3. Pattern of misconduct. This is the second time the Accused has made misrepresentations to the court. In *In re Slayton*, 18 DB Rptr at 56, he acted negligently. This time he acted intentionally. *Standards*, § 9.22(c).
  - 4. Multiple offenses. *Standards*, § 9.22(d).
  - 5. Substantial experience in the practice of law. The Accused has been licensed to practice law in Oregon since 1986. *Standards*, § 9.22(i).
- e. **Mitigating circumstances.** The following mitigating circumstances exist:
  - 1. Cooperative attitude toward the proceedings. *Standards*, § 9.32(e).
  - 2. Character and reputation. Members of the legal community will attest to the Accused's good character and reputation. *Standards*, § 9.32(g).

10.

Under the *Standards*, 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*, § 6.12.

11.

Generally, the Supreme Court has suspended lawyers who have made misrepresentations to a court or others. *In re Jackson*, 347 Or 426, 223 P3d 387 (2009) (120-day suspension imposed on lawyer who, among other things, made misrepresentations to the court in order to cover up his own neglect in the underlying matter); *In re Wilson*, 342 Or 243, 149 P3d 1200 (2006) (lawyer suspended for 180 days for making misrepresentations to the court and opposing counsel in connection with the postponement of a trial); *In re Morris*, 326 Or 493, 953 P2d 387 (1998) (120-day suspension of lawyer who altered and then filed with the court a final account after the statement had already been signed and notarized by the personal representative); *In re Jones*, 326 Or 195, 951 P2d 149 (1997) (45-day suspension of lawyer who had his client sign bankruptcy documents in blank notwithstanding the existence of a perjury clause).

12.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be suspended for 60 days for violation of RPC 8.4(a)(3) and RPC 8.4(a)(4), the suspension to be effective June 15, 2010.

13.

In addition, on or before the last day of the suspension, the Accused shall pay to the Oregon State Bar its reasonable and necessary costs in the amount of \$130.00, incurred for the Accused's deposition. Should the Accused fail to pay \$130.00 in full by the 60th day, 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.

14.

The Accused acknowledges that he has certain duties and responsibilities under the Rules of Professional Conduct and BR 6.3 to immediately take all reasonable steps to avoid foreseeable prejudice to his clients during the term of his suspension. In this regard, the Accused has arranged for Todd Moore, an active member of the Oregon State Bar, to either take possession of or have ongoing access to the Accused's client files and serve as the contact person for clients in need of the files during the term of the Accused's suspension. The Accused represents that Todd Moore has agreed to accept this responsibility.

15.

The Accused acknowledges that reinstatement is not automatic on expiration of the period of suspension. He is required to comply with the applicable provisions of Title 8 of the Bar Rules of Procedure. The Accused also acknowledges that he cannot hold himself out as an active member of the Bar or provide legal services or advice until he is notified that his license to practice has been reinstated.

16.

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 17th day of May 2010.

/s/ Donald R. Slayton

Donald R. Slayton

OSB No. 862898

EXECUTED this 20th day of May 2010.

OREGON STATE BAR

By: /s/ Stacy J. Hankin

Stacy J. Hankin

OSB No. 862898

Assistant Disciplinary Counsel

Cite as *In re Newell*, 24 DB Rptr 112 (2010)

**Cite as 348 Or 396 (2010)**

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re:

Complaint as to the Conduct of

ROBERT D. NEWELL,

Accused.

(OSB 07-142; SC S057231)

Before De Muniz, Chief Justice, and Gillette, Durham, Balmer, Kistler, and Linder, Justices. Walters, J., did not participate in the consideration or decision of this case.

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

Argued and submitted January 8, 2010. Filed June 10, 2010.

Mark J. Fucile, Fucile & Reising LLP, Portland, argued the cause and filed the briefs for the Accused.

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

PER CURIAM

The Accused is publicly reprimanded.

**SUMMARY OF THE SUPREME COURT OPINION**

In this attorney discipline case, the Bar charged the accused with violating Rule of Professional Conduct (RPC) 4.2. Generally, that rule prohibits a lawyer from communicating on certain subjects with a person whom the lawyer knows is represented on those subjects. The trial panel found that the accused had violated Rule 4.2 and publicly reprimanded him. The Accused has requested review from this court. The Accused is publicly reprimanded.

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re:	)	
	)	
Complaint as to the Conduct of	)	Case No. 09-24
	)	
RHONDA LEE ANTELL,	)	SC S058544
	)	
Accused.	)	

Counsel for the Bar:	Jeffrey D. Sapiro
Counsel for the Accused:	Marc D. Blackman
Disciplinary Board:	None
Disposition:	Violation of RPC 8.4(a)(2) and RPC 8.4(a)(3). Stipulation for Discipline. One-year suspension, 10 months stayed, one-year probation.
Effective Date of Order:	June 14, 2010

**ORDER ACCEPTING STIPULATION FOR DISCIPLINE**

Upon consideration of the court.

The court accepts 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 one-year term of probation, effective June 14, 2010.

\_\_\_\_\_  
June 11, 2010  
DATE

\_\_\_\_\_  
/s/ Paul J. De Muniz  
CHIEF JUSTICE

**STIPULATION FOR DISCIPLINE**

Rhonda Lee Antell, attorney at law (hereinafter “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 17, 1987, and has been a member of the Oregon State Bar continuously since that time. At all material times, the Accused had an active license, but was not engaged in the private practice of law, did not have a location at which she engaged in the private practice of law, and was exempt from mandatory professional liability insurance requirements. For purposes of this proceeding, the parties deem her residence in Washington County, Oregon, as the appropriate location for establishing jurisdiction and venue.

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.

On March 14, 2009, the State Professional Responsibility Board authorized a formal disciplinary proceeding against the Accused for alleged violations of RPC 8.4(a)(2) and RPC 8.4(a)(3) of the Rules of Professional Conduct. 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.

Prior to November 2006, the Accused was in a romantic relationship with another individual (hereinafter “L”). In or prior to November 2006, the Accused formed the belief that L was being unfaithful and was in an intimate relationship with another person (hereinafter “C”).

6.

Between about November 23, 2006, and January 19, 2007, in reaction to the belief described in paragraph 5, the Accused, using C’s name, communicated with L and others and asserted that L had engaged in conduct with C constituting sexual harassment. The Accused, with the intent to harass, intimidate, torment, and

embarrass C, also made electronic communications to C, L, and others using lewd, lascivious, indecent, and obscene words, images, and language, and suggesting the commission of lewd or lascivious acts by C.

7.

In February 2008, the Accused was charged in the Superior Court of King County, Washington, with the crimes of identity theft in the second degree, a felony, in violation of Washington Revised Statute 9.35.020(1), (3), and cyberstalking, a misdemeanor, in violation of Washington Revised Statute 9.61.260(1)(c), (3)(b). On October 9, 2008, the Accused entered pleas of guilty to both charges and received a monetary sanction on the identity theft charge and a deferred sentence on the cyberstalking charge.

8.

The Accused admits that the aforesaid conduct constituted criminal conduct reflecting adversely on her honesty, trustworthiness, and fitness to practice in violation of RPC 8.4(a)(2), and dishonesty and misrepresentation in violation of RPC 8.4(a)(3) of the Rules of Professional Conduct.

### SANCTION

9.

The Accused and the Bar agree that the ABA *Standards for Imposing Lawyer Sanctions* (hereinafter “*Standards*”) are to be considered in fashioning an appropriate sanction. 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) **Duties violated.** By committing acts that violated RPC 8.4(a)(2) and RPC 8.3(a)(3), the Accused violated her duty to the public to maintain personal integrity. *Standards*, § 5.1.
- (b) **Mental state.** The Accused acted intentionally and knowingly. “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. “Intent” is the conscious objective or purpose to cause a particular result. *Standards*, p. 7. The Accused’s misconduct was not the result of a rash impulse, but involved significant thought, planning, and effort. The Accused’s conduct involved repeated acts of misconduct over several months.

- (c) **Injury.** In determining the appropriate sanction for the Accused's misconduct, consideration is given to actual and potential injury. *In re Williams*, 314 Or 530, 840 P2d 1280 (1992). The Accused caused actual and potential injury, both to C by subjecting her to anxiety and embarrassment, and to C's employer and law enforcement, both of which devoted substantial resources to identifying the Accused.
- (d) **Aggravating factors.** "Aggravating factors" are considerations that increase the degree of discipline to be imposed. *Standards*, § 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 acted with selfish and dishonest motives. *Standards*, § 9.22(b).
- (e) **Mitigating factors.** Mitigating factors are considerations that may decrease the discipline that may be imposed. *Standards*, § 9.32. There are several mitigating factors in this case. The Accused has no prior record of discipline. *Standards*, § 9.32(a). She cooperated in the investigations of her conduct by law enforcement and disciplinary authorities. *Standards*, § 9.32(e). According to the Accused's psychologist who treated her for nearly two years after the instant offenses, the untreated internalization of emotional pain (feelings of rejection, sense of inadequacy and shame) that she experienced at the end of her marriage to her children's father after finding out about his ongoing infidelities likely contributed substantially to the Accused's inappropriate reaction when it turned out that her new significant other was sexually promiscuous. *Standards*, § 9.32(c). Other penalties have been imposed. The King County Superior Court placed the Accused on probation with conditions for her criminal conduct. The Accused is a practicing certified public accountant (CPA) and the Oregon Board of Accountancy suspended the Accused's CPA license for three years, all of which was stayed subject to five years' probation with conditions for her criminal conduct. *Standards*, § 9.32(k). The Accused is remorseful. *Standards*, § 9.32(l).

10.

The *Standards* provide that disbarment is generally appropriate where a lawyer has engaged in "serious criminal conduct," a necessary element of which includes theft (or other acts enumerated in the subsection), or where a lawyer engages in intentional conduct involving dishonesty or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice. *Standards*, § 5.11(a), (b). Where a lawyer knowingly engages in criminal conduct that does not contain an element listed in



§ 5.11(a), but which seriously adversely reflects on the lawyer's fitness to practice, suspension is generally appropriate. *Standards*, § 5.12. When a lawyer knowingly engages in any other conduct that involves dishonesty or misrepresentation that adversely reflects on the lawyer's fitness to practice, reprimand is generally appropriate. *Standards*, § 5.13.

Where dishonesty or misrepresentation was committed but not in the practice of law, even when it involved criminal conduct, the court has at times imposed reprimands. *See, e.g., In re Carpenter*, 337 Or 226, 95, P3d 203 (2004). The lawyer's conduct in *Carpenter* reflected a single isolated event. By comparison, the Accused's conduct was repeated and occurred over a two-month period of time and arose out of jealousy and insecurity that the man with whom she was having an intimate relationship was having a similar relationship with another woman. The conduct in both cases occurred entirely in the lawyers' personal lives. *See also In re Kumley*, 335 Or 639, 75 P3d 432 (2003) (inactive lawyer who filed forms in connection with his candidacy for an elective office falsely represented that his current occupation was attorney); *In re Flannery*, 334 Or 224, 47 P3d 891 (2002) (lawyer, a resident of Washington, used a friend's Oregon address to renew his Oregon driver license). The Accused's criminal conduct, unlike that in *Carpenter*, *Kumley*, and *Flannery*, involved a series of acts and for that reason reflects more adversely on her fitness to practice law.

11.

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 when the misconduct is caused in whole or in part by problems or circumstances that can be remedied and monitoring conditions that address the underlying causes of the misconduct can be imposed. *Standards*, § 2.7. *See In re Buehner*, S Ct S38015 (1992) (180-day suspension, all of which stayed subject to a two-year probation with conditions that included mental health treatment for violations of DR 1-102(A)(2) (criminal conduct) and DR 1-102(A)(3) (dishonesty and misrepresentation)). Although the Accused has addressed personal and mental health issues, additional attention to them is required to ensure that her understanding and changes in her behavior are maintained.

12.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused's license to practice law shall be suspended for a period of one (1) year, with 10 months of the suspension stayed during a one (1) year term of probation, for her violations of RPC 8.4(a)(2) and RPC 8.4(a)(3). This sanction, including the 60 days of

imposed suspension, shall be effective three days after this stipulation is approved by the supreme court.

13.

During the term of probation, the Accused shall comply with the following conditions:

- (a) The Accused shall comply with all provisions of this stipulation, the Rules of Professional Conduct applicable to Oregon lawyers, the provisions of ORS chapter 9, the conditions of probation in the King County criminal case, and the conditions of probation imposed by the Board of Accountancy;
- (b) The Accused shall continue mental health treatment and shall meet monthly with Steven Scherr, PhD, a clinical psychologist, or such other mental health professional approved in writing by Disciplinary Counsel's Office. The Accused shall comply with the recommendations of the mental health provider;
- (c) A member of the State Lawyers Assistance Committee or such other person approved by Disciplinary Counsel in writing shall supervise the Accused's probation (hereinafter "Supervising Attorney");
- (d) The Accused shall meet with the Supervising Attorney at least monthly, and more often as may be requested by the Supervising Attorney, for the purpose of reviewing the Accused's compliance with the terms of the probation. The Accused shall cooperate and shall comply with all reasonable requests of the Supervising Attorney and Disciplinary Counsel's Office that will allow the Supervising Attorney and Disciplinary Counsel's Office to evaluate the Accused's compliance with the terms of this stipulation for discipline;
- (e) In the event the Accused fails to comply with any recommendation of Dr. Scherr or other mental health treatment provider, or other condition of this stipulation, the Accused shall immediately notify her Supervising Attorney and Disciplinary Counsel in writing;
- (f) At least quarterly, and by such dates as established by Disciplinary Counsel's Office, the Accused shall submit a written report to Disciplinary Counsel, approved in substance by the Supervising Attorney, advising whether she is in compliance or noncompliance with the terms of this stipulation, the King County criminal case probation, the Board of Accountancy probation, the recommendations of mental health treatment providers, and each of them. The Accused's report

shall also identify: the dates and purpose of the Accused's meetings with the Supervising Attorney, and the dates of meetings and other consultations between the Accused and all mental health professionals during the reporting period. In the event the Accused has not complied with any term of probation in this disciplinary case, the King County criminal case, or the Board of Accountancy, the report shall also describe the noncompliance and the reason for it, and when and what steps have been taken to correct the noncompliance;

- (g) The Accused hereby waives any privilege or right of confidentiality to the extent necessary to permit disclosure by Stephen Scherr, PhD, or any other mental health treatment providers of the Accused's compliance or noncompliance with this stipulation and their treatment recommendations to the Accused's Supervising Attorney, Disciplinary Counsel's Office, and the State Lawyers Assistance Committee. The Accused agrees to execute any additional waivers or authorizations necessary to permit such disclosures;
- (h) The Accused expressly authorizes Stephen Scherr, PhD, and other mental health treatment providers, to communicate with and to release information otherwise protected from disclosure by state and federal law to the Accused's Supervising Attorney, Disciplinary Counsel's Office, the State Lawyers Assistance Committee, and each of their respective representatives, to the extent necessary to disclose the Accused's participation, compliance, and noncompliance with the terms of this agreement and any treatment recommendations;
- (i) The Accused is represented in this proceeding by Marc Blackman. The Accused and Marc Blackman hereby authorize direct communication between the Accused and Disciplinary Counsel's Office, the Accused's Supervising Attorney and representatives of the State Lawyers Assistance Committee, and each of them, after the date this stipulation is approved by the Supreme Court for the purposes of administering and monitoring the Accused's compliance with this stipulation;
- (j) The Accused is responsible 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 any condition of her probation, Disciplinary Counsel may initiate proceedings to revoke the Accused's probation pursuant to BR 6.2(d), and impose the stayed period of suspension. In such event, the probation and its terms shall be continued until resolution of any revocation proceeding;

- (I) The Accused's reinstatement after the imposed term of her suspension is governed by BR 8.3. In the event the Accused is reinstated under that rule and thereafter fully complies with the terms of this agreement and successfully completes her probation, she shall be unconditionally reinstated without further order of the Disciplinary Board or the Supreme Court.

14.

The Accused acknowledges that reinstatement is not automatic on expiration of the period of imposed suspension. She is required to comply with the applicable provisions of Title 8 of the Bar Rules of Procedure. The Accused also acknowledges that she cannot hold herself out as an active member of the Bar or provide legal services or advice until she is notified that her license to practice has been reinstated.

15.

This Stipulation for Discipline has been reviewed by the Disciplinary Counsel's Office, the sanction was approved by the State Professional Responsibility Board, and this stipulation shall be submitted to the Supreme Court for consideration pursuant to the terms of BR 3.6.

DATED this 3rd day of May 2010.

/s/Rhonda Lee Antell

Rhonda Lee Antell

OSB No. 870206

OREGON STATE BAR

By:/s/Jeffrey D. Sapiro

Jeffrey D. Sapiro

OSB No. 783627

Disciplinary Counsel

APPROVED:

/s/ Marc D. Blackman

Marc D. Blackman

OSB No. 730338

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re:	)	
	)	
Complaint as to the Conduct of	)	Case No. 09-34
	)	
CHARLES F. LEE,	)	
	)	
Accused.	)	
Counsel for the Bar:		Michael Jewett and Stacy J. Hankin
Counsel for the Accused:		None
Disciplinary Board:		R. Paul Frasier, Chair Penny Lee Austin Philip Duane Paquin, Public Member
Disposition:		Trial Panel Opinion. Dismissed.
Effective Date of Trial Panel Opinion:		June 19, 2010

**OPINION OF TRIAL PANEL**

This matter came before a duly constituted trial panel of the Disciplinary Board of the Oregon State Bar on January 28, 2010, at the law offices of Dole, Coalwell, Clark, Mountainspring, Mornarich & Aitken, 810 SE Douglas Avenue, Roseburg, OR. The panel consisted of R. Paul Frasier, Esq., Chair, Penny Austin, Esq., Trial Panel member, and Philip Paquin, Public Member. The Accused was present and represented himself. Stacy Hankin, Disciplinary Counsel, and Michael Jewitt, Esq., represented the Bar. The Trial Panel has considered the pleadings, trial memorandums, and arguments of counsel.

The Trial Panel also considered all testimony and exhibits received by the panel at the trial.

Based upon the findings and conclusions made below, we find that the Accused did not violate the Rule of Professional Conduct as set forth in the complaint. Consequently, the complaint is dismissed.

## 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 law.

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

3. The Accused represented Ben Kempke (“Father”) in a divorce action that commenced in 2006 (*Kempke and Kempke*, Douglas County Circuit Court # 06 001002 OS). A judgment of divorce was entered in July of 2007. As part of the judgment, a parenting plan was incorporated into the judgment. Ben Kempke was the primary custodial parent with parenting time granted to the mother of the children, Tabitha Kempke (“Mother”), now Tabitha Benedict.

4. In 2008 Tabitha filed several motions for change of custody and for a status quo order. The court denied a change of custody and did not enter the requested status quo order, and left the parenting-time agreement from the July 19, 2007, judgment in place.

5. During mother’s parenting time during the first week of September 2008, an argument erupted between Mother and the 14-year-old daughter of the Kempkes. The Accused was told by Father that the argument was severe. Mother was quoted by Daughter as saying Mother had said such things as “Get out of the house and don’t come back.” Daughter then left and went to Father’s home. The daughter reported that Mother was out of control and that Mother had threatened to kill herself. Daughter described a situation where Mother had been recklessly driving her car with Daughter as a passenger and where the car was sliding when the car went around corners. Father described how Daughter was so scared at her Mother’s conduct that she actually hid in her bedroom closet when she arrived at Father’s home. Daughter’s mental status was such that Daughter stayed home from school. Mother called Father and told him he should keep Daughter for the remainder of her scheduled parenting time on that occasion.

6. Mother’s next scheduled parenting time was scheduled for the week of September 14, 2008. Prior to that time, Daughter and Mother had a phone conversation. The conversation did not go well. Father reported that Daughter was still distraught with her mother, was scared of her Mother, and was refusing to go to Mother’s home. Father decided that until things calmed down that Daughter should stay with him and did not force Daughter to go to Mother’s scheduled parenting time.

7. On Monday September 15, 2008, the Accused and Ben Kempke consulted about the events between the Daughter and Mother. The Accused testified

that while he did not have any actual knowledge as to what had occurred, the Accused believed his client's rendition of what had happened and believed that Daughter was extremely scared of her mother and feared for her safety. The Accused met with Daughter and saw for himself that Daughter was acting very scared of her mother and was adamant that she did not want to be with Mother. The Accused advised Ben Kempke that he had the authority to suspend the parenting time of the Mother as to this one child if Father deemed it was in the best interest of Daughter. Mr. Kempke decided that he would not allow his daughter to go to Mother's home for the immediate future. Father also testified that he would have kept Daughter from Mother regardless of the advice he received from the Accused. The Accused then faxed a letter to the attorney of Mother, Ms. Nancy Howe, wherein he stated that he had advised Mr. Kempke to suspend Tabitha Kempke's parenting time with the daughter in question.

8. Mother and her attorney did not file any motion with the court contesting the decision of Ben Kempke to suspend the parenting time. Another matter had been filed with the court regarding the child custody issue that was already set for hearing. It was anticipated by Ms. Howe that the matter would be raised at that time.

9. After a short period of time, Mr. Kempke allowed his daughter to have scheduled parenting time with her mother. The panel notes that the timing of that decision is suspicious as it happened to coincide with Ben Kempke's vacation to go hunting. Had he continued to prevent parenting time he either would have had to find someone to care for the daughter while he was gone, or he would have had to cancel his plans.

10. Mother and her attorney did not raise the temporary suspension of the parenting time at the next court hearing scheduled for previously filed motions in the case. No motion to hold Mr. Kempke in contempt was filed.

## **DISCUSSION**

The issue in this case is straightforward. That is, can an attorney, who believes that a child is danger, advise a client that the client has the ability to suspend court-ordered parenting time in a divorce? If the answer to that question is yes, then there is no violation of the rules of ethics governing lawyers in Oregon. If the answer is no, then there would be a violation for which discipline should be imposed.

After considering the arguments of the parties, we are persuaded that the Bar has failed to prove by clear and convincing evidence that a violation of the Rules of Professional Conduct has occurred.

Divorce cases, especially where child custody and support issues are present, can be very acrimonious. This case was no different. While commendable efforts

were made to make sure the children's lives were kept on an even keel, it is clear that the parents did not get along and were apt to go to court on issues that arose rather than to try to work them out without court intervention.

The Accused argues that the custodial parent has an obligation to provide for the best interests of the child in question, and that when in the opinion of the custodial parent it is in the best interests of the child, the custodial parent has the obligation to suspend parenting time of the other parent. We agree that there can be emergency situations where a parent needs to take action where a clear danger is present to the child if parenting time is allowed.

The Accused argues that the situation between the Kempke Daughter and Mother rose to an emergency situation. We are persuaded that the Accused reasonably believed that such was the case in this situation.

In examining the testimony of the Accused, we find him to be credible in his testimony. Not only was his testimony without internal contradiction, but the manner he testified—such as the tenor of his voice and body language—was indicative of a person who was telling the truth. Therefore, we believe the Accused when he testified that he believed he was faced with a situation where the mental health of Daughter was in danger if parenting time was continued for the immediate future.

While not necessary for our opinion, as this case may be reviewed,<sup>1</sup> we also make findings as to the credibility of the two parents in this case. The panel finds that both parents had credibility issues when they testified. As to Mother, we note that her physical demeanor and voice tenor was not indicative of someone who was telling the truth. She was obviously biased against the Accused as she was argumentative and hostile toward him. We noted that she contradicted herself. On issues such as whether she had a gambling problem, there was evidence to suggest she was not telling the truth when she at one time denied such a problem. She also contradicted herself on the issue of a restraining order.

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<sup>1</sup> If upon review it is concluded that we are wrong that the Accused did not engage in conduct prejudicial to the administration of justice, we note that we are not persuaded that the advice of the Accused resulted in harm to Mother or the system. We note that any harm that possibly occurred started with the Father and not the Accused. In addition, we are not persuaded that Mother suffered the harm she described. While she claimed that the children were using this incident as a way to get Mother to do what they wanted, there was no testimony by Mother that she had changed her parenting decisions based upon any threat by the children. In addition, no contempt proceeding was filed and no one brought up this issue when the custody issue was once again before the Court. We also note that, for whatever reason, Mother chose to file a Bar complaint against the Accused, yet did nothing to the person who made the actual decision to suspend parenting time. Given these facts, had a violation been found, we would have only imposed a public reprimand and not a suspension.



Father also had credibility issues. His demeanor also suggested he was not telling the truth. His testimony was replete with answers to questions such as “I don’t know,” “I guess,” “I don’t recall,” and “I don’t remember.” Father claimed that he had to take emergency action to protect his daughter, yet we note two things of interest. As a mandatory reporter because of his occupation (deputy sheriff), he was obligated to report an abusive situation involving a child. He did not do so. Further, when it came to his hunting trip, he was more than happy to give Mother her parenting time so he could go on his trip. These actions do not indicate that Father really believed that an emergency situation existed such that he had to take the extreme action of stopping Mother’s parenting time.

While Mother tried to downplay what occurred between her and her daughter, it was equally obvious that Father was exaggerating the situation. We note that neither the Father nor Mother called the police to report an emergency situation. Neither party went to court to rectify or justify what occurred. The only action taken by any party to address this issue was Mother’s complaint to the Bar about the Accused’s conduct.

Even if we are wrong in our above analysis, we have an alternate basis in finding the Accused not guilty of the violation alleged by the Bar. The Bar alleges that the Accused violated RPC 8.4(a)(4) where it states “It is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice.” The Bar must show that the Accused did something that was prejudicial to the administration of justice. In this case, the Accused gave advice to his client that he could temporarily stop Mother’s parenting time. However, it was not the Accused who actually stopped the parenting time. Father testified that he had already stopped the parenting time and would have continued to do so regardless what advice he had received from the Accused. While we note that Father does have credibility issues, we also note that the Accused testified that it was the client’s decision to stop parenting time. The Bar presents no evidence that contradicts that it was Father’s decision to stop parenting time.

In our view, given Father’s actions, any conduct prejudicial to the administration of justice began prior to the Father telling the Accused the current state of Daughter’s mental health on September 15 and would have continued regardless what the Accused advised his client. If anyone is to blame for parenting time being withheld, it is Father and not the Accused.

## CONCLUSION

We are not persuaded by clear and convincing evidence that the Accused violated the Rules of Professional Conduct as alleged by the Bar. We therefore dismiss this complaint.

Cite as *In re Lee*, 24 DB Rptr 121 (2010)

Dated this 14th day of April 2010.

/s/ R. Paul Frasier

R. Paul Frasier

Trial Panel Chair

/s/ Penny Lee Austin

Penny Lee Austin

Trial Panel Member

/s/ Philip Duane Paquin

Philip Duane Paquin

Trial Panel Member

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
 )  
Complaint as to the Conduct of ) Case No. 09-72  
 )  
RANKIN JOHNSON, )  
 )  
Accused. )

Counsel for the Bar: Amber Bevacqua-Lynott  
Counsel for the Accused: Lawrence Matasar  
Disciplinary Board: None  
Disposition: Violation of RPC 1.3, RPC 1.4(a), and RPC  
8.4(a)(3). Stipulation for Discipline. Six-month  
suspension.  
Effective Date of Order: June 30, 2010

**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 June 30, 2010, for violations of RPC 1.3, RPC 1.4(a), and RPC 8.4(a)(3).

DATED this 16th day of June 2010.

/s/ Gilbert B. Feibleman  
Gilbert B. Feibleman  
State Disciplinary Board Chairperson

/s/ William B. Crow  
William B. Crow, Region 5  
Disciplinary Board Chairperson

## **STIPULATION FOR DISCIPLINE**

Rankin Johnson, attorney at law (hereinafter “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 25, 1996, 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, 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.

On August 10, 2009, a Formal Complaint was filed against the Accused pursuant to the authorization of the State Professional Responsibility Board (hereinafter “SPRB”), alleging violation of RPC 1.3 (neglect of a legal matter), RPC 1.4(a) (failure to keep a client reasonably informed about the status of a matter and failure to promptly comply with reasonable requests for information), and RPC 8.4(a)(3) (conduct involving misrepresentation). 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 June 2002, Joshua Marsing (“Marsing”) filed a petition for postconviction relief in circuit court. In April 2004, the circuit court filed a judgment dismissing Marsing’s postconviction case. In mid-May 2004, Marsing filed a notice of appeal. In December 2005, the Accused was appointed as counsel for Marsing and accepted responsibility to represent him through the remainder of his postconviction appeal.

6.

On September 6, 2006, the Court of Appeals affirmed the trial court's decision and judgment without opinion. The Accused notified Marsing about the decision. On September 12, 2006, Marsing notified the Accused that he wanted to file a petition for review with the Supreme Court. Marsing also asked the Accused to respond to certain questions related to his case.

7.

The Accused did not file a petition for review, did not respond to Marsing's questions, and did not otherwise communicate with Marsing concerning the postconviction appeal. In early November 2006, the Court of Appeals filed an appellate judgment and order awarding costs in the postconviction appeal and sent a copy of the judgment to the Accused and to Marsing.

8.

In early February 2007, Marsing asked the Accused some questions about the appellate judgment and order awarding costs and inquired about the status of the petition for review. On about March 10, 2007, the Accused represented to Marsing that the Supreme Court had denied his petition for review in November 2006, and that he had notified Marsing of the decision the same month.

9.

Based on these representations by the Accused that the Supreme Court had denied review, as well as instructions from the Accused that Marsing should next file for federal relief, Marsing filed a petition for habeas corpus in federal court in May 2007. Assistant Federal Defender Kristina Hellman ("Hellman") was appointed to represent Marsing in the federal case.

10.

In August 2007, Marsing discovered that the Accused had not filed a petition for review and contacted the Accused. In response, the Accused represented to Marsing that he had prepared a petition for review but it was not filed because he failed to give it to his assistant or he gave it to his assistant and the petition was overlooked and not filed, and that he had filed a motion to permit late filing of a petition for review. However, the Accused had not filed, and did not thereafter file, a petition for review, nor did he notify Marsing that he had not done so.

11.

In September 2007, Hellman requested Marsing's file from the Accused and asked him to confirm that he was reopening Marsing's postconviction appeal to file a

petition for review. The Accused represented to Hellman that he had filed the motion to reopen the appeal. In fact, he had not done so. The Accused did not respond to Hellman's subsequent request that he provide her with a copy of the motion.

12.

When the Accused did not respond to letter inquiries from Marsing in November and December 2007, Marsing contacted the Office of Public Defense Services ("OPDS") for assistance. In and after January 2008, both Hellman and the OPDS contacted the Accused and asked him to respond to Marsing's requests for information.

13.

On January 8, 2008, because Marsing had not yet exhausted his state remedies, the court stayed proceedings in Marsing's federal case pending decision concerning Marsing's petition for review in the postconviction appeal. Hellman notified the Accused of this event, but it did not prompt him to review Marsing's file or check with the court. Instead, the Accused represented to Hellman that he was waiting for a ruling on his motion to allow the filing of a late petition for review.

14.

In early February 2008, Marsing requested information concerning his postconviction appeal from the appellate court records section of the State Court Administrator's Office. Marsing was informed that no petition for review had been filed and there had been no activity in the postconviction appeal since November 3, 2006, when the case was closed. Specifically, no motion to allow a late petition had been filed. Marsing notified the Accused and Hellman about his discovery.

15.

In mid-February, Marsing and Hellman again asked the Accused for information about the status of Marsing's postconviction appeal. The Accused represented to Hellman that he was still waiting for a ruling on his motion to allow the filing of a late petition for review.

16.

In early March, Marsing again requested information concerning his postconviction appeal from the appellate court records section of the State Court Administrator's Office. Marsing was informed that no petition for review had been filed and there had been no activity in the postconviction appeal since November 3, 2006, when the case was closed. Marsing forwarded this information to the OPDS and

Hellman and requested assistance. On March 20, 2008, a representative of the OPDS asked the Accused to respond to Marsing's inquiries.

17.

That same day, Hellman notified the Accused that no action had occurred in Marsing's postconviction appeal in the Court of Appeals since November 3, 2006, the case was closed, and the appellate records section had no record of a petition for review or a motion to allow the late filing of a petition. Hellman asked the Accused to check his file and to send her a copy of the motion. The Accused represented that he had located a copy of the motion to allow late filing of the petition for review and a note from his assistant reflecting that the motion had been filed, but he did not provide a copy of this motion to Hellman.

18.

On April 3, 2008, the Accused filed a motion to recall appellate judgment in the Court of Appeals concerning Marsing's postconviction appeal. On June 24, 2008, the court granted the motion.

19.

On April 8, 2008, the Accused represented to Marsing that he had filed a motion for relief from default with the Court of Appeals, he would file a separate motion seeking leave to file a petition for review with the Supreme Court, and he would send Marsing a copy of the motion seeking leave to file the late petition for review when it was filed.

20.

Hearing nothing more, in late April Marsing again requested information concerning his postconviction appeal from the Accused. Around this same time, Hellman again requested a copy of the Accused's motions to file a late petition for review. The Accused did not respond to these requests.

21.

On May 16, 2008, the Accused filed a motion for relief from default and motion for extension of time to file Marsing's petition for review in the Supreme Court. On May 21, 2008, the Supreme Court granted the motions. However, the Accused took no action to file a petition for review and did not communicate with Marsing or Hellman.

22.

In late July 2008, Marsing reminded the Accused about his April requests and the Accused's representations concerning the postconviction appeal and again asked him for information about his case. In and after July 2008, Marsing also contacted the OPDS for assistance. On July 30, 2008, the OPDS again asked the Accused to respond to Marsing's requests and to keep Marsing informed about his case. In response to its inquiry, the Accused represented to the OPDS that he had been checking the status of the case, but that the court had made a mistake and failed to enter the extension order into the court tracking system. In fact, the Accused had not made any efforts to track the status of the extension order.

23.

In early October 2008, Marsing asked the Accused to respond to questions and to keep him informed about the status of his case. The Accused did not respond, and in mid-November 2008, Marsing renewed his requests. On November 25, 2008, the Accused's assistant notified Marsing that the Accused had filed a motion for relief from default, was drafting a petition for review, and would send Marsing a copy of the petition and a more detailed letter regarding the status of the case.

24.

On November 25, 2008, the Accused filed a motion for relief from default and a motion for extension of time to file Marsing's petition for review concerning Marsing's postconviction appeal in the Supreme Court. The Accused finally filed Marsing's petition for review in the Supreme Court on December 16, 2008.

25.

On December 18, 2008, Marsing complained to the Client Assistance Office of the Oregon State Bar ("CAO"). In early February 2009, the Accused misrepresented to CAO that he did not file a petition for review earlier because Marsing failed to notify him that he wanted to file a petition until after the time to file the petition had passed.

### **Violations**

26.

The Accused admits that his failures to take action on Marsing's behalf constituted neglect of a legal matter entrusted to him, in violation of RPC 1.3. The Accused further admits that his failure to notify Marsing of events in the case or respond to his requests for information (and others on Marsing's behalf) constituted a failure to keep a client reasonably informed about the status of a matter and failure to



promptly comply with reasonable requests for information, in violation of RPC 1.4(a). Finally, the Accused admits that several of his statements and responses to Marsing, Hellman, OPDS, and the Bar amounted to misrepresentations in violation of RPC 8.4(a)(3).

### Sanction

27.

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, including communication, to his client. *Standards*, § 4.4. The *Standards* assume that the most important ethical duties are those obligations which a lawyer owes to clients. *Standards*, at 5. The Accused also violated his duty of candor to his client and the public. *Standards*, §§ 4.6, 5.1.
- b. **Mental state.** There are three recognized mental states under the *Standards*. “Intent” is the conscious objective or purpose to accomplish a particular result. *Standards*, at 9. “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*, at 9. “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*, at 9.

Although the Accused’s neglect of Marsing’s matter was initially negligent, it thereafter became knowing when he was reminded of the need to take action and continued to fail to do so. Likewise, the Accused’s failure to transmit certain information to Marsing or communicate with him about the status of his case may have initially been negligent. However, it became knowing when both Marsing and others on his behalf requested that the Accused communicate with Marsing and update him on his postconviction appeal, and the Accused still did not do so. The Accused knowingly misrepresented the status of the case to Marsing and Hellman and knowingly misrepresented the reasons for his failures to act to the Bar and OPDS.

- c. **Injury.** An injury need not be actual, but only potential, to support the imposition of a sanction. *Standards*, at 6; *In re Williams*, 314 Or 530, 840 P2d 1280 (1992). In this case, Marsing was actually injured by the Accused's delay of his matter, and by the anxiety and frustration caused by the Accused's lack of communication. *See In re Cohen*, 330 Or 489, 496, 8 P3d 953 (2000) (client anxiety and frustration as a result of the attorney neglect can constitute actual injury); *In re Schaffner*, 325 Or 421, 426–427, 939 P2d 39 (1997). Marsing was also potentially injured to the extent that his appeal may have been successful. However, Marsing was ultimately able to assert his legal claim.

In addition, the Accused's misstatements to the Bar caused actual injury to both the legal profession and to the public because additional inquiry was necessitated, thereby delaying the Bar's investigations and, consequently, the resolution of the complaints against him. *In re Schaffner*, 325 Or at 426–427; *In re Miles*, 324 Or 218, 222–223, 923 P2d 1219 (1996); *In re Haws*, 310 Or 741, 753, 801 P2d 818 (1990); *see also In re Gastineau*, 317 Or 545, 558, 857 P2d 136 (1993) (court concluded that the Bar was prejudiced due to a failure to fully respond, because the Bar had to investigate in a more time-consuming way, and the public respect for the Bar was diminished, because the Bar could not provide a timely and informed response to complaints).

- d. **Aggravating circumstances.** Aggravating circumstances include:
1. A prior record of discipline. *Standards*, § 9.22(a). The Accused was previously reprimanded for negligently making false statements to the court about having lost contact with his client and then withdrawing from the matter, in violation of DR 1-102(A)(4) (conduct prejudicial to the administration of justice) and DR 2-110(A)(2) (improper withdrawal). *In re Johnson*, 17 DB Rptr 185 (2003).
  2. Multiple offenses. *Standards*, § 9.22(c).
  3. A pattern of misconduct. *Standards*, § 9.22(d). *See In re Schaffner*, 323 Or 472, 480, 918 P2d 803 (1996).
  4. A vulnerable victim. *Standards*, § 9.22(h). Marsing was incarcerated and dependent on the Accused to communicate with him and properly handle the appeal.
  5. Substantial experience in the practice of law. *Standards*, § 9.22(i). The Accused was admitted to practice in Oregon in

1996 and practices primarily in the area of criminal appeals and postconviction matters.

e. **Mitigating circumstances.** Mitigating circumstances include:

1. Remorse. *Standards*, § 9.32(l). The Accused has expressed that he is remorseful for the delay and any injury.

28.

Under the *Standards*, a suspension is generally appropriate when a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client, or when a lawyer engages in a pattern of neglect and causes injury or potential injury to a client. A suspension is also generally appropriate when a lawyer knowingly deceives a client, and causes injury or potential injury to the client. *Standards*, §§ 4.42, 4.62.

29.

Oregon case law also supports the imposition of a suspension. See *In re Meyer*, 328 Or 220, 228, 970 P2d 647 (1999) (one-year suspension for single neglect of a domestic relations matter where attorney had previously been reprimanded for neglect); *In re Purvis*, 306 Or 522, 760 P2d 254 (1988) (six-month suspension where lawyer with no prior discipline failed to take action over several months to seek reinstatement of a client's child support payments, told his client that he was pursuing the matter when he was not, and failed to cooperate in the Bar's investigation); *In re Butler*, 324 Or 69, 921 P2d 401 (1996) (one-year suspension for lawyer with substantial experience who neglected a personal injury case, resulting in its dismissal, failed to notify the client of the dismissal, and assured the client that he was moving forward on the case while he was trying to find a way to reinstate it); *In re Knappenberger*, 340 Or 573, 135 P3d 297 (2006) (one-year suspension for neglect where lawyer with substantial experience failed to complete and file a qualified domestic relations order over a substantial period of time, and refused to acknowledge the wrongfulness of the conduct). The Accused's misconduct is not as egregious as that in *Butler* and *Knappenberger*, as each of them had more substantial prior discipline, either similar to that charged and/or extensive in amount.

30.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be suspended for six months for violations of RPC 1.3, RPC 1.4(a), and RPC 8.4(a)(3), the sanction to be effective June 30, 2010, or fourteen (14) days after the stipulation is approved, whichever is later.

31.

In addition, on or before December 31, 2010, the Accused shall pay to the Oregon State Bar its reasonable and necessary costs in the amount of \$423.40, incurred for his deposition. Should the Accused fail to pay \$423.40 in full by December 31, 2010, 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.

The Accused acknowledges that he has certain duties and responsibilities under the Rules of Professional Conduct and BR 6.3 to immediately take all reasonable steps to avoid foreseeable prejudice to his clients during the term of his suspension. In this regard, the Accused has arranged for Leah A. Johnson, 714 SW 20th Place, Portland, OR, an active member of the Oregon State Bar, to either take possession of or have ongoing access to the Accused's client files and serve as the contact person for clients in need of the files during the term of the Accused's suspension. The Accused represents that Leah Johnson has agreed to accept this responsibility.

33.

The Accused acknowledges that reinstatement is not automatic on expiration of the period of suspension. He is required to comply with the applicable provisions of Title 8 of the Bar Rules of Procedure. The Accused also acknowledges that he cannot hold himself out as an active member of the Bar or provide legal services or advice until he is notified that his license to practice has been reinstated.

34.

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 27th day of May 2010.

/s/ Rankin Johnson

Rankin Johnson

OSB No. 964903

EXECUTED this 2nd day of June 2010.

OREGON STATE BAR

By: /s/ Amber Bevacqua-Lynott

Amber Bevacqua-Lynott

OSB No. 990280

Assistant Disciplinary Counsel

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
)  
Complaint as to the Conduct of ) Case No. 06-9110  
)  
R. KEVIN HENDRICK, )  
)  
Accused. )

Counsel for the Bar: Jane E. Angus  
Counsel for the Accused: Andrew P. Ostitis  
Disciplinary Board: Bronson D. James, Chair  
James D. Van Ness  
Martin Johnson, M.D., Public Member  
Disposition: Violations of RPC 1.15-1(a), RPC 1.15-1(c),  
RPC 1.15-1(d), RPC 7.1(a)(1), RPC 8.1(a)(1),  
RPC 8.4(a)(2), and RPC 8.4(a)(3).  
Trial Panel Opinion. Two-year suspension.  
Effective Date of Opinion: June 22, 2010

**TRIAL PANEL OPINION**

**Summary of Disposition**

This matter came before the panel by way of hearing, on November 23, 2009. After hearing all the testimony and evidence, the panel finds in favor of the Bar, concluding that the Bar established, by clear and convincing evidence, each of the RPC violations alleged in the complaint. The panel orders that the Accused be suspended from the practice of law for a period of two (2) years.

**Initial Findings of Fact**

At the outset, the panel feels it is important to discuss what transpired immediately before and at the hearing in this matter on November 23, 2009, as it proved a significant factor in the panel's credibility assessment of the Accused. A few days prior to the hearing, the panel chair received an emergency motion for continuance from the Accused, through his counsel. Attached to the motion was a letter from the Accused, to his counsel, indicating that he could not endure the stress

of a disciplinary hearing. The Accused submitted, along with that motion, a letter from his physician recommending that the Accused continue treatment, and have a minimum of at least 90 days of a stress-free environment.

At the telephonic hearing to discuss the motion, the panel chair asked the counsel for the Accused if the Accused was scheduled for any procedure or treatment that would have to be delayed by holding the scheduled hearing. Counsel for the Accused responded no, that the only treatment the Accused was undergoing was ongoing medication, and no procedures were contemplated. The panel chair then inquired about the letter from the Accused, to counsel, that accompanied the motion. That letter had been written on the Accused's law firm letterhead. Panel chair asked counsel if the Accused was still practicing law, to which counsel replied that the Accused was continuing to practice. When the panel chair denied to continuance, counsel for the Accused informed the panel that the Accused would likely refuse to appear at the hearing.

On the date of the hearing the Accused did not appear personally. The Accused's counsel did appear, however, and stated his position that without the Accused the proceeding could not move forward, and pursuant to Bar Rule of Procedure 5.8(a) the panel would be obligated to enter an order of default. The panel informed counsel that it determined that BR 5.8(a) allowed default for a failure of appearance, without mandating that such appearance be in person, as opposed to an appearance through counsel. The panel ruled that an appearance through counsel was sufficient for purposes of BR 5.8(a) to divest the panel of authority to enter an default, and the schedule heading would continue.

Upon receiving that ruling, counsel for the Accused informed the panel that the Accused would instruct him therefore to withdraw as counsel, thus obligating the panel to enter an order of default. Upon being presented with this ultimatum, the panel informed counsel that BR 5.8(a) was discretionary, and the panel "may" order a default upon a failure of the accused to appear, but is not compelled to issue such an order. The panel informed the parties that in its opinion this case, given its complexity, and the volume of exhibits, would benefit from a presentation of the evidence, and that the hearing would be held. At that point counsel for the Accused agreed to participate in the proceeding.

Turning now to the factual matters that formed the basis of the complaint, R. Kevin Hendrick, the Accused, was admitted to practice in Oregon in 1991, performing as sole practitioner since 1994. In 2003, Hendrick established the "Valley Law Center" as an assumed business name of his legal practice. From its inception, Valley Law Center was indivisible from Hendrick's legal practice. The Valley Law Center Web site represented in its advertising that the law firm consisted of several attorneys, a "legal team." This was false.

One stated work area for the Valley Law Center was the removal of negative credit information from ChexSystems, an organization that monitors bank accounts and negative checking information. Hendrick advertised his work, through the Valley Law Center, to remove negative credit information reported to ChexSystems. At this point, the panel deems it appropriate to quote from the recitation of facts in *In re Hendrick*, 346 Or 98, 208 P3d 488 (2009) (Kisler, J., dissenting):

Chex Systems, Inc., maintains a list of persons with a history of overdrawn checks or closed accounts and provides that information to banks. If a person is on Chex Systems' list, that person frequently will have difficulty opening a new bank account.

The accused, doing business as Valley Law Center, offered consumers help in getting off Chex Systems' list. The website for Valley Law Center told consumers that, in return for an advance payment of \$249, Valley Law Center would help them remove their names from Chex Systems' list. The website also explained why Valley Law Center's services were superior to nonlegal alternatives. According to the website, the "most important reason [why Valley Law Center provides effective help] is that we are an actual Law Firm. We know the law and we use our legal knowledge and extensive experience to get you out of [Chex Systems]."

The accused received advance payments from multiple clients for his help in removing their names from Chex Systems' list.

The panel finds that summation of the facts to be accurate and concise, and adopts it.

Hendrick offered his services as to ChexSystems for a flat fee, but without a written fee agreement, and without a fee agreement that specified that the sum was earned on receipt.

Aileen Fernandez contacted Hendrick to have negative credit information of hers removed from ChexSystems. She paid a sum of \$249.00 to Hendrick, operating as the Valley Law Center, for this service. Fernandez represents but one of at least thirty-five other clients handled in this manner by Hendrick (most likely that number is far larger). Hendrick did not maintain records of his transactions with these clients.

By e-mail, on July 5, 2005, Fernandez informed Hendrick that she wanted a refund. Hendrick's Web site advertised full refunds for client dissatisfaction with his ChexSystems services. From July 5, 2005, to December 9, 2005, Hendrick did not refund Fernandez' funds, or communicate with Fernandez at all. After multiple attempts to communicate with Hendrick, without response, Fernandez contacted the Oregon State Bar.



### **RPC Violations**

The above factual findings establish that Hendrick violated RPC 1.15-1(a) and (c), failure to deposit and maintain client funds in trust and failure to prepare and maintain complete records of client funds. Further, Hendrick violated RPC 1.15-1(d) in failing to promptly return client funds. Finally, Hendrick violated both RPC 7.1(a)(1) (false or misleading statements about the lawyer or lawyer's law firm) and RPC 8.4(a)(3) (dishonesty or misrepresentation in his advertising of, and conduct with, the Valley Law Center).

Therefore, the panel finds that the Bar has established, by clear and convincing evidence, the first, second, and third causes of complaint.

With respect to the fourth cause of complaint, the Accused is charged with violating RPC 7.1(a)(1) and RPC 8.4(a)(3). Again, the panel finds by clear and convincing evidence that the Accused advertised his firm as a team of lawyers, when in fact the Accused was a sole practitioner, and finds the violations proven.

### **Factual Findings Regarding the Disciplinary Investigation**

The panel finds that during the disciplinary investigation, Hendrick made several false and knowingly misleading statements, and otherwise failed to cooperate with the investigation in the following particular ways:

- Hendrick initially informed the Bar that he had performed ChexSystems work for 36 clients. That was later established to be false, and the number of affected clients was far greater.
- Hendrick denied that others performed ChexSystems work at his direction. This was established as false.
- Hendrick claimed, under oath, that he made check registers for his trust account with respect to ChexSystems clients. This was false.
- Hendrick claimed that payments for ChexSystems work were not made out to Valley Law Center. This was false.
- Hendrick denied under oath that Valley Legal Systems work was advertised on the Internet through a Web site titled [fixmybankaccount.com](http://fixmybankaccount.com), and that the site made representations about the number of attorneys, a "legal team," and a money back guarantee. That was established as false.

### **RPC Violations**

The panel finds that in establishing the above factual conduct, the Bar has established by clear and convincing evidence that Hendrick violated both RPC

8.1(a)(1) and RPC 8.4(a)(2) Specifically, the facts proven establish criminal conduct on the part of the Accused, specifically perjury under ORS 162.065.

### **Sanctions**

At the outset, the panel finds no mitigating factors weighing in favor of the Accused. In terms of aggravating factors, the panel finds the following:

- The Accused was admitted in 1991, and has substantial experience in practicing law. *Standards*, § 9.22(h).
- The Accused refused to acknowledge wrongful conduct. While the panel accepts that the Accused has a right to defend himself against the charges, he has no right to deliberately mislead the disciplinary investigatory process. No reasonable attorney could argue that the actions of the Accused in cooperating with the Bar, or this panel, were justified. *Standards*, § 9.22(g).
- The Accused acted with a dishonest motive in his handling of ChexSystems clients' matters, funds, and in responding to the Bar. *Standards*, § 9.22(b).
- The Accused submitted false and misleading statements to the Bar, and this panel. *Standards*, § 9.22(e)(f).
- The Accused has a prior disciplinary history, with an admonition of neglect in 2001. *Standards*, § 9.22(a).

In accordance with the *Standards* for discipline, and in consideration of the aggravating factors in this case, the panel suspends the Accused from the practice of law for a period of two (2) years.

**ORDER**

For the foregoing reasons, IT IS HEREBY ORDERED that the Accused, R. Kevin Hendrick, be suspended from the practice of law in the State of Oregon for a period of two (2) years.

Dated April 5, 2010

/s/ Bronson D. James

Bronson D. James  
OSB No. 033499  
Trial Panel Chair

/s/ Jim Van Ness

Jim Van Ness  
OSB No. 991193  
Attorney Panel Member

/s/ Dr. Martin Johnson

Dr. Martin Johnson  
Public Member

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re:	)	
	)	
Complaint as to the Conduct of	)	Case Nos. 07-175 and 10-18
	)	
SCOTT P. BOWMAN,	)	SC S058608
	)	
Accused.	)	

Counsel for the Bar:	Jeffrey D. Sapiro
Counsel for the Accused:	Michael J. Slominski
Disciplinary Board:	None
Disposition:	Violation of DR 1-102(A)(2), RPC 1.4(a), RPC 1.15-1(a), RPC 1.15-1(c), RPC 1.8(h)(1), RPC 1.8(h)(3), RPC 5.4(a), RPC 5.5(a), RPC 8.1(a)(2), RPC 8.4(a)(2), and ORS 9.160(1). Stipulation for Discipline. One-year suspension, eight months stayed, two-year probation.
Effective Date of Order:	September 6, 2010

**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 a period one year, with four months of suspension imposed effective 60 days from the date of this order, and eight months of the suspension stayed pending the completion of two years' probation pursuant to the terms of the stipulation.

July 8, 2010

DATE

/s/ W. Michael Gillette

PRESIDING JUSTICE

### **STIPULATION FOR DISCIPLINE**

Scott P. Bowman, attorney at law (hereinafter “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 June 9, 2003, and has been a member of the Oregon State Bar continuously since that time, having his office and place of business in Clackamas County, Oregon.

3.

The Accused enters into this Stipulation for Discipline freely, 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.

On February 24, 2010, an Amended Formal Complaint was filed against the Accused pursuant to the authorization of the State Professional Responsibility Board (hereinafter “SPRB”), alleging violations of RPC 5.5(a), ORS 9.160(1), DR 1-102(A)(2), RPC 8.4(a), RPC 8.1(a)(2), RPC 1.4(a), RPC 1.15-1(a), RPC 1.15-1(c), RPC 1.8(f), RPC 1.8(h)(1), RPC 1.8(h)(3), and RPC 5.4(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.

As a result of a check tendered by the Accused to pay his 2007 Oregon State Bar membership assessment being dishonored by the bank for insufficient funds, the Accused was suspended as an active member of the Bar pursuant to ORS 9.200 from July 3, 2007, to July 11, 2007. During this period, the Accused engaged in activities that constituted the practice of law.

6.

For tax years 2005, 2006, and 2007, the Accused willfully failed to file federal and state personal income tax returns, or pay income tax due, in violation of 26 USC §7203 and ORS 314.075(1).

7.

During the course of the Bar's investigation into the Accused's conduct commencing in October 2007 and thereafter, the Accused knowingly failed to provide documents and records requested by the Bar's Disciplinary Counsel and knowingly failed to provide complete responses to inquiries made by Disciplinary Counsel.

8.

In or about February 2009, Loan Secure NW LLC (hereinafter "Loan Secure NW") was a limited liability company formed in the State of Oregon to offer mortgage loan modification services to members of the public. The Accused was counsel to Loan Secure NW.

9.

In February 2009, Piotr Prusiewicz (hereinafter "the Client") entered into a Loss Mitigation Services Agreement (hereinafter "the Agreement") with the Accused, the terms of which provided that the Accused would render legal services to the Client by renegotiating with the Client's mortgage lender the terms of the Client's mortgage obligations.

10.

Pursuant to the terms of the Agreement, the Client paid \$1,995 to Loan Secure NW for the services to be rendered by the Accused. Loan Secure NW thereafter paid the Accused \$950 of this sum and retained the remainder of the Client's money or paid it to third persons other than the Accused. By dividing the Client's \$1,995 with Loan Secure NW, the Accused shared a legal fee with a nonlawyer.

11.

At no time were the Client's funds or any portion of them deposited into the Accused's lawyer trust account or any other lawyer trust account. The Agreement did not provide that the Client's funds were earned by the Accused upon receipt.

12.

The Agreement required the Client to prospectively and unconditionally waive any right of action or claim against the Accused arising out of the Accused's legal

services rendered under the Agreement. The Client was not independently represented in making the Agreement.

13.

The Agreement required the Client to agree that any future controversy between the Client and the Accused arising from or related to the Accused's services was subject to binding and final arbitration under rules of the American Arbitration Association. The Accused did not obtain the Client's informed consent to this arbitration provision in a writing signed by the Client.

14.

Between February 17, 2009, and the end of June 2009, the Accused failed to respond to inquiries from the Client, keep the Client reasonably informed about the status of the Client's legal matter or promptly comply with the Client's reasonable requests for information.

### Violations

15.

The Accused admits that, by engaging in the conduct described above, he violated RPC 5.5(a) and ORS 9.160(1) (paragraph 5); DR 1-102(A)(2) and RPC 8.4(a)(2) (paragraph 6); RPC 8.1(a)(2) (paragraph 7); and RPC 1.4(a), RPC 1.15-1(a), RPC 1.15-1(c), RPC 1.8(h)(1), RPC 1.8(h)(3), and RPC 5.4(a) (paragraphs 8–14).

Upon further factual inquiry, the parties agree that the charges of alleged violations of DR 1-102(A)(2)/RPC 8.4(a)(2) for tax years 2003–2004, and RPC 1.8(f) in the Loan Secure NW matter should be and, upon the approval of this stipulation, are dismissed.

### Sanction

16.

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 several duties identified under the *Standards* including: § 4.1, duty to preserve client property (failure to deposit client funds in trust); § 4.3, duty to avoid conflicts of interest

(improper provisions in Loss Mitigation Services Agreement); § 4.4, duty of diligence to client (in the Loan Secure NW matter); § 5.1, duty to comply with the law (tax returns); and § 7.0, duties owed to the profession (practicing while suspended, failing to respond to disciplinary inquiry, fee sharing).

- b. **Mental state.** In most respects, the Accused committed misconduct as described in this stipulation with a knowing mental state, described in the *Standards* as 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*, at p. 7. With respect to the failure to deposit client funds into trust and the inclusion of improper provisions in the Loss Mitigation Services Agreement, the Accused acted negligently, described in the *Standards* as a failure to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation. *Standards*, at p. 7.
- c. **Injury.** For purposes of sanction, injury from a lawyer's misconduct can be actual or potential. *In re Williams*, 314 Or 530, 840 P2d 1280 (1992). In this case, no actual injury arose from the Accused's practicing law during a period of suspension, although there was a potential for injury to clients who received services from the Accused when he was not actively licensed and insured. The Accused's failure to file income tax returns caused actual injury by hindering the taxing authorities in their administration of the taxing and revenue collection process. The returns have now been filed, although there remains some tax to be paid to the Oregon Department of Revenue. No tax was owed to the federal government for the years in which the Accused failed to file returns. The Accused's failure to respond in the disciplinary inquiry delayed the investigation. The Client in the mortgage loan modification matter was injured by the Accused's failure to keep the Client informed, and was potentially injured by the failure to place his funds in a trust account and the inclusion of the various improper provisions in the Loss Mitigation Services Agreement.
- d. **Aggravating circumstances.** Aggravating circumstances include:
  - 1. A pattern of misconduct. *Standards*, § 9.22(c);
  - 2. Multiple offenses. *Standards*, § 9.22(d);
  - 3. Initial obstruction of the Bar investigation. *Standards*, § 9.22(e);



4. Although not a longtime practitioner (admitted in 2003), the Accused attended a master's program in tax law before being admitted in Oregon and therefore was more knowledgeable than many concerning tax law obligations. *Standards*, § 9.22(i).
- e. **Mitigating circumstances.** Mitigating circumstances include:
  1. Absence of a prior disciplinary record. *Standards*, § 9.32(a);
  2. Personal or emotional problems in the nature of physical health and mental health (depression and anxiety) conditions. *Standards*, § 9.32(c).

17.

Under the *Standards*, a term of suspension is generally appropriate for the misconduct that the Accused committed. *Standards*, §§ 4.12, 4.42, 5.12, 7.2.

18.

Oregon case law also supports the imposition of a suspension in this case. *See In re Koliha*, 330 Or 402, 9 P3d 102 (2000) (suspension for practicing law while suspended); *In re Lawrence*, 332 Or 502, 31 P3d 1078 (2001) (and cases cited therein; suspension for failure to file tax returns); *In re Miles*, 324 Or 218, 923 P2d 1219 (1996); *In re Schaffner*, 323 Or 472, 918 P2d 803 (1996) (suspension for not responding to a disciplinary inquiry); *In re Little*, 247 Or 503, 431 P2d 284 (1967) (suspension for fee-splitting); *In re Redden*, 342 Or 393, 153 P3d 113 (2007) (suspension for not responding to client).

19.

Probation, while not favored by the Supreme Court as a disposition in a contested-case proceeding, *see In re Obert*, 336 Or 640, 655, 89 P3d 1173 (2004), can be appropriate as an agreed-upon sanction when conditions are imposed that correlate to the misconduct at issue. In such a case, some term of suspension is stayed pending the completion of the probationary period. BR 6.2. *See also Standards*, § 2.7. In this case, there is evidence that the Accused experienced significant health problems including depression that contributed, in part, to some of the misconduct described in this stipulation and the Accused has expressed a desire to work within a structured probation as a means of making him a better lawyer.

20.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be suspended for a period of one (1) year for the violations described above, with four (4) months of the suspension imposed commencing 60 days after this

stipulation is approved by the court, and eight (8) months of the suspension stayed pending the completion of a two (2) year probation with conditions set out below. The two (2) year term of probation will commence upon the Accused's reinstatement from the term of imposed suspension.

21.

During the term of probation, the Accused shall comply with the following conditions:

(a) The Accused shall comply with all provisions of this stipulation, the Rules of Professional Conduct applicable to Oregon lawyers, and the provisions of ORS chapter 9;

(b) The Accused shall communicate with Disciplinary Counsel's Office and allow Disciplinary Counsel's Office access to information, as Disciplinary Counsel's Office deems necessary, to monitor compliance with this stipulation;

(c) The Accused shall make all past-due tax payments—principal, interest, and penalties, to the appropriate taxing authority no later than the end of the first year of the probationary term, and provide proof of such payment to Disciplinary Counsel;

(d) Before the term of imposed suspension expires, the Accused shall attend not less than ten (10) hours of MCLE accredited programs that emphasize practical skills and law office management. These credit hours shall be in addition to those MCLE credit hours required of the Accused for his normal MCLE reporting period. Upon completion of the ten (10) hours described in this paragraph, the Accused shall submit to Disciplinary Counsel's Office an affidavit of compliance describing the credits hours taken and when and where they were taken. Completing this credit-hour requirement and filing the compliance affidavit are conditions of the Accused's reinstatement following the term of imposed suspension;

(e) Before the term of imposed suspension expires, the Accused shall meet with office management consultants from the Professional Liability Fund (hereinafter "PLF") for an evaluation of his office practices and the development of a written plan for improvements to his office practices, management, and systems. When the Accused receives recommendations from the PLF, in the form of a written plan or otherwise, regarding his office practices, management, and systems, he shall notify Disciplinary Counsel's Office of the PLF's recommendations in his first quarterly report described in paragraph 21(n) below. The Accused shall implement all recommendations made by the PLF, to the extent reasonably possible, and participate in at least one follow-up review by the PLF no later than six months after the Accused is reinstated from the term of imposed suspension. The Accused shall promptly report his progress in the implementation of the PLF recommendations to his Supervisor;

(f) Linda G. Beloof, or another bar member approved by Disciplinary Counsel, shall serve as the Accused's supervisor (hereinafter "Supervisor"). The Accused agrees to cooperate and comply with all reasonable requests made by his Supervisor that the Supervisor, in her sole discretion, determines 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;

(g) The Accused shall meet with his Supervisor within fourteen (14) days after the term of imposed suspension commences to ensure that all active client matters have been referred to other lawyers or that arrangements have been made so that those matters are properly tended to while the Accused is suspended. The Accused shall meet again with his Supervisor during the term of imposed suspension to review the recommendations and written plan made by the PLF as described in paragraph 21(e) above and to discuss methods for implementing those recommendations;

(h) After the Accused is reinstated from the term of imposed suspension, the Accused shall meet monthly with his Supervisor for the purpose of reviewing the status of the Accused's law practice, his performance of legal services on the behalf of clients, and the sufficiency of communication by the Accused to his clients, opposing counsel, and the courts. The frequency of these meetings may be adjusted by the Supervisor to every other month if she, in her discretion, determines that the Accused's performance warrants the adjustment;

(i) The Accused authorizes his Supervisor to communicate with Disciplinary Counsel's Office regarding the Accused's compliance or noncompliance with the terms of this agreement and to release to Disciplinary Counsel's Office any information Disciplinary Counsel's Office deems necessary to permit it to assess the Accused's compliance;

(j) The Accused has received treatment for depression and anxiety. He shall continue with treatment for his mental health as directed by his health care providers and comply with the treatment recommendations of those providers, including taking pharmaceutical medications as prescribed;

(k) The Accused shall meet no less than once a month with a counselor at the Oregon Attorney Assistance Program (hereinafter "OAAP") to address issues related to depression and anxiety, and shall attend programs offered by OAAP for those issues as recommended by the OAAP counselor;

(l) A member of the State Lawyers Assistance Committee (hereinafter "SLAC"), or such other person approved by Disciplinary Counsel in writing (hereinafter "Monitor"), shall monitor the Accused's compliance with those terms of probation dealing with his mental health. The Accused shall meet with his Monitor

monthly, or more often as may be requested by the Monitor, for the purpose of reviewing the Accused's compliance with the terms of paragraphs 21(j) and (k) above. The Accused shall cooperate and comply with all reasonable requests of the Monitor and Disciplinary Counsel's Office that will allow the Monitor and Disciplinary Counsel's Office to evaluate the Accused's compliance with the terms of this stipulation for discipline;

(m) In the event the Accused fails to comply with any recommendation of his mental health care providers or his OAAP counselor, the Accused shall immediately notify his Monitor and Disciplinary Counsel in writing;

(n) Quarterly, and by such dates as established by Disciplinary Counsel's Office, the Accused shall submit a written report to Disciplinary Counsel, approved in substance by his Supervisor and his Monitor, advising whether he is in compliance or noncompliance with the terms of this stipulation and the recommendations of his mental health treatment providers, and each of them. The Accused's report shall also identify the dates of the Accused's meetings with his Supervisor and Monitor, and the dates of meetings and other consultations between the Accused and all mental health professionals during the reporting period. In the event the Accused has not complied with any term of probation, the report shall describe the noncompliance and the reason for it, and further describe when and what steps have been taken to correct the noncompliance;

(o) The Accused hereby waives any privilege or right of confidentiality to the extent necessary to permit disclosure by OAAP or any mental health treatment providers of the Accused's compliance or noncompliance with this stipulation and their treatment recommendations to the Accused's Supervisor, Disciplinary Counsel's Office, and Monitor. The Accused agrees to execute any additional waivers or authorizations necessary to permit such disclosures;

(p) The Accused expressly authorizes OAAP and other mental health treatment providers to communicate with and to release information otherwise protected from disclosure by state and federal law to the Accused's Supervisor, Disciplinary Counsel's Office, and Monitor, and each of their respective representatives, to the extent necessary to disclose the Accused's participation, compliance, and noncompliance with the terms of this stipulation and any treatment recommendations;

(q) The Accused is represented in this proceeding by Michael J. Slominski. The Accused and Michael J. Slominski hereby authorize direct communication between the Accused and Disciplinary Counsel's Office, the Accused's Supervisor, and Monitor, and each of them, after the date this stipulation is approved by the

Supreme Court for the purposes of administering and monitoring the Accused's compliance with this stipulation;

(r) The Accused is responsible for the cost of all professional services required under the terms of this stipulation and the terms of probation;

(s) In the event the Accused fails to comply with any condition of his probation, Disciplinary Counsel may initiate proceedings to revoke the Accused's probation pursuant to BR 6.2(d), and impose the stayed period of suspension. In such event, the probation and its terms shall be continued until resolution of any revocation proceeding;

(t) The Accused's reinstatement after the term of imposed suspension is governed by BR 8.3. Upon the Accused's reinstatement under that rule and his full compliance thereafter with the terms of this stipulation and successful completion of his probation, he shall be unconditionally reinstated without further order of the Supreme Court.

22.

The Accused acknowledges that he has certain duties and responsibilities under the Rules of Professional Conduct and BR 6.3 to immediately take all reasonable steps to avoid foreseeable prejudice to his clients during the term of his suspension. In this regard, the Accused has arranged for Michael J. Slominski, an active member of the Oregon State Bar, to either take possession of or have ongoing access to the Accused's client files and serve as the contact person for clients in need of the files during the term of the Accused's suspension. The Accused represents that Michael J. Slominski has agreed to accept this responsibility.

23.

The Accused acknowledges that reinstatement is not automatic on expiration of the term of imposed suspension. He is required to comply with the applicable provisions of Title 8 of the Bar Rules of Procedure. The Accused also acknowledges that he cannot hold himself out as an active member of the Bar or provide legal services or advice until he is notified that his license to practice has been reinstated.

24.

This Stipulation for Discipline has been reviewed by Disciplinary Counsel of the Oregon State Bar and the sanction was approved by the SPRB. The parties agree the stipulation now is to be submitted to the Supreme Court for consideration pursuant to the terms of BR 3.6.

Cite as *In re Bowman*, 24 DB Rptr 144 (2010)

EXECUTED this 14th day of June 2010.

/s/ Scott P. Bowman

Scott P. Bowman

OSB No. 032174

EXECUTED this 17th day of June 2010.

OREGON STATE BAR

By: /s/ Jeffrey D. Sapiro

Jeffrey D. Sapiro

OSB No. 783627

Disciplinary Counsel

**Cite as 348 Or 535 (2010)**  
**IN THE SUPREME COURT**  
**OF THE STATE OF OREGON**

In re:

Complaint as to the Conduct of

FREDERICK T. SMITH,

Accused.

(OSB 07-53; SC S056148)

En Banc

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

Argued and submitted May 13, 2010. Filed July 15, 2010.

Frederick T. Smith argued the cause and filed the briefs in propria persona.

Mary A. Cooper, Assistant Disciplinary Counsel, 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 90 days, commencing 60 days from the date of this decision.

**SUMMARY OF THE SUPREME COURT OPINION**

In this lawyer disciplinary proceeding, the Oregon State Bar charged Frederick T. Smith (the Accused) with four violations of the Oregon Rules of Professional Conduct (RPC) in connection with his representation of a client, Rochelle Leveque, in 2005. Specifically, the Bar alleged that the accused violated RPC 3.1 (taking action on behalf of a client with no nonfrivolous basis), RPC 4.1(a) (making a false statement of material fact or law to a third person in the course of representing a client), RPC 8.4(a)(2) (committing a criminal act that reflects adversely on a lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects), and RPC 8.4(a)(3) (conduct involving dishonesty, fraud, deceit, or misrepresentation that reflects adversely on the lawyer's fitness to practice law). Following a hearing, a trial panel of the Disciplinary

Board concluded that the Accused had violated the rules as alleged and suspended the Accused for 90 days. The Accused seeks review pursuant to ORS 9.536(1) and Bar Rule of Procedure (BR) 10.1, challenging the findings and conclusions of the trial panel with respect to each alleged violation. We review bar disciplinary matters de novo. ORS 9.536(2); BR 10.6. The alleged misconduct must be proved by clear and convincing evidence. BR 5.2. We conclude that the Accused violated the four rules listed above; we also conclude that the Accused should be suspended for 90 days.



IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re:	)	
	)	
Complaint as to the Conduct of	)	Case Nos. 09-09, 09-10, 09-49,
	)	09-50, 09-51, 09-109, 09-110,
KEITH HAYES,	)	09-112, 09-113, 09-116, 09-117,
	)	09-118, 09-119, 09-120, and 09-144
Accused.	)	

Counsel for the Bar:	Amber Bevacqua-Lynott
Counsel for the Accused:	None
Disciplinary Board:	Deanna L. Franco, Chair Llewellyn M. Fischer Joan J. LeBarron, Public Member
Disposition:	Violation of RPC 1.3, RPC 1.4(a) and (b), RPC 1.5(a), RPC 1.15-1(d), RPC 1.16(d), RPC 3.3(a)(1) and (4), RPC 3.4(c), RPC 8.1(a)(2), RPC 8.4(a)(3), and RPC 8.4(a)(4). Trial Panel Opinion. Disbarment.
Effective Date of Opinion:	July 27, 2010

**TRIAL PANEL OPINION**

**Procedural History**

This matter is before a Region 6 Trial Panel of the Oregon State Bar Disciplinary Board on a Formal Complaint consolidating 27 causes of complaint in connection with at least 39 client matters to consider the sanctions sought by the Bar against the Accused.

The Accused was personally served with the Bar's Petition for Immediate Suspension During Pendency of Disciplinary Proceeding (BR 3.1), Formal Complaint and Notice to Answer on December 31, 2009.

On January 12, 2010, the Accused was served with the Bar's Notice of Intent to Take Default by mail. That mailing was not returned undelivered. The Accused failed to answer or otherwise appear within the time allowed.

On January 25, 2010, the Bar filed a Motion for Order of Default against the Accused. On January 26, 2010, pursuant to BR 5.8(a), the Region 6 Chair entered an Order granting the Bar's motion for default and holding the facts alleged in the Formal Complaint to be true. The Order of Default accorded the Bar an opportunity to submit for the Trial Panel's consideration evidence and legal authority limited to the issue of appropriate sanction.

On March 18, 2010, the Trial Panel Chairperson received a letter from the Accused, dated March 17, 2010, requesting a hearing pursuant to BR 2.4(h).

On March 25, 2010, the Trial Panel Chairperson sent the Accused a letter explaining that an Order of Default had been entered against him and that the Trial Panel had the ability to set aside the Order of Default only upon a showing by the Accused that "the accused's failure to . . . answer or appear timely was the result of mistake, inadvertence, surprise or excusable neglect" (BR 5.8(b)). Since the Accused's request for a hearing under BR 2.4(h) failed to address any of the required circumstances, the Accused's request was denied. However, the Accused was offered the opportunity to provide the Trial Panel with a sanctions memorandum concerning evidence of mitigation of the misconduct as outlined in the Formal Complaint. The letter requested that such information be submitted to the Trial Panel on or before April 15, 2010.

On March 31, 2010, the Trial Panel Chairperson received an additional letter from the Accused reiterating his March 17, 2010, request for a hearing pursuant to BR 2.4(h).

On April 1, 2010, the Trial Panel Chairperson responded to the Accused's letter informing the Accused that the Trial Panel had already denied his request for a hearing, that it was doing so again, and that the deadline for the Accused to submit a memorandum to the Trial Panel was April 15, 2010.

The Accused failed to provide any evidence of mitigation.

On April 28, 2010, the Bar filed a memorandum in support of sanctions, together with supporting declarations and copies of documents of record.

Therefore, the only issue considered by the Trial Panel was the sanction sought by the Bar.

### **Findings and Conclusions as to Violations**

At all relevant times, the Accused, Keith Hayes, was an attorney at law, duly admitted by the Supreme Court of the State of Oregon on September 21, 1990, to practice law in this state and was a member of the Bar, having his office and place of business in the County of Marion, State of Oregon.

As explained below, the Trial Panel finds that the appropriate sanction in this case is disbarment. In making its determination, the Trial Panel considered the allegations of the Bar's Formal Complaint, the Order of Default, the Bar's April 28, 2010, Sanctions Memorandum, and the Exhibits provided to the Trial Panel by the Bar. Because of the entry of default, the facts alleged in the Formal Complaint are deemed to have been conclusively established. BR 5.8(a). Additional facts relating to sanctions are established through the Bar's submission of evidence regarding sanctions. The Trial Panel has reviewed the facts as established by default, considering de novo the conclusions to be drawn therefrom. We summarize the facts in the Formal Complaint drawing our own conclusions as follows.

The Accused is charged with twenty-seven (27) causes of complaint in connection with at least thirty-nine (39) client matters including: (a) neglect of legal matters entrusted to him and failure to adequately communicate with his clients; (b) charging and collecting clearly excessive fees; (c) knowingly making misrepresentations to the court, knowingly concealing other important information, and causing prejudice to the administration of justice; (d) knowingly disobeying rules and rulings of the U.S. Bankruptcy Court; (e) failing to promptly deliver property his clients were entitled to receive; (f) failure to comply with obligations on termination of employment; and (g) failure to respond to the requests of the Disciplinary Counsel's Office. These charges all represent violations of the Oregon State Bar Rules of Professional Conduct.

Based on its consideration of the allegations and evidence received, the Trial Panel agrees with the Bar regarding the professional duties violated by the Accused.

**1. The Accused violated RPC 1.3 of the Rules of Professional Conduct.**

RPC 1.3 states:

A lawyer shall not neglect a legal matter entrusted to the lawyer.

The Trial Panel finds that the Accused violated RPC 1.3 by neglecting the legal matters entrusted to him by his clients by failing to take substantive action to complete or move his client's matters forward. Specifically, the Accused repeatedly failed to file complete and accurate schedules and other required documents and repeatedly failed to deliver or timely deliver documents requested by bankruptcy trustees.

**2. The Accused violated RPC 1.4(a) and 1.4(b) of the Rules of Professional Conduct.**

RPC 1.4(a) provides:

- (a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

RPC 1.4(b) provides:

- (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

The Trial Panel finds that the Accused violated RPC 1.4(a) and (b) by his repeated failure to adequately communicate with his clients and failing to respond to their efforts to communicate with him. Specifically, the Accused failed to notify certain clients that he had received documents important to their particular proceedings, failed to notify a number of his clients that he would be suspended from practice before the bankruptcy court, and would not be available for legal consultation or assistance.

**3. The Accused violated RPC 1.5(a) of the Rules of Professional Conduct.**

RPC 1.5(a) in relevant part states:

- (a) A lawyer shall not enter into an agreement for, charge or collect an illegal or clearly excessive fee or a clearly excessive amount for expenses.

The Trial Panel finds that the Accused violated RPC 1.5(a) by charging and collecting a fee when the Accused filed thirty-five (35) bankruptcy petitions while he was aware that he was to be suspended from practice before the bankruptcy court. At the time the Accused filed these cases, he knew that he would not be able to perform the necessary services for these clients, including but not limited to attending meetings of creditor and confirmation hearings, as well as making himself available to answer questions or concerns about their cases.

**4. The Accused violated RPC 3.3(a)(1) and 3.3(a)(4) of the Rules of Professional Conduct.**

RPC 3.3(a)(1) provides that:

- (a) A lawyer shall not knowingly:
  - (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.

RPC 3.3(a)(4) provides that:

- (a) A lawyer shall not knowingly:
  - (4) conceal or fail to disclose to a tribunal that which the lawyer is required by law to reveal.

The Trial Panel finds that the Accused violated RPC 3.3(a)(1) and 3.3(a)(4) by knowingly and repeatedly filing compensation-disclosure documents that contained false and misleading information, by failing to disclose or accurately disclose material information to the court, and by making false representations in motions to the court. Moreover, by not making the proper disclosures to the court, the Accused's actions constituted pure misrepresentation and misrepresentations by omission which amounted to conduct prejudicial to the administration of justice in violation of RPC 8.4(a)(4) and 8.4(a)(3).

**5. The Accused violated RPC 3.4(c) of the Rules of Professional Conduct.**

RPC 3.4(c) states that:

A lawyer shall not:

- (c) knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists.

The Trial Panel finds that the Accused violated RPC 3.4(c) by willfully not complying with court orders that required the Accused to file amended compensation disclosure forms, to file applications for supplemental compensation with a copy of the fee agreement, to file a report identifying all cases in which the Accused failed to disclose clients' legal insurance, and to disgorge and refund fees to clients and to the bankruptcy trustees. Furthermore, the failure to comply with court orders amounts to another instance in which the Accused's actions amount to conduct prejudicial to the administration of justice in violation of RPC 8.4(a)(4).

**6. The Accused violated RPC 1.15-1(d) of the Rules of Professional Conduct.**

RPC 1.15-1(d) provides in relevant part:

- (d) Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

The Trial Panel finds that the Accused violated RPC 1.15-1(d) when, on at least two (2) occasions, the Accused, after a specific request from the client and after the court's termination of the Accused as counsel for a client, failed to timely provide

his clients with their files or to return the unearned portion of the their retainers. Moreover, by failing to refund the unearned portion of fees and by failing to account for and deliver to his client all unearned fees and expenses upon the termination of his employment, the Accused violated RPC 1.16(d).

## **7. The Accused violated RPC 8.1(a)(2).**

RPC 8.1 in relevant part provides:

- (a) a lawyer . . . in connection with a disciplinary matter, shall not:
  - (2) . . . knowingly fail to respond to a lawful demand for information from . . . disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6.

A lawyer may violate RPC 8.1(a)(2) when he or she knowingly fails to respond to the inquiries or requests of Disciplinary Counsel. *In re Paulson*, 346 Or 676, 216 P3d 859 (2009); *In re Schenck*, 345 Or 350, 194 P3d 804 (2008), *modified on recons.*, 345 Or 652 (2009). The Trial Panel finds that the Accused, with the exception of a single, incomplete response to one of the Disciplinary Counsel's Office's first requests, failed to respond to the approximately forty (40) separate requests to provide information and documents associated with information identified in the Bar's Formal Complaint.

## **Sanction**

### **A. ABA Standards**

The ABA *Standards for Imposing Lawyer Sanctions* (hereinafter "*Standards*") and Oregon case law are considered in determining the appropriate sanction. *In re Biggs*, 318 Or 281, 295, 864 P2d 1310 (1994); *In re Spies*, 316 Or 530, 541, 852 P2d 831 (1993). 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.

#### ***General Duties Violated.***

The Accused's violation of duties set forth in RPC 1.3 (diligence/neglect), RPC 1.4(a) (duty to communicate with the client), and RPC 1.4(b) (duty to explain a matter to permit client to make informed decision), breached his general duty to act with reasonable promptness and diligence in representing a client (*Standards*, § 4.4) and his duty of candor (*Standards*, § 4.6).

The Accused's violation of duties set forth in RPC 1.15-1(d) (duty to deliver property belonging to client) and RPC 1.16(d) (failure to take proper steps upon the

termination of representation) violated his duty to preserve and return client property (*Standards*, § 4.1).

The Accused's violation of duties set forth in RPC 1.5(a) (excessive fee) and RPC 8.1(a)(2) (failure to respond to disciplinary inquiries) violated his general duties as a professional (*Standards*, § 7.0).

The Accused's violation of duties set forth in RPC 3.3(a)(1) (duty to not knowingly make a false statement of fact or law to a tribunal) and RPC 3.3(a)(4) (duty to disclose that which the lawyer is required to reveal), RPC 3.4(c) (duty to not knowingly disobey an obligation under the rules of a tribunal), RPC 8.4(a)(3) (professional misconduct to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation), and RPC 8.4(a)(4) (professional misconduct to engage in conduct that is prejudicial to the administration of justice), violated his duty to the legal system not to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation to a court (*Standards*, § 6.1) and to comply with court orders and rules and avoid abuse of the legal process (*Standards*, § 6.2).

***Mental State.***

"Intent" is the conscious awareness of the nature or attendant circumstances of the conduct with the intent to cause 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's failure to act on behalf of his clients or to communicate with them was knowing, and often intentional.

The Accused's actions in filing documents with the bankruptcy court containing false and misleading information and in failing to include other required information was knowing.

The Accused's actions in disregarding orders of the court were knowing and intentional.

That the Accused was aware of the disciplinary investigation is established by his incomplete response to an initial inquiry. His failure to further respond to the additional inquiries thereafter was at the least knowing.

***Extent of Actual or Potential Injury.***

For the purposes of determining an appropriate disciplinary sanction, the Trial Panel takes into account both actual and potential injury. *Standards*, at 6; *In re Williams*, 314 Or 530, 840 P2d 1280 (1992).

The *Standards* define "injury" as "harm to the client, the public, the legal system or the profession which 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. *Standards*, p. 7. An injury does not need to be actual, but only potential, to support the imposition of a sanction. *In re Williams*, 314 Or at 547.

The Accused caused actual and potential injury to his clients, the legal system, and the profession. The Accused's misconduct caused the resolution of his clients' matters to be stalled or delayed, and caused his clients emotional turmoil in terms of anxiety and frustration. Moreover, many clients also suffered financial loss as a result of the Accused's delay or were prejudiced by the dismissal of their cases. The Accused's failure to return fees or timely return documents and files frustrated his clients' ability to pursue their matters without his assistance.

The Accused obstructed investigation by the Bar disciplinary authorities, causing actual injury to both the legal profession and to the public. *See In re Gastineau*, 317 Or 545, 558, 857 P2d 136 (1993) (noting injury to the Bar from noncooperation, including the need to conduct more time-consuming investigation and the diminished public respect resulting from not being able to provide a timely and informed process to client's complaints).

### ***Presumptive Sanction.***

Absent aggravating or mitigating circumstances, the following *Standards* appear to apply:

"Suspension is generally appropriate when a lawyer knows or should know he is dealing improperly with client property and causes injury or potential injury to a client" (*Standards*, § 4.12).

"Disbarment is generally appropriate when: . . . (b) a lawyer knowingly fails to perform services for a client and causes serious or potentially serious injury to a client; or (c) a lawyer engages in a pattern of neglect with respect to client matters and causes serious or potentially serious injury to a client" (*Standards*, § 4.41).

"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).

"Disbarment is generally appropriate when a lawyer knowingly deceives a client with the intent to benefit the lawyer or another, and causes serious injury or potential serious injury to a client" (*Standards*, § 4.61).

"Suspension is generally appropriate when a lawyer knowingly deceives a client, and causes injury or potential injury to the client" (*Standards*, § 4.62).



“Disbarment is generally appropriate when a lawyer, with the intent to deceive the court, makes a false statement, submits a false document, or improperly withholds material information, and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding” (*Standards*, § 6.11).

“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*, § 6.12).

“Disbarment is generally appropriate when a lawyer knowingly violates a court order or rule with the intent to obtain a benefit for the lawyer or another, and causes serious injury or potentially serious injury to a party or causes serious or potentially serious interference with a legal proceeding” (*Standards*, § 6.21).

“Suspension is generally appropriate when a lawyer knows that he or she is violating a court order or rule, and causes injury or potential injury to a client or a party, or causes interference or potential interference with a legal proceeding” (*Standards*, § 6.22).

“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” (*Standards*, § 7.1).

“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).

Disbarment is the presumptive sanction for the Accused’s pattern of knowingly failing to perform services causing potential serious injury to his client, his deceiving clients for his own benefit, his intentional submission of false documents and improperly withholding material information causing potential serious injury to a party or potential serious adverse effect on the legal proceeding, his knowing violation of court orders or rules causing potential serious injury to a party or potential serious adverse effect on the legal proceeding, and his knowing violation of duties he owes as a professional, including refraining from charging or collecting excessive fees, and his intentional failure to respond to disciplinary inquiries. Viewed as a whole, the facts of this case mandate the presumptive sanction of disbarment and many, if not most, of the individual violations viewed separately would establish a presumptive sanction for disbarment.

***Aggravating and Mitigating Circumstances.***

The following factors which are recognized as aggravating under the *Standards* exist in this case:

1. A prior record of discipline (*Standards*, § 9.22(a)). In 2001, the Accused received a letter of admonition for violation of DR 9-101(C)(4), *current* RPC 1.15-1(d) (failure to promptly provide client property that the client was entitled to receive), when the Accused did not provide all file materials as requested by the client upon completion of the client's case. Moreover, in 2002, the Accused was publicly reprimanded for violations of DR 6-101(B), *current* RPC 1.3 and RPC 1.4 (neglect and failure to adequately communicate with clients), when he failed to take timely action in a bankruptcy proceeding, resulting in the repossession of the client's vehicles.

The Accused's prior violations are identical to a number of situations addressed in the present case.

2. A dishonest or selfish motive (*Standards*, § 9.22(b)).

3. A pattern of misconduct (*Standards*, § 9.22(c)). The Accused's pattern of misconduct, established not only in the instant case but in prior disciplinary matters, extends across a significant period of time and involves many clients.

4. Multiple offenses (*Standards*, § 9.22(d)). The Accused has violated several rules, many repeatedly, involving many of the most basic general duties owed to his clients and the profession.

5. Substantial experience in the practice of law The Accused has practiced law since 1990 and had substantial experience at the time he committed these violations.

The Trial Panel has carefully examined the record and we find no mitigating circumstances whatsoever.

**B. Oregon Case Law**

Consistent with the *Standards* and Oregon case law, when a lawyer neglects his clients' matters, fails to return clients funds and property, makes misrepresentations and false statements to court, the lawyer is disbarred. *In re Purvis*, 308 Or 451, 781 P2d 850 (1989) (lawyer disbarred for misconduct including neglect, failing to return client funds, misrepresentation, and making false statements); *In re Dixon*, 305 Or 83, 750 P2d 157 (1988) (attorney disbarred for grossly neglecting clients' affairs, being deceitful to clients, other members of the Bar, and to state and federal judges).

The Trial Panel finds that the Accused's misconduct is a pattern of pervasive deceit and gross neglect of entrusted legal matters. As a result, the sanction must be disbarment.

### **Conclusion**

The *Standards* alone, before considering aggravating factors, provide authority for disbarment. Aggravating factors only increase the grounds for that disposition. The Accused has demonstrated a total disregard for his obligations to his clients, the public, the court, and to the profession.

For the reasons given and upon the facts found herein, the Trial Panel unanimously concludes that the Accused should be permanently disbarred.

### **Order**

IT IS HEREBY ORDERED that the Accused, Keith Hayes, be, and upon the effective date of this Order shall be, permanently DISBARRED.

Dated this 26th day of May 2010.

/s/ Deanna L. Franco

Deanna L. Franco

OSB No. 01047

Trial Panel Chair

/s/ Llewellyn M. Fischer

Llewellyn M. Fischer

OSB No. 733518

Attorney at Law

/s/ Joan J. LeBarron

Joan J. LeBarron

Public Member

**Cite as 348 Or 574**

**IN THE SUPREME COURT  
OF THE STATE OF OREGON**

In re:

Complaint as to the Conduct of

D. RAHN HOSTETTER,

Accused.

(OSB Nos. 07-37, 07-161; SC S056471)

En Banc

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

Argued and submitted March 1, 2010. Filed July 29, 2010.

Roy Pulvers, Hinshaw & Culertson LLP, Portland, argued the cause and filed the briefs for the Accused.

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

PER CURIAM

The Accused is suspended from the practice of law for 150 days, commencing 60 days from the date of the filing of this decision.

**SUMMARY OF THE SUPREME COURT OPINION**

In this lawyer disciplinary matter, the Bar charged the Accused with ethical violations in two separate matters. In the Ingle matter, the Bar alleged that the Accused violated the former-client conflict-of-interest rule. The trial panel concluded that the Accused violated DR 5-105(C) and RPC 1.9(a) when, having represented the borrower in the underlying loan transaction, he subsequently represented the lender in collecting the loans from the borrower's estate. In the Grohs matter, the Bar alleged that the Accused violated the rule against misrepresentation. The trial panel concluded that the Accused violated RPC 8.4(a)(3) when he "acquiesced [in] the removal" of a notarized signature page from one deed and had it placed on a second deed, which contained a different legal description, and then had the altered deed recorded. In part because the Accused had been disciplined previously, the trial panel recommended that he be suspended from the practice of law for 150 days.

Pursuant to ORS 9.536(1) and Bar Rules of Procedure (BR) 10.1 and 10.3, the Accused seeks review of the trial panel's conclusions. This court reviews the trial panel decision de novo. ORS 9.536(2); BR 10.6. The Bar must establish misconduct by clear and convincing evidence. BR 5.2. Clear and convincing evidence means "evidence establishing that the truth of the facts asserted is highly probable." *In re Cohen*, 316 Or 657, 659, 853 P2d 286 (1993). As to the Ingle matter, we conclude that the Accused violated DR 5-105(C) and RPC 1.9(a). As to the Grohs matter, we conclude that the Accused violated DR 1-102(A)(3) and RPC 8.4(a)(3). We impose a suspension of 150 days.

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re:	)	
	)	
Complaint as to the Conduct of	)	Case No. 08-161
	)	
GARY R. CARL,	)	
	)	
Accused.	)	

Counsel for the Bar:	Amber Bevacqua-Lynott
Counsel for the Accused:	None
Disciplinary Board:	Robert A. Miller, Chair Jerry Casby Dunny Sorensen, Public Member
Disposition:	Trial Panel Opinion. Dismissed.
Effective Date of Opinion:	August 3, 2010

**TRIAL PANEL OPINION**

**NATURE OF THE CASE**

In 2004, the Accused represented Ruth Kimbell in a dissolution proceeding in the Lane County Circuit Court. The husband, Bryan Kimbell, was represented by Eugene attorney Lynn Shepard. The dissolution was eventually settled between the parties and included a division of husband's pension through the Civil Service Retirement System provided him as a postal employee. Husband also had a Thrift Savings Plan which was administered through his post office employment. Following a negotiated resolution of the terms and conditions of the dissolution, a General Judgment of Dissolution of Marriage was entered on June 1, 2004, that included the following provisions:

4.3: Pursuant to the terms of a Qualified Domestic Relations Order . . . to be entered separately herein, [Wife] is awarded 50% of [Husband's] interest in his civil service pension, attributable to the periods up to and including May 31, 2004 . . . . the Court shall retain jurisdiction to enter and amend this judgment and the orders for the purpose of establishing or maintaining the qualification as a [QDRO], under the Internal Revenue Code, or as may be necessary. All documents as may be required by this paragraph shall be

prepared and submitted to the Court and the parties shall each pay one half of the costs of said preparation.

4.4: Each party shall be awarded the personal property now in his/her possession or name, except as set forth above. . . .

(Ex. 8, p.3)

On or about June 15, 2004, pursuant to an agreement between the parties' counsels, the Accused forward a copy of the General Judgment and documents relating to husband's retirement benefits to David Gault (hereinafter "CPA"), a CPA the Accused hired to prepare the Qualified Domestic Relations Order (hereinafter "QDRO"). Ex.9.

Previously, on May 25, 2004, the Accused had faxed to CPA Husband's personal statement of benefits from the United States Postal Department which included Husband's retirement plan, Thrift Savings Plan, Social Security, and Medicare benefits. Ex. 6.

On May 26, 2004, CPA faxed the Accused a memorandum confirming that husband was a member of the Civil Service Retirement System (CSRS), had a retirement plan with which the CPA was very familiar and for whom he had written several previous orders (QDROs). Ex. 6. CPA also opined that in addition to husband's CSRS account, he probably had one or two defined contribution plans, including a Federal Thrift Savings Plan for which he had also written previous orders. Ex. 6.

On May 28, 2004, Accused provided CPA with a signed release by Husband authorizing CPA to request any and all information concerning any benefit that Husband may have had with CSRS. Ex. 7.

Subsequently, CPA prepared two QDROs, one for the division of Husband's CSRS pension (Ex. 15), and one for division of Husband's Federal Thrift Savings Plan (Ex. 16). Both orders were submitted to the court by the Accused ex parte and were signed by the court on July 28, 2004. Ex. 15, 16. Also on July 28, 2004, the Accused mailed attorney Shepard conformed copies of the QDROs which had been signed by Lane County Circuit Court Judge Bearden and filed with the court the same day. Ex. 17.

After receiving the two QDROs from the Accused, attorney Shepard forwarded them to Husband for review on August 2, 2004. Ex. 19. On August 6, 2004, an intra-office memo to attorney Shepard from her assistant stated that Husband did not believe that the Thrift Savings Plan was included in the dissolution judgment. Ex. 21. Subsequently, between August 13, 2004, and September 1, 2004, the Accused received a letter from the National Finance Center regarding Husband's Thrift Savings Plan showing a total account balance, including an outstanding loan, of

\$11,806.79, 50% of which was to be awarded to Wife. Ex. 25. On September 1, 2004, the Accused forwarded a copy of the Thrift Savings Plan letter dated August 13, 2004, to attorney Shepard. Ex. 24. After some discussion between Husband and attorney Shepard regarding the amount of the Thrift Savings Plan to which Wife should be entitled, Shepard subsequently wrote the Thrift Savings Plan on November 3, 2004, asking for a comprehensive account history of Husband's account, including when any loans were taken out. Ex. 29.

On November 15, 2004, the Thrift Savings Plan sent attorney Shepard a letter stating in part that the Thrift Savings Plan was "one part of the retirement system created for federal employees in the Federal Employees Retirement System Act of 1986" and further provided detailed account information, including loan dates and amounts against the TSP account. Ex. 30.

Several years passed without further discussion by Husband of the Thrift Savings Account, the QDROs, or Husband's apparent displeasure over having to share that account with his ex-wife. On February 26, 2008, husband filed Oregon State Bar complaints against the Accused and attorney Shepard. Ex. 31 and 32. The essence of Husband's complaint against the Accused was that the Accused had illegally submitted an order which awarded Wife one-half of the Thrift Savings Plan account. Ex. 32. Husband also complained that the QDRO was entered without Husband or attorney Shepard being made aware that it was being submitted to the court. Ex. 32.

## **DISCUSSIONS AND CONCLUSIONS OF LAW**

The Bar has the burden to prove the Accused's alleged misconduct by clear and convincing evidence. BR 5.2. Clear and convincing evidence means evidence establishing that the truth of the facts asserted is highly probable. *In re Johnson*, 300 Or 52, 55, 707 P2d 573 (1985).

The Bar alleges three violations by the Accused: improper ex parte contact, a violation of DR 7-110(B); conduct involving dishonesty or misrepresentation, a violation of DR 1-102(A)(3); and conduct prejudicial to the administration of justice, a violation of DR 1-102(A)(4). The Accused denied all of the allegations. Ex. 2, p. 2.

### **The Bar's First Cause of Complaint**

At the time of the Accused's alleged unethical conduct DR 7-110(B) provided:

In an adversary proceeding, a lawyer shall not communicate, or cause another to communicate, as to the merits of the cause with a judge or an official before whom the proceeding is pending except:

- (1) In the course of official proceedings in the cause.



(2) In writing if the lawyer promptly delivers a copy of the writing to opposing counsel or to the adverse party if the adverse party is not represented by a lawyer.

(3) Orally upon adequate notice to opposing counsel or to the adverse party if the adverse party is not represented by a lawyer.

(4) As otherwise authorized by law or by Judicial Rule 2 of the Code of Judicial Conduct.

DR 7-110(B).

The trial panel concludes the Bar has not proven by clear and convincing evidence that the Accused violated this rule.

The Bar and Accused agree that the Accused's submission of the two QDROs to the court was an in-writing ex parte communication with the court before whom the dissolution proceeding was pending. The only question is whether the lawyer "promptly deliver(ed) a copy of the writing's to opposing counsel," as required by DR 7-110(B)(2).

In determining the meaning of "promptly delivers" the Bar references *In re Leuenberger*, 337 Or 183, 93 P3d 786 (2004), and argues that "promptly delivers" under *Leuenberger* is satisfied as long as the Accused sends a copy of the written communication before the Accused presents it to the court, even if the delivery occurs less than one business day before. However, a close reading of *Leuenberger* does not support the Bar's position.

The disciplinary rule requiring that ex parte communications be delivered promptly to opposing counsel does not define the term's "promptly delivers." In *Leuenberger*, the accused transmitted to adverse counsel facsimile copies of ex parte motions which were to be communicated to the trial court regarding the merits of the cause. The fax was sent to adverse counsel's office "about a half an hour" before the ex parte contact. *In re Leuenberger*, 337 Or at 189. The Bar contended that the accused's eleventh-hour transmissions of his ex parte motions "likely contravened" the purpose of the rule which was "to prevent the effect or appearance of granting undue advantage to one party" (citing *In re Smith*, 295 Or 755, 759, 670 P2d 1018 (1983)). The court agreed that the accused's conduct contravened the "general purpose" of the rule but it did not violate the wording of the rule. *In re Leuenberger*, 337 Or at 207.

In the present case, the Accused's mailing of both QDROs to attorney Shepard on the same day they were presented to the court constitutes "prompt delivery," although the signed orders would not have reached adverse counsel until one or two days later.

Ideally, matters to be presented to the court ex parte, unless stipulated by all involved counsel, should be either personally delivered, faxed, e-mailed, or mailed conventionally so as to provide sufficient time for adverse counsel to review them and appear at ex parte to contest the document being presented to the court. However, DR 7-110(B)(2) does not so provide. It is limited to the requirement of “prompt delivery” of a copy of the writing that is communicated to the judge. The rule does allow ex parte written communication between a party’s attorney and the presiding judge of the case as long as the writing is promptly delivered to adverse counsel. The act of communicating assumes a transfer of information from one person to another, not the intent to transfer information. The rule does not require prior notice to adverse counsel of one’s intent to submit an ex parte writing to a judge at some time in the future. Rather, DR 7-110(B)(2) permits an ex parte written communication as long as a copy of it is promptly delivered to the other side.

The necessity for interpreting the meaning of this particular rule on an ad hoc, case-by-case basis demonstrates its ambiguity and further provides no practical guidance to members of the Bar regarding what constitutes prompt delivery of ex parte writings. Perhaps the Oregon Supreme Court has not established a standard or checklist for rule compliance because the rule itself does not provide one.

The panel believes that although the conduct of the Accused was less than what is normally expected from members of the Bar in such a situation, we cannot find by clear and convincing evidence that the Accused’s conduct violated the precise wording of DR 7-110(B)(2).<sup>1</sup>

### **The Bar’s Second Cause of Complaint**

The Bar’s second cause of complaint alleges that the Accused violated DR 1-102(A)(3) which provides:

It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

DR 1-102(A)(3).

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<sup>1</sup> The panel notes that ORCP 9 provides an example of how DR 7-110(B)(2) could have more clearly defined the terms “promptly delivers.” ORCP 9 provides, in part:

“Delivery of a copy within this rule means: Handing it to the person to be served; or leaving it at such person’s office with such person’s clerk or person apparently in charge thereof; or if there is no one in charge, leaving it in a conspicuous place therein; or if the office is closed or the person to be served has no office, leaving it at such a person’s dwelling house or usual place of abode with some person over 14 years of age then residing therein.”

Based upon the trial panel's finding that the Accused's conduct did not violate DR 7-110(B), the Accused's conduct was not dishonest, fraudulent, deceitful, or misrepresentative, and therefore does not violate DR 1-102(A)(3).

The Bar's argument that the Accused, "by intentionally failing to notify opposing counsel that he was seeking a QDRO dividing husband's savings account thereby committing a misrepresentation by non-disclosure of a material fact," fails because the Accused did in fact notify opposing counsel of the QDRO. Had Husband or his attorney objected to the orders, nothing prevented them from promptly filing a motion to set them aside. The panel finds nothing dishonest or misrepresentative in the Accused's conduct.

### **The Bar's Third Cause of Complaint**

The Bar's third cause of complaint against the Accused alleges that he violated DR 1-102(A)(4), which provides as follows:

It is professional misconduct a lawyer to engage in conduct that is prejudicial to the administration of justice.

DR 1-102(A)(4).

To establish a violation of this rule, the Bar must show:

- (1) That the Accused lawyer engaged in "conduct" by doing something that the lawyer should not have done or by failing to do something that the lawyer was supposed to do;
- (2) That the conduct occurred during the course of a judicial proceeding or another proceeding that has the trappings of a judicial proceeding; and
- (3) That the conduct was prejudicial because it involves several acts that cause some harm to the administration of justice or because it involved a single act that caused substantial harm to the administration of justice. *See In re Rhodes*, 331 Or 231, 236 13 P3d 512 (2000).

Based upon the trial panel's finding that the Accused did not do something that the lawyer should not have done or failed to do something that he should have done, the Bar has failed to prove by clear and convincing evidence that the Accused violated DR 1-102(A)(4).

**ORDER**

Based on the foregoing, the trial panel orders that the Accused be acquitted on all charges.

Dated this 1st day of June 2010.

/s/ Robert A. Miller

Robert A. Miller

OSB No. 73205

Trial Panel Chair

/s/ Jerry Casby

Jerry Casby

OSB No. 784593

Panel Member

/s/ Dunny Sorensen

Dunny Sorensen

Public Member

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re:	)	
	)	
Complaint as to the Conduct of	)	Case Nos. 08-93, 09-33, 09-42,
	)	09-59, 09-60, and 09-91
DANIEL W. DICKERSON,	)	
	)	
Accused.	)	

Counsel for the Bar:	Linn D. Davis
Counsel for the Accused:	None
Disciplinary Board:	F. Gordon Allen, Chair Lisa M. Caldwell Howard I. Freedman, Public Member
Disposition:	Violation of RPC 1.3, RPC 1.4(a), RPC 1.5(a), RPC 1.15-1(a), RPC 1.15-1(c), RPC 1.15-1(d), RPC 1.16(d), RPC 8.1(a)(2), and RPC 8.4(a)(3). Trial Panel Opinion. Disbarment.
Effective Date of Opinion:	August 7, 2010

**TRIAL PANEL OPINION**

This matter came on for hearing on April 5 and 6, 2010, before a trial panel of F. Gordon Allen (Chair), Lisa M. Caldwell, and Howard I. Friedman (public member).

The Oregon State Bar was represented by Linn D. Davis.

The Accused, Daniel W. Dickerson, appeared by telephone and was not represented by counsel.

Testimony and exhibits were received and argument heard.

The Accused was charged with violations of Oregon Rule of Professional Conduct 1.3, 1.4(a), 1.5(a), 1.15-1(a), 1.15-1(c), 1.15-1(d), 1.16(d), 8.1(a)(2), and 8.4(a)(3) in connection with matters handled for seven different clients.

### **Findings and Conclusions**

1. The Panel recommends that the Accused be permanently disbarred. The Panel finds that the facts as stated by the Bar in its Third Amended Complaint and trial memorandums are accurate and were proven by clear and convincing evidence. The Panel understands that the Accused's RPC violations occurred during a relatively short period in the Accused's life when he was also experiencing personal problems. The Panel, however, is stuck by four facts. First, at the time of his troubles the Accused failed to acknowledge to a number of clients that he was unable to represent them adequately and failed to advise them to seek other counsel. Second, the Accused repeatedly failed to acknowledge that his inability to represent these clients adequately entitled them to an accounting and rebate of fees received pursuant to implied and express agreements that he would competently handle and complete their legal matters. Third, the Accused repeatedly failed to cooperate with the OSB in its investigation. Fourth, the Accused showed no remorse at the time of the hearing and made excuses that were not believable. The Panel does not believe that the Accused's RPC violations can be attributed to temporary personal problems. The Panel finds that the Accused is unfit to practice law.

2. The Panel specifically finds that the Accused was not a credible witness. In the face of strong evidence from seven clients of neglect and failure to account for funds, and strong evidence from the Bar of failure and refusal to cooperate in its investigation, the Accused maintained that he was without fault. His position was not credible.

3. The Panel finds that the Bar has sustained its burden of proof with respect to all alleged violations of RPC 8.1(a)(2). The Panel does not believe that the Accused's failure to cooperate with the Bar's investigations resulted from his physical inability to access his files. The Accused provided no witnesses or documents to corroborate his inability to access his files at the times when the Bar was requesting information. His testimony lacked detail about when he was prevented from accessing his files. The Panel does not believe that the Accused's consistent refusal to cooperate with the Bar resulted from inability to access files.

4. The Panel finds that the Bar has sustained its burden of proof with respect to violations of RPC 1.15-1(d). In the Morsman, Aljamal, Essig, Steiner, and Haberlock cases he was asked by his clients to account for the funds and refund the unearned portion. He did not respond.

5. In the Morsman case the Panel finds that the Accused violated RPC 1.15-1(a) by taking trust funds before they were earned. In view of his consistent failure to account for and return "flat fee" funds in other cases where the Accused did

not perform his agreed-upon tasks, the Panel finds that the misappropriation of trust funds in the Morsman case was intentional.

6. In the Essig case the Panel finds that the Accused violated RPC 1.15-1(d) by retaining proceeds from a settlement in violation of a fixed-fee agreement and then refusing to provide documentary evidence or an accounting justifying the additional charges. While the Accused testified that he had spent sufficient time on the matter to merit the additional fees, taking the fees from the settlement without client consent was not justified. The Accused's refusal to account was not justified.

7. Although the facts in the Steiner case were troubling in a number of respects, the OSB limited its charges to violations of RPC 1.15-1(d) and RPC 8.1(a)(2). The Panel finds that the Accused violated both.

8. The Panel finds that the Accused violated RPC 1.3 in the Myers case by failing to pursue the matter competently in all of the respects alleged by the OSB. His consistent and ongoing failure to keep his clients accurately advised of the status of the matter violated RPC 1.4(a). The Accused's failure to provide his clients with their files violated RPC 1.15-1(d). The Panel finds that the Accused's communications with his clients on the status of the case violated RPC 8.4(a)(3). The Accused made misrepresentations, failed to correct misrepresentations, and was generally dishonest and deceitful in his communications with his clients. The Panel finds that the dishonesty was intentional.

9. The Panel finds that the Accused violated RPC 1.3 in the Haberlock case by failing to pursue the matter competently in all of the respects alleged by the OSB. Although the Accused was retained pursuant to a flat-fee agreement, his neglect of the matter entitled the client to a rebate of some portion of the fees. The Accused failed to respond to requests from his client and his client's new counsel for an accounting and rebate of the unearned portion of the fee and for a return of the client's file. The Panel finds that the Accused's failure to respond violated RPC 1.15-1(d). His retention of the unearned portion of the fee also violated RPC 1.5(a) in that it resulted in the client being charged an excessive fee. His failure promptly to deliver the file to the client's new lawyer violated RPC 1.16(d).

10. The Panel finds that the Accused violated RPC 1.4(a) in the Alguire case by failing to keep his client reasonably informed about the status of the case and by failing to respond to his client's inquiries about the status. The Panel finds that the OSB did not sustain its burden of proof with respect to a violation of RPC 1.16(d). The Panel finds that the Accused's failure to cooperate with Disciplinary Counsel violated RPC 8.1(a)(2).

DATED this 4th day of June 2010.

/s/ F. Gordon Allen

F. Gordon Allen  
Trial Panel Chair

/s/ Lisa M. Caldwell

Lisa M. Caldwell  
Trial Panel Lawyer Member

/s/ Howard I. Freedman

Howard I. Freedman  
Trial Panel Public Member



IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re:	)	
	)	
Complaint as to the Conduct of	)	Case No. 09-03
	)	
ROBERT S. SIMON,	)	
	)	
Accused.	)	

Counsel for the Bar:	Richard Weill and Amber Bevacqua-Lynott
Counsel for the Accused:	Bradley F. Tellam
Disciplinary Board:	None
Disposition:	Violation of DR 2-106(A) and ORS 9.160. Stipulation for Discipline. Public reprimand.
Effective Date of Order:	August 16, 2010

**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 violations of DR 2-106(A) and ORS 9.160.

DATED this 16th day of August 2010.

/s/ Gilbert B. Feibleman  
Gilbert B. Feibleman  
State Disciplinary Board Chairperson

/s/ William B. Crow  
William B. Crow, Region 5  
Disciplinary Board Chairperson

### **STIPULATION FOR DISCIPLINE**

Robert S. Simon, attorney at law (hereinafter “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 27, 1990, 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, 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.

On December 21, 2009, 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 1-102(A)(3) (conduct involving misrepresentation), DR 2-106(A) (charging or collecting an illegal or excessive fee), DR 3-101(B) (the unlawful practice of law), and ORS 9.160 (holding oneself out as qualified to practice law when not an active member of the Oregon State Bar). 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.

Effective December 10, 1999, the Accused was suspended from the practice of law in Oregon for 60 days pursuant to the stipulation for discipline in *In re Simon*, 13 DB Rptr 145 (1999).

6.

During the 1990s, the Accused represented NSP Development Inc. (hereinafter “NSP”) in a number of matters. As part of his work for NSP, the Accused made the acquaintance of Clarence Langer (hereinafter “Langer”) who was a partner or participant with NSP with respect to several real estate projects located on Langer land within the City of Sherwood. One of those NSP/Langer development projects involved the location of a Fred Meyer store on land owned or controlled by Langer (hereinafter “Fred Meyer Project”). In 1996, Langer retained the Accused in connection with Langer’s recovery of past-due compensation from the City of Sherwood for an oversized waterline installed by Langer in a subdivision.

7.

During the Accused’s 60-day suspension, he occasionally utilized an e-mail address that might have led others to believe that he was authorized to practice law. In addition, on or about May 2, 2000, an offsite third-party vendor employed by the Accused’s law firm and working under the supervision of the Accused issued an invoice on behalf of the law firm directed to Langer at the address and under the account number for the representation of Langer. The May 2, 2000, invoice purported to charge Langer for time entries at the Accused’s normal hourly rate for work performed by the Accused on behalf of his employer, NSP, related to the Fred Meyer Project during the time of the Accused’s suspension. Although issued after the Accused was authorized to practice law again, the May 2, 2000, invoice, through the inclusion of the time entries, created an impression to Langer that the Accused was eligible to practice law when he, in fact, was not eligible to do so during his suspension.

### **Violations**

8.

The Accused admits that, by billing the Langers for work during the period of his suspension, he charged an excessive fee in violation of DR 2-106(A). The Accused further admits that, through the occasional use of the e-mail address and the entries in the May 2, 2000, invoice, he created an appearance that he was qualified to practice law in Oregon at a time when he was not an active member of the Oregon State Bar in violation of ORS 9.160.

9.

Upon further factual inquiry, the parties agree that the charges of DR 1-102(A)(3) and DR 3-101(B) should be and, upon the approval of this stipulation, are 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.** The Accused violated his duties to the profession to refrain from charging excessive fees and to not engage in conduct suggestive of the unauthorized practice of law. *Standards*, § 7.0.
- b. **Mental state.** The Accused acted negligently. 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 took steps to refrain from practicing law during the period of his suspension, but mistakenly transmitted the invoice to the Langers and used an e-mail address on occasion suggesting that he was licensed to practice law during a time when he was not.
- c. **Injury.** Injury can be either actual or potential under the *Standards*. *In re Williams*, 314 Or 530, 840 P2d 1280 (1992). The Langers were potentially injured by the Accused’s actions.
- d. **Aggravating circumstances.** Aggravating circumstances include:
  1. A prior record of discipline. *Standards*, § 9.22(a). In December 1999, the Accused was suspended for 60 days for violation of DR 6-101(A) (lack of competence), DR 7-102(A)(8) (knowingly engaging in conduct contrary to law or the disciplinary rules), and DR 7-110(B) (improper ex parte contact) in connection with two client matters. *In re Simon*, 13 DB Rptr 145 (1999).
  2. Multiple offenses. *Standards*, § 9.22(d).
  3. Substantial experience in the practice of law. *Standards*, §9.22(i). The Accused was admitted in Oregon in 1990, and at the time of the misconduct at issue, he had been a lawyer for 10 years.
- e. **Mitigating circumstances.** Mitigating circumstances include:
  1. Absence of a dishonest or selfish motive. *Standards*, § 9.32(b).

2. The Accused has cooperated with the Bar in its investigation of his conduct and in the formal proceedings. *Standards*, § 9.32(e).
3. Delay in disciplinary proceedings. *Standards*, § 9.32(j).
4. Remorse. *Standards*, § 9.32(m). The Accused has acknowledged his misconduct and expressed remorse for its occurrence.

11.

Under the *Standards*, a reprimand is generally appropriate when a lawyer negligently 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*, § 7.3.

12.

Oregon case law similarly suggests that a reprimand is appropriate for inadvertently practicing law for a short period of time when ineligible to do so. *See, e.g., In re Davidson*, 20 DB Rptr 264 (2006); *In re Casey*, 19 DB Rptr 105 (2005); *In re Dixon*, 17 DB Rptr 102 (2003); *In re Bassett*, 16 DB Rptr 190 (2002).

Case law also provides that a reprimand is appropriate for an excessive fee in circumstances such as these. *See, e.g., In re Nishioka*, 23 DB Rptr 44 (2009); *In re Gudger*, 21 DB Rptr 160 (2007); *In re Skinner*, 14 DB Rptr 38 (2000).

13.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be publicly reprimanded for violation of DR 2-106(A) and ORS 9.160, the sanction to be effective upon approval by the Disciplinary Board.

14.

In addition, on or before September 30, 2010, the Accused shall pay to the Oregon State Bar its reasonable and necessary costs in the amount of \$269.80, incurred for the Accused's deposition. Should the Accused fail to pay \$269.80 in full by September 30, 2010, 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 SPRB. If approved by the SPRB, the

Cite as *In re Simon*, 24 DB Rptr 181 (2010)

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 August 2010.

/s/ Robert S. Simon

Robert S. Simon

OSB No. 901209

EXECUTED this 4th day of August 2010.

OREGON STATE BAR

By: /s/ Amber Bevacqua-Lynott

Amber Bevacqua-Lynott

OSB No. 980280

Assistant Disciplinary Counsel

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
)  
Complaint as to the Conduct of ) Case No. 09-69  
)  
TODD STEPHEN HAMMOND, )  
)  
Accused. )

Counsel for the Bar: Amber Bevacqua-Lynott  
Counsel for the Accused: None  
Disciplinary Board: None  
Disposition: Violation of DR 2-106(A) and RPC 1.5(a).  
Stipulation for Discipline. Public reprimand.  
Effective Date of Order: August 16, 2010

**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 violations of DR 2-106(A) and RPC 1.5(a).

DATED this 16th day of August 2010.

/s/ Gilbert B. Feibleman  
Gilbert B. Feibleman  
State Disciplinary Board Chairperson

/s/ Mary Kim Wood  
Mary Kim Wood, Region 6  
Disciplinary Board Chairperson

### **STIPULATION FOR DISCIPLINE**

Todd Stephen Hammond, attorney at law (hereinafter “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 2, 1998, 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 September 21, 2009, a Formal Complaint was filed against the Accused pursuant to the authorization of the State Professional Responsibility Board (hereinafter “SPRB”), alleging violation of DR 2-106(A) and RPC 1.5 (charging or collecting an illegal or excessive fee). 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 November 2004, the Accused undertook to represent Rolando Balsamo (“Balsamo”) in matters related to his Federal Employees’ Compensation Act (“FECA”) claim with the Office of Workers Compensation Programs (“OWCP”). Specifically, Balsamo wanted the OWCP to acknowledge that Balsamo needed work limitations due to a shoulder injury.



6.

Pursuant to a written fee agreement, Balsamo paid the Accused a nonrefundable retainer of \$5,760, earned upon receipt.

7.

Thereafter, the Accused communicated with the OWCP, indicated that he represented Balsamo, and requested Balsamo's file. In response to the Accused's notice of representation and request, the OWCP sent Balsamo's file to the Accused.

8.

Balsamo's request for work limitations was denied, and he subsequently suffered additional injury to his shoulder.

9.

In March 2006, pursuant to a written fee agreement, Balsamo paid the Accused a second nonrefundable retainer of \$4,560, earned upon receipt, for further assistance with Balsamo's shoulder injury claim.

10.

At all times relevant herein, 5 USC § 8127 provided in relevant part that a claimant on a FECA claim may authorize an individual to represent him or her in any proceeding before the Secretary of Labor, but that a claim for legal or other services furnished in respect to a case, claim, or award for compensation is valid only if approved by the Secretary.

11.

At all times relevant herein, 20 CFR 10.700, et seq., provided in relevant part that a representative or individual properly authorized by a claimant in writing to act for the claimant in connection with a claim or proceeding under the FECA may charge the claimant a fee and other costs associated with the representation before OWCP. However, before any fee for services can be collected, the fee must be approved by the Secretary. A representative is properly appointed when the appointment is done in writing.

12.

The Accused did not obtain agency approval before he collected the two fees from Balsamo.

## Violations

13.

The Accused admits that, by entering into agreements with Balsamo and collecting nonrefundable flat fees from him without the approval of the OWCP, the Accused charged and collected illegal fees in violation of DR 2-106(A) (first fee) and RPC 1.5(a) (second fee).

## 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 the profession to refrain from unreasonable or improper fees. *Standards*, § 7.0
- b. **Mental state.** The Accused acted knowingly, which means he had the conscious awareness of the nature or attendant circumstances of his conduct but not the conscious objective or purpose to accomplish a particular result. *Standards*, at 9.
- c. **Injury.** Injury can be either actual or potential under the *Standards*. *In re Williams*, 314 Or 530, 840 P2d 1280 (1992). Balsamo was actually injured insofar as he paid the Accused to assist him with his OWCP matters, which fees were never approved by the agency. However, Balsamo’s injury is mitigated to the extent that the Accused ultimately refunded Balsamo some of the fees he collected.
- d. **Aggravating circumstances.** Aggravating circumstances include:
  1. A prior record of discipline. *Standards*, § 9.22(a). The Accused was previously suspended for 30 days for the same violations at issue in this case. *In re Hammond*, 22 DB Rptr 168 (2008) (“*Hammond I*”). This aggravating factor refers to offenses that have been adjudicated prior to imposition of the sanction in the current case. *In re Jones*, 326 Or 195, 200, 951 P2d 149 (1997). However, the weight attributed to this prior offense must be determined using the criteria set forth in *Jones*, namely: (1) the relative seriousness of the prior offense and resulting sanction;

(2) the similarity of the prior offense to the offense in the case at bar; (3) the number of prior offenses; (4) the relative recency of the prior offense; and (5) the timing of the current offense in relation to the prior offense and resulting sanction, specifically, whether the accused lawyer had been sanctioned for the prior offense before engaging in the offense in the case at bar. These considerations can serve to heighten or diminish the significance of earlier misconduct. *Jones*, 326 Or at 200.

The misconduct at issue in this case predates the misconduct at issue in *Hammond I*, so this is not an instance where the Accused had warning and elected to engage in additional misconduct. Cf. *In re Hereford*, 306 Or 69, 75, 756 P2d 30 (1988) (prior discipline demonstrated that the lawyer had both warning and knowledge of the disciplinary process when he engaged in the misconduct in this case); *In re Meyer*, 328 Or 220, 229, 970 P2d 647 (1999) (prior disciplinary offenses, taken together, carry significant weight in aggravation because the presence of prior disciplinary rule violations resulting in four relevant sanctions demonstrates that the lawyer is careless with respect to his ethical obligations).

By the time the Accused was disciplined in 2008 for similar misconduct, his participation in Balsamo's matter had been completed for some time. Accordingly, the significance of this aggravating factor is diminished. See *In re Kluge II*, 335 Or 326, 351, 66 P3d 492 (2003) (fact that accused lawyer was not sanctioned for offenses before committing the offenses at issue in subsequent case diminishes weight of prior offense); *In re Huffman*, 331 Or 209, 227–228, 13 P3d 994 (2000) (relevant timing of current offense in relation to prior offense is pertinent to significance as aggravating factor); *In re Starr*, 326 Or 328, 347–348, 952 P2d 1017 (1998) (weight of prior discipline somewhat diminished because it occurred at roughly the same time as events giving rise to the present proceeding—i.e., the subsequent misconduct did not reflect a disregard of an earlier adverse ethical determination).

2. A pattern of misconduct. *Standards*, § 9.22(c). Prior to *Hammond I*, it was the Accused's routine practice to enter into these types of agreements with clients and this case in conjunction with his prior discipline demonstrates that his misconduct occurred over a

substantial period of time. See *In re Schaffner*, 323 Or 472, 480, 918 P2d 803 (1996).

- e. **Mitigating circumstances.** Mitigating circumstances include:
1. Absence of a dishonest motive. *Standards*, § 9.32(b).
  2. Timely good faith effort to make restitution. *Standards*, § 9.32(d). The Accused repaid Balsamo a portion of his attorney fees when Balsamo brought his concerns to the Accused's and the Bar's attention.
  3. Remorse. *Standards*, § 9.32(l). The Accused has expressed remorse for his conduct.

15.

Under the *Standards*, a 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. However, because the Accused's mitigating factors outweigh those in aggravation in severity and in number, a reduction of the presumptive sanction is justified. A public reprimand is the appropriate result.

16.

Oregon cases reach a similar result. See, e.g., *In re Nishioka*, 23 DB Rptr 44 (2009) (attorney reprimanded for billing a client at an hourly rate that exceeded the rate specified in the fee agreement, making the fee excessive, and collecting fees in a probate proceeding without obtaining court approval, making the fee illegal); *In re Mitchell*, 17 DB Rptr 26 (2003) (attorney reprimanded for collecting a fee from the estate of a disabled person without first obtaining court approval); *In re Jacobson*, 12 DB Rptr 99 (1998) (attorney reprimanded for failing to file an annual accounting and collecting legal fees from an estate without first obtaining court approval); *In re Hill*, 261 Or 573, 495 P2d 261 (1972) (lawyer reprimanded for entering into a contingent fee agreement with a divorce client).

17.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be publicly reprimanded for violation of DR 2-106(A) and RPC 1.5(a), the sanction to be effective upon approval by the Disciplinary Board.

18.

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 5th day of August 2010.

/s/ Todd S. Hammond

Todd Stephen Hammond

OSB No. 982468

EXECUTED this 6th day of August 2010.

OREGON STATE BAR

By: /s/ Amber Bevacqua-Lynott

Amber Bevacqua-Lynott

OSB No. 990280

Assistant Disciplinary Counsel

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
)  
Complaint as to the Conduct of ) Case No. 10-67  
)  
PRISCILLA MALONEY, )  
)  
Accused. )

Counsel for the Bar: Stacy J. Hankin  
Counsel for the Accused: None  
Disciplinary Board: None  
Disposition: Violation of RPC 1.4(a). Stipulation for Discipline.  
Public reprimand.  
Effective Date of Stipulation: August 16, 2010

**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 reprimanded for violating of RPC 1.4(a).

DATED this 16th day of August 2010.

/s/ Gilbert B. Feibleman  
Gilbert B. Feibleman  
State Disciplinary Board Chairperson

/s/ William Crow  
William Crow Region 5  
Disciplinary Board Chairperson

### **STIPULATION FOR DISCIPLINE**

Priscilla Maloney, attorney at law (hereinafter “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 in Multnomah County, Oregon, until July 2006, at which time she moved to Nevada.

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 July 10, 2010, the State Professional Responsibility Board (hereinafter “SPRB”) authorized formal disciplinary proceedings against the Accused for alleged violation of 1.4(a) of the Oregon Rules of Professional Conduct. 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 2004, the Accused undertook to represent Matthew Reason (hereinafter “Reason”) in an appeal of a criminal matter.

6.

After October 2006, the Accused failed to communicate with Reason despite numerous inquiries from him asking about the status of his legal matter.

7.

On November 1, 2006, the Oregon Court of Appeals affirmed the trial court's decision in Reason's criminal matter. The Accused filed a petition for review with the Oregon Supreme Court, which was denied on February 6, 2007. The Accused failed to inform Reason of the two court decisions and the petition for review she filed.

### Violations

8.

The Accused admits that by engaging in the conduct described in paragraphs 5 through 7, she violated RPC 1.4(a).

### 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 her duty to act with reasonable diligence and promptness in communicating with Reason. *Standards*, § 4.4.
- b. **Mental state.** The Accused acted knowingly when she failed to respond to Reason's inquiries and negligently when she failed to communicate important information to Reason.
- c. **Injury.** Reason sustained significant actual injury because of the Accused's failure to inform him about the court decisions as the time in which he had to file a petition for postconviction relief expired. Fortunately, Reason's subsequent lawyer successfully obtained an extension in which to file the petition.
- d. **Aggravating circumstances.** Aggravating circumstances include:
  1. Vulnerable victim. Reason was incarcerated and was therefore unable to travel to the Accused's office and obtain an answer to his inquiries, but had to rely on mail and the telephone. *In re Obert*, 336 Or 640, 654, 89 P3d 1173 (2004). *Standards*, § 9.22(h).



2. Substantial experience in the practice of law. The Accused has been a licensed lawyer since 1988. *Standards*, § 9.22(i).

**e. Mitigating circumstances.** Mitigating circumstances include:

1. Absence of a prior disciplinary record. *Standards*, § 9.32(a).
2. Absence of a dishonest or selfish motive. *Standards*, § 9.32(b).
3. Timely good faith effort to rectify the consequences of misconduct. At the request of Reason's subsequent lawyer, the Accused prepared and signed an affidavit acknowledging that Reason's failure to timely file a petition for postconviction relief was due entirely to her failure to inform him that a final judgment had been entered. *Standards*, § 9.32(d).
4. Cooperative attitude toward the proceedings. *Standards*, § 9.32(e).
5. Remorse. *Standards*, § 9.32(l).

10.

Under the *Standards*, suspension is generally appropriate when a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client. *Standards*, § 4.42. 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.

11.

Generally, lawyers who knowingly neglect a legal matter or fail to keep clients informed are suspended. *In re Snyder*, 348 Or 307, \_\_ P3d \_\_ (filed May 27, 2010); *In re Redden*, 342 Or 393, 153 P3d 113 (2007); *In re Schaffner*, 323 Or 472, 918 P2d 803 (1996).

However, where, as in this case, the mitigating circumstances substantially outweigh the aggravating circumstances, and the lawyer did not engage in any other misconduct, a reprimand is the more appropriate sanction. *In re Farthing*, 22 DB Rptr 281 (2008); *In re Nielson*, 22 DB Rptr 286 (2008).

12.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be reprimanded for violation of RPC 1.4(a).

13.

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 4th day of August 2010.

/s/ Priscilla Maloney

Priscilla Maloney

OSB No. 880722

EXECUTED this 9th day of August 2010.

OREGON STATE BAR

By: /s/ Stacy J. Hankin

Stacy J. Hankin

OSB No. 862898

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re:	)	
	)	
Complaint as to the Conduct of	)	Case Nos. 10-16 and 10-17
	)	
CARTER A. DAUM,	)	
	)	
Accused.	)	

Counsel for the Bar:	Amber Bevacqua-Lynott
Counsel for the Accused:	None
Disciplinary Board:	None
Disposition:	Violation of RPC 1.1, RPC 1.2(c), RPC 1.3, RPC 1.4(a), RPC 8.4(a)(3), and RPC 8.4(a)(4). Stipulation for Discipline. 120-day suspension.
Effective Date of Order:	September 17, 2010

**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 120 days for violations of RPC 1.1, RPC 1.2(c), RPC 1.3, RPC 1.4(a), RPC 8.4(a)(3), and RPC 8.4(a)(4), the sanction to be effective September 15, 2010, or 30 days after approval by the Disciplinary Board, whichever is later.

DATED this 18th day of August 2010.

/s/ Gilbert B. Feibleman  
Gilbert B. Feibleman  
State Disciplinary Board Chairperson

/s/ R. Paul Frasier  
R. Paul Frasier, Region 3  
Disciplinary Board Chairperson

### **STIPULATION FOR DISCIPLINE**

Carter A. Daum, attorney at law (hereinafter “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, 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 March 23, 2010, a Formal Complaint was filed against the Accused pursuant to the authorization of the State Professional Responsibility Board (hereinafter “SPRB”), alleging violations of RPC 1.1 (competence), RPC 1.2(c) (counseling or assisting a client in illegal or fraudulent conduct), RPC 1.3 (neglect of a legal matter), RPC 1.4(a) (failing to keep a client reasonably informed of the status of a matter or comply with reasonable requests for information), RPC 8.4(a)(3) (conduct involving dishonesty or misrepresentation), and RPC 8.4(a)(4) (conduct prejudicial to the administration of justice). 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**

### **Case No. 10-16**

#### **Cockrum Matter**

5.

In February 2008, Dawn Cockrum (“Cockrum”) and her husband, Russell Stout (“Stout”), paid the Accused the final installment of a \$1,200 fee for the Accused’s representation in a Chapter 7 bankruptcy proceeding. Thereafter, the Accused misplaced the documents Cockrum had provided him which contained the information necessary to prepare the bankruptcy petition.

6.

In April 2008, Cockrum contacted the Accused’s office about the status of the case. The Accused’s staff discovered that Cockrum’s and Stout’s paperwork had been mislaid and that the bankruptcy petition had not been filed as promised. The Accused then took the necessary steps to prepare and file the petition and schedules.

7.

In late April 2008, Cockrum received her government stimulus check in the amount of \$1,500 and spent the proceeds.

8.

In June 2008, Cockrum and Stout appeared for their first meeting of creditors and were informed that they must pay the trustee the money they received from Cockrum’s stimulus check. The Accused had not previously informed Cockrum and Stout that the stimulus check was an asset of the bankruptcy estate. Even with the trustee’s demand, the Accused told Cockrum and Stout that he was uncertain about whether they would really be required to repay the funds. The Accused represented to Cockrum and Stout that whether the stimulus checks belonged to the trustee was a new issue on which he would do some research and that he would advise them of the results of his research. Thereafter, the Accused did not contact Cockrum or Stout regarding whether they must repay the stimulus money.

9.

Shortly after the first meeting of creditors, Stout refused to participate any further in the bankruptcy. Cockrum immediately notified the Accused’s office and inquired whether Stout’s withdrawal of his petition would affect her portion of the bankruptcy. Although the Accused had never previously encountered this situation, he represented to Cockrum that Stout’s actions would have no impact on her portion of

the case and assured her that he would complete her bankruptcy. Thereafter, the Accused simply forwarded Cockrum's certificate of completion for rule-mandated financial classes to the court and assumed that Cockrum would be discharged and that Stout's case would be dismissed. He did not follow up with the court or monitor Cockrum's file or its progress through the court. Cockrum heard nothing further from the Accused and believed that an order of discharge had been entered.

Aside from forwarding to the trustee a proposed plan for Cockrum to repay the stimulus check proceeds in June 2008, the Accused left it to Cockrum and the trustee to resolve the repayment issue. He did nothing further to resolve the issue or determine whether it had been resolved.

In February 2009, Cockrum learned that her bankruptcy case was still open. Thereafter, she made multiple attempts to contact the Accused, but the Accused did not respond for several weeks.

10.

When the Accused contacted Cockrum, he represented that he had sent the documents necessary to close Cockrum's case to the court in July 2008 and surmised that, since the case was still open, the trustee or the court must have made a mistake. The Accused did not verify the truth of this representation to Cockrum.

11.

In March 2009, Cockrum asked the Accused and the bankruptcy trustee for some direction and clarification about the stimulus money. She did not receive a response from either.

12.

In June 2009, after Cockrum complained to the Bar about the Accused's conduct, the Accused sent Cockrum documents that indicated that the bankruptcy case was now in her name only. However, the Accused never confirmed whether Cockrum was required to repay the stimulus funds to the trustee or whether her proposed payment plan was acceptable to the trustee.

### **Violations**

13.

The Accused admits that his failure to act on Cockrum's behalf constituted neglect of a legal matter in violation of RPC 1.3. The Accused further admits that his failure to respond to Cockrum's attempts to communicate with him amounted to a failure to comply with reasonable requests for information, in violation of RPC 1.4(a).

**Case No. 10-17**

**Ireland Matter**

14.

Before October 2005, the Accused undertook to represent James and Amee Ireland (collectively “the Irelands”) in a Chapter 7 bankruptcy proceeding. They completed all schedules and necessary paperwork approximately one week before the effective date of major changes in the bankruptcy laws. The Irelands paid the Accused \$300 for the filing fee, and the Accused promised that the Irelands’ bankruptcy would be filed in advance of the changes to the law. However, due to the Accused’s error, he did not file the Irelands’ petition before the laws changed. The Accused knew that Amee would be leaving soon to attend medical school outside of Oregon. He agreed to file a new bankruptcy for the Irelands at no additional cost when it was convenient to them.

15.

In July 2008, Amee completed medical school and the Irelands requested that the Accused file their Chapter 7 bankruptcy petition. The Irelands provided the Accused with an updated list of creditors and all forms of income, including Amee’s student loans and a private stipend she was receiving during her residency from the Douglas County Independent Physicians Association (“DCIPA”). The Accused failed to recognize that Amee’s DCIPA stipend was not a traditional student loan and might be subject to discharge.

16.

After reviewing the Irelands’ updated figures, the Accused was concerned that they did not have sufficient monthly obligations to qualify for a Chapter 7 discharge. Accordingly, while he was aware that the Irelands did not pay rent, he inquired as to the average rental cost in their area and knowingly and intentionally added that figure to the Irelands’ expenses in their petition and schedules. The Accused knew at the time that he included it that this figure was a fabrication that was material to the bankruptcy court’s determination of whether the Irelands qualified for a Chapter 7 discharge.

17.

At all times relevant herein, 11 USC §727(a)(4) provided in relevant part that the bankruptcy court shall grant the debtor a discharge, unless the debtor knowingly and fraudulently, in or in connection with the case, made a false oath or account or presented or used a false claim.

18.

In late July or early August 2008, Amee Ireland met with the Accused to review the draft petition and called several errors to the Accused's attention.

19.

On or before August 18, 2008, Amee met with the Accused to finalize the bankruptcy forms for filing. The Accused represented to Amee that all of the errors in the draft petition had been corrected. The Accused failed to review the Irelands' 2008 petition and schedules to ensure that the identified errors were corrected before they were filed. He asked for Amee to sign the forms, under penalty of perjury, for herself and James, and advised that it was permissible for her to do so. Amee signed all the forms as requested; but the Accused gave her only the signature pages and not the schedules that listed the Irelands' creditors and monthly expenses.

20.

On August 18, 2008, the Accused filed the Irelands' bankruptcy petition. The Accused failed to provide the trustee with the Irelands' tax returns prior to their first meeting of creditors, as directed by the trustee. The Accused also failed to alert the trustee to the Irelands' desire to affirm certain debts related to Amee's continuing education.

21.

In November 2008, the Irelands received notice of a "no asset" discharge. The Accused allowed Amee's DCIPA contract to be discharged.

22.

In mid-November 2008, Amee was notified that her DCIPA stipend had been included in the bankruptcy and that she would receive no future payments. Amee attempted to contact the Accused on multiple occasions, but he did not respond.

23.

The Accused also failed to contact the court or otherwise research how to deal with a discharged student loan (apart from the DCIPA stipend) after he was notified by Amee that the loan company was attempting to force the cosigner to repay the obligation. The Accused failed to contact the student loan company to learn if there was a process by which the mistakenly discharged loan could be reaffirmed. When contacted by Amee after she obtained reaffirmation forms from the student loan company, the Accused refused to sign or attempt to file the forms on her behalf, insisting that the judge would not reopen her case.



## Violations

24.

The Accused admits that his handling of the Irelands' bankruptcy constituted a failure to provide competent representation, in violation of RPC 1.1. The Accused also admits that by advising Amee to sign the petitions and by including the fabricated rental information, he counseled or assisted a client in illegal or fraudulent conduct, in violation of RPC 1.2(c), and engaged in conduct involving fraud, dishonesty, or misrepresentation in violation of RPC 8.4(a)(3). The Accused further admits that his collective conduct amounted to conduct prejudicial to the administration of justice, in violation of RPC 8.4(a)(4).

## Sanction

25.

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 duties of diligence and competence to his clients. *Standards*, §§ 4.4, 4.5. The *Standards* provide that the most important ethical duties are those obligations which a lawyer owes to clients. *Standards*, at 5. The Accused also violated his duties to the legal system to refrain from misrepresentations to the court and to avoid abuse of the legal process. *Standards*, § 6.2.
- 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*, at 9. "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*, at 9.

The Accused acted both knowingly and negligently. In Cockrum's matter, he may have initially been negligent in failing to attend to her case. However, his neglect thereafter became knowing when Cockrum brought the matter to his attention, and his failure to respond to Cockrum was also knowing.

In the Irelands' matter, the Accused was negligent in failing to initially file the Irelands' bankruptcy prior to the law change and in failing to recognize that Amee's circumstances required different treatment in the bankruptcy proceeding. The Accused knowingly added rental information into the Irelands' bankruptcy petition and schedules and knowingly advised Amee to sign them for herself and James under penalty of perjury.

- c. **Injury.** Injury may be either actual or potential. *In re Williams*, 314 Or 530, 840 P2d 1280 (1992). "Injury" is harm to a client, the public, the legal system, or the profession which results from a lawyer's misconduct. *Standards*, at 7. The Accused's conduct caused injury to the bankruptcy court and proceedings, as both Cockrum's and the Irelands' matters were delayed, and the Irelands' case is now being investigated by the U.S. Trustee's Office. In addition to the delay, Cockrum was actually injured by the frustration and anxiety caused by the Accused's failure to communicate with her. *See In re Cohen*, 330 Or 489, 496, 8 P3d 953 (2000) (client anxiety and frustration as a result of the attorney neglect can constitute actual injury under the *Standards*); *In re Schaffner*, 325 Or 421, 426–427, 939 P2d 39 (1997); *In re Arbuckle*, 308 Or 135, 140, 775 P2d 832 (1989). Amee also lost her ability to continue to obtain the DCIPA stipend, which she used to help fund her medical schooling.

"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. *In re Arbuckle*, 308 Or at 140. The Accused's failure to more timely or adequately attend to the issues in both cases caused potential injury to his clients and their ability to obtain bankruptcy relief.

- d. **Aggravating circumstances.** Aggravating circumstances include:
1. A dishonest or selfish motive. *Standards*, § 9.22(b).
  2. Multiple offenses. *Standards*, § 9.22(d).
  3. Substantial experience in the practice of law. *Standards*, § 9.22(i). The Accused was admitted in Oregon in 1981.
- e. **Mitigating circumstances.** Mitigating circumstances include:
1. Absence of prior record of discipline. *Standards*, § 9.32(a).

2. Personal or emotional problems. *Standards*, § 9.32(c). At the time of the misconduct at issue in this case, the Accused's wife and legal assistant was seriously ill.
3. Full and free disclosure and cooperation in these proceedings. *Standards*, § 9.32(e).

26.

Under the *Standards*, a reprimand is generally appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client, causing injury or potential injury. *Standards*, § 4.43. A reprimand is also appropriate where a lawyer demonstrates failure to understand relevant legal doctrines or procedures and causes injury or potential injury. *Standards*, § 4.53.

A suspension is generally appropriate when a lawyer 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. A suspension is also 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*, § 6.12.

27.

The court has also held that suspensions are appropriate where false statements are made or false documents are submitted to the court. *See, e.g., In re Jackson*, 347 Or 426, 223 P3d 387 (2009) (lawyer suspended for 120 days for falsely representing to the court that burglaries at his office were the reason he was unable to proceed with the domestic relations case in a timely manner); *In re Jones*, 326 Or 195, 951 P2d 149 (1997) (45-day suspension where attorney had a client sign blank documents containing perjury clauses, filled out the documents himself, and filed the documents with the court); *In re Greene*, 290 Or 291, 620 P2d 1379 (1980) (60-day suspension where lawyer intentionally failed to disclose nature of real estate transaction to the probate court). *See also In re Dames*, 10 DB Rptr 81 (1996) (attorney suspended for 120 days for misrepresenting the existence of a promissory note to the court in a conservatorship proceeding).

28.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be suspended for 120 days for violations of RPC 1.1, RPC 1.2(a), RPC 1.3, RPC 1.4(a), RPC 8.4(a)(3), and RPC 8.4(a)(4), the sanction to be effective

September 15, 2010, or 30 days after approval by the Disciplinary Board, whichever is later.

29.

The Accused acknowledges that he has certain duties and responsibilities under the Rules of Professional Conduct and BR 6.3 to immediately take all reasonable steps to avoid foreseeable prejudice to his clients during the term of his suspension. In this regard, the Accused has arranged for Margaret M. Maginnis, an active member of the Oregon State Bar, to either take possession of or have ongoing access to the Accused's client files and serve as the contact person for clients in need of the files during the term of the Accused's suspension. The Accused represents that Margaret M. Maginnis has agreed to accept this responsibility.

30.

The Accused acknowledges that reinstatement is not automatic on expiration of the period of suspension. He is required to comply with the applicable provisions of Title 8 of the Bar Rules of Procedure. The Accused also acknowledges that he cannot hold himself out as an active member of the Bar or provide legal services or advice until he is notified that his license to practice has been reinstated.

31.

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 9th day of August 2010.

/s/ Carter A. Daum

Carter A. Daum

OSB No. 812020

EXECUTED this 11th day of August 2010.

OREGON STATE BAR

By: /s/ Amber Bevacqua-Lynott

Amber Bevacqua-Lynott

OSB No. 980280

Assistant Disciplinary Counsel

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re:	)	
	)	
Complaint as to the Conduct of	)	Case Nos. 09-74 and 10-71
	)	
LISETTE M. SPENCER,	)	
	)	
Accused.	)	

Counsel for the Bar:	Amber Bevacqua-Lynott
Counsel for the Accused:	Rebecca Whitney-Smith
Disciplinary Board:	None.
Disposition:	Violation of RPC 1.2(a), RPC 1.3, RPC 1.4(a), RPC 1.5(a), and RPC 8.4(a)(4). Stipulation for Discipline. 90-day suspension.
Effective Date of Order:	September 1, 2010

**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 ninety (90) days, effective September 1, 2010, or seven days after this Order is signed, whichever is later, for violation of RPC 1.2(a), RPC 1.3, RPC 1.4(a), RPC 1.5(a), and RPC 8.4(a)(4).

DATED this 18th day of August 2010.

/s/ Gilbert B. Feibleman  
Gilbert B. Feibleman  
State Disciplinary Board Chairperson

/s/ Carl W. Hopp, Jr.  
Carl W. Hopp, Jr., Region 1  
Disciplinary Board Chairperson

### **STIPULATION FOR DISCIPLINE**

Lisette M. Spencer, attorney at law (hereinafter “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, having her office and place of business in Klamath 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.

On September 25, 2009, a Formal Complaint (Case No. 09-74) was filed against the Accused pursuant to the authorization of the State Professional Responsibility Board (“SPRB”), alleging violation of RPC 1.3, *formerly* DR 6-101(B) (neglect of a legal matter); RPC 1.4(a), *formerly* DR 6-101(B) (failure to keep a client reasonably informed about the status of a matter or promptly comply with reasonable requests for information); RPC 1.5(a) (charging or collecting an illegal or clearly excessive fee); and RPC 8.4(a)(4) (conduct prejudicial to the administration of justice).

On July 10, 2010, the SPRB authorized formal disciplinary proceedings (Case No. 10-71) against the Accused for alleged violations of RPC 1.2(a) (failing to abide by a client’s decisions concerning the objectives of the representation), RPC 1.3, and RPC 1.4(a) of the Oregon Rules of Professional Conduct.

The parties intend that this Stipulation for Discipline set forth all relevant facts, violations, and the agreed-upon sanction as a final disposition of these proceedings.

**Edwin Gerrue Matter**

**Case No. 09-74**

**Facts**

5.

Prior to August 2004, Edwin Gerrue (“Gerrue”) had fulfilled his child support obligations to his former wife and his children were grown. In August 2004, the Accused undertook to represent Gerrue when Gerrue’s former wife improperly garnished his wages. Gerrue paid the Accused a \$500 retainer.

6.

Between August 9, 2004, and March 15, 2005, the Accused took no action on Gerrue’s garnishment and did not contact or have communication with him regarding the case. During this same time period, Gerrue left repeated telephone messages for the Accused, and scheduled one or more appointments with the Accused that she failed to keep.

7.

In June 2005, Gerrue’s employer stopped garnishing his wages. In or around August 2005, pursuant to an invoice, Gerrue paid the Accused an additional \$92 she claimed was owed for her services.

8.

Between August 2005 and September 2006, the Accused did not communicate with Gerrue or bill him for any additional services in connection with his garnishment matter.

9.

On August 31, 2006, without consulting with or notifying Gerrue, the Accused filed a “Motion to Satisfy Money Award Pursuant to ORS 18.235 and Request for Hearing” on behalf of Gerrue, which sought an order satisfying in full Gerrue’s child support judgment. Without consulting with or notifying Gerrue, the Accused served this motion on Gerrue’s former wife, Child Support Enforcement in Texas, and the Division of Child Support in Oregon.

10.

In mid-September 2006, the Accused directed her staff to inform Gerrue that a trial setting conference for the motion described in paragraph 9 was set for September 25, 2006. Gerrue arranged on his own to have the motion withdrawn.

11.

Between September 2006 and January 17, 2008, the Accused did not communicate with Gerrue or bill him for any additional services in connection with his garnishment matter.

12.

On or about January 17, 2008, the Accused sent an invoice to Gerrue, billing him 1.3 hours (\$156.00) for time she had spent preparing the unauthorized Motion to Satisfy Money Award in August 2006. Gerrue objected to the bill. On or about June 16, 2008, the Accused notified Gerrue that his outstanding balance had grown to \$168.07, due to interest.

### **Violations**

13.

The Accused admits that her failures to take more timely action on Gerrue's matter constituted neglect of a legal matter, in violation of RPC 1.3 (*former* DR 6-101(B)), and that her failures to keep Gerrue informed of the status of his matter or respond to his requests for information violated RPC 1.4(a) (*former* DR 6-101(B)).

The Accused further admits that the bills that she sent to Gerrue for services that he did not request amounted to charging a clearly excessive fee, in violation of RPC 1.5(a), and that her delay of Gerrue's matter as well as her filing an action that was not requested or authorized by her client constituted conduct prejudicial to the administration of justice, in violation of RPC 8.4(a)(4).

### **Sarah Taylor Matter**

#### **Case No. 10-71**

#### **Facts**

14.

On March 24, 2009, Sarah Taylor ("Taylor") and her husband (collectively the "Taylors") retained the Accused to prepare and file the documents necessary for Taylor's husband to complete a stepparent adoption of Taylor's adult daughter. The Taylors requested that the adoption be completed by June 6, 2009, if at all possible, because that was their daughter's birthday. The Accused agreed to try. However, between March 24, 2009, and October 24, 2009, the Accused took no substantive action to complete the adoption.



15.

Between March 24, 2009, and October 24, 2009, Taylor and her husband called the Accused numerous times to inquire as to the status of the adoption. The Accused did not return their calls or otherwise respond.

16.

On October 24, 2009, Taylor terminated the Accused's employment and requested a full refund of her retainer. The Accused refunded Taylor's retainer.

### **Violations**

17.

The Accused admits that by failing to take substantive action on Taylor's adoption, especially in light of the deadline she agreed to try to meet, the Accused failed to abide by a client's decisions concerning the objectives of the representation and neglected a legal matter entrusted to her, in violation of RPC 1.2(a) and RPC 1.3.

The Accused further admits that by not responding to the Taylors' inquiries, she failed to keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information, in violation of RPC 1.4(a).

### **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.** In this matter, the Accused violated the duty she owed to her clients to act with reasonable diligence and promptness in representing them (including adequately communicating with them). *Standards*, § 4.4. The *Standards* provide that the most important ethical duties are those obligations that a lawyer owes to clients. *Standards*, at 5. The Accused also violated her duty to the legal system to avoid abuse to the legal process and her duty to the profession to avoid charging or collecting improper fees. *Standards*, §§ 6.2, 7.0.
- b. **Mental state.** There are three types of mental state recognized under the *Standards*: "Intent" is the conscious objective or purpose to accomplish

a particular result. “Knowledge” is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result. “Negligence” is the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation. *Standards*, at 7.

The Accused’s neglect of Gerrue’s matter, as well as her failures to respond to his inquiries, were knowing. Similarly, while the Accused’s action in billing Gerrue for the unwanted services may have been initially negligent, it became knowing when she did not correct the billing after Gerrue brought it to her attention and protested its validity.

Similarly, the Accused’s neglect of Taylor’s matter may have initially been negligent, but became knowing when the Taylors made inquiries, to which the Accused knowingly failed to respond.

- c. **Injury.** Injury can either be actual or potential under the *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*, at 7.

Gerrue was actually injured by the Accused’s delay. In 2004–2005, he lost money out of every check to which he was entitled and ultimately felt compelled to quit his job to avoid the continuing unwarranted garnishment. Gerrue was potentially injured by both the unwanted motion and the Accused’s bill for those services. Both Gerrue and Taylor also sustained additional actual injury in the form of delay, anxiety, and frustration because the Accused failed to communicate with them. *In re Knappenberger*, 337 Or 15, 23, 90 P3d 614 (2004); *In re Obert*, 336 Or 640, 89 P3d 1173 (2004).

- d. **Aggravating circumstances.** Aggravating circumstances include:
  - 1. Multiple offenses. *Standards*, § 9.22(d).
  - 2. A pattern of misconduct. *Standards*, § 9.22(c).
  - 3. Substantial experience in the practice of law. *Standards*, § 9.22(i). The Accused was admitted in Oregon in 1996.

- e. **Mitigating circumstances.** Mitigating circumstances include:
1. No prior history of discipline. *Standards*, § 9.32(a).
  2. Absence of a dishonest motive. *Standards*, § 9.32(b).
  3. Personal and emotional problems. *Standards*, § 9.32(c). The Accused was experiencing symptoms of depression during the period of the misconduct in the Gerrue matter caused primarily by the stress of marital difficulties.
  3. A cooperative attitude toward the disciplinary proceedings. *Standards*, § 9.32(e).
  4. Good character or reputation. *Standards*, § 9.32(g).

19.

Under the *Standards*, a suspension is generally appropriate where a lawyer knowingly fails to perform services for a client or engages in a pattern of neglect and causes injury or potential injury to a client. *Standards*, § 4.42. A suspension is also generally appropriate when a lawyer knowingly interferes with a legal proceeding or 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*, §§ 6.22, 7.2.

20.

Oregon case law also supports the imposition of a suspension. *See In re Koch*, 345 Or 444, 198 P3d 910 (2008) (attorney who had been previously reprimanded for similar misconduct was suspended for 120 days where she failed to advise her client that another lawyer would prepare a qualified domestic relations order for the client, and thereafter failed to communicate with the client and that second lawyer when they needed information and assistance from attorney to complete the legal matter); *In re Redden*, 342 Or 393, 153 P3d 113 (2007) (where no prior discipline, lawyer received 60-day suspension for knowing neglect in failing to complete a child support arrearage matter for a client, resulting in its dismissal); *In re Worth*, 337 Or 167, 92 P3d 721 (2004) (120-day suspension where lawyer with prior similar discipline failed to move a client's case forward, despite several warnings from the court and a court directive to schedule arbitration by a date certain, resulting in the court granting the opposing party's motion to dismiss); *In re LaBahn*, 335 Or 357, 67 P3d 381 (2003) (60-day suspension for neglect of litigation plus the attorney's failure to inform his client of the dismissal of the case caused by his neglect). *See also In re Campbell*, 345 Or 670, 202 P3d 871, *recons. denied*, \_\_\_ Or \_\_\_ (2009) (attorney received 60-day suspension, in part for excessive fee that resulted from billing a client for late fees in

excess of the legal rate of interest without obtaining the client's written agreement to pay those charges); *In re Eckrem*, 23 DB Rptr 84 (2009) (90-day suspension where attorney neglected an adoption matter by not filing the petition timely or submitting required information to DHS, and for neglecting a second matter and failing to respond to client inquiries).

21.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be suspended from the practice of law for 90 days for violation of RPC 1.2(a), RPC 1.3, RPC 1.4(a), RPC 1.5(a), and RPC 8.4(a)(4), the sanction to be effective September 1, 2010, or seven days after approval by the Disciplinary Board, whichever is later.

22.

The Accused acknowledges that she has certain duties and responsibilities under the Rules of Professional Conduct and BR 6.3 to immediately take all reasonable steps to avoid foreseeable prejudice to her clients during the term of her suspension. In this regard, the Accused has arranged for Monte Ludington, an active member of the Oregon State Bar, to either take possession of or have ongoing access to the Accused's client files and serve as the contact person for clients in need of the files during the term of the Accused's suspension. The Accused represents that Monte Ludington has agreed to accept this responsibility.

23.

The Accused acknowledges that reinstatement is not automatic on expiration of the period of suspension. She is required to comply with the applicable provisions of Title 8 of the Bar Rules of Procedure. The Accused also acknowledges that she cannot hold herself out as an active member of the Bar or provide legal services or advice until she is notified that her license to practice has been reinstated.

24.

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 9th day of August 2010.

/s/ Lisette M. Spencer

Lisette M. Spencer

OSB No. 963398

EXECUTED this 13th day of August 2010.

OREGON STATE BAR

By: /s/ Amber Bevacqua-Lynott

Amber Bevacqua-Lynott

OSB No. 990280

Assistant Disciplinary Counsel

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
 )  
Complaint as to the Conduct of ) Case No. 09-124  
 )  
MICHAEL R. JORDAN, )  
 )  
Accused. )

Counsel for the Bar: Kellie F. Johnson  
Counsel for the Accused: Christopher R. Hardman  
Disciplinary Board: None  
Disposition: Violations of RPC 1.3, RPC 1.4(a), RPC 1.4(b),  
and RPC 8.4(a)(3). Stipulation for Discipline.  
60-day suspension.  
Effective Date of Order: August 21, 2010

**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 on August 21, 2010, for violations of RPC 1.3, RPC 1.4(a), RPC 1.4(b), and RPC 8.4(a)(3).

DATED this 24th day of September 2010.

/s/ Gilbert B. Feibleman  
Gilbert B. Feibleman  
State Disciplinary Board Chairperson

/s/ William B. Crow  
William B. Crow, Region 5  
Disciplinary Board Chairperson

## **STIPULATION FOR DISCIPLINE**

Michael R. Jordan, attorney at law (hereinafter “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 in Multnomah 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.

On November 21, 2009, the State Professional Responsibility Board (hereinafter “SPRB”) authorized formal disciplinary proceedings against the Accused for alleged violations of RPC 1.3 (neglect of a legal matter), RPC 1.4(a) (failure to keep a client reasonably informed about the status of a legal matter), RPC 1.4(b) (failure to provide sufficient explanations to the client to allow for informed decisions), and RPC 8.4(a) (3) (conduct involving misrepresentation by omission), of the Oregon Rules of Professional Conduct. 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 June 2005, the Accused undertook to represent Setsuko Seven (“Seven”) in a dissolution of marriage proceeding. Seven had had surgery for a virulent form of stomach cancer, and in 2006, hip replacement surgery. Her failing health and resultant reduced earning capacity led Seven to seek out Jordan’s assistance to secure spousal support, medical insurance, and a place to live.

6.

The dissolution proceeding was set for trial on April 5, 2006. On that day, the parties negotiated a settlement whereby they would be legally separated for two years, and Seven would receive the family home, spousal support, and health care coverage. After not less than two years, the parties' marriage would be dissolved. The settlement was read into the record, and the parties agreed to its terms on the record.

7.

The Accused then prepared a stipulated final judgment. As of April 5, 2006, the parties had not established the value of their retirement accounts and opposing counsel wanted several changes to the Accused's proposed final judgment. Negotiations continued for approximately two months thereafter, during which time Seven's husband moved to Thailand without signing the judgment and without notice to the court, the Accused, or Seven, and subsequently the trial judge retired. Seven's husband never signed the judgment and the court dismissed the dissolution case on September 21, 2006. The Accused did not inform Seven of the dismissal or otherwise communicate with her regarding the status of the proceeding.

8.

Seven's husband did not transfer title to the family home or pay spousal support pursuant to the parties' settlement agreement. In April 2008, Seven decided to dissolve her marriage as permitted by the judgment she believed had been entered in 2006. On or about April 23, 2008, Seven consulted with new counsel who informed her that her dissolution of marriage case had been dismissed by the court for lack of prosecution in 2006.

9.

Subsequent to June 2006, the Accused failed to keep Seven informed of the status of her case and failed before April 23, 2008, to inform her that the case had been dismissed by the court. That the court had dismissed her case and that no final judgment had been entered were material facts to Seven, and the Accused knew this information was material when he failed to disclose it to her. After about June 2006, the Accused made no attempt to contact Seven or to reinstate her case.

### **Violations**

10.

The Accused admits that the conduct described in paragraphs 5 through 9 herein violated RPC 1.3, RPC 1.4(a), RPC 1.4(b), and RPC 8.4(a)(3).



## Sanction

### 11.

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 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. **Duties violated.** In violating RPC 1.3, RPC 1.4(a), RPC 1.4(b), and RPC 8.4(a)(3), the Accused violated duties of diligence and candor owed to his client. *Standards*, §§ 4.4, 4.6.
- b. **Mental state.** The Accused acted knowingly by failing to perform services diligently for his client and by failing to keep her informed as to the status of her case. “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*, at 7.
- c. **Injury.** The *Standards* define “injury” as “harm to the client, the public, the legal system or the profession which 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. *Standards*, at 7. An injury does need not be actual, but only potential, to support the imposition of sanctions. *In re Williams*, 314 Or 530, 840 P2d 1280 (1992).

The Accused caused serious actual injury to his client when he failed to do anything on Seven’s case for a period of about 22 months, failed to inform her that he knew the proceeding had not been resolved by the entry of a final judgment, and failed to inform her that the court had dismissed the case. His failure to act and disclose information he knew was material to his client and resulted in Seven not having a judgment for spousal support and medical insurance for a period of 22 months and prevented her from obtaining title to her home and dissolving her marriage.

- d. **Aggravating circumstances.** “Aggravating factors” are considerations that increase the degree of discipline to be imposed. *Standards*, § 9.22. In this case, they include:
  1. There are multiple offenses. *Standards*, § 9.22(d);

2. Seven was a vulnerable victim. *Standards*, § 9.22(h); and
  3. The Accused was admitted to the practice of law in 1974 and has substantial experience in the practice of law. *Standards*, § 9.22(i).
- e. **Mitigating circumstances.** “Mitigating factors” are considerations that may reduce the degree of discipline to be imposed. *Standards*, § 9.32. In this case, they include:
1. The Accused has no prior record of discipline. *Standards*, § 9.32(a);
  2. The Accused did not act with dishonest or selfish motives. *Standards*, § 9.32(b); and
  3. The Accused has expressed remorse for the delay and any injury he may have caused Seven. *Standards*, § 9.32(l).

12.

Under the *Standards*, a suspension is generally appropriate when a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client, or when a lawyer engages in a pattern of neglect and causes injury or potential injury to a client. *Standards*, § 4.42. A suspension is also appropriate when a lawyer knowingly deceives a client and causes injury or potential injury to the client. *Standards*, § 4.62.

13.

In similar cases, Oregon law provides for a lawyer’s suspension.

In *In re Obert*, 336 Or 640, 89 P3d 1173 (2004), the Supreme Court imposed a 30-day suspension where the lawyer neglected three client matters and failed in one matter to disclose that the client’s case had been dismissed.

In *In re LaBahn*, 335 Or 357, 67 P3d 381 (2003), the lawyer filed a lawsuit on behalf of his client on the last day before the statute of limitations ran, but failed to effect timely service on the defendants, which resulted in the court’s dismissing the case. The lawyer then failed for over a year to inform his client of the dismissal. The court imposed a 60-day suspension, finding that the lawyer had neglected the client’s case and made a misrepresentation by omission when he failed to inform his client of the dismissal.

In *In re Coyner*, 342 Or 104, 149 P3d 1118 (2006), the court suspended the lawyer for three months after finding that he committed neglect of two separate legal matters. The lawyer neglected a client’s appeal resulting in the case being dismissed

by the Court of Appeals. The lawyer also failed to respond to a motion to dismiss from opposing counsel, and failed to inform the client when the motion was granted.

In *In re Jackson*, 347 Or 426, 223 P3d 387 (2009), the court suspended the lawyer for 120 days when, while representing a client in a dissolution of marriage proceeding, the lawyer was not prepared for a settlement conference he had requested, failed to schedule dates with an arbitrator, failed to respond to messages from the arbitrator's office, and failed to pursue the arbitration. The lawyer also made misrepresentations to the court.

14.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be suspended for 60 days for violation of RPC 1.3, RPC 1.4(a), RPC 1.4(b), and RPC 8.4(a)(3), the sanction to be effective August 21, 2010, or seven days after the stipulation is approved, whichever is later.

15.

The Accused acknowledges that he has certain duties and responsibilities under the Rules of Professional Conduct and BR 6.3 to immediately take all reasonable steps to avoid foreseeable prejudice to his clients during the term of his suspension. In this regard, the Accused has arranged for James Bruce at Jordan, Caplan, Paul & Etter, 921 SW Washington St. #755, Portland, OR 97205, an active member of the Oregon State Bar, to either take possession of or have ongoing access to the Accused's client files and serve as the contact for clients in need of their files during the term of the Accused's suspension. The Accused represents that James Bruce has agreed to accept this responsibility.

16.

The Accused acknowledges that reinstatement is not automatic on expiration of the period of suspension. He is required to comply with the applicable provisions of Title 8 of the Bar Rules of Procedure. The Accused also acknowledges that he cannot hold himself out as an active member of the Bar or provide legal services or advice until he is notified that his license to practice has been reinstated.

17.

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 17th day of August 2010.

/s/ Michael R. Jordan

Michael R. Jordan

OSB No. 741656

EXECUTED this 17th day of August 2010.

OREGON STATE BAR

By: /s/ Kellie F. Johnson

Kellie F. Johnson

OSB No. 970688

Assistant Disciplinary Counsel

**Cite as 349 Or 108**

**IN THE SUPREME COURT  
OF THE STATE OF OREGON**

In re:

Complaint as to the Conduct of

SEAN L. HARTFIELD,

Accused.

(OSB 08-42; SC S058271)

En Banc

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

Submitted on the record and under advisement August 6, 2010. Filed September 23, 2010.

Linn D. Davis, Assistant Disciplinary Counsel, Tigard, filed the brief for the Oregon State Bar.

No appearance contra.

PER CURIAM

The Accused is publicly reprimanded.

**SUMMARY OF THE SUPREME COURT OPINION**

In this lawyer disciplinary proceeding, the Oregon State Bar charged Sean L. Hartfield (the Accused) with violating three provisions of the Oregon Rules of Professional Conduct (RPC). A trial panel of the Disciplinary Board concluded that the Accused had violated RPC 8.4(a)(4), which makes it professional misconduct for a lawyer to “engage in conduct that is prejudicial to the administration of justice,” dismissed the other two charges, and publicly reprimanded the Accused. The Accused timely requested review but failed to file an opening brief with this court. The Bar petitioned for review and filed a brief, but waived oral argument. We have considered this matter on the record before the trial panel and on the Bar’s brief filed with this

Cite as *In re Hartfield*, 24 DB Rptr 225 (2010)

court. ORAP 11.25(3)(a). On de novo review (ORS 9.536(2); Bar Rule of Procedure (BR) 10.6), we conclude that the Accused violated RPC 8.4(a)(4). We publicly reprimand the Accused.

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re:	)	
	)	
Complaint as to the Conduct of	)	Case No. 09-21
	)	
JAMES F. O'ROURKE,	)	
	)	
Accused.	)	

Counsel for the Bar:	Amber Bevacqua-Lynott
Counsel for the Accused:	Wayne Mackeson
Disciplinary Board:	None
Disposition:	Violation of RPC 1.1. Stipulation for Discipline. Public reprimand.
Effective Date of Order:	October 6, 2010

**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 RPC 1.1.

DATED this 6th day of October 2010.

/s/ Gilbert B. Feibleman  
Gilbert B. Feibleman  
State Disciplinary Board Chairperson

/s/ William B. Crow  
William B. Crow, Region 5  
Disciplinary Board Chairperson

### **STIPULATION FOR DISCIPLINE**

James F. O'Rourke, attorney at law (hereinafter "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, 1978, 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, 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.

On May 15, 2009, a Formal Complaint was filed against the Accused pursuant to the authorization of the State Professional Responsibility Board ("SPRB"), alleging violation of RPC 3.3(a)(1) (making a knowing false statement of fact or law to a tribunal or a failure to correct a false statement of material fact made to a tribunal) and RPC 8.4(a)(3) (conduct involving misrepresentation). On September 11, 2010, the SPRB authorized formal disciplinary proceedings against the Accused for alleged violations of RPC 1.1 (failure to provide competent representation). 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 May 9, 2005, Lyssa Heep ("Heep"), an unmarried adult, was involved in a serious automobile accident that left her in a coma. On February 14, 2006, Heep's mother, Candace Blomgren ("Blomgren") hired the Accused to pursue a personal injury claim on Heep's behalf. Without thinking the matter through, the Accused had Blomgren execute a fee agreement as Heep's guardian ad litem. Blomgren also



executed multiple medical releases as Heep's guardian ad litem, to enable the Accused to obtain Heep's medical records. At the time, Blomgren had not been appointed as Heep's guardian ad litem and the Accused did not grasp that formal appointment was necessary. Although the Accused had consulted with another attorney more familiar with probate matters, the Accused did not know that it was inappropriate to proceed with Blomgren (as Heep's parent and next of kin) utilizing the ad litem designation until she was duly appointed by the court.

6.

Between February 2006 and May 2007, the Accused sent numerous letters to third parties and requests for records to medical providers, at times including the medical releases, all of which represented that he was Heep's attorney. As Blomgren was not duly appointed by the court as Heep's guardian ad litem, these representations were untrue.

7.

On March 13, 2007, the court appointed an independent conservator for Heep. Heep, having revived from her coma, objected to the appointment of a guardian (as opposed to a guardian ad litem) and, in the afternoon of May 1, 2007, the court appointed a lawyer to represent Heep in the proceedings.

8.

On May 2, 2007, concerned about the expiration of the statute of limitations and unaware of how best to protect Heep's interests, the Accused filed a personal injury lawsuit on Heep's behalf, without notice to or approval from Heep, Heep's conservator, or Heep's attorney, and represented to the court therein that he was Heep's attorney.

### **Violations**

9.

The Accused admits that his failure to initially determine the proper method to undertake to represent Heep, and his failure to determine whether and in what form he should file a personal injury lawsuit on her behalf, resulted in representations to the court and third parties about Blomgren's status and the identification of his own client that were not accurate, and amounted to a failure to provide Blomgren or Heep with the knowledge, skill, thoroughness, and preparation reasonably necessary for their competent representation, in violation of RPC 1.1.

Upon further factual inquiry, the parties agree that the charges of alleged violations of RPC 3.3(a)(1) and RPC 8.4(a)(3) should be and, upon the approval of this stipulation, are 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.** The Accused violated his duty of competence to his client. *Standards*, § 4.5. The *Standards* provide that the most important ethical duties are those obligations which lawyers owe their clients. *Standards*, at 5.
- b. **Mental state.** The Accused acted negligently. 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*, at 9. Although the Accused is an experienced practitioner, this was the first time he had represented an impaired client and he did not know or appreciate how to establish and clarify Blomgren’s representative capacity for Heep.
- c. **Injury.** Injury can be actual or potential. *Standards*, § 3.0. Heep was actually injured to the extent that her medical information was improperly released to the Accused. However, the information obtained was used in a manner intended to further Heep’s interests, and the Accused did secure an offer of settlement from the insurance company that exceeded the policy limits.
- d. **Aggravating circumstances.** Aggravating circumstances include:
  1. Heep was in a vulnerable state. *Standards*, § 9.22(h).
  2. Substantial experience in the practice of law. *Standards*, § 9.22(i). The Accused was admitted in Oregon in 1978.
- e. **Mitigating circumstances.** Mitigating circumstances include:
  1. Absence of a prior record of discipline. *Standards*, § 9.32(a).

2. Absence of a dishonest or selfish motive. *Standards*, § 9.32(b).
3. Full and free disclosure to disciplinary authorities or cooperative attitude toward proceedings. *Standards*, § 9.32(e).
4. Character or reputation. *Standards*, § 9.32(g). The Accused enjoys a good reputation in the legal community and has provided significant service to the Bar.

11.

Under the *Standards*, a reprimand is generally appropriate when a lawyer:

- (a) demonstrates failure to understand relevant legal doctrines or procedures and causes injury or potential injury to a client; or
- (b) is negligent in determining whether he or she is competent to handle a legal matter and causes injury or potential injury to a client. *Standards*, § 4.53.

12.

Oregon case law also supports the imposition of a reprimand where an attorney exhibits a lack of competence in probate proceedings. *See, e.g., In re Zanutelli*, 23 DB Rptr 124 (2009) (attorney reprimanded for failing to make sufficient inquiry into elderly wife's capacity before modifying her estate plan, failing to adequately consult with husband and wife separately regarding their objectives, failing to recognize that wife was unable to provide basic information about her assets and failing to sufficiently investigate to determine that the couple had only been married for three weeks and that husband was a recently convicted felon); *In re Nawalany*, 20 DB Rptr 315 (2006) (attorney reprimanded when he drafted will and power of attorney on an expedited basis for someone he did not know that left testator's house to the person that contacted the attorney; attorney failed to make sufficient inquiry into the testator's deteriorating mental state or her relationship with the beneficiary, who had been exercising undue influence over the testator); *In re Stevens*, 20 DB Rptr 53 (2006) (attorney reprimanded where, in a conservatorship, attorney repeatedly failed to submit timely accountings to the court and when he did file accountings, they were deficient in substance and format required by statute and court rule).

13.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be publicly reprimanded for violation of RPC 1.1, the sanction to be effective upon approval 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 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 September 2010.

/s/ James F. O'Rourke

James F. O'Rourke

OSB No. 783286

EXECUTED this 1st day of October 2010.

OREGON STATE BAR

By: /s/ Amber Bevacqua-Lynott

Amber Bevacqua-Lynott

OSB No. 990280

Assistant Disciplinary Counsel

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
)  
Complaint as to the Conduct of ) Case No. 09-141  
)  
JAMES C. HILBORN, )  
)  
Accused. )

Counsel for the Bar: Jennifer A. Nelson, Amber Bevacqua-Lynott  
Counsel for the Accused: None  
Disciplinary Board: None  
Disposition: Violation of RPC 1.4(a), RPC 1.4(b), and RPC  
8.4(a)(4). Stipulation for Discipline. 30-day  
suspension.  
Effective Date of Order: December 15, 2010

**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 December 15, 2010, for violation of RPC 1.4(a) and (b) and RPC 8.4(a)(4).

DATED this 8th day of October 2010.

/s/ Gilbert B. Feibleman  
Gilbert B. Feibleman  
State Disciplinary Board Chairperson

/s/ William G. Blair  
William G. Blair, Region 4  
Disciplinary Board Chairperson

### **STIPULATION FOR DISCIPLINE**

James C. Hilborn, attorney at law (hereinafter “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 26, 1977, 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 January 19, 2010, a Formal Complaint was filed against the Accused pursuant to the authorization of the State Professional Responsibility Board (“SPRB”), alleging violations of RPC 1.4(b) (failure to explain a matter to the extent necessary to permit a client to make informed decisions regarding the representation), RPC 1.7(a)(1) (multiple-client current conflict), RPC 1.7(a)(2) (personal interest current conflict), and RPC 8.4(a)(4) (conduct prejudicial to the administration of justice). On September 11, 2010, the SPRB authorized an additional charge in these proceedings for alleged violation of RPC 1.4(a) (failure to keep a client reasonably informed about the status of a matter). 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 2003, the Accused represented an association of homeowners (collectively the “Good Sleep Society”) formed to sue West Hills Development (“West Hills”) for allegedly misrepresenting the frequency and times of train travel on

a track adjacent to the members' homes in Banks, Oregon ("Lawsuit 1"). Earle Nakagawa ("Nakagawa") and Patrice Nakagawa (collectively the "Nakagawas"), were among the more than fifty (50) members of the Good Sleep Society who participated in Lawsuit 1. In or around January 2003, Lawsuit 1 was settled. Part of the settlement was a contractual provision that West Hills use its continuing best efforts, diligence, and good faith to move the small switching yard located behind the homes affected by the suit.

6.

Between January 2003 and June 2007, the Accused communicated with a few members of the Good Sleep Society who indicated that they were still troubled by the switching yard. The Accused had a July 2006 phone conversation with Nakagawa in which Nakagawa indicated that he was still bothered by the railroad and wanted to "go forward." The Accused told Nakagawa that someone would be in contact with him if any legal action was initiated.

7.

In June 2007, on behalf of thirteen (13) members of the original Good Sleep Society ("GSSA"), the Accused brought an action against West Hills to enforce the prior settlement ("Lawsuit 2"). The Nakagawas were listed as among the GSSA plaintiffs.

8.

Prior to initiating this action, the Accused did not notify the Nakagawas of the commencement of this action, did not obtain any portion of the filing fee from them, and did not obtain their specific approval or consent to be included in Lawsuit 2.

9.

Between June 2007 and June 2008, the Accused had no communication with the Nakagawas, did not notify them that they were plaintiffs, and did not keep them apprised of events in Lawsuit 2.

10.

On April 9, 2008, the Accused proceeded to arbitration in Lawsuit 2 without the knowledge or consent of the Nakagawas. The arbitrator ruled in favor of West Hills.

11.

Between April 13, 2008, and May 13, 2008, the Accused did not respond to multiple requests from opposing counsel and the arbitrator to confirm the identity of

all of his clients in Lawsuit 2 and provide their contact information, necessitating the scheduling of hearings to resolve those issues before a judgment could be entered.

12.

On June 16, 2008, the court confirmed an arbitration award in favor of West Hills and awarded West Hills its costs and attorney fees, which resulted in a judgment against the GSSA plaintiffs, including the Nakagawas. The Accused did not notify the Nakagawas of these events.

### **Violations**

13.

The Accused admits that by failing to notify the Nakagawas of the initiation of the enforcement proceeding (Lawsuit 2), and that they had been included as named plaintiffs in that proceeding, and to thereafter communicate the status of the case to them, the Accused failed to adequately communicate with his clients, in violation of RPC 1.4(a) and (b).

The Accused further admits that his failure to maintain contact with all of his clients and maintain current contact information for them caused delays in the arbitration proceedings, as did the Accused's failure to provide this information to opposing counsel and the arbitrator, in violation of RPC 8.4(a)(4).

Upon further factual inquiry, the parties agree that the charges of alleged violations of RPC 1.7(a)(1) and (2) should be and, upon the approval of this stipulation, are dismissed.

### **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 of diligence to his clients, including his duty to adequately communicate with them. *Standards*, § 4.4. The *Standards* presume that the most important ethical duties are those obligations which a lawyer owes to clients. *Standards*, at 5. The Accused also violated his duty to the profession to avoid abuse of the legal process. *Standards*, § 6.2.



- 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*, at 9. 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*, at 9.

The Accused initially acted negligently in failing to notify or communicate with the Nakagawas. However, his failure to communicate became knowing when other Good Sleep Society members brought to his attention that they had not updated the Nakagawas and the Accused thereafter took no steps to do so. The Accused's failure to respond to opposing counsel and the arbitrator was knowing.

- c. **Injury.** Injury can be actual or potential. *Standards*, § 3.0. The Accused caused actual injury to the Nakagawas, who had not expressly stated that they wanted to participate in litigation and who subsequently paid \$5,500 toward the judgment entered against the GSSA plaintiffs in Lawsuit 2.

- d. **Aggravating circumstances.** Aggravating circumstances include:

- 1. A prior record of discipline. *Standards*, § 9.22(a). The Accused was previously suspended for failing to adequately communicate with clients (RPC 1.4(a) and (b)), failing to provide competent representation (RPC 1.1), making misrepresentations to clients about the status of their cases (RPC 8.4(a)(3)), and failing to respond to the Bar (RPC 8.1(a)(2)). *In re Hilborn*, 22 DB Rptr 102 (2008) ("*Hilborn I*"). He was suspended for nine months, all but two months of which were stayed, pending a two-year probation that he completed in May 2010. However, much of the relevant conduct in the pending matter occurred prior to discipline being imposed in *Hilborn I* and thereby diminishes the significance of *Hilborn I* as an aggravating factor. *See In re Jones*, 326 Or 195, 200, 951 P2d 149 (1997).
- 2. Substantial experience in the practice of law. *Standards*, § 9.22(i). The Accused was admitted in Oregon in 1977.

- e. **Mitigating circumstances.** Mitigating circumstances include:

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

2. Full and free disclosure to disciplinary authorities or cooperative attitude toward these proceedings. *Standards*, § 9.32(e).
3. Remorse. *Standards*, § 9.32(l). The Accused has expressed remorse for his conduct.

15.

Under the *Standards*, a suspension is generally appropriate when a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client, or when a lawyer engages in a pattern of neglect and causes injury or potential injury to a client. *Standards*, § 4.42. A suspension is also generally appropriate when a lawyer knowingly fails to comply with requests of a tribunal, and causes injury or potential injury to a client or a party, or causes interference or potential interference with a legal proceeding. *Standards*, § 6.22.

16.

Case law supports the imposition of a short suspension for similar violations. *See, e.g., In re Freudenberg*, 20 DB Rptr 190 (2006) (attorney suspended for 30 days where he made changes to the content of a stipulated judgment that had already been signed by his client, affixed the signature page to the revised judgment, and then filed the judgment with the court without informing the court or his client of the alterations); *In re Johnson*, 18 DB Rptr 181 (2004) (attorney suspended for 30 days when (1) she prepared and filed with the court her client's affidavit without making sufficient inquiry about whether the statements in the affidavit were true; (2) negligently asserted in a motion to withdraw that there were no hearings scheduled in the case, leading her client to miss a scheduled hearing; and (3) negligently misstated in a court affidavit the position taken by an insurance carrier regarding the distribution of life insurance proceeds).

17.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be suspended for 30 days for violation of RPC 1.4(a) and (b) and RPC 8.4(a)(4), the sanction to be effective December 15, 2010, or 30 days after approval by the Disciplinary Board, whichever is later.

18.

In addition, on or before December 31, 2010, the Accused shall pay to the Oregon State Bar its reasonable and necessary costs in the amount of \$300, incurred for his deposition. Should the Accused fail to pay \$300 in full by December 31, 2010, 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.

The Accused acknowledges that he has certain duties and responsibilities under the Rules of Professional Conduct and BR 6.3 to immediately take all reasonable steps to avoid foreseeable prejudice to his clients during the term of his suspension. In this regard, the Accused has arranged for Lee M. Griffith of James King Law LLC, 14780 SW Osprey Drive Suite 240, Beaverton, OR 97007, an active member of the Oregon State Bar, to either take possession of or have ongoing access to the Accused's client files and serve as the contact person for clients in need of the files during the term of the Accused's suspension. The Accused represents that Mr. Griffith has agreed to accept this responsibility.

20.

The Accused acknowledges that reinstatement is not automatic on expiration of the period of suspension. He is required to comply with the applicable provisions of Title 8 of the Bar Rules of Procedure. The Accused also acknowledges that he cannot hold himself out as an active member of the Bar or provide legal services or advice until he is notified that his license to practice has been reinstated.

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 September 2010.

/s/ James C. Hilborn

James C. Hilborn

OSB No. 772205

EXECUTED this 29th day of September 2010.

OREGON STATE BAR

By: /s/ Amber Bevacqua-Lynott

Amber Bevacqua-Lynott

OSB No. 990280

Assistant Disciplinary Counsel

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
)  
Complaint as to the Conduct of ) Case No. 10-74  
)  
ANN MERCER, )  
)  
Accused. )

Counsel for the Bar: Mary A. Cooper  
Counsel for the Accused: Bradley F. Tellam  
Disciplinary Board: None  
Disposition: Violations of Oregon RPC 5.5(a), Washington RPC  
5.5(a), and Oregon RPC 3.5(b).  
Stipulation for Discipline. Public reprimand.  
Effective Date of Order: October 8, 2010

**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 violating Oregon RPC 5.5(a), Washington RPC 5.5(a), and Oregon RPC 3.5(b).

DATED this 8th day of October 2010.

/s/ Gilbert B. Feibleman  
Gilbert B. Feibleman  
State Disciplinary Board Chairperson

/s/ William B. Crow  
William B. Crow, Region 5  
Disciplinary Board Chairperson

## **STIPULATION FOR DISCIPLINE**

Ann Mercer, attorney at law (hereinafter “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 December 23, 1992, 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 advice of counsel. This Stipulation for Discipline is made under the restrictions of Bar Rule of Procedure 3.6(h).

4.

On July 10, 2010, the State Professional Responsibility Board (hereinafter “SPRB”) authorized formal disciplinary proceedings against the Accused for alleged violations of RPC 3.5(b) and RPC 5.5(a) of the Oregon Rules of Professional Conduct, and RPC 5.5(a) of the Washington Rules of Professional Conduct. 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.

### **Cahoon Matter**

The Accused was retained by Wife to address QDRO issues arising in the Cahoon dissolution action, filed in the State of Washington. Although the Accused was not licensed to practice law in Washington, Wife had other counsel (attorney of record) who was a licensed Washington attorney. The opposing party (Husband) also retained QDRO counsel, Wayne Harris, who was licensed in both Washington and Oregon.

In January 2007, the dissolution (except for the QDRO issues) was resolved and Wife's Washington counsel withdrew from her representation. Over the next several months, the Accused and Harris communicated about the remaining QDRO issues.

6.

**Sinclair matter**

In another dissolution matter filed in Washington, the Sinclair matter, the Accused was retained to represent Husband with respect to QDRO issues; Harris was retained to represent Wife. Because the Accused was not licensed in Washington, Harris questioned whether she was authorized to represent Husband. Harris therefore moved the court (Judge Edwin Poyfair) for permission to communicate directly and exclusively with Husband.

Judge Poyfair granted Harris's motion and issued an order stating that the Accused had no lawful authority in Washington to represent Husband with respect to QDRO issues, that the Accused's conduct in the Sinclair litigation constituted the unauthorized practice of law in Washington, and that Harris could ethically communicate directly with Husband.

On January 4, 2009, Harris complained about the Accused to both the Oregon and Washington bar associations. On December 7, 2009, the Washington State Bar Association Practice of Law Board found that the Accused had engaged in the unauthorized practice of law in Washington in both the Cahoon and the Sinclair matters.

7.

**Jorgenson Matter**

The Jorgenson matter, filed in the State of Oregon, involved follow-up proceedings to a dissolution action. The Accused (representing Husband) sent Wife (who was then unrepresented) two forms of judgment. The first was for a stipulated judgment, which the Accused asked Wife to sign and return. The second was for a nonstipulated judgment, which the Accused said would be filed if she did not hear back from Wife.

Wife then hired Harris, to whom the Accused provided the same stipulated and nonstipulated forms of judgment and the same instruction that she would file the nonstipulated judgment if she did not hear back from Harris.

Harris responded by asking the Accused several questions about the proposed stipulated judgment and also by asserting that the Accused could not file the nonstipulated judgment without first making a motion (duly served on Harris) asking the court for permission.

Thereafter, without notifying Harris, the Accused filed the nonstipulated judgment. She appeared ex parte to obtain the court's signature on January 5, 2009, without notifying Harris of her intent to do so. The judgment was later set aside because Harris had not received notice.

### Violations

8.

By reason of the foregoing, the Accused admits that in the Cahoon and Sinclair matters, she practiced law in violation of regulations of the legal profession in the State of Washington, in violation of Washington RPC 5.5(a) and Oregon RPC 5.5(a).

The Accused also admits that by filing the nonstipulated judgment in the Jorgensen matter without informing him of the date the matter would be heard, she engaged in ex parte communications with the court, in violation of Oregon RPC 3.3(d).

### 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 duties she owed to the profession and the legal system. *Standards*, §§ 6.0, 7.0.
- b. **Mental state.** The Accused's mental state was negligent, which the *Standards* define as the 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 the situation.

- c. **Injury.** There is no evidence that any client suffered actual injury as a result of the Accused's violations in the Cahoon and Sinclair matters, although her unauthorized representation created the potential for injury. The Accused's conduct in the Jorgensen matter, however, did result in actual injury in that it forced the opposing party to incur the additional expense of moving to set aside the judgment that she improperly obtained.
- d. **Aggravating circumstances.** Aggravating circumstances include multiple offenses (*Standards*, § 9.22(e)) and substantial experience in the practice of law (*Standards*, § 9.22(i)).
- e. **Mitigating circumstances.** Mitigating circumstances include absence of a prior disciplinary record (*Standards*, § 9.32(a)), absence of a dishonest or selfish motive (*Standards*, § 9.32(b)), cooperative attitude toward proceedings (*Standards*, § 9.32(e)), and remorse (*Standards*, § 9.32(m)).

10.

*Standards*, § 7.13 provides that a reprimand is generally appropriate when a lawyer has negligently engaged in conduct that violates the duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.

11.

*Standards*, § 6.33 provides that a reprimand is appropriate when a lawyer is negligent in determining whether it was proper to communicate with an individual in the legal system. The *Standards* therefore suggest that a public reprimand is the appropriate sanction in this case.

12.

Oregon case law also supports the imposition of a public reprimand when a lawyer has negligently engaged in the unauthorized practice of law for brief periods of time (e.g., *In re Bassett*, 16 DB Rptr 190 (2002); *In re Davidson*, 20 DB Rptr 264 (2006)). Lawyers who have negligently engaged in ex parte communications are also typically reprimanded (e.g., *In re McGavic*, 22 DB Rptr 248 (2008)).

13.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused will be publically reprimanded for violating Oregon RPC 5.5(a), Washington RPC 5.5(a), and Oregon RPC 3.5(b).



14.

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 5th day of October 2010.

/s/ Ann Mercer

Ann Mercer

OSB No. 926280

OREGON STATE BAR

By: /s/ Mary Cooper

Mary Cooper

OSB No. 910013

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
 )  
Complaint as to the Conduct of ) Case No. 09-139  
 )  
MITCHELL R. BARKER, )  
 )  
Accused. )

Counsel for the Bar: Amber Bevacqua-Lynott  
Counsel for the Accused: Ronald Barker  
Disciplinary Board: None  
Disposition: Violation of RPC 5.5(a), RPC 8.1(a)(1), and ORS  
9.160. Stipulation for Discipline. 60-day  
suspension.  
Effective Date of Order: November 3, 2010

**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 September 15, 2010, or 14 days after approval by the Disciplinary Board, whichever is later, for violations of RPC 5.5(a), RPC 8.1(a)(1), and ORS 9.160.

DATED this 20th day of October 2010.

/s/ Gilbert B. Feibleman  
Gilbert B. Feibleman  
State Disciplinary Board Chairperson

/s/ William G. Blair  
William G. Blair, Region 4  
Disciplinary Board Chairperson

## **STIPULATION FOR DISCIPLINE**

Mitchell R. Barker, attorney at law (hereinafter “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 17, 2000, and has been a member of the Oregon State Bar continuously since that time, having his office and place of business in Ada and Canyon Counties, Idaho.

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.

On January 25, 2010, a Formal Complaint was filed against the Accused pursuant to the authorization of the State Professional Responsibility Board (“SPRB”), alleging violation of RPC 5.5(a) (practicing law in a jurisdiction in violation of the regulation of the legal profession), RPC 8.1(a)(1) (making a false statement of material fact in connection with a disciplinary matter), and ORS 9.160 (practicing law or holding oneself out as able to practice law in Oregon while not an active member of the Bar). 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 June 5, 2008, the Accused was suspended from practice in Oregon for failing to comply with his continuing legal education requirements.

6.

On October 3, 2008, the Accused filed an appearance as counsel of record for Joan Prigge (“Prigge”) in Clatsop County Circuit Court.

7.

Between October 2008 and January 2009, the Accused appeared on behalf of and represented Prigge in a legal matter in Clatsop County, Oregon.

8.

On September 17, 2009, the Accused was reinstated as an active member of the Oregon State Bar.

9.

On June 24, 2009, and September 24, 2009, Disciplinary Counsel’s Office (“DCO”) requested that the Accused respond to allegations that he represented Prigge in Oregon during a time when he was suspended from the practice of law in Oregon.

10.

On October 27, 2009, in response to inquiries from DCO, the Accused represented in a letter to DCO that he was a lessee of the Idaho law firm of Sallaz & Gatewood, Chtd.; that Prigge was the client of the Sallaz & Gatewood firm and was really never the Accused’s client; that the law firm needed an Oregon bar member in order to negotiate with the Clatsop County District Attorney’s office on a traffic ticket issued to Prigge; that the law firm asked the Accused to make contact with the Clatsop County DA and that he did so by telephone in late December 2008, when he called and made a settlement suggestion; and that when he called the DA’s office, he did not realize he was suspended in Oregon.

11.

Although the Accused was assisting the Sallaz & Gatewood firm in representing Prigge, and had never met or spoken with her, he was aware that he had filed a notice of representation and other pleadings on her behalf, and had negotiated with the district attorney in that matter. Accordingly, his October 2009 representations to DCO that he was only tangentially involved in the Prigge case were incomplete and inaccurate disclosures.

## Violations

12.

The Accused admits that by practicing law in Oregon at a time when he was administratively suspended, he acted contrary to the regulation of the legal profession, and held himself out as able to practice law in Oregon while not an active member of the Oregon State Bar, in violation of RPC 5.5(a) and ORS 9.160.

The Accused further admits that his description to DCO of his involvement in the Prigge case in Clatsop County, including his failure to disclose that he had filed a notice of representation and other pleadings on her behalf, constituted an omission of material facts which were necessary in order to not make the information provided to DCO a false statement of material fact in connection with a disciplinary matter, in violation of RPC 8.1(a)(1).

## Sanction

13.

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 duties to the profession to refrain from unauthorized practice and to respond appropriately in disciplinary investigations. *Standards*, § 7.0.
- b. **Mental state.** There are three recognized mental states under the *Standards*. “Intent” is the conscious objective or purpose to accomplish a particular result. *Standards*, at 9. “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*, at 9. “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*, at 9.

Although the Accused may have been negligent by practicing law in Prigge’s matter while suspended, his later representations to the Bar were knowing.

- c. **Injury.** An injury need not be actual, but only potential, to support the imposition of a sanction. *Standards*, at 6; *In re Williams*, 314 Or 530, 840 P2d 1280 (1992). In this case, Prigge and the administration of justice were both potentially injured to the extent that Prigge's case may have been delayed or undone because the Accused was not authorized to practice law in Oregon.

In addition, the Accused's misstatement to the Bar caused actual injury to both the legal profession and the public because additional inquiry was necessitated, thereby delaying the Bar's investigation and, consequently, the resolution of the complaint against him. *In re Schaffner*, 325 Or 421, 426–427, 939 P2d 39 (1997); *In re Miles*, 324 Or 218, 222–223, 923 P2d 1219 (1996); *In re Haws*, 310 Or 741, 753, 801 P2d 818 (1990); *see also In re Gastineau*, 317 Or. 545, 558, 857 P2d 136 (1993) (court concluded that the Bar was prejudiced due to a failure to fully respond, because the Bar had to investigate in a more time-consuming way, and the public respect for the Bar was diminished because the Bar could not provide a timely and informed response to complaints or complainants).

- d. **Aggravating circumstances.** Aggravating circumstances include:
1. Multiple offenses. *Standards*, § 9.22(d).
  2. Submission of false statements during the disciplinary process. *Standards*, § 9.22(f).
  3. Substantial experience in the practice of law. *Standards*, § 9.22(i). The Accused was admitted in Oregon in 2000, in Idaho in 1999, and in Utah in 1985.
- e. **Mitigating circumstances.** Mitigating circumstances include:
1. Absence of a prior disciplinary record. *Standards*, § 9.32(a).
  2. Absence of a selfish motive. *Standards*, § 9.32(b).
  3. Personal or emotional problems. *Standards*, § 9.32(c). During the time that preceded the Accused's failure to comply with his continuing education requirements, he suffered some medical problems that distracted his attention and may have contributed to his failure to comply.

14.

Under the *Standards*, a 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. A reprimand is generally appropriate when a lawyer negligently engages in such conduct. *Standards*, §§ 7.2, 7.3.

15.

Oregon case law also supports the imposition of a suspension. *See, e.g., In re Boehmer*, 23 DB Rptr 19 (2009) (attorney suspended for 60 days when, in response to a bar request, attorney represented that she had mailed copies of her trust account client ledger cards to the Bar when she had not); *In re Wilson*, 19 DB Rptr 357 (2005) (attorney with no prior discipline suspended for 60 days when she continued to represent a client in a probate matter while suspended for nonpayment of Bar dues and accepted payment from the estate without court approval); *In re Carreon*, 19 DB Rptr 297 (2005) (attorney suspended for 60 days where he acted as house counsel and engaged in the practice of law in British Columbia without being admitted there and applied corporate funds to a money judgment that had been entered against him in connection with his employment, without the corporation's consent); *In re Fritzler*, 17 DB Rptr 75 (2003) (attorney with no prior discipline suspended for 60 days when he continued to practice for two months during administrative suspension for nonpayment of Bar dues).

16.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be suspended for 60 days for violation of RPC 5.5(a), RPC 8.1(a)(1), and ORS 9.160, the sanction to be effective September 15, 2010, or 14 days after approval by the Disciplinary Board, whichever is later.

17.

The Accused acknowledges that he has certain duties and responsibilities under the Rules of Professional Conduct and BR 6.3 to immediately take all reasonable steps to avoid foreseeable prejudice to his clients during the term of his suspension. However, the Accused represents that he has no Oregon clients and will not undertake to represent any clients in Oregon prior to being reinstated following the completion of his suspension.

18.

The Accused acknowledges that reinstatement is not automatic on expiration of the period of suspension. He is required to comply with the applicable provisions of Title 8 of the Bar Rules of Procedure. The Accused also acknowledges that he cannot hold himself out as an active member of the Bar or provide legal services or advice until he is notified that his license to practice has been reinstated.

19.

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 3rd day of September 2010.

/s/ Mitchell R. Barker

Mitchell R. Barker

OSB No. 001490

EXECUTED this 21st day of September 2010.

OREGON STATE BAR

By: /s/ Amber Bevacqua-Lynott

Amber Bevacqua-Lynott

OSB No. 990280

Assistant Disciplinary Counsel



IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
 )  
Complaint as to the Conduct of ) Case No. 08-151  
 )  
SCOTT A. HODGESS, )  
 )  
Accused. )

Counsel for the Bar: Kellie F. Johnson  
Counsel for the Accused: Paula Lawrence  
Disciplinary Board: None  
Disposition: Violations of ORS 9.160, RPC 5.5(a), and  
RPC 8.1(a)(2). Stipulation for Discipline.  
Public reprimand.  
Effective Date of Order: October 29, 2010

**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 publically reprimanded for violations of ORS 9.160, RPC 5.5(a), and RPC 8.1(a)(2).

DATED this 29th day of October 2010.

/s/ Gilbert B. Feibleman  
Gilbert B. Feibleman  
State Disciplinary Board Chairperson

/s/ Mary Kim Wood  
Mary Kim Wood, Region 6  
Disciplinary Board Chairperson

### **STIPULATION FOR DISCIPLINE**

Scott A. Hodgess, attorney at law (hereinafter “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 4, 2001, 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, 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.

On December 16, 2008, a Formal Complaint was filed against the Accused pursuant to the authorization of the State Professional Responsibility Board (hereinafter “SPRB”), alleging violations of ORS 9.160, RPC 5.5(a), and RPC 8.1(a)(2). The parties therefore entered into a diversion agreement which was not successfully completed. 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.

- a. Effective July 15, 2008, the Accused was suspended from membership in the Oregon State Bar for failure to pay his 2008 Professional Liability Fund assessment. Pursuant to BR 8.4, the Accused was reinstated to active membership in the Oregon State Bar on July 17, 2008.
- b. On and between July 15, 2008, and July 16, 2008, the Accused engaged in the unauthorized practice of law by appearing in court on behalf of clients, drafting pleadings or other legal documents for clients,

rendering legal advice to clients orally or in writing, communicating orally and in writing with opposing counsel or third persons about legal proceedings on behalf of clients, filing pleadings or reports with the court on behalf of clients, and holding himself out to the public as and representing to third persons that he was qualified to practice law.

- c. Thereafter, the Accused knowingly failed to fully respond to lawful demands for information about his conduct made by Disciplinary Counsel's Office.

### Violations

6.

The Accused admits that by engaging in the conduct described in paragraph 5, he violated ORS 9.160, RPC 5.5(a), and RPC 8.1(a)(2).

### 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 duties to the profession to refrain from the unlawful practice of law and to cooperate with the Bar's investigation. *Standards*, §7.0.
- b. **Mental state.** The Accused acted negligently by failing to cease the practice of law while he was administratively suspended from the practice of law for nonpayment of his PLF assessment. 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*, at 9.

However, the Accused acted knowingly when he failed to respond to the Disciplinary Counsel's Office (DCO). "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*, at 9.

- c. **Injury.** Injury can be either actual or potential under the Standards. *In re Williams*, 314 Or 530, 840 P2d 1280 (1992). There was potential harm to the public in the Accused practicing law without malpractice insurance, and actual harm to the DCO investigation in the delays he caused by failing to respond to its inquiries.
- d. **Aggravating circumstances.** Aggravating circumstances include:
  - 1. Prior admonition for similar conduct and multiple offenses. *Standards*, § 9.22(a).
  - 2. Multiple offenses. *Standards*, § 9.22(d).
- e. **Mitigating circumstances.** Mitigating circumstances include:
  - 1. Absence of dishonest or selfish motive. *Standards*, § 9.3(b).
  - 2. Personal or emotional problems for which the Accused now has received treatment. *Standards*, § 9.3(c).
  - 3. Remorse. *Standards*, § 9.3(l).

8.

Under the *Standards*, 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. *Standards*, § 7.2. A public reprimand is generally appropriate when a lawyer negligently 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*, § 7.3.

9.

Oregon Case law suggests that a reprimand is appropriate for inadvertently practicing law for a short period of time when ineligible to do so. *See, e.g., In re Davidson*, 20 DB Rptr 264 (2006); *In re Casey*, 19 DB Rpt 105 (2005); *In re Dixon*, 17 DB Rpt 102 (2003); *In re Bassett*, 16 DB Rptr 190 (2002).

10.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be publicly reprimanded for violation of ORS 9.160, RPC 5.5(a), and RPC 8.1(a)(2), the sanction to be effective upon approval by the Disciplinary Board.

11.

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 19th day of October 2010.

/s/ Scott A. Hodgess

Scott A. Hodgess

OSB No. 012880

OREGON STATE BAR

By: /s/ Kellie F. Johnson

Kellie F. Johnson

OSB No. 970688

Assistant Disciplinary Counsel

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re:	)	
	)	
Complaint as to the Conduct of	)	Case No. 10-81
	)	
J. LEE STREET,	)	SC S058814
	)	
Accused.	)	

Counsel for the Bar:	Jeffrey D. Sapiro
Counsel for the Accused:	David J. Elkanich
Disciplinary Board:	None.
Disposition:	Violation of DR 1-102(A)(2) and RPC 8.4(a)(2). Stipulation for discipline. One-year suspension, eight months stayed, two-year probation.
Effective Date of Order:	November 10, 2010

**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 in the State of Oregon for a period of one year, with four months of the suspension to be imposed immediately and eight months of the suspension stayed pending completion of a two-year probation as outlined in the Stipulation for Discipline.

November 10, 2010  
DATE

/s/ Paul J. De Muniz  
CHIEF JUSTICE

### **STIPULATION FOR DISCIPLINE**

J. Lee Street, attorney at law (hereinafter “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 6, 1998, and has been a member of the Oregon State Bar continuously since that time, having his office and place of business at times relevant to this stipulation in Multnomah 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.

On July 10, 2010, the State Professional Responsibility Board (hereinafter “SPRB”) authorized formal disciplinary proceedings against the Accused for alleged violations of DR 1-102(A)(2) of the Code of Professional Responsibility and RPC 8.4(a)(2) of the Rules of Professional Conduct. 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.

For tax years 2003, 2004, 2005, 2006, 2007, and 2008, the Accused did not file federal and state personal income tax returns until April 2010, and has not yet paid income tax due for those years.

## Violations

6.

The Accused stipulates that the conduct described in paragraph 5 constitutes violations of DR 1-102(A)(2) (for tax year 2003) and RPC 8.4(a)(2) (for tax years 2004–2008).

## Sanction

7.

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 his duty to maintain his personal integrity by complying with the law. *Standards*, § 5.1.
- b. **Mental state.** The Accused committed the misconduct described in this stipulation with a knowing mental state, described in the *Standards* as 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*, at p. 7.
- c. **Injury.** For purposes of sanction, injury from a lawyer’s misconduct can be actual or potential. *In re Williams*, 314 Or 530, 840 P2d 1280 (1992). The Accused’s nonfiling of income tax returns caused actual injury by hindering the taxing authorities in their administration of the taxing and revenue-collection process. The returns have now been filed, although there remains a significant amount of tax yet to be paid to the Internal Revenue Service and the Oregon Department of Revenue.
- d. **Aggravating circumstances.** Aggravating circumstances include:
  1. A pattern of misconduct. *Standards*, § 9.22(c);
  2. Substantial experience in the practice of law, if not in the first years of his nonfiling, as the duration of nonfiling extended over time. *Standards*, § 9.22(i).
- e. **Mitigating circumstances.** Mitigating circumstances include:
  1. Absence of a prior disciplinary record. *Standards*, § 9.32(a);



2. Personal or emotional problems in the nature of a mental health condition (depression). *Standards*, § 9.32(c);
3. Good faith effort to make restitution or to rectify consequences of misconduct. *Standards*, § 9.32(d);
4. Full and free disclosure to disciplinary authorities. *Standards*, § 9.32(e);
5. Character and reputation in community. *Standards*, § 9.32(g);
6. Remorse. *Standards*, § 9.32(l).

8.

Under the *Standards*, a term of suspension is generally appropriate for the misconduct committed by the Accused. *Standards*, § 5.12.

9.

Oregon case law also supports the imposition of a suspension in this case. See *In re Lawrence*, 332 Or 502, 31 P3d 1078 (2001), and cases cited therein (suspension imposed for failure to file tax returns).

10.

Probation, while not favored by the Supreme Court as a disposition in a contested-case proceeding, see *In re Obert*, 336 Or 640, 655, 89 P3d 1173 (2004), can be appropriate as an agreed-upon sanction when conditions are imposed that correlate to the misconduct at issue. In such a case, some term of suspension is stayed pending the completion of the probationary period. BR 6.2. See also *Standards*, § 2.7. In this case, there is evidence that the Accused experienced depression that may have contributed, in part, to the misconduct described in this stipulation and the Accused has since obtained treatment for that condition.

11.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be suspended for a period of one (1) year for the violations described above, with four (4) months of the suspension imposed immediately upon this stipulation's approval by the court, and eight (8) months of the suspension stayed pending the completion of a two (2) year probation with conditions set forth below. The two (2) year term of probation will commence upon the Accused's reinstatement from the term of imposed suspension.

12.

During the term of probation, the Accused shall comply with the following conditions:

- (a) The Accused shall comply with all provisions of this stipulation, the Rules of Professional Conduct applicable to Oregon lawyers, and the provisions of ORS chapter 9;
- (b) The Accused shall communicate with Disciplinary Counsel's Office (DCO) and allow DCO access to information, as DCO deems necessary, to monitor compliance with this stipulation;
- (c) During the term of imposed suspension, the Accused shall contact the Internal Revenue Service (IRS) and the Oregon Department of Revenue (DOR) and commence negotiations with those agencies for payment plans on his past-due income taxes. Demonstrating good faith efforts to engage in such negotiations is a condition of the Accused being eligible for reinstatement at the end of the term of imposed suspension. After he is reinstated from the term of imposed suspension, the Accused shall complete the negotiations and enter into payment plans with IRS and DOR, if he has not already done so, as promptly as reasonably practicable;
- (d) During the term of probation, the Accused shall comply timely with all provisions of the payment plans describe in paragraph 12(c) once agreed upon, including making timely periodic payments when they are due. The Accused shall provide proof to DCO of his compliance with this subsection as part of his quarterly reports described in paragraph 12(j) below;
- (e) The Accused has received treatment for depression. He shall continue with treatment for his mental health as directed by the Oregon Attorney Assistance Program (hereinafter "OAAP") and his health care providers, and comply with the treatment recommendations of those providers;
- (f) The Accused shall meet no less than once a month with a counselor at OAAP, in person or via telephone if permitted by OAAP, to address issues related to depression, and shall attend programs offered by OAAP for depression and related conditions as recommended by the OAAP counselor;
- (g) A member of the State Lawyers Assistance Committee (hereinafter "SLAC"), or such other person approved by DCO in writing (hereinafter "the Monitor"), shall monitor the Accused's compliance with those

terms of probation dealing with his mental health. The Accused shall meet with his Monitor every other month, or more often as may be requested by the Monitor, for the purpose of reviewing the Accused's compliance with the terms of paragraphs 12(e) and (f) above. The Accused shall cooperate and comply with all reasonable requests of the Monitor and DCO that will allow the Monitor and DCO to evaluate the Accused's compliance with the terms of this stipulation for discipline;

- (h) In the event the Accused fails to comply with any recommendation or request of his mental health care providers or his OAAP counselor, the Accused shall immediately notify his Monitor and Disciplinary Counsel in writing of the noncompliance;
- (i) In the event that the Accused feels that he must return to Texas for an extended period of time, and this return is deemed appropriate by the OAAP, the Accused may substitute work with the Texas Lawyer Assistance Program (hereinafter "TLAP") for work with the OAAP. Such substitution is conditioned on preapproval from the OAAP and the Monitor;
- (j) Quarterly, and by such dates as established by DCO, the Accused shall submit a written report to Disciplinary Counsel, approved in substance by his Monitor, advising whether he is in compliance or noncompliance with the terms of this stipulation and the recommendations of his mental health treatment providers, and each of the providers. The Accused's report shall also identify the dates of the Accused's meetings with his Monitor and the dates of meetings and other consultations between the Accused and all mental health professionals during the reporting period. In the event the Accused has not complied with any term of probation, the report shall describe the noncompliance and the reason for it, and further describe when and what steps have been taken to correct the noncompliance;
- (k) The Accused hereby waives any privilege or right of confidentiality to the extent necessary to permit disclosure by OAAP or any mental health treatment providers of the Accused's compliance or noncompliance with this stipulation and their treatment recommendations to the Accused's Monitor and DCO. The Accused agrees to execute any additional waivers or authorizations necessary to permit such disclosures;
- (l) The Accused expressly authorizes OAAP (or TLAP as is allowed under their operable rules) and other mental health treatment providers to

communicate with and to release information otherwise protected from disclosure by state and federal law to the Accused's Monitor and DCO, and each of their respective representatives, only to the extent necessary to disclose the Accused's participation, compliance, and noncompliance with the terms of this stipulation and any treatment recommendations;

- (m) The Accused is represented in this proceeding by David J. Elkanich. The Accused and David J. Elkanich hereby authorize direct communication between the Accused and DCO, the Accused's Monitor, and each of them, after the date this stipulation is approved by the Supreme Court, for the purposes of administering and monitoring the Accused's compliance with this stipulation;
- (n) The Accused is responsible for the cost of all professional services required under the terms of this stipulation and the terms of probation;
- (o) In the event the Accused fails to comply with any condition of his probation, Disciplinary Counsel may initiate proceedings to revoke the Accused's probation pursuant to BR 6.2(d), and impose the stayed period of suspension. In such event, the probation and its terms shall be continued until resolution of any revocation proceeding.

13.

The Accused acknowledges that reinstatement is not automatic on expiration of the term of imposed suspension. He is required to comply with the applicable provisions of Title 8 of the Bar Rules of Procedure. When the Accused entered into this stipulation, he was an inactive member of the Oregon State Bar with a reinstatement application pending before the Board of Governors pursuant to BR 8.2(e). Accordingly, the Accused's reinstatement after the term of imposed suspension is governed by BR 8.2(f). The Accused acknowledges that he cannot hold himself out as an active member of the Bar or provide legal services or advice until he is notified that his license to practice has been reinstated. Upon the Accused's reinstatement from the imposed term of his suspension and his full compliance thereafter with the terms of this stipulation and successful completion of his probation, he shall be unconditionally reinstated without further order of the Supreme Court.

14.

This Stipulation for Discipline has been reviewed by Disciplinary Counsel of the Oregon State Bar and the sanction was approved by the SPRB. The parties agree the stipulation now is to be submitted to the Supreme Court for consideration pursuant to the terms of BR 3.6.

EXECUTED this 22nd day of September 2010.

/s/ J. Lee Street  
J. Lee Street  
OSB No. 983965

EXECUTED this 22nd day of September 2010.

OREGON STATE BAR

By: /s/ Jeffrey D. Sapiro  
Jeffrey D. Sapiro  
OSB No. 783627  
Disciplinary Counsel

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re:	)	
	)	
Complaint as to the Conduct of	)	Case Nos. 08-135, 08-136, 08-137,
	)	08-138, 09-58, 09-90, and 10-10
	)	
SUSAN FORD BURNS,	)	
	)	
Accused.	)	
Counsel for the Bar:		Linn D. Davis
Counsel for the Accused:		None
Disciplinary Board:		William B. Crow, Chair Anthony A. Buccino Charles H. Martin, Public Member
Disposition:		Violations of RPC 1.4(a), RPC 1.5(a), RPC 1.7(a), RPC 1.15-1(c), RPC 1.15-1(d), RPC 1.15-1(e), RPC 1.16(d), RPC 8.1(a)(2), DR 2-106(A), and DR 9-101(C)(3). Trial Panel Opinion. One-year suspension.
Effective Date of Opinion:		December 7, 2010

**DECISION OF TRIAL PANEL**

This matter came on for hearing on August 13, 2010, before a trial panel of William B. Crow, Anthony A. Buccino, and Charles H. Martin (public member). The Oregon State Bar was represented by Linn D. Davis. The Accused appeared pro se. Testimony and exhibits were received and argument heard.

An order of default was entered on October 29, 2009, for the reason that the Accused failed to appear within the time provided by the Bar Rules of Procedure.

The Accused was permitted to put on testimony concerning the sanctions that were warranted by the charges of violation by the Oregon State Bar.

The Accused was charged with violations of Oregon Rules of Professional Conduct 1.5(a), 1.15-1(c), 1.15-1(d), 1.15-1(e), 8.1(a)(2), 1.4(a), 1.16(d), 1.7(a), DR 2-106(A), and 9-101(C)(3).

### **Findings and Conclusions**

The panel recommends that the Accused be suspended for a period of one year. The panel finds that the facts stated by the Bar in its Amended Formal Complaint and the Oregon State Bar's Sanction Memo Following Default Judgments are accurate and were proven by clear and convincing evidence. The panel is aware that the accused RPC violations occurred during a period of time in the Accused's life when she was experiencing serious personal problems. The panel, however, is persuaded by the factual evidence put on by the Oregon State Bar. The Accused repeatedly failed to acknowledge or respond to lawful inquiries of disciplinary authorities for the Oregon State Bar. The panel does not accept the Accused's reliance on personal problems as an adequate answer to the RPC violations with which she was charged and which were proved by clear and convincing evidence.

The Accused failed to respond to lawful inquiries of the disciplinary authorities concerning this disciplinary matter, in violation of RPC 8.1(a)(2).

In sum, the panel finds that the Bar has sustained its burden of proof by clear and convincing evidence with respect to the violations of each section of the RPCs with which the Accused is charged and in the manner alleged by the Bar in its Amended Formal Complaint and Oregon State Bar's Sanction Memo Following Default Judgments.

### **Aggravating and Mitigating Circumstances**

The following factors are recognized by the trial panel as aggravating under the standards that exist in this case:

(a) A prior record of discipline. In December 2008, the Accused was publicly reprimanded for violations of RPC 1.3 (neglect of a legal matter), RPC 1.4(a) (failure to communicate with a client), and RPC 1.16(d) (failure to take reasonably practicable steps to protect the client upon termination of employment). See *In re Burns*, 22 DB Rptr 325 (2008). Similar conduct to that with which the Accused is charged in this proceeding was involved. Much of the Accused's failure to respond to disciplinary inquiries in the present matter occurred while she was still subject to the jurisdiction of the Disciplinary Board in the prior matter and continued after her reprimand.

(b) Dishonest or selfish motive. The Accused acted out of a dishonest or selfish motive when she illegally took fees, took or charged excessive fees, failed to properly handle or account for funds, and engaged in representation despite a personal-interest conflict without obtaining informed consent.

(c) A pattern of misconduct. The Accused's pattern of misconduct extends across a period of years and involves many clients.

(d) Multiple offenses. The Accused has violated several rules, many of them repeatedly, involving many different duties owed to her clients and the profession.

(e) Bad faith and obstruction of the disciplinary proceeding. Although the Accused eventually offered some cooperation in earlier matters, the failure to cooperate is unexplained and unexcused. The Accused failed to provide information in the Nelson and McLenithan matters.

(f) Substantial experience in the practice of law. The Accused has practiced law since 1991 and had substantial experience at the time she committed these violations.

There are no mitigating circumstances, although the Accused in some matters eventually provided refunds of excessive or illegal fees or corrected her accounting regarding fees paid. She did so in an untimely fashion.

DATED this 30th day of September 2010.

/s/ William B. Crow

William B. Crow, Panel Chair

/s/ Anthony A. Buccino

Anthony A. Buccino

/s/ Charles H. Martin

Charles H. Martin



IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
 )  
Complaint as to the Conduct of ) Case No. 10-15  
 )  
THEODORE C. CORAN, )  
 )  
Accused. )

Counsel for the Bar: Linn D. Davis  
Counsel for the Accused: None  
Disciplinary Board: None  
Disposition: Violation of RPC 1.5(c)(2), RPC 1.15-1(a), and  
RPC 1.15-1(c). Stipulation for Discipline. Public  
reprimand.  
Effective Date of Order: December 7, 2010

**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 RPC 1.5(c)(2), RPC 1.15-1(a), and RPC 1.15-1(c).

DATED this 7th day of December 2010.

/s/ Gilbert B. Feibleman  
Gilbert B. Feibleman  
State Disciplinary Board Chairperson

/s/ Mary Kim Wood  
Mary Kim Wood, Region 6  
Disciplinary Board Chairperson

### **STIPULATION FOR DISCIPLINE**

Theodore C. Coran, attorney at law (hereinafter “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, 1982, and has been a member of the Oregon State Bar continuously since that time, having his principal 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 March 12, 2010, a Formal Complaint was filed against the Accused pursuant to the authorization of the State Professional Responsibility Board (hereinafter “SPRB”), alleging violations of RPC 1.5(c)(2), RPC 1.15-1(a), and RPC 1.15-1(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 or about March 9, 2005, the Accused undertook to represent Aaron P. Bostwick (hereinafter “Bostwick”) in the direct appeal of Bostwick’s most recent criminal convictions. Pursuant to a written fee agreement drafted by Bostwick, the Accused agreed to represent Bostwick on direct appeal for a flat fee. The written agreement did not provide that Bostwick’s fee, if paid in advance, would be treated as if it belonged to the Accused upon receipt and not afforded the protection of a lawyer trust account. The Accused later agreed that the Accused would obtain the funds to pay the flat fee by recovering and selling a motor vehicle Bostwick owned.

6.

In January 2007, the Accused received a check from the sale of Bostwick's motor vehicle. The Accused deposited this check into an account other than a lawyer trust account. Although the Accused had already made substantial efforts on behalf of Bostwick in the criminal appeal, including preparing and filing the opening brief, he had not yet fully completed the representation for which the flat fee was paid. The Accused subsequently completed the representation in full.

7.

On or about November 13, 2007, Bostwick offered to pay the Accused a bonus fee for each month that Bostwick's sentence was reduced on appeal. The Accused accepted that offer.

### **Violations**

8.

The Accused admits that by engaging in the conduct described in paragraphs 5 through 7, he charged an improper contingent fee in a criminal case in violation of RPC 1.5(c)(2), he failed to deposit client funds into a lawyer trust account in violation of RPC 1.15-1(a), and he failed to maintain client funds in a lawyer trust account except as the funds were earned or costs incurred, in violation of RPC 1.15-1(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.** By failing to deposit and maintain in a lawyer trust account client funds that he had not yet fully earned, the Accused violated his duty to preserve his client's property. *Standards*, § 4.1. By accepting his client's offer to pay a contingent fee in a criminal case, the Accused violated duties owed as a professional. *Standards*, § 7.0.
- b. **Mental state.** The fee agreement in the matter was drafted by Bostwick. The Accused acted negligently in failing to ensure that a written agreement specified that the Accused's fees would be deemed earned on

receipt. The Accused also acted negligently in that by the time he obtained Bostwick's fees, almost two years later, he had completed and filed the appellate brief and he believed the funds were earned. The Accused negligently failed to recognize that by accepting Bostwick's offer to pay a bonus he was entering into an arrangement for an improper contingent fee.

- c. **Injury.** There was limited potential for injury as the Accused made substantial efforts on Bostwick's behalf in the criminal appeal prior to collecting the funds. Because the Accused completed the representation, no actual injury resulted. In addition no bonus fee was paid to the Accused.
- d. **Aggravating circumstances.** Aggravating circumstances include:
  - 1. Prior disciplinary offenses. *Standards*, § 9.22(a).<sup>1</sup> In August 2000, the Accused was reprimanded for engaging in conflicts of interest that arose from the Accused's joint representation of codefendants in a criminal matter, in violation of DR 5-105(C) and DR 5-105(E). *In re Coran*, 14 DB Rptr 136 (2000). In August 2002, the Accused was reprimanded for a personal-interest conflict of interest, in violation of DR 5-101(A), and neglect of a legal matter, in violation of DR 6-101(B). *In re Coran*, 16 DB Rptr 234 (2002). Those prior offenses were relatively less serious as reflected in the sanctions. They are not similar to the offenses at issue. While not remote in time, the misconduct in those matters was not recent at the time of the present misconduct.
  - 2. Multiple offenses. *Standards*, § 9.22(d).
  - 3. Substantial experience in the practice of law. *Standards*, § 9.22(i).
- e. **Mitigating circumstances.** Mitigating circumstances include:
  - 1. Absence of a dishonest or selfish motive. *Standards*, § 9.23(b).

---

<sup>1</sup> When evaluating prior offenses, the court reviews all offenses prior to imposition of the sanction in the current case. *In re Jones*, 326 Or 195, 200, 951 P2d 149 (1997). In determining the weight of each offense, the court considers: "(1) the relative seriousness of the prior offense and resulting sanction; (2) the similarity of the prior offense to the offense in the case at bar; (3) the number of prior offenses; (4) the relative recency of the prior offense; and (5) the timing of the current offense in relation to the prior offense and resulting sanction, specifically, whether the accused lawyer had been sanctioned for the prior offense before engaging in the offense in the case at bar." *In re Jones*, 326 Or at 200.

2. Full and free disclosure to disciplinary board and cooperative attitude toward proceedings. *Standards*, § 9.23(e).
3. Character or reputation. *Standards*, § 9.23(g). Several circuit court judges and a director of indigent defense services submitted evidence in support of the Accused's character and reputation in the legal community.
4. Remorse. *Standards*, § 9.23(l).

10.

Under the *Standards*, reprimand is generally appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client. *Standards*, § 4.13. Similarly, where a lawyer negligently engages in conduct that violates a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system, reprimand is recommended. *Standards*, § 7.3.

11.

Oregon case law supports a sanction of reprimand under these particular circumstances. *See, e.g., In re Angel*, 22 DB Rptr 351 (2008) (lawyer reprimanded for violations of RPC 1.5(a), RPC 1.15-1(c), RPC 1.15-1(d), and RPC 1.16(d) where the mitigating factors far exceeded a single aggravating factor); *In re Gudger*, 21 DB Rptr 160 (2007) (lawyer reprimanded for violations of RPC 1.5(a) and former DR 9-101(A) where mitigating factors were not clearly outweighed by aggravating factors, including a prior disciplinary history). Although the Accused's prior reprimands are an aggravating factor, the aggravation is reduced since different misconduct was involved in those matters and the reprimands are not recent. Furthermore, the mitigating factors in the present matter outweigh the aggravating factors. Cases involving similar violations that have resulted in suspension are typically more aggravated in that the accused lawyer never earned the full fee and failed to promptly return unearned funds. *See, e.g., In re Eakin*, 334 Or 238, 48 P3d 147 (2002) (lawyer suspended for 60 days for violating DR 9-101(A), DR 9-101(C)(3), and DR 9-101(C)(4)); *In re Balocca*, 342 Or 279, 151 P3d 154 (2007) (lawyer suspended 90 days for violating DR 9-101(A), DR 9-101(C)(3), DR 2-106(A), DR 2-110(A)(3), and DR 5-105(C)).

12.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be publicly reprimanded for violation of RPC 1.5(c)(2), RPC 1.15-1(a), and RPC 1.15-1(c).

13.

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 18th day of November 2010.

/s/ Theodore C. Coran

Theodore C. Coran

OSB No. 822260

EXECUTED this 19th day of November 2010.

OREGON STATE BAR

By: /s/ Linn D. Davis

Linn D. Davis

OSB No. 032221

Assistant Disciplinary Counsel

**Cite as 349 Or 366 (2010)**

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re:

Complaint as to the Conduct of

LYNN M. MURPHY,

Accused.

(OSB 08-77, 08-78, 09-63; SC S058743)

En Banc

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

Submitted on the record and under advisement October 27, 2010. Filed December 9, 2010.

No appearance by either party.

PER CURIAM

The Accused is suspended from the practice of law for 120 days, commencing 60 days from the filing of this decision.

**SUMMARY OF THE SUPREME COURT OPINION**

In this lawyer disciplinary proceeding, the Oregon State Bar charged Lynn M. Murphy (the Accused) with seven violations of the Oregon Rules of Professional Conduct (RPCs) arising out of three separate matters. In the Perry matter, the Bar alleged violations of RPC 1.3(neglect of a legal matter), RPC 1.4(a) (failure to communicate with client), and RPC 8.1(a)(2) (failure to respond to Bar's investigation). In the Newman matter, the Bar alleged only a violation of RPC 8.1(a)(2). In the Hubler matter, the Bar alleged violations of RPC 1.16(c) (failure to notify court of withdrawal from representation), RPC 1.16(d) (failure to safeguard client's interests after withdrawal), and RPC 8.1(a)(2). Following a hearing, the trial panel found by clear and convincing evidence that the Accused had violated RPC

Cite as *In re Murphy*, 24 DB Rptr 275 (2010)

1.3 and RPC 1.4(a) in the Perry matter and RPC 8.1(a)(2) in each of the three matters. The trial panel imposed a suspension of 120 days. The Accused is suspended from the practice of law for 120 days, commencing 60 days from the filing of this decision.



IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
)  
Complaint as to the Conduct of ) Case No. 10-128  
)  
GINO G. PIERETTI, )  
)  
Accused. )

Counsel for the Bar: Mary A. Cooper  
Counsel for the Accused: Janet M. Schroer  
Disciplinary Board: None  
Disposition: Violations of RPC 1.3 and RPC 1.4(a). Stipulation  
for Discipline. Public reprimand.  
Effective Date of Order: December 17, 2010

**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 violations of RPC 1.3 and RPC 1.4(a).

DATED this 17th day of December 2010.

/s/ Gilbert B. Feibleman  
Gilbert B. Feibleman  
State Disciplinary Board Chairperson

/s/ William B. Crow  
William B. Crow, Region 5  
Disciplinary Board Chairperson

### **STIPULATION FOR DISCIPLINE**

Gino G. Pieretti, attorney at law (hereinafter “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 June 1, 1958, 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, 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.

On October 15, 2010, the State Professional Responsibility Board (hereinafter “SPRB”) authorized formal disciplinary proceedings against the Accused for alleged violations of RPC 1.3 and RPC 1.4(a) of the Oregon Rules of Professional Conduct. 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 in September 2001 to represent a client (“Client”) in an action against the City of Portland (“City”). At that time, the case was set for trial in January 2002. The Accused agreed with the City’s attorney to remove the case from the trial docket and submit it instead to independent binding arbitration. On January 7, 2002, the Accused filed a motion and order to postpone the trial for the reason that the case had been submitted for binding arbitration before retired Justice Bud Lent. Thereafter, a stipulation for independent binding arbitration and an abatement order signed by both the Accused and City’s attorney were filed with the court in February 2002. Thereafter, the parties were notified by Justice Lent that he

was retiring. The Accused then discussed with Client proposing retired Justice Betty Roberts to serve as the arbitrator. No further discovery was conducted, and no substitute arbitrator was appointed. Sometime after February 2002, the case fell “off [the Accused’s] radar screen.” In June 2005, the court dismissed the case. The Accused was unaware of the dismissal until the Client contacted him in 2009, requesting the Accused’s assistance on a criminal charge. Thereafter, the Client made a claim for legal malpractice damages on the Professional Liability Fund and that claim is currently pending. The Accused is now fully retired from the practice of law after a career of more than 50 years.

6.

The Client claims that during the seven-year period between 2002 and 2009, he made repeated inquiries of the Accused, but the Accused put him off. The Accused recalls some telephone calls from the Client, but recalls that those calls were few and far between, until 2009 when he was contacted by the Client about the criminal matter. The Accused denies that he put off or knowingly failed to respond to inquiries from the Client, believing that he returned all telephone messages on his message machine, either at the end of the day or shortly after he next returned to the office. The Accused concedes the possibility that his office telephone answering machine may occasionally have been too full to accept messages from the Client.

### **Violations**

7.

By reason of the foregoing, the Accused admits that he neglected the Client’s legal matter entrusted to him, in violation of RPC 1.3, and also failed to respond to the Client’s inquiries in violation of RPC 1.4(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. **Duties violated.** The Accused violated his duties to his client to act with reasonable diligence and promptness on his behalf. *Standards*, § 4.4.

- b. **Mental state.** The Accused's mental state was negligent, which the *Standards* define 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. *Standards*, at 7.
- c. **Injury.** The Client suffered actual injury in that the Accused's inactivity on the case caused it to be dismissed for lack of prosecution. *Standards*, at 7.
- d. **Aggravating circumstances.** Aggravating circumstances include:
  - 1. A prior disciplinary offense. *Standards*, § 9.22(e). The Accused was publicly reprimanded in 1994 for violating DR 1-102(A)(3) (misrepresentation) and DR 6-101(A) (incompetence). *See In re Pieretti*, 8 DB Rptr 133 (1994).
  - 2. The Accused has substantial experience in the practice of law. *Standards*, § 9.22(i).
- e. **Mitigating circumstances.** Mitigating circumstances include:
  - 1. Absence of a dishonest or selfish motive. *Standards*, § 9.32(b).
  - 2. Personal or emotional problems (consisting of personal and family health issues) during this period of time. *Standards*, § 9.32(c).
  - 3. Cooperative attitude toward disciplinary proceedings. *Standards*, § 9.32(e).
  - 4. Remorse. *Standards*, § 9.32(l).

9.

*Standards*, § 4.43 provides 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 also supports the imposition of a public reprimand when a lawyer inadvertently neglects a case for an extended period of time. *See In re Hansen*, 16 DB Rptr 64 (2002) (lawyer publicly reprimanded after he sent demand letter on client's behalf but thereafter left the private practice of law without following up on the demand letter or taking further steps to advance client's claim); *see also In re Freudenberg*, 22 DB Rptr 195 (2008) (lawyer publicly reprimanded for putting his

client's real property case in lawyer's "to do" pile but thereafter failing to act on it or respond to client's inquiries for several months).

11.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be publicly reprimanded for violations of RPC 1.3 and RPC 1.4(a).

12.

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 9th day of December 2010.

/s/ Gino G. Pieretti

Gino G. Pieretti  
OSB No. 580757

OREGON STATE BAR

By: /s/ Mary A. Cooper

Mary A. Cooper  
OSB No. 910013  
Assistant Disciplinary Counsel

IN THE SUPREME COURT  
OF THE STATE OF OREGON

In re: )  
 )  
Complaint as to the Conduct of ) Case No. 10-104  
 )  
DAN VAN THIEL, )  
 )  
Accused. )

Counsel for the Bar: Stacy J. Hankin  
Counsel for the Accused: Carl Burnham  
Disciplinary Board: None  
Disposition: Violation of RPC 2.4(a)(1), RPC 2.4(a)(2), and  
RPC 4.3. Stipulation for Discipline. Public  
reprimand.  
Effective Date of Order: December 29, 2010

**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 RPC 2.4(a)(1), RPC 2.4(a)(2), and RPC 4.3.

DATED this 29th day of December 2010.

/s/ Gilbert B. Feibleman  
Gilbert B. Feibleman  
State Disciplinary Board Chairperson

/s/ Carl W. Hopp, Jr.  
Carl W. Hopp Jr, Region 1  
Disciplinary Board Chairperson

### **STIPULATION FOR DISCIPLINE**

Dan Van Thiel, attorney at law (hereinafter “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, 1964, and has been a member of the Oregon State Bar continuously since that time, having his office and place of business in Baker 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.

On September 10, 2010, a Formal Complaint was filed against the Accused pursuant to the authorization of the State Professional Responsibility Board (hereinafter “SPRB”), alleging violation of RPC 1.7, RPC 1.9(a), RPC 2.4(a)(1), RPC 2.4(a)(2), and RPC 4.3. 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.

Sometime prior to May 2008, Beth Wethington (hereinafter “Wethington”) and Scott Jager (hereinafter “Jager”) decided to dissolve their marriage.

6.

In May 2008, the Accused undertook to mediate the dissolution of Wethington and Jager’s marriage. The Accused failed to clearly inform Wethington and Jager of and obtain their consent to his role as mediator.

7.

Sometime in August 2008, the Accused undertook to represent Jager in the dissolution of marriage matter.

8.

After the Accused undertook to represent Jager in the dissolution of marriage matter, he gave legal advice to Wethington, other than the advice to seek counsel, when the Accused knew or reasonably should have known that Wethington's interests were or had a reasonable possibility of being in conflict with Jager's interests.

9.

In January 2009, on Jager's behalf, the Accused sent Wethington a proposed marital settlement agreement in which the Accused stated that he represented Jager only in the matter. As a result of that statement, Wethington retained a lawyer, and after additional negotiations, the parties resolved the dissolution of marriage matter by stipulation.

### **Violations**

10.

The Accused admits that by engaging in the conduct described in paragraphs 5 through 9, he violated RPC 2.4(a)(1), RPC 2.4(a)(2), and RPC 4.3.

Upon further factual inquiry, the parties agree that the charges of alleged violations of RPC 1.7 and RPC 1.9(a) should be and, upon the approval of this stipulation, are dismissed.

### **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. **Duties violated.** The Accused violated duties he owed to avoid conflicts of interest and avoid improper communications with unrepresented persons. *Standards*, §§ 4.3, 6.3.
- b. **Mental state.** The Accused acted negligently.



- c. **Injury.** Wethington sustained actual injury in that for a period she looked to and relied upon the legal advice provided by the Accused in deciding how to proceed in the dissolution of marriage proceeding. Fortunately, Wethington did not actually enter into any binding agreement until after she consulted with independent counsel.
- d. **Aggravating circumstances.** The following aggravating circumstances are present:
  - 1. Multiple offenses. *Standards*, § 9.22(d).
  - 2. Vulnerability of victim. Based on a prior attorney-client relationship between the Accused and Wethington in an unrelated matter, Wethington was vulnerable in relying upon the Accused's advice in the dissolution of marriage matter when he was not looking out for her interests. *Standards*, § 9.22(h).
  - 3. Substantial experience in the practice of law. The Accused has been licensed to practice law in Oregon since 1964. *Standards*, § 9.22(i).
- e. **Mitigating circumstances.** The following mitigating circumstances are present:
  - 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 proceedings. *Standards*, § 9.32(e).
  - 4. Character or reputation. Members of the community will attest to the Accused's good character and reputation. *Standards*, § 9.32(g).

12.

Under the *Standards*, reprimand is generally appropriate when a lawyer is negligent in determining whether the representation of a client may be materially affected by the lawyer's own interests, or whether the representation will adversely affect another client, and causes injury or potential injury to a client. *Standards*, § 4.33. Reprimand is also generally appropriate when a lawyer is negligent in determining whether it is proper to engage in communication with an individual in the legal system, and causes injury or potential injury to a party or interference or potential interference with the outcome of the legal proceeding. *Standards*, § 6.33.

13.

Consistent with the *Standards*, lawyers who have engaged in similar misconduct have been reprimanded. *In re Simcoe*, 14 DB Rptr 89 (2000) (reprimand imposed on lawyer who gave legal advice to an unrepresented person and also failed to promptly return file materials); *In re Greif*, 21 DB Rptr 233 (2007); *In re Bryant*, 12 DB Rptr 69 (1998) (reprimands imposed on lawyers who acted as scriveners in dissolution of marriage matters).

14.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be reprimanded for violation of RPC 2.4(a)(1), RPC 2.4(a)(2), and RPC 4.3.

15.

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 6th day of December 2010.

/s/ Dan Van Thiel

Dan Van Thiel  
OSB No. 641102

EXECUTED this 21st day of December 2010.

OREGON STATE BAR

By: /s/ Stacy J. Hankin

Stacy J. Hankin  
OSB No. 862028  
Assistant Disciplinary Counsel

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